Canada Law Journal

VOL. LVIII. TORONTO, DECEMBER, 1922. No. 7

TO OUR READERS.

The life of this Journal has been a long one, as time is counted in this young country of ours, but we are glad to be told that it has been a useful one in its day and generation. It was commenced and has been carried on not as a commercial venture or in connection with or under the control or management of any business concern, but as a labour of love, simply seeking to be a means of communication between members of the profession; to represent them as a class; to further their legitimate interests and aims; to be a medium for imparting information on legal matters; and in suggesting improvements in the law and its administration and in simplifying practice and procedure; and, in all this, acting as the organ of the profession,—serving it to the best of its ability and upholding its honour and dignity

We are proud and glad to know that in his report we can quote as an authority the words of one who is the most worthy and respected founder of the Canadian Bar Association and, as its present President, may be considered as now standing at the head of the profession in Canada, and who in that capacity has by his energy, ability and generosity made a seeming impossibility a marked success.

In answer to our letter agreeing to his suggestion that the Canada Law Journal should continue its existence as a component part of the Canadian Bar Association Review, he writes as follows:—

"Dear Mr. O'Brien,—

"I thank you for your cordial letter of September 29th.

"For almost fifty years you have done excellent service for the Bar of Canada by the publication of your Canada Law Journal. In addition to its practical uses you have always in it upheld fine professional ideals. Now you are showing the same kindly and generous spirit and a desire to still further help the profession by transferring to the Association that Journal, to the end that, in the proposed Canadian Bar Review, the spirit

and tradition of your publication may be continued and perpetuated. I join most sincerely with you in the hope expressed in your letter that our expectations for the future of that new magazine may all be realized and that you may see in it the fruition of your "labour of love" throughout these past years.

"I am grateful for your good wishes in respect of the Association in future.

"Very sincerely yours, J. A. M. AIKINS."

The Journal came into existence in the town of Barrie, county of Simcoe, on January 1, 1855, under the name of "The Upper Canada Law Journal and Local Courts Gazette," and under the editorial management of "James Patton, Esq., Barrister-at-Law, and others"—The others were James Robert Gowan, Judge of the County Court of the County of Simcoe,—afterwards well known in the history of Canada as Hon. Sir James Gowan, K.C.M.G., Senator of Canada, and Hewitt Bernard, a partner of James Patton and afterwards known as Col. Bernard, K.C., Deputy Minister of Justice. Mr. Patton, for a short time Solicitor General of Upper Canada, was the founder of the firm of Patton, Osler and Moss, and later a partner of Sir John A. Macdonald. He was subsequently Collector of Customs at Toronto.

The principal contributors to the Journal were Judge Gowan and Mr. Bernard, Mr. Patton attending to the many other matters well known to those who enter the busy field of journalism.

An incident connected with the birth of this organ of the legal profession in Canada may be of interest and worth noting. The present Treasurer of the Law Society of Upper Canada, Hon. Featherston Osler, recently one of the Justices of the Ontario Court of Appeal, was a law student in the office of James Patton, as was also the present Editor of this Journal. One morning Mr. Patton requested their attendance in the attic over the office, where they found sheets of brown paper and a pile of the first number of The Upper Canada Law Journal and Local Courts Gazette, also a pot of paste and brushes. They were told to wrap up and direct and mail the new publication to the persons to be found on a list of names also provided. This they did, little thinking that 57 years afterwards one of them would be writing these parting words to its readers and that his life-long friend would read them. He tells

me, *en passant*, that our Master in the Law told us to be careful to put "Esquire" after the names of Division Court Clerks, but that a simple "Mr." would be sufficient for the Bailiffs.

In those days special attention was given, and properly so, to the administration of law in connection with Magistrates, Municipalities and the newly formed Division Courts. The Law Journal, with such a man as Judge Gowan in charge of these departments, was the most important factor in giving them efficiency and in producing uniformity of practice and procedure throughout all the counties of our present province of Ontario.

The next year (1856) Mr. W. D. Ardagh, Mr. Patton's partner, took charge of the Journal and was connected with it until some years later he went to Manitoba as County Judge at Winnipeg.

In 1857 the office of publication was moved to Toronto, when Robert A. Harrison, B.C.L., Deputy Attorney General, joined Wm. Ardagh, who had become a partner in the firm of Crawford, Hagerty & Ardagh. From this time, and on until Mr. Harrison became Chief Justice of the Queen's Bench, Judge Gowan was the life and soul of the Journal, and the largest contributor to its columns.

The year 1864 saw the end of the Old Series, published in quarto form. Vol. 1 of the New Series appeared in 1865 in its present octavo form, with the name of Henry O'Brien as one of its Editors along with Wm. D. Ardagh and Robt. A. Harrison. Mr. O'Brien was at that time the Reporter in Practice Court and a partner of Mr. Christopher Robinson, a partnership which lasted with an unbroken fellowship for over thirty years. He is responsible for anything that has appeared in the Journal since the New Series began. His more than half a century of hard work was mostly a labour of love, but withal a pleasant one, thanks to the kind sympathy of an indulgent profession and frequent aid from many who helped to lighten his self-imposed burdens.

It may not unjustly be said that in the two series of the Journal may be found a record of, or reference to, almost everything that is of interest in the legal history of the Province, e.g., changes suggested or effected in criminal and civil procedure, and sketches of the lives of eminent members of the Bench and Bar. As one illustration of many changes effected

by the Journal by means of persistent urging in its columns, was the introduction of the system of County Crown Attorneys, which has continued without any material change up to the present time. Much of the information referred to cannot be found elsewhere, or is not easily accessible, and the lawyer in his leisure moments may find in the Journal a mine of information, and even amusement.

It is a great pleasure to us to hear that our old friend and most welcome contributor in former days, and whose name is well known to our readers, becomes the editor of *The Canadian Bar Review*. We are glad that the pen we lay down is to be taken up by one so competent for the task he undertakes as Dr. Charles Morse, K.C., D.C.L., Registrar of the Exchequer Court at Ottawa.

CANADIAN BAR ASSOCIATION.

The Annual Meeting of this Association was held, as our readers are aware, during the month of August last at Vancouver.

It was as usual most interesting. The President, Sir James Aikins, K.C., conducted the proceedings with his usual tact and courtesy. Many distinguished visitors were present, several from the United States, and Lord Shaw from Edinburgh, one of the most respected of the Scottish Law Courts. A full report of the proceedings will hereafter appear in the Canadian Bar Association Review. We have only room at present for the President's address and the report of the Committee on the Administration of Justice.

THE PRESIDENT'S ADDRESS.

By the by-laws of the Association the Annual Presidential Address is a necessity which you and I on this occasion will have to suffer. It will not, however, be entitled "De Profundis." The large quantity of fine food for thought which has been swallowed by those of you who have just attended the Meeting of the American Bar Association will require according to the custom of that Association at least twelve months to fully digest. Those who attend this Meeting will be similarly rationed—accordingly the first course of such a meal should be light.

It cannot be otherwise for I prepared it out of my larder exhausted of any substantial stuff it ever contained by six previous presidential addresses.

"Laws are not our life, only the house wherein our life is led, nay, they are but the bare walls of the house; all whose essential furniture, the inventions and traditions and daily habits that regulate and support our existence are not the work of Dracos and Hampdens but . . . . of philosophers, alchymists, prophets, and the long forgotten train of artists and artisans, who from the first have been jointly teaching us how to think and how to act, how to rule over spiritual and physical nature.

To each nation its believed history is its Bible, (so saith Carlyle.)

"Law, man's sole guardian ever since the day when the old brazen age in sadness saw love fly the world."

"Law teaches us to know when we commit injury and when we suffer it."

Consideration of such quoted thoughts helps one to understand such proverbs and phrases as "Like law, like people." (Port) The Laws of a nation give an outline of its history. Law is a record of the progress of civilization. May I for a little while lead you in some reflective wanderings among those well weathered and well architectured ideas. The steps which usually lead up to the house wherein our life is led are the peoples common thought and acts—daily habits approved customs laws. It has been said "If a man were to make all the ballads he need not care who should make the laws of a nation."

This may be interpreted as meaning that the familiar songs of a people express and also mould their thought, manners, usage traditions, faiths and glories, out of which spring National Spirit and National Laws. What inspiration, sympathy and unity were created in England by the popular ballads and songs of the passing centuries; what in Scotland by the vocal music of its bards (My Lord Shaw I said vocal music though perhaps the skirl of the bagpipes may be traced in the spirit and the laws of the Scot) and by the poetry of Burns and Scott. What in Ireland by its early minstrelsy, and by the lyrics of Tom Moore. The heart of the people of the British Empire and the United States is made sorrowful, because

synchronizing with the silence of the Irish Popular Songs is anarchy and the defiance of the law which, if even now observed and obeyed, would be the bulwark of Irish liberty as it is of ours, for the liberty of a free state is the privilege and power to do everything that the laws permit, and to make those laws.

"The harp that once through Tara's halls
The soul of music shed,
Now hangs as mute on Tara's walls
As if that soul were fled."

Let us hope that it has not fled and that the people of Erin, overcoming and controlling themselves, may, without fear, abide and work in the green pastures and beside the more peaceful waters, and become a strong unit in the British Empire.

Who can estimate the influence of their nationalizing effect upon the people of the United States of their popular songs. I will not say Yankee Doodle, though no doubt it has had its effect, but such songs as "Swanee River," "My Old Kentucky Home," which we, in Canada, also sing without hurt to our young and sensitive national pride.

No Canadian can be too thankful for the inspiring, comforting, uniting and Canadianizing influence of the Chansons Populaires du Canada, including Claire Fontaine, and the songs of the Great Dominion, among which is the Maple Leaf. As you listen to this varied music in the concert hall of our Anglo American Canadian Civilization you hear the voices of the singers blend into great national choruses of their several lands.

Here "O! Canada! our home and native land
We stand on guard for thee."

There "The Star Spangled Banner, Oh, long may it wave
O'er the land of the free and the home of the brave."

Yonder "When Britain first at Heaven's command,
Arose from out the azure main
This was the charter of the land,
Britons never shall be slaves."

And then in unison all sing the same great tune, expressive of the same sentiment of love and loyalty to their own country though differing in words.

"My country 'tis of thee" and
"God Save our Gracious King."

NATIONAL SPIRIT AND THE LAW.

Such songs and the inventions, the traditions and daily habits that regulate and support our existence, and the teaching in family and school mentioned by Carlyle generate in a united people a National Spirit, or National Soul, that is, if they are worthy a place in history. A Swiss Bluntschli enunciates it thus:

"The nation is not a mere sum of citizens; and the State is not a mere collection of external regulations. . . . . The one national spirit which is something different from the average sum of the contemporary spirit of all citizens, is the spirit of the State; the one national will, which is different from the average will of the multitude is the will of the State . . . . To extend the reputation and the power of the State, to further its welfare and its happiness, has universally been regarded as one of the most honourable duties of gifted man."

The nation exists to develop the most perfect type of citizen, of loyal citizen and to further the welfare and best interests of all who compose it. To that end there is nothing more sacred, more essential than the protection and fostering of a sane group mind and laudable national ambitions.

It is said the past lights a lamp for the guidance of the present age, but the national spirit though originating in the past is not only a light but a leading and compelling power, and gives direction to national activities, aspirations and laws.

"There is a mystery in the soul of state
Which hath an operation more divine
Than tongue or pen can give expression to."
(Shakespeare).

Why are the United Kingdom, the United States, Canada, and those Dominions under the Southern Cross, so alike in song, in sentiment, in laws, why? Because though they possess diversities of gifts, they are born of the one spirit, the British spirit, they are many members but one body, that is, one enveloping civilization in which there should be no schism.

"TO CIRCUMSTANCE AND CUSTOM LAW MUST YIELD." (Span. pr.)

Now the sources of a nation's song and spirit are the causes of a civilized nation's laws, but there is this difference—the songs and spirit lead in the formation and confirmation of customs, usages and habits, then law follows, sometimes too far

behind, and makes out of them rules of conduct, for instance, the common law passed by no Parliament was the crystallization of those usages which have stood the test of time into law by judicial decision and interpretation. But usages and methods change to suit the requirements of the day, and on occasion, swiftly. Indeed instant regulations are sometimes essential for new discoveries and inventions. The Common Law, Code Law, and Constitutional Law, are constantly altering and advancing to harness, control and utilize the new born thoughts and expressed wishes of people. The Common Law of Blackstone's time has been so modified by judicial interpretation and legislation that it is scarcely recognizable in the rules of conduct of today which we are pleased to call the Common Law. It is borrowing largely now from the Pandects and Institutes of the Civil Law. For the same reason Code Law is changing. The Constitution of the United States has been stretched on all sides by the Supreme Court to cover the growing body, and the Congress has been busy in sewing on amending strips. Even young Canada would feel itself bound by some restricting clauses of the British North America Act, if it and the Imperial authorities did not quietly ignore them, and all are happy because they know the objectionable clauses can at any time be repealed when Canada requires it, and we are warned against any further written definition of status in the Empire which undoubtedly would embarrass free development. Until Canada has finished growing it cannot be defined. It doth not yet appear what we Canadians shall be. Let our advancing thought and evolving acts as we move toward the beckoning ultimate declare us "Omnis definitio periculosa est."

Laws in Canada and America.

It would be a mistake to assume from what has been said that fundamental laws of all the Canadian Provinces would be the same. They are not. That is why there is in the Constitution of the Canadian Bar Association the clause relating to its objects:—

"Promote the administration of justice and uniformity of legislation throughout Canada so far as is consistent with the preservation of the basis system of law in the respective provinces."

For the basic local laws of eight Provinces differ more widely from those of Quebec than they do from the United States, except perhaps Louisiana.

A SHORT APPEAL TO HISTORY WILL EXPLAIN THE REASON.

The Historian's History of the World says:—

"The stage on which the drama of Canadian History unfolds may seem to the world an obscure one. A closer view, however, will reveal that on this stage some of the gravest problems of history have been pressed to a solution. . . . . Battles were fought on the Rhine, the Elbe, the Danube; German, Austrian, Spanish thrones were shaken to their fall; navies grappled in the Caribbean and Mahratta hordes were slaughtered on the rice fields of India, to decide the struggle which ended only upon the Plains of Abraham. Now in these Imperial domains which Wolfe's triumph secured to British sway, a people is taking shape which bids fair to combine the power and genius of the two great races from which it springs."

As a matter of fact the stage was the northern hemisphere. The drama might be called "The Birth of the British Empire, and the American and Canadian Nations." The time was the middle of the 18th century. The important scene to us was on the Continent. Acts in it had been closed with the treaties of Ryswick 1697, Utrecht 1o13, Aix la Chapelle 1748. The latter was only a suspension of hostilities during which both combatants were preparing for another round. Some historians say that in the fight of the British under command of young Washington against the French under Jumonville near where Pittsburg now stands, the shot that killed Jumonville was heard not only throughout the settlements and wilds of America, but in Europe, and started the old French war, the Seven Years' War, or, some call it, the French and Indian War. In that war George Washington capitulated at Fort Necessity to DeVilliers, brother of Jumonville, on the 4th of July, 1754. Then began the British Colonial disaster and defeats at Braddocks Crossing, Lake George, Oswego, Fort William Henry and Ticonderoga. At that time the French held this Continent from the Rockies to the Alleghannies, and from the Gulf of Florida to the North Pole, except the Hudson Bay Company's territory, and seemed likely to realize their hope to drive the British Colonials eastward of the Alleghannies, and if possible into the ocean. In

sequence events followed, out of which arose the British Empire, and which made possible the American and Canadian nations. By reason of the disasters in the war the British people demanded a change of Government, and William Pitt, afterwards Lord Chatham, became Prime Minister, a friend of freedom and a sympathizer with those who contended for it, the greatest War Minister Britain ever had, except perhaps Lloyd George. In 1757 he acceded to settled power and held it till 1761. The glory of those years was due to his genius. He roused the English people to the highest patriotism. He enthused the oversea British as they were never touched from London before or since. He controlled war operations everywhere without interfering in them anywhere. His was the directing mind in the expansion of his country's power, the founder of the British Empire. He supported Clive in gaining for it the Indian Empire, he selected Wolfe to put new France under British rule, which Wolfe did.

Yonder at the City of Quebec stands a monument bearing on the one side the name of Wolfe, the other, of Montcalm, and in the centre this tribute to their just and joint renown:—

"Mortem virtus communem Famam historia Monumentum posteritatis dedit." That event gave this Canadian land to that posterity who dedicated that monument. The same event overthrew the power which pressed upon the thirteen Atlantic British Colonies. and paralysed the arm which hemmed them in. Those Colonies being thus relieved from their enemies the opportunity was given them to move westward, and to turn their attention to domestic politics and consolidate, which they accordingly did with distinguished emphasis.

In his dying hours Montcalm sent this message to the General then in command of the British (General Townsend)

"Monsieur, the humanity of the English sets my mind at peace concerning the fate of the French prisoners and the Canadians. Feel towards them as they have caused me to feel. Do not let them perceive that they have changed masters. Be their protector, as I have been their father."

The action of the British toward the French prisoners and the Canadians was consistent with the appeal of Montcalm to the humanity of the English. The Canadians had at the time of the capitulation of Montreal, September, 1760, their own

usages and laws, and their own method of administering them. French ways were not English ways. The change of Sovereignty and the introduction of new laws naturally caused disquietude which was abated by the Quebec Act 1774, sometimes called the Magna Charta of Canadians of French descent in Quebec. I understand that Mr. Justice Anglin intends referring to this.

That, however, was not the final solution. The Colonies in British North America were advancing vigorously. Those of British and French descent were accommodating themselves to each other. So eventually the British North America Act, the only written part of our Constitution, was passed, by which all laws on subjects within the Federal Jurisdiction are nation wide. So substantially is the public law and the law which relates to commercial and business transactions.

PROVINCIAL JURISDICTIONS.

No doubt as time passes convenience will require, and the preservation of Provincial Jurisdiction demand, greater uniformity in those provincial laws which relate to classes of business carried on between the Provinces. That, undoubtedly, should be left to the free volition of the Provinces. No one Province should be expected to make all the concessions to attain greater unity. The Civil Code system of Quebec relating to purely local and domestic matters differs fundamentally from the system in other Provinces; why should it not, if such be the will of the Quebeckers? It should be the aim of the Canadian people to keep the exercise of provincial rights and privileges free from all kinds of external interferences or encroachment. Citizens will best develop their powers, and make their richest contribution to Canada in the habitat and milieu and the atmosphere to which they are most naturally adapted and the administration of the laws to which they are accustomed. They will usually do what is to their interest, and the more readily if there is no outside power appearing to thereunto compel them. If there is, their sweet reasonableness vanishes.

A minister from another parish, on account of the sudden illness of the resident one, took his place, and was about to begin the service when the beadle presented to him the gown which he said was always worn in that pulpit. Said the minister, Am I compelled to wear it? No, was the reply. Then answered the minister "I will."

The great Creator never made any two things exactly alike, one star differeth from another in their glory, yet even those stars sang together.

So do our Provinces though occasionally some people in them lose the right key or pitch.

I am not suggesting that those from foreign lands should be permitted to continue their alien habits, language and ideals. As they come to benefit themselves by our better advantages, resources, and the protection of our laws, they must in all respects conform to things Canadian, and they should not be admitted more quickly than they can be quietly and effectually assimilated and Canadianized. There is such a thing as bartering a nation's birthright for a mess of pottage.

JULY 1776.

After the failure of the American forces to take Quebec they left Canada with its entire consent, and on the 1st July, 1776, assembled at Crown Point, quite persuaded that Canada would not be a useful 14th State. Three days later, on the 4th July the thirteen issued the Declaration of Independence which had been foreshadowed by Franklin's Colonial Union, signed I think on behalf of seven colonies on the 4th July, 1754.

That Declaration of Independence made clear the separation between the United States and Canada, so far as state sovereignty, independent government and international relations are concerned, not otherwise, for "Like law, like people." Up to that time except as to the original Canadians, the laws in what is now Canada and for them over 100 years in the west of Canada and in remonstrating and demonstrating 13 were the laws of England. From the Rio Grande to the North Pole the people of this Continent were and are the heritors of the same mid-eighteenth century British traditions, customs, history, literature and laws, and of the same British spirit and ideals, the same love of freedom and popular self-government.

It would therefore be far more remarkable if our laws were substantially different than that they should be the same in principle as they are. To each nation its believed history is its Bible. In prejudiced criticism of that Bible of the Nations mentioned some are disposed to cut out the English Genesis and Exodus and Deuteronomy or the book of the original law. Let me use from the Israelitish believed history a simile for the

newer born nations of British beginnings, equally applicable to this continent as to their land of promise.

"Thou hast brought a vine out of England, thou hast cast out the heathen and planted it, Thou preparedst room before it and didst cause it to take deep root and it has filled the land. She sent out her boughs unto the sea and her branches unto the river.

The simile of national houses is suggested by Kipling respecting the young Dominions in the British Empire:—

"Daughter am I in my mother's house
But mistress in my own."

Also suggested by Carlyle in the quotation made at the beginning.

"Laws are not our life, only the house wherein our life is led; nay, they are but the bare walls of the house, all whose essential furniture, the inventions and traditions and daily habits that regulate and support our existence are not the work of Dracos and Hampdens but . . . . . of philosophers, alchymists, prophets, and the long-forgotten train of artists and artisans, who from the first have been jointly teaching us how to think and how to act, how to rule over spiritual and physical nature. . .

In Seman's case Coke said:—

"The house of every one is to him his fortress and castle." those houses, those laws, how wonderful! They uphold, envelop and shelter us. Living within them, we have liberty and are safe. The foundations and chief material of the Canadian and American houses are the English laws. The Canadian has in one part the beauty of a French design. The American has structural variations to suit the country.

In the main they are the same, so are the House of Great Britain, of New Zealand, Australia and South Africa; they belong to the same civilization, the growth and strength of which will continue while those houses stand together.

"While our manners, while our arts,
That mould a nation's soul
Still cling around our hearts,
Between let oceans roll,
Our joint communion breaking with the sun,

Yet still from every beach
The voice of blood shall reach
More audible than speech,
We are one."

REPORT OF COMMITTEE ON THE ADMINISTRATION OF JUSTICE.

Questions remitted for reconsideration:—At the last meeting of the Association there were three subjects remitted for further consideration and report, and your Committee now begs to report upon these as follows:—

1. Should the present right of appeal to the Privy Council be limited to constitutional cases?

The majority of your Committee are of the opinion that the right of appeal to the Privy Council should be maintained without the suggested limitation to constitutional questions. They consider that the Judicial Committee has rendered long and valuable service to the Canadian public and to the legal profession by furnishing a tribunal composed of judges of greater learning, more varied experience and wider vision than can be hoped for under present conditions in Canada. They see a great advantage resulting from the existence of such a final Court of Appeal in which there is more freedom from political, racial or religious bias and from local prepossessions. They observe with regret that the vicious system of making judicial nominations rather as rewards for political services than for the professional qualifications of candidates shows no signs of disappearing from our customs, and they feel that until this danger is removed it would be inadvisable to abolish or restrict the right of appeal.

Finally, the majority of your Committee are impressed with the objection which has frequently been made that the disappearance of this right would have the effect of severing one of the most important ties by which Canada is united to the Empire.

A minority of your Committee, while conscious of the great services which have been rendered to our jurisprudence by the Privy Council, and without thinking that there is any urgent need for restricting the right of appeal, cannot but think that in view of the ever-increasing autonomy of this Dominion, such an institution must be regarded as transitory rather than per-

manent, and that while it is normal in the case of a Crown colony, such an institution seems scarcely compatible with the legitimate evolution of a self-governing Dominion.

It appears to them unreasonable that the legislatures of Canada should be trusted to make laws without any practical restriction on their power of legislation, and that its judges should not be trusted to interpret those laws. Without admitting that impartial decisions cannot be expected from the judges of Canada, or that the system of nominating judges produces this result, they conceive that the proper remedy for these evils is, not to apply for external assistance, but rather to agitate until our governments are impressed with the necessity of making more satisfactory appointments to the Bench. They venture to think that our governments will not feel their full responsibility in this respect until our courts are as supreme in their sphere as our legislatures are in theirs.

Australia has carried the doctrine of autonomy to its legitimate conclusion in obtaining a restriction of the prerogative in regard to appeals to the Privy Council in constitutional cases, and it is noteworthy that the Supreme Court of Australia is regarded as exceptionally strong.

The minority of your Committee would also appeal to the example of Australia as showing that the restriction of this right of appeal cannot be regarded as implying any diminution of the sense of loyalty in a dominion, or as evidence of indifference as to the value of the union.

2. Should the Supreme Court of Canada have its members increased with a view to the strengthening of that Court on the equity side of our jurisprudence, and should that court be composed of an unequal number so as to avoid the occurrence of dismissals by virtue of equal division?

Upon this point your Committee are unanimously of opinion that there is no need of increasing the number of Supreme Court judges for the reasons assigned. For many years the judges in the various courts of Canada have administered both law and equity indiscriminately, and there seems no special need of increasing or strengthening the Supreme Court on the equity side nor does it seem necessary to provide for an increase in the number of judges for the purpose of preventing dismissals resulting from an equal division. This can be avoided

by the judges adopting the rule that only an unequal number of judges shall hold sittings, and the evil, if it be one, would not be removed by adding to their numbers.

There is, however, in the opinion of your Committee something to be said in favour of giving representation on the Supreme Court to the Prairie Provinces, as long, at least, as geographical distinctions are recognized. In view of the diversity of laws and practice in the different provinces, it is perhaps an advantage to have representatives, if not from each province, at least from each group of provinces, so as to assist the court in ascertaining the customs and practice of each particular centre of litigation. In that view the middle west, which furnishes a considerable quantity of litigation pending before the Supreme Court, would certainly be entitled to as much representation as provinces which have hitherto secured representation and which admittedly have fewer cases before that court.

3. Should the rendering of one judgment as the judgment of the Court instead of individual judgments be adopted?

On this question the opinion of your Committee is divided. The majority hold the view that it would be dangerous to suppress dissenting opinions altogether as this would tend to give decisions rendered by a bare majority a fictitious appearance of unanimity and strength which really does not belong to them. So far as the majority of your Committee know this has not been the practice in any of the English and American courts. The instance given of the Privy Council rendering a single judgment without any dissenting opinions cannot be regarded as being in point, because the Privy Council is not, strictly speaking, a court of law, but a Committee which makes a report to the Crown. In the House of Lords, which deals with appeals from the British Isles, all the opinions of the Law Lords are given *in extenso*. Possibly a *via media* might be adopted of having the judgment of the majority delivered by one of the judges, and the opinion of the minority by one of the dissenters. This would certainly be a boon to the profession and would reduce the volume of the reports very considerably. It is submitted, however, that this must be left to the good sense and initiative of the judges themselves, and that the adoption of any hard and fast rule in this regard would be undesirable.

A minority of your Committee, however, believe that a single judgment should be the rule, and in the case of the reports of the Judicial Committee of the Privy Council.

Retirement of Judges. By the Statute of the Dominion 12 & 13 Geo. V, chapter 29, assented to on the 28th of June, 1922, the Judges Act, (R.S.C. 1906, chapter 138) is amended by providing that any judge who is found by the Governor in Council upon a report of the Minister of Justice, to have become, by reason of age or infirmity, incapacitated or disabled from the due execution of his office, shall cease to be paid any further salary if the facts respecting the incapacity or disablement are first made the subject of enquiry and report, and the judge is given reasonable notice of the time and place appointed for the enquiry, and accorded an opportunity by himself or his counsel of being heard and of cross-examination of witnesses and of adducing evidence on his own behalf. Provision is then made for the issuing of a commission of enquiry to one or more judges with the usual powers of summoning witnesses, taking evidence under oath, enforcing attendance, etc.

The Statute then enacts that nevertheless His Majesty shall, by letters patent, grant to any judge so found by the Governor in Council to be incapacitated or disabled by reason of age or infirmity, and who resigns his office, the annuity which he might have received if he had resigned at the time when he ceased to be entitled to receive any further salary, and that nothing in this Act contained shall prevent the Governor in Council from granting to any judge so found to be incapacitated or disabled leave of absence for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence be granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Your Committee regret that it should have been thought necessary to enact such a statute, which must, in their view, tend to lower the high office of the judges in the opinion of the profession and of the public. Such an enactment can only be justified if all other means have failed to secure the retirement of incapacitated or disabled judges, and your Committee venture to express a doubt whether the benefits of the remedy introduced by this staute will not be overborne by the disparaging effect of such legislation upon the judicial office.

LEGAL EDUCATION.

Although this subject has been discussed to such a degree that a learned writer in a recent article seems to suggest that it has been over-discussed, it is hoped that a few further observations may not be amiss. They arise largely out of the ideas that have already been advanced.

Without attempting to speak on behalf of any particular organization it may be said, I think, for such of the members of the profession generally as have evinced any interest in legal education, that their desire is not to be unduly critical of present conditions but rather to consider the possibilities of improvement along certain definite lines. Certainly the personnel of the teaching staff at Osgoode Hall, for example, is not and has never been in question. Indeed our prejudices are apt to be the stronger in favor of the "let-well-enough-alone" policy by reason of the great service which that Law School has rendered to the cause of legal education since its inception. But it is the law of progress that "our little systems have their day" and pass on to make way for even better things.

It is not mine to participate in the somewhat metaphysical discussion of this subject that many of the champions of change are disposed to carry on, but to direct the reader to a few more or less concrete propositions and facts.

Many of the very best jurists in Ontario have been among those lawyers whose entry into the legal profession antedated the existence of the Law School, and it is submitted that on the whole they have been men of higher attainments than those who have followed. Now I desire at this point to parenthetically anticipate the challenge of the protagonist of the Law School by refusing in advance to give a single example of this, firstly, because I do not assume to be competent to sit in judgment on the relative merits of any two of my seniors, secondly, because I do not desire any controversy of a personal nature, and thirdly, because it wouldn't prove anything if I complied. The proposition is merely an opinion and could not be made stronger by the expression of another opinion not necessarily supporting it even if accepted. I do not pretend that there are not some lawyers of the later period who are not only superior to some of the earlier period, but equal to the best. (This leaves plenty of room for all my opponents). I return to the proposition,

because certain important inferences may be drawn from it.

Why is it that such a great proportion of those early pioneers have been distinguished for their brilliancy at the Bar and in all the various branches of the work of the legal profession? Their knowledge of root principles has a sweep that seems utterly lacking in scores of modern practitioners. It is surely unreasonable to ascribe it to the fact that they were set adrift to burrow for themselves as best they might to prepare for the examinations. At any rate to so argue is to suggest that the coming of the Law School had a detrimental rather than a beneficial effect. The answer must be sought elsewhere. Some cognizance should be taken of the fact that many of the present leaders whom the younger members of the Bar are wont to admire for the depth and breadth of their legal knowledge, have lived through a period of much transitional change, and of necessity have much more than a bowing acquaintance for example, with "actions of assumpsit," "trespass on the case," "demurrers," etc., etc., (terms that are like a foreign language to many a young lawyer of 1922), and, (what is of even greater importance) with the wivision between legal and equitable jurisdictions. Allowance must also be made for the fact that with the prevalence of the twentieth century mania for money-making, there has been a tendency, not by any means confined to the legal profession, towards superficiality, and this tendency has been expressed within our ranks in the form of efforts to direct one's studies especially towards that kind of knowledge which best serves in the making of a living, rather than in the cultivation of the mind. And so we have been content to learn the rule without knowing anything of the reason for it. Suffice it that the rule is there and must be followed, "don't ask us why." And a third factor, no doubt, is found in the fact that procedure has been made so loose and flexible (with the high intent that justice and not technique should be paramount) that accuracy of thinking and expression have ceased to be as indispensible as they once were. This aspect is most noticeable, perhaps, in the familiar case of pleadings. Time was when the fate of the cause depended on the pleadings being in proper form, and their preparation required a basic knowledge of the legal principles governing the case. All that is swept away, and pleadings in many cases have the appearance of being the work

of a stenographer,—I mean no disrespect to the stenographer.

Yet all these factors taken together, scarcely tell the whole story. A surprisingly large percentage of the pre-Law-School men were University graduates, or college trained men. They made up for the absence of the Law School by academic training and study that first fitted them to pursue their legal studies logically and thoroughly, and to begin at the sources of things and trace the growth and application of this principle and that, and so acquire a broad groundwork of learning on which to build the work of all the years that followed. It must have taken great qualities of perseverance, steady application and vision to become a lawyer in those days. Then came the law school. It must have appeared at the first as a sort of competitor of the University, as an Institution that would dispense with the practical necessity of a University career to become a lawyer. At any rate, today, a vast percentage of students enrolled at Osgoode Hall have never seen a University except from the outside. No one would pretend that the two years' clerkship which they serve in a law office under modern conditions is equivalent in value to the contribution of a University career. And yet this period of service, plus attendance at lectures for roughly twenty-two hundred hours scattered through a period of three years, and a partial reading of which is prescribed during these lectures, is supposed to change a boy fresh from High School (the entrance standard has very recently is that in the limited time at their disposal, the lecturers must of necessity centre the interest largely on what is strictly and actually present-day law, and give the historical features rather meagre treatment. This, it is submitted, contributes to the superficial spirit of the age, already referred to. And in the eight years since the writer left the law school, the task of the lecturer must have become more and more difficult, for that period has witnessed voluminous legislation on a multitude of subjects which did not trouble us much in 1913, and there seems to be still more to follow.

If there is any moral to be drawn, it is, firstly, that the method of teaching law should be what Professor McKay of McGill University recently described as directing the students to "the sources",—a method doubtless involving more time than the present method of topical treatment according to various

more or less unrelated headings; and, secondly, (and with great deference to opinion to the contrary) whole-time lecturers or professors, and a full time school programme, that would bring the student under the jurisdiction of the staff and the constant influence of association long enough to give him the legal atmosphere of the place and create an esprit de corps that would be conducive of valuable results to student and to school. One cannot forbear to say a word in passing about the contrast in the matter of ethics between the conceptions prevailing today and those of other days. It was not necessary to lay down rules for the guidance of the men of the old school as to what was right or wrong. Yet rules there were, more perfectly conceived in the minds of the members of the profession because they were founded on a great unwritten law of fair and honourable dealings. Logical or illogical as it may be, that which is based in traditions always seems to lawyers and others to be supported by more sacred and effective instances, than new precepts, the latter issuing, as it sometimes seems, out of more or less arbitrary conceptions. It is true that our modern codes of ethics are not new precepts but are only intended as memoranda of those hitherto unwritten rules of conduct by which we have always been governed. But the contents of these same codes are all too new to scores of those whom they are intended to influence, and reach their minds as new-formed and more or less idealistic propositions which it is commendable to adopt if convenient, and not as long established and well recognized rules for common every day application. The traditions of which I have been speaking were once so deep-rooted that it would have been an insult to any lawyer worthy the name to have a code of morals prescribed for the governing of his dealings with his clients and others, and the desire for a written code has only become evident in quite modern times. A quotation from the very instructive and admirable address delivered by the Honourable Chief Justice Mathers on this subject at the Annual Meeting of the Canadian Bar Association in 1920 (See Canadian Bar Association Year Book 1920, at page 271) is timely:—"Suggestions for the adoption of a code or canons of "ethics have not in the past met with much favour either in England "or Canada. There has, however, been for some time a grow-"ing feeling here, stronger in the West perhaps than in the

"East, that the recognized ethical rules which experience has "shewn to be necessary for its government and control, if the "profession of the law is to fulfill its highest destiny, should "be formulated and reproduced in such a way as to be available "to the guidance of the young practitioner instead of leaving "him to discover when too late that he has been *betrayed by* "*ignorance* into taking a false step."

I am not aware that it has ever been suggested that these old standards, which indeed the modern codes simply reiterate, have proved too ideal for practical application. But on the other hand it is well known that they have been lamentably departed from in many, many instances. Is not this departure also traceable to the absence of sufficient common association by the embryo lawyers during the period when, if ever, they must have instilled in them the ideals which we like still to believe the profession cherishes as a whole? Be that as it may the fact can scarcely be seriously controverted that there are young men in the ranks of the profession today who have no more idea of the meaning or place of professional or any other ethics than some of their clients whom they unsuccessfully represent in the Police Courts. Would this situation continue to the same extent if the men who are to man the ranks of the profession went forth from the life of a seminary of equal rank and standing with any of the best Universities in the country into the life of the world, carrying with them a pride in all the traditions that cling to the life of the school? In short, a pride in the school itself and all that it has meant to them as *their* school, instead of a place at which they listened to a few lectures at more or less frequent intervals followed by a hasty leave-taking in order to reach the Registry Office or the Division Court? I venture to state that there are many instances of men who have come through the three years' tuition at Osgoode Hall who, when they graduated, could not give the names of the men who sat four seats away from them in the Lecture Room.

In a paper already too long, space is lacking to develop other ideas perhaps equally important with the above. There is the thought that the general course should be followed by optional courses of a special nature. Many young men today walk out of the law school into the offices of corporations to whose service they devote their whole time and professional skill. These

would welcome such a course, and their number seems to be on the increase. Apart from such cases, many graduates would like to be able to specialize in some particular branch of practice, and any great legal seminary worthy the name, in this day of specialization, ought to afford them facilities for so doing. Indeed, to go a step further, one's training at Osgoode Hall ought to be given with the idea in mind that not only does the student body include those who will go forth to practice law, in the strict and narrow sense, but also many of the future statesmen and law-makers and text writers and teachers. Surely something in the course should contribute in a large measure to better fit them for such posts.

On the whole it is not too dogmatic to say that a change is due. The need is not only apparent but is becoming more and more imperative. The financial problems attending it are not such as cannot be overcome, and this Province which has been in the vanguard, and to which we have been told that some of the other Provinces are looking for high and noble example, must inevitably relinquish its leadership if it stands still, and that right early. No one advocates that what we have should simply be swept away. Our text is evolution, not revolution, but the next step in the process is overdue.

ARTHUR A. MACDONALD.

SIR JOHN BEVERLEY ROBINSON.

A RETROSPECT.

In introducing Lady Astor, M.P., to the Ontario Legislature, the Prime Minister, the Hon. E. C. Drury, said the fact that she had been born in Virginia and was now a law maker at Westminster made it fitting she should speak to a law making body in Canada which owed so much to Virginia, and referred particularly to the great services to the administration of justice rendered by Chief Justice Sir John Beverley Robinson.

A critic, more concerned with unimportant minor details than the "weightier matters of the law," wrote to one of the daily papers that Chief Justice Robinson was not born in Virginia, but in Quebec. He did not, however, point out that his father, Christopher Robinson, one of the first Benchers of the Law Society of Upper Canada, had been born in Virginia. Like many others of the splendid men of that day, he was a

U.E. Loyalist. He was, as stated in Dr. Geo. R. Parkin's preface to the biography of Sir Beverley Robinson written by his son, Major-General C. W. Robinson, C.B., one of "those loyalists who, driven or self-exiled for conscience sake, kindled in Canada that passionate attachment to the idea of a united empire which has controlled the policy of the country for more than a century, is a dominant force in its politics to-day and has contributed, perhaps more than any other single factor, to determine the future of the empire itself."

Sir John, though not the first Chief Justice of Upper Canada, was the first Chief Justice or President of the Court of Error and Appeal. In 1829 he became Chief Justice of Upper Canada. This position he filled for 33 years, until in 1862 he was called to the higher position just above referred to.

In the more important matters Mr. Drury was much more accurate than his critic. It is quite true that the Common Law of England was introduced into Upper Canada in 1792 by the Legislature, but the Courts held that this did not introduce such English laws as were clearly not applicable to the state of things existing in the Province. On this point it will suffice to refer to two cases: *Doe Anderson* v. *Todd* (1846), 2 U.C.R. 82; *Regina* v. *Roblin* (1862), 21 U.C.R. 352.

In both of these cases Chief Justice Robinson gave the judgment of the Court. The record proves that under the statesmanlike guidance of Chief Justice Robinson Upper Canada adopted in this respect a course similar to that taken by Virginia, then a British Dominion, in the seventeenth century and afterwards in the eighteenth century by Nova Scotia, whose Governor recited in an Order in Council of 1721 that he had been directed to make the "Lawes of Virginia" the rule and pattern "where the same are applicable to the present circumstances."

To anyone familiar with the early history of our law it is quite as ludicrous to say, as Mr. Drury's critic does of Chief Justice Robinson, "He had no more to do with 'formulating the common law of this country' than any other Judge," as it would be for an English writer to make a similar statement about Lord Mansfield or Lord Stowell. As to the suggestion that Sir John Beverley Robinson knew nothing of the law of Virginia, it is only necessary to recall that he was an accom-

plished scholar as well as a profound Jurist. For two years he was President of the Canadian Institute, now the Royal Canadian Institute. One of his correspondents was Mr. Conway Robinson, described by his son and biographer, General C. W. Robinson, as a "leading member of the Bar and Chairman of the Executive Committee of the Virginia Historical Society." Sir John visited the famous William and Mary College, of which again, to quote his biographer, "his ancestor, Christopher Robinson, had been a trustee under the original charter of 1693 and where his father had been educated."

Both Christopher Robinson, the father of the Chief Justice, and John Marshall, the most famous of the Chief Justices of the United States, attended William and Mary College in Virginia, and it is probable that they were there at the same time. At all events, it is certain both attended when the celebrated George Wythe was Professor of Law.

Speaking of Marshall's college life, his latest biographer, Beveridge, says: "He had hard work, it appears, to keep his mind on the learned words that fell from the lips of Mr. Wythe." Several times in notes of the law lectures appears the name of Miss Mary Ambler, whom Marshall afterwards married. The conclusion of Beveridge is "the lure of Mary Ambler was greater than that of learning." Perhaps it may also be said of Robinson that the lure of the commission under which he served so gallantly in the Queen's Rangers was greater than that of learning. The Queen's Rangers were commanded by Colonel Simcoe, afterwards Lieutenant-Governor of Upper Canada.

Men, who still live, can testify to the permanent and beneficial effects of the Robinson tradition in the administration of justice in this Province. This tradition certainly embodied all that was best in the traditions of the English Courts and of British Virginia.

Mr. Drury is to be commended for obeying the injunction of Kipling to praise "famous men," and we may repeat the phrase used in his lifetime in regard to certain aspects of the work of Chief Justice Robinson by a political opponent, Mr. Henry Eccles, Q.C., at the time Treasurer of the Law Society of Upper Canada: "No limit need be placed on our praises."

It is well to keep in remembrance those who have by their lives and example raised the standard of national character and ennobled the profession to which they belong. No man has lived in vain if he has fellow men to do the right and spurn the wrong.

We have spoken of the great Chief Justice; in the same connection we would refer to his son, Christopher Robinson, Q.C., who most worthily carried on the traditions of the family. It is not so many years since he was taken from us, but his name will not soon be forgotten. In all high aspirations, devotion to duty, unstained honour, trusted and beloved by all, as was the father so was the son.

Let us conclude with the words of Dr. Parkin in his preface already referred to: "A biography like this brings out in strongest relief the supreme value of character in public as in private life. Personal and family detail may be of limited interest; the broader teaching goes to the root of national welfare. Characters such that of Sir John Beverley Robinson give distinction and dignity to a country's history."

PROBATE DURING LIFETIME OF TESTATOR.

The enterprising editor of a medico-legal journal made a suggestion which he fondly hoped would have been acted on. He says:—

"It is now nearly four years since I suggested in an article in the Medico-Legal Journal (September-October, 1918, issue), that the present practice that a will could only be probated after the death of the testator, should be changed, so as to permit a testator to have his will probated during his lifetime. Not only would this avoid a great many of the difficulties at present encountered in the proving of a will, when some of the subscribing witnesses may have died or disappeared or when they have lost all recollection of ever having witnessed the will, but also could the question as to the testator's soundness of mind and reasons for his disposing of his property be determined, at a time when the testator could prove that he was of disposing mind and memory and that he had good reasons for disposing of his property in the way he did. Any illegality in the will could be determined then and there. The question whether the testator had left too much money to charity,

whether the trusts established by him complied with the provisions of the law; in fact the whole question of the legality of the will could be determined then and there, when the testator is still alive and able to defend his actions. It would in a great many instances prevent the contesting of a will by disgruntled relatives, on the ground that the testator, at the time of the making of the will, was *non compos mentis*, that is to say, not of disposing mind and memory."

It is really very pathetic that no one seems to have taken any notice of the above suggestion; for the writer is evidently in earnest. It is not a joke, and it has manifest attractions for the many half-starving members of our profession. For, if necessary legislation were introduced and the public "caught on," Surrogate business would be booming. Most people do make many wills before they shuffle off, and it would be lovely to have them all probated. We are glad to bring this suggestion before the budding statesmen in our local Legislatures who are on the watch for some subject whereon to draft a bill and so justify their friends in electing them to Parliament.

CRIMINAL RESPONSIBILITY FOR MOTOR ACCIDENTS.

The first statutory enactment in Canada declaring the criminal responsibility of persons in charge of dangerous things was that contained in the Criminal Code of 1892, (Can.), ch. 29, sec. 213. That section was carried into the Criminal Code of 1906 as section 247, and reads as follows:—

"247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

This enactment appears to have been intended to declare the criminal liability already existing at common law. Sir James Fitzjames Stephen in his Digest of the Criminal Law of England states the related proposition based upon the common law as follows:—

"It is the legal duty of every one who does any act which without ordinary precautions is or may be dangerous to human

life, to employ those precautions in doing it." Stephen's Digest of Criminal Law, 6th ed., article 237.

Sec. 247 of the Criminal Code declares criminal responsibility for the consequences of omitting to take reasonable precautions against and to use reasonable care to avoid endangering human life, provided the omission so to do is without "lawful excuse."

Secs. 16 to 68, inclusive, of the Criminal Code, 1906, deal with matters of justification and excuse. By sec. 16 "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

The common law is not abrogated by the Code, and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution and defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy, in which event the Code will prevail. R. v. Cole (1902), 5 Can. Cr. Cas. 330, 3 O.L.R. 389; R. v. Walkem (1908), 14 B.C.R. 1 at p. 7.

Culpable homicide, not amounting to murder, is manslaughter. Cr. Code sec. 262.

And, with certain limitations as to the time of death being within a year and a day of the cause of death (Cr. Code sec. 254), homicide is culpable when it consists (inter alia in the killing of any person by an omission without lawful excuse to perform or observe any legal duty. Cr. Code sec. 252. The legal duty referred to is presumably a duty qua the criminal law which is the subject of the Code and does not refer to such civil rights as are, in general, outside of the legislative jurisdiction of the Dominion Parliament and are delegated to the legislative control of the Provincial Legislatures by the British North America Act, 1867, (Imp.) ch. 3.

The decision in the McCarthy case, supra, affirms in the result the majority opinion of the Saskatchewan Court of Appeal, see R. v. McCarthy (1921), 57 D.L.R. 93, 14 Sask. L.R. 145. It may be taken as establishing that there was no substantial wrong or miscarriage in the direction by the trial court that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case; but while so affirming the result in the trial court and in the Saskatchewan Court of Appeal, some of the opinions in the

Supreme Court of Canada contain dicta which would support the proposition that there is no such difference between negligence involving criminal responsibility and negligence which results in civil responsibllity at least in the Province of Saskatchewan which was the jurisdiction appeal from. The questions of criminal responsibility becoming enlarged or diminished under Cr. Code sec. 247 because of differences in the various provincial laws dealing with civil negligence was not considered. The reference to "reasonable" precautions in Code sec. 247 gives room for much difference of opinion as to the scope of criminal responsibility and as to how far the question of reasonableness of the precaution or care referred to in Code sec. 247 may, on the one hand, be a question of fact only for the jury and, on the other hand, a question of law for the court.

The development of the Criminal Code of Canada (with the exception of the practice clauses) from the draft English Criminal Code which did not become law in England, tends to show that Code sec. 247 was framed solely with reference to the criminal responsibility under the English common law as applied to crimes, and that it may be treated as a definition of what is sometimes termed "gross negligence" and sometimes "negligence per se" in the criminal courts.

Carelessness is criminal and, within limits, supplies the place of direct criminal intent. Bishop on Criminal Law 313.

In Sir James Fitzjames Stephen's History of the Criminal Law of England (1883) it is said in reference to manslaughter by negligence that the legal and popular meanings of the word are nearly identical as far as the popular meaning goes; but in order that negligence may be culpable "it must be of such a nature that the jury think that a person who caused death by it ought to be punished; in other words it must be of such a nature that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health, and whether this was so or not must depend upon the circumstances of each particular case." Vol. 2 Stephen's History of Criminal Law, p. 123.

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other persons has intervened

between his act or omission and the fatal result. R. v. Ledger (1824), 2 F. & F. 857.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. Reg. v. Walker (1862), 1 C. & P. 320.

In the application of the English common law, the prevailing rule is to exclude contributory negligence on the part of the deceased as an excuse in a criminal case. Reg. v. Jones (1870), 11 Cox C.C. 544, disapproving Reg. v. Birchall (1866), 4 F. & F. 1087; Reg. v. Swindall (1846), 2 Cox C.C. 141; Reg. v. Dant (1865), 10 Cox C.C. 102; Reg. v. Hutchinson (1864), 9 Cox C.C. 555.

And in a recent Canadian case it was held that contributory negligence is no defence to the criminal prosecution under Cr. Code secs. 247 and 284, of a light and power company for causing grievous bodily injury by omitting without lawful excuse to take reasonable precautions against endangering human life in the care of the company's electric wires, R. v. Yarmouth Light and Power Co. Ltd. (1920), 56 D.L.R. 1, 53 N.S.R. 152, 34 Can. Cr. Cas. 1, and see annotation to that case, 56 D.L.R. at p. 5.

In cases of homicide the rule is established in many of the United States that one who wantonly or in a reckless or grossly negligent manner does that which results in the death of a human being, is guilty of manslaughter although he did not contemplate such a result. Commonwealth v. Hawkins (1893), 157 Mass. 551, 553, 32 N.E. 862. His gross negligence in exposing another to a personal injury by intentionally doing the act, makes his intention criminal. Commonwealth v. Hawkins, supra; Banks v. Braman (1905), 188 Mass. 367, 74 N.E. 594.

Criminal negligence is sometimes referred to as negligence per se. Such negligence has been defined as "the omission to do what the law requires or the failure to do anything in the manner required by law." Babbitt's Law of Motor Vehicles, 2nd ed., sec. 954; St. Louis, etc., Ry. v. Keokuk (1887), 31 Fed. Rep. 755 at p. 756.

"Negligence per se" has been described as an act or omission which the law has commanded or prohibited, the occurrence of which is, of itself and independent of its result, as matter of law declared a failure of duty rendering the culprit liable to

public punishment, and this irrespective of all questions of the exercise of prudence, diligence, care or skill in case a fellow being is injured. Thompson Commentaries on Negligence, 2nd ed. sec. 10, 204; Babbitt's Law of Motor Vehicles (1917), 2nd ed., sec. 955; Cecchi v. Lindsay (1910), 1 Boyce 185 (Del.), 75 Atl. 376; Robinson v. Simpson (1889), 8 Houst. 398 (Del.), 32 Atl. 287.

"When the imperfection in the discharge of duty is so great as to make it improbable that it was the result of mere inadvertence, then in proportion to such improbability does the probability of negligent injury diminish and that of malicious injury increase." Wharton on Negligence, 2nd ed., sec. 22.

If one is grossly and wantonly reckless in exposing others to danger, the law holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury, there is a constructive intention as to the consequences which, entering into the wilful intentional act, the law imputes to the offender and in this way a charge which would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. Banks v. Braman, 188 Mass. 367, 74 N.E. 594. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognised as an elementary principle in criminal law. Banks v. Braman, supra; and see Commonwealth v. Pierce (1884), 138 Mass. 165; Commonwealh v. Hartwell (1880), 128 Mass. 415; Bjornquist v. Boston & Albany Railroad (1904), 185 Mass. 130, at p. 134.

If the operator of a motor vehicle, with reckless disregard for the safety of others, so negligently drives his vehicle in a public highway as to cause the death of a person thereon, he is guilty of criminal homicide. Davids' Law of Motor Vehicles (U.S.A. 1911), sec. 237; State v. Goetz (1910), 83 Conn. 437, 76 Atl. 1000; State v. Campbell (1910), 82 Conn. 671 at p. 677, 74 Atl. 927, 135 Am. State Rep. 293.

Individuals as well as corporations, in the use and operation of dangerous machines, should have a due regard to the preservation of the rights of the public in the use of the public streets, as well as the protection of persons using such streets from in

jury; and if they fail in this and should in the operation of a vehicle which is always attended with more or less danger negligently, carelessly and recklessly destroy human life, it is but in keeping with the proper and impartial administration of justice, that penalties should be suffered for the commission of such acts. State v. Watson (1909), 216 Mo. 420, 115 S.W. Rep. 1011, at p. 1015.

W. J. TREMEEAR.

CRIMINAL RESPONSIBILITIES OF MEDICAL MEN.

In an article which appears on another page the criminal responsibility for negligence in motor car cases is discussed. The general principle laid down by the Supreme Court of Canada in the case there referred to (*McCarthy* v. *The King*, 61 D.L.R. 170) is that a person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences. This is a proposition of the common law as well as one in our Criminal Code. It is of general application to "anything whatever, whether animate or inanimate."

In the case above referred to it was a motor car; but the same rule would apply to an infinite number of other articles endangering life. It is to one of these we would draw attention for the purpose of warning a class who are too apt to imagine that they are immune from liability of that character. We refer to medical practitioners.

It is commonly reported that on several occasions surgeons have carelessly left in abdominal wounds, necessary for some operation, an instrument, or part of one, which was used in the operation. In other cases it has been thought necessary by the physician to apply heat, using a hot water bag. These have, not infrequently, been applied to the body of the patient without proper covering, resulting in some cases in such a serious scald or burn as to endanger life and which has given intense pain and impaired a limb for life. In one case a scalding hot water bag was carelessly applied or permitted to be applied to a patient's feet, with the result that she is said to be a cripple for life. In other cases these applications have

been such that if placed carelessly on a vital spot, whilst the patient was unconscious, they would have caused death.

It is rather surprising that at present we are not aware of any prosecution for criminal carelessness of this character. Doctors can be thankful that the public are averse to prosecuting offenders of a class so generally kind and considerate; but they are not immune. Certain it is that if an unfortunate nurse were thus careless she would be instantly dismissed and her diploma cancelled. This has been done to them; why not to those who ought to be even more careful? In some hospitals no such application is permitted until its heat is tested by a thermometer. Cases of gross carelessness in this respect are much more common than people are aware. Perhaps it would be desirable to make an example of some of these "kind and considerate" people who sometimes are more hurtful than helpful.

Review of Current English Cases.

By Cecil Carrick, Barrister-at-Law.

Bailor and bailee — Motor car deposited for sale — "Customer's sale risk"—Negligence of bailee's servant.

Rutter v. *Palmer*, 1922, 2 K.B. 87 (Court of Appeal). The owner of a motor car deposited it for sale on commission with the keeper of a garage upon the terms of a printed document, containing the clause, "Customer's cars are driven by your staff at customer's sole risk." The garage keeper sent the car out in charge of one of his drivers to show it to a prospective purchaser. It was damaged owing to the negligence of the driver. In an action for damages by the owner of the car against the garage keeper, the defendant set up the above clause.

Held, that if an ordinary bailee uses words applicable to the act of his servants, inasmuch as he is not liable for their acts, unless negligent, the words will generally cover negligent acts, although such acts are not specially mentioned, because otherwise the words would have no effect. Although a common carrier, being liable for the acts of his servants, whether negligent or not, in order to protect himself from responsibility for all their acts, must use words which will include negligent acts, the principle of the carrier's cases does not apply to bailees of this class.

Trial by jury—Delivery of verdict in hearing of some only of the jury—Affidavit by juror—New trial.

Ellis v. *Deheer*, 1922, 2 K.B. 113 (Court of Appeal). A jury, upon returning from the jury room to the Court, found the jury box occupied by a jury trying another case. Only the foreman and two or three of the jury were able to get into the body of the Court. The rest of the jury remained outside the body of the Court. The verdict was delivered and judgment entered. Upon a subsequent day, three jurors made affidavits that they did not hear what the foreman said, and that he did not deliver the true verdict of the jury. Upon an application for a new trial, it was held that although affidavits will not be received from jurymen as to the discussion which they may have had between themselves when considering their verdict, or as to the reasons for their decision, yet the affidavits filed in this case should be admitted because they dealt with something that happened after the return of the jury to Court. A new trial was ordered.

Settlement—Construction—Second marriage of wife—Ultimate trust for wife's statutory next of kin had she died intestate and "without having been married"—Claim of child of former marriage.

Boyce (appellant) *and Wasbrough and others* (respondents) (1922), 1 A.C. 425 (House of Lords). A wife, who had obtained a divorce from her first husband, by whom she had one son, by a settlement made in contemplation of a second marriage, settled a fund, upon the death of the survivor of herself and the intended husband, upon trusts for the issue of the intended marriage, and if there should be no child who should become entitled thereunder, a general power of appointment over the fund was reserved to her. In default of appointment the fund was to be held, in the event of her predeceasing her husband, in trust for such person or persons as under the Statutes of Distribution would have become entitled thereto at her death, had she died possessed thereof intestate, and "without having been married." There was no issue of the second marriage, and the wife predeceased her husband without having exercised her power of appointment. On the death of the husband the question arose whether the son by the former marriage was entitled to the fund as next of kin. It was held (Lord Buckmaster and Lord Parmoor dissenting) that the son was ex-

cluded, there being nothing in the context or the circumstances to modify the natural meaning of the words "without having been married." These words are general and apply to any marriage, (per Viscount Birkenhead.) While in litigation of this class it has been held that a plaintiff, being defeated in the Court, must support the expenses of the appeal, yet there is an exception where in the appellate Courts the appeal discloses a difference of judicial opinion so clear and persistent as to make it plain that there was an important and debatable legal issue. In such case the costs should be paid out of the estate.

Landlord and tenant—Agreement by landlord to keep sea wall in repair — Action for damages for breach of agreement — Implied condition of notice of want of repair.

Murphy and others (appellants) *and Hurly* (respondent) (1922), 1 A.C. 369 (House of Lords). This was an appeal from the Court of Appeal in Ireland. The appellants were judicial tenants of the respondent. The rent payable by them to the landlord was fixed by the Irish Land Commission on the basis that as a condition of the tenancy in each case the landlord should keep in repair a certain sea wall. This sea wall was damaged by heavy weather and as a result the crops and holdings of the tenants were injured. They thereupon claimed damages for breach of the covenant to keep the wall in repair. Held, that it was not necessary to show that the landlord had notice of want of repair. The principle upon which notice is required to be given to a lessor requiring him to repair demised premises in accordance with his covenant before proceedings are taken to obtain damages for the breach is not inherent in the relationship between landlord and tenant. The doctrine depends upon the consideration whether the circumstances are such that knowledge of what may be required to be done to comply with the covenant cannot reasonably be supposed to be possessed by the one party while it is by the other. Such may be the case where the tenant has special knowledge springing from his occupancy of the premises, and where the landlord is in a state of ignorance arising from the absence of such occupancy. There was no such implication in this case.

Vendor and purchaser—Open contract for sale of land—Public right of way—Latent defect.

Yandle and Sons v. *Sutton; Young* v. *Same*, 1922, 2 Ch. 199; Sargant, J. The defendant in these actions agreed with the

plaintiffs to buy certain lands. Both agreements were open contracts. He refused to complete the contracts on the ground that there was a public right of way across both parcels of land. The plaintiffs sued for specific performance. The track being an unmetalled open track, of a nature compatible with the existence of either a right of way or of a mere accommodation track for the use of the persons entitled to the land, it was not a necessary indication of a right of way. In order to be a patent defect the defect must either be visible to the eye, or arise by necessary implication from something visible to the eye. The actions were dismissed.

Negligence—Wall adjoining highway—Defective condition—Injury to child in yard adjoining highway—Non-liability of owner of wall.

Bromby v. *Mercer*, 1922, 2 K.B. 126 (Court of Appeal). The plaintiff, an infant, was playing in the yard of premises owned by the defendant. These premises were let by the defendant to a tenant, whom the infant was visiting. They were separated from a highway by a stone wall. The defendants were liable under the tenancy to keep the outside of the premises in good repair.

The plaintiff, while in the yard, placed her hand upon the wall, whereupon a flagstone fell upon her, causing serious injuries. At the trial, the plaintiff was given judgment, on the ground that, although the defendants were not liable to her for negligence, because they owed no duty to her, yet they were liable in damages for permitting the wall to be in so dangerous a condition as to constitute a public nuisance to persons using the highway. On appeal, it was held that inasmuch as the plaintiff was never upon the highway at all, no right of hers was infringed, so far as the use of the highway was concerned. She could not recover damages for injury caused by a public nuisance, because she was not at the time exercising any public right. Apart from this, she had no right, either in contract or tort, because the defendants, not being occupiers, owed no duty to any person coming on to the premises.

Bankruptcy—Gaming Act—Bets paid by cheque—Action by trustee to recover.

Scranton's Trustee v. *Pearse*, 1922, 2 Ch. 87 (Court of Appeal). The debtor paid the defendant, a bookmaker, cheques

for bets lost on horse racing, and subsequently was adjudicated a bankrupt. His trustee in bankruptcy sued for the amount of the cheques. The defendant contended that such an action was practically dishonest,, and should not be brought by an officer of the Court. It was held by Astbury, J., that all proceedings should be stayed on this ground. On appeal, however, it was held that where a right of action was vested in a trustee in bankruptcy in respect of a statutory debt, the Court was not entitled to say that it was dishonourable for him to enforce it, and judgment was given for the plaintiff.

Power of appointment—Exercise to obtain personal advantage—Freedom to re-marry—Fraud on power.

Cochrane v. *Cochrane,* 1922, 2 Ch. 230; Sargant, J. A husband, being anxious to have a decree *nisi* made absolute in order that he might re-marry, agreed, at the request of his wife, to appoint in favor of the only child of the marriage more than half of a fund of £50,000, over which he was the donee of a special power of appointment amongst his children or remoter issue. There being issue by his second marriage, he purported to appoint anew in favor of all his children. A declaration was sought that the latter appointment was invalid. It was held that the first appointment was a fraud on the power, in that it was made by him in order to obtain a personal benefit for himself, namely, freedom to re-marry.

Constitutional law—Acquisition of land—Contract by minister—Necessity for Order in Council.

Mackay (appellant) *and Attorney-General for British Columbia and others* (respondents), 1922, 1 A.C. 457 (Privy Council). By section 3 of the Public Works Act (R.S.B.C. 1911, c. 189, as amended in 1914) the Lieutenant-Governor in Council may acquire, in the name of His Majesty, lands for certain public purposes. By s. 37, the Minister, in this case the Minister of Public Works, has power to enter into any contract required for carrying out the provisions of the Act, but no such contract is to be binding on him unless signed by him and sealed with the seal of his Department. Certain lands in the City of Vancouver were alleged to have been sold by the appellant to the Sovereign at a price to be determined by arbitration. An award was made. The Government of the Province changed before the purchase price so determined was paid. The new ministers

refused to advise that the agreement be carried out, on the ground that there was no evidence that its execution had been authorised by the Lieutenant-Governor in Council, or that it was sealed with the seal of the Department of Works. It was held that as the constitution of British Columbia follows the type of responsible government in the British Empire, it requires that the Sovereign or his representatives should act on the advice of Ministers responsible to Parliament, that is to say, they should not act individually but constitutionally. A contract which involves the provision of funds by Parliament requires that Parliament should have authorised it, either directly or under the provisions of a statute. In this case no contract could have been made unless sec. 3 authorised it. No order-in-council having been passed, the case was ended, without it being necessary to enter upon the point made as to the seal.

Lawyers' Lyrics.

THE STUDENT'S DREAM.

By the late E. Douglas Armour, K.C.

I sat alone, with Benjamin on Sales upon my knee;
The letters danced before me and the words I couldn't see;
I'd attended many a lecture, and had taken many a note,
But I couldn't see a grain of sense in anything I wrote.

I was reading for my Call exam., immersed in deepest gloom,
Oppressed with nervous doubt and dread of what might be my doom;
I was overcharged with Equity, and Common Law and Torts,
And altogether I was feeling greatly out of sorts.

The books were piled around me in a litter on the floor;
There were Marsh's "Court of Chancery," and perhaps a dozen more,
A wretched book on Titles, and another one on Wills,
De Colyar, Pollock, Leake and Best, and poor old Byles on Bills.

And now a mist seemed gathering about me in the room,
And through it all the books in curious forms began to loom;
They perched in turn upon my knee, and flapped their leaves and fluttered,
And whirled in circles round my head, and aminously muttered.

They pulled my hair and boxed my ears and bumped against my nose,
And then they settled on the floor in front of me in rows.
And Blackstone hobbled forward with a question to propound—
"What is the rule in Shelley's case, and where can it be found?"

This seemed to be the signal for the ill-conditioned rabble,
For they poured forth questions right and left as fast as they could gabble.
"Does dower attach on land alone? If so, pray answer how
A man can say, 'With all my worldly goods I thee endow'?"

"State reasons for all answers, and especially the next,
And where the lectures differ from your reading of the text."
"If A. kick B., and B. kick C., who, driven by distraction,
In turn kicks A., is this what's called circuity of action?"

"If A. sues C. for damages, can C., if he's a mind,
Buy up the kick B. got from A. and pay A. off in kind?
Or, if it's not assignable, can C. set up the plea
That, though he gave the kick to A., 'twas to the use of B.?"

"If either course you should adopt, will counter-claiming do,
Or does the law of set-off apply to a set-to?
In case you should not think so, but advise that C. sue A.,
Explain, as nearly as you can, what you would make C. pay?"

"Suppose your neighbour dines with you and guzzles too much port,
Are you, as neighbour, bound to give him lateral support?"
"If B. sues A., for that A. merely shook his fist at B.,
Is *falsa demonstratio non nocet* a good plea?"

"How is it that the ancient forms of writ did outlive us?
For instance, writ of entry *sur disseisin in the quibus?*"
"Is a double possibility your chance of getting through?"
"And, can you sue in trover for conversion of a Jew?"

"If attendance at the lectures is considered, as a rule,
To be equally important for the students and the school,
Then why should not the Benchers make arrangements to have cabs sent
For those who are habitually late, or who are absent?"

At last, I got so angry at this senseless sort of joke
That I aimed a kick—and nearly tumbled off my chair—and woke.
The fire was out, the lamp was low, and I was cold and weary;
The room seemed full of calf-bound ghosts that made me feel quite eerie.

I let the books lie where they were and stumbled off to bed,
But, before I pressed the pillow with my throbbing, aching head,
I consulted a decanter which I keep upon my table,
With "sumedum bis in die atque noctu" on the label.

CANADA, OUR CANADA!

The following suggested as a new National Anthem for Canada, was written by Mr. Archer Martin, son of Hon. Mr. Justice Martin, of British Columbia:

1. Hail! stately country of our sires!
To Thee we light the altar fires,
Ne'er to be quenched till life expires,
Canada, our Canada!

Chorus—Canada, we hail Thee!
Whoever may assail Thee,
Never shall we fail Thee,
Canada, our Canada!

2. Each true son's heart glows with the flame
Of patriot pride to see Thy name
Writ large upon the roll of fame,
Canada, our Canada!

3. From East to *St. Elias' towers,
The cry comes through th' awakened hours—
"Arise, assert Thy manhood's powers,
Canada, our Canada!

4. "The time has come to take Thy place,
"Among the nations, face to face,
"Equal at last with ev'ry race,"
Canada, our Canada!

ARCHER MARTIN.

Victoria, B.C., July 1st, 1922.

* Mt. St. Elias (18,024 feet) overlooking the Pacific and forming the S.W. corner boundary between the Yukon and Alaska.

Correspondence.

CONVEYANCES "IN TRUST"

Editor, Canada Law Journal,

Dear Sir:—

Referring to my article in your issue of February last, relative to the case of Re McKinley and McCullough, 51, D.L.R. 659, and 46, O.L.R. 535, decided by our Court of Appeal, which deals with the question of Conveyances to Grantees "in trust", I think it is worth while calling attention to the case (decided by the Privy Council) of Bank of Montreal v. Sweeney, A.C. (1887) 617 which held that in the case of a transfer of shares by a holder to whom they have been assigned "in trust", a transferee from such holder is bound to inquire whether the transfer is authorised by the nature of the trust.

Lord Halsbury, L.C. :—in his judgment says:—

"The bank had express notice that, as regards the property transferred to them, Rose stood to some person in the relation expressed by the words "in trust", and the only question is what duty was cast upon the bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorised by the nature of his trust. In fact they made no inquiry at all about the matter, following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim."

"Then it was argued that the words "in trust" do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the Company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title: and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own.

It seems curious that this case was apparently not referred to when the matter was before the Court of Appeal.

Yours truly,

F. P. BETTS.

London, Ont.
Nov., 1922.

Book Reviews

The Canadian Railway Act, 1919. Third Edition by Angus MacMurchy, K.C. and John D. Spence, Barristers at Law. pp. LVII 789, Toronto, 1922, Canada Law Book Company, Limited.

The second edition of the above work, which was published in 1911, had 80 pages more text and over 400 more decisions than the first edition which appeared in 1905. About 3000 cases are cited in the third edition. The first 57 pages of the book are taken up with a comparative statement of the section numbers of The Railway Act, 1919, and amending Acts and the preceding Act, as well as with citations of cases. There are 754 pages of text. Readiness of reference is provided for by an index of 43 pages.

The present edition has about 100 pages more of text and annotations than the second edition. At the same time, there has been a cutting down in bulk by omitting the Lord's Day Act, the Schedule of Forms and requirements respecting plans, the Regulations of the Board, etc., and by adoption of abbreviations in citations wherever possible.

The setting out of the decisions in black-faced type in the present edition is an aid to the eye in running down the authorities cited.

The text is copiously annotated. Of the total printed text, approximately 60% of the space is taken up with annotations. Without attempting to enumerate in detail and simply by way of illustration, it may be noted that of 135 pages of text covering Sections 312 to 359 of the Railway Act—the portion peculiarly concerned with freight and passenger tolls—117 are taken up with annotations. The information, especially in the section dealing with tariffs and tolls, is rich in citations from decisions of the United States courts and regulative tribunals.

The Editors, in this connection, acknowledge their indebtedness to the Chief Counsel and the Assistant Counsel of the Interstate Commerce Commission. While these decisions are informative and in various instances indicate the road, at the same time it is recognized that only when the circumstances in Canada are on all fours with those in the United States can the decisions based on the latter be regarded as applicable in their entirety in Canada. *Manitoba Dairymen's Assn. vs. Dominion and Canadian Express Cos.*, 14 C.R.C. 142, p. 148.

The Railway Act has developed by accretion and has in form a lack of logic which appertains to such a method of development. It is a code setting out the conditions which, in the absence of express legislation, are to be read with the terms of the Special Act. It sets out the powers of the railway not only as to the fundamental matter of compulsory taking of land, but also as to the powers in connection with construction and operation. Then, in addition, there is super-imposed an extensive regulative jurisdiction extending from the approval of a route map to the sections dealing with tolls.

The regulative portions, so far as tolls are concerned, deal primarily with railway tolls. There has not, however, been a development on any rigid logical method. By successive enactments, regulative jurisdiction has been conferred in regard to Express Telegraph and Telephone tolls. While, in respect of railway services, there is jurisdiction not only over facilities but also over tolls, the jurisdiction in respect of services set out in the preceding section is a toll jurisdiction alone.

The same lack of thorough-going logical organization is apparent when the terms of particular sections are considered. Section 375, subsection 12, dealing with Telephones provides that "The jurisdiction and powers of the Board and in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers .. .. shall extend and apply to all companies as in this section defined." Such a delegation of law-making power to a tribunal with mingled judicial and administrative functions would give pause to a United States' commentator. In dealing with this situation, Parliament has shown that the same laws do not apply to it as to nature. *Natura non facit saltum.*

Not only those who desire to deal with the Railway Law of Canada from a technical standpoint but also those who desire from an informational standpoint to obtain an acquaintance with the evolution of Canadian law in regard to railways will find in the text a clear and compendious treatment applying wherever possible the scientific canons of the comparative method. In sum, it is an excellent and convenient work of reference.

S. J. MCLEAN.

Bench and Bar.

THE HON. MR. JUSTICE PIERCE BUTLER.

United States Supreme Court.

It was our intention to congratulate the Hon. Mr. Justice Pierce Butler on his recent appointment to the Bench of the highest Court in the Republic of the United States, but when we survey the history of this gentleman, we refrain from so doing, but instead we congratulate the United States and Mr. President Harding in the selection of a man of such attainments and ability.

Mr. Justice Butler is first a gentleman. The second requirement for a Judge is that he should if possible know a little law. We ask our readers to examine the record of Mr. Justice Butler as a jurist and at once it will be made known that he is at the top of his profession, of a lucid mind, with a broad expanse of the principles of law from a life study, for legal attainments do not come as "a birthday present."

Mr. Justice Butler has taken part in some of the great matters of judication in Canada, and we almost claim him as one of our own, and we are proud of him.

OBITUARY

E. Douglas Armour, K.C.

This eminent lawyer, well known as such not only in the Province of Ontario, but also throughout Canada, passed off the scene at his residence in Toronto on October 3rd, at the age of 71.

A native born Canadian, he was educated at Trinity College School, Weston, and matriculated at Trinity University, Toronto, from which he subsequently received the degree of D.C.L. Called to the Bar in 1876, he was appointed Queen's Counsel in 1890. For 29 years he was a lecturer in the Ontario Law School on Real Property and Constitutional Law. The first editor of *The Canadian Law Times,* he so remained for some nineteen years. He was a Bencher of the Law Society of Upper Canada for 11 years and was chairman of the Legal Education Committee. Latterly he was consulting editor of the Dominion Law Reports.

A student in all branches of the law, his speciality was that of Real Property. He occupied, in his day and generation, the same unique position which in former days was held by Alexander Leith, whose books on real property are still among the classics of our profession. Happily for us Mr. Armour's ability and learning were equalled by his industry, as a list of his works amply testifies. Among those most familiar to our readers are his works on the law of Titles, of Real Property, and of the Devolution of Estates. He was also that author of Law Lyrics, being verses on legal subjects. In the Canadian edition of Theobald on Wills, Mr. Armour added the Canadian cases. His writings have greatly enriched the law libraries of Canada, and they are not unknown in other parts of the Empire.

Of Mr. Armour it can be well said that a versatile lawyer, a learned counsel and a distinguished citizen has passed beyond.

OSGOODE HALL LIBRARIAN.

It is a source of great satisfaction to the profession at large and especially of Toronto, that the Law Society of Upper Canada has seen fit to appoint Mr. J. J. Daley to the position of Chief Librarian at Osgoode Hall.

Mr. Daley was appointed to the position of Assistant Librarian in 1885, and since that time by his thoughtful and courteous attention to his duties has won a host of friends not only among the members of the profession but with all with whom he has come in contact.

It is the general feeling among the profession that Mr. Daley's long connection with the Library and his intimate knowledge of its vast contents eminently qualify him for this position; that the Law Society was well advised in making the appointment, and, that under his able guidance the usefulness and advantages of the Library will be developed to the fullest extent.

Flotsam and Jetsam.

The commercial atmosphere of the 20th century is also affecting honorary titles in England, for we are told that knighthoods and baronetcies have been on sale there cheap for cash "to the right kind of politicians". This is perhaps a harmless phase of trade and commerce, provocative only of the con-

temptuous mirth of those not as yet to a proper sense of decency. But there are safe matters at home that we might attend to before criticising outsiders.

We impute no wrong motive whatever to the lavish bestowal in this Dominion of the title of K.C.: but it has so cheapened what ought to be an honourable professional distinction that it is not now coveted for that reason; the lists are too often criticised with a smile by those who would, in these days, rather refuse than accept the intended compliment. We do not in these remarks criticize the names but object to the number of them.

Whilst the matters above referred to are comparatively of minor importance, we cannot refrain from again, and for the last time, referring to something else of a cognate nature, i. e., the selection of suitable men for the Bench. This is of vital importance to the country, and of continuous interest to the profession.

We have now a Bar Association which has attained a position entitling and enabling it to exert a powerful influence for good in relation to judicial appointments. It has, moreover, a duty in that respect which we trust it will perform. We are aware of the difficulty every government has in inducing the best men to go on the Bench. An effort should be made however, to overcome this difficulty; but certainly this is no excuse for the appointment, as has too often been the case, of political friends no longer useful to the Party; or whose seat in the Cabinet is wanted for some one else. How refreshing it has been to see, though most infrequently, the appointment of some eminent lawyer hailing from the opposition side of the house! Why not? Party politics, never too savoury, are odious when they invade the sacred precincts of the Bench.

The Sheet Almanac which has for so many years, been published in connection with this Journal will be continued and sent to the readers of our successor *The Canadian Law Review,* the first number of which will be issued early in the new year.

ANALYTICAL INDEX