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THE BETTERMENT OF CIVIC CONDITIONS.

From one end of Canada to the other there is a feeling of unrest over municipal problems. The present stringency in the money markets has called sharp attention to the enormous waste that has been going on in civic affairs for many years. Everywhere one hears of the general inefficiency of our municipal government.

Several important Canadian cities are trying, or proposing to try, experiments, which are a radical departure from the present system. Edmonton, and other places in the West, are trying a form of city government by commission. St. John, in the East, has followed their example. Westmount has a business manager. Ottawa has this year a mayor who is virtually a business manager. Some people advocate taking all questions of civic government completely out of the hands of the people, and placing them in the hands of commissioners, as is done in Washington.

The Boards of Trade of Toronto and other cities are talking of asking the Provincial Legislature to appoint a commission to investigate the whole question; but, judging by the present attitude of the Premier and the Provincial Secretary, they are not likely to meet with much encouragement. The public utterances of both gentlemen would appear to indicate that they think the Ontario Municipal Act not at present in need of much revision.

There can be little doubt that our city councils, as at present constituted, are not as efficient as they might be. They are especially weak on the side of administration. This arises from the frequent changes in the heads of the civic departments, and a consequent lack of continuity in business management. The chairman of a minor committee one year takes charge of the works department the next, and he looks to promotion, after

twelve months, to that of finance; thence on to the mayoralty for one, or two years. He is then expected to retire in favour of a new generation. No great business is thus managed.

Owing to lack of competent administration it has been estimated by careful investigators that from twenty-five to forty per cent. of the moneys raised by municipal taxation is wasted. It has also been stated that more than one Canadian city, if forced into liquidation would be found perilously near to bankruptcy. Many cities are finding it increasingly difficult to raise money, and several prominent financiers have recently advocated a Local Government Board, similar to that in England, and its equivalent in Germany, for the supervision of municipal finances.

Is it possible to touch the tap-root of our weakness in municipal government?

It is well to remember that good laws do not necessarily make good government. A city is not well governed by good laws; it can only be well governed by good men. If we could induce our best citizens to give their time to the service of the city, it would perhaps be found that our Municipal Act was a fairly efficient instrument. Competent jurists say that it is far ahead of the English Municipal Act in force to-day. Professor Munro, of Harvard University, says: "Divorced from its own environment the English system of city government would command scarcely a word in its favour. There is scarcely a vice in local government which the letter of its legal provision does not permit. It is full of anomalies and clumsy survivals. Where any feature of it has been tried elsewhere the result has been almost invariably a disappointment. Yet the fact remains that the affairs of English cities are better managed on the whole than those of large municipalities in any other country. That is because sound local traditions have been developed and these have determined the course of municipal management." A century ago the affairs of many English cities were in desperate straits. Their present condition is due to the arousing of the civic conscience, which has brought about a thorough reformation.

It looks as though it were impossible, under present conditions, to get our most competent citizens to offer themselves in adequate numbers to the service of the city. Municipal politics being in the hands of the machine, it is questionable if they could be elected. Even if they could, not many citizens of the highest type would care to run the gauntlet of annual elections, with the possibility of defeat at the hands of a demagogue, or ward boss.

In many cities there is the added disagreeable feature of ward patronage, utterly repugnant to those who would put city management upon a sound business basis. Before we can hope to induce our best men to offer their services to the city, we must make the work attractive to them. We must improve the conditions.

Where shall we look for the best examples of well-governed cities, in order to improve our own? Shall we look to the United States? They have the worst municipal system in the civilized world. So much so that there are many advocates there of government by commission. Leaving aside the City of Washington, quite a special case, it sprang into existence a dozen years ago in Galveston. That city was in desperate financial condition. It had been partially destroyed; it had defaulted upon its bond interest, and was practically bankrupt. The citizens surrendered for a time their right of self-government. Some other cities have sought to escape from the evils of their municipal system by a similar course, in whole or in part.

But does any one believe that the men of our race are going to be content permanently to abandon their inalienable right of self-government? Such a policy is foreign to the genius of our people. Commission government may be a necessary temporary make-shift, but it can never permanently satisfy the aspirations of Anglo-Saxon citizenship.

If we find it necessary to make changes in our system of city government, is it not reasonable to adopt some of the features of the best-governed cities of the world? These are to be found in England and in Germany. The English cities are an example to all others of honest, prudent and economical management.

There are no better governed cities anywhere. As has been already mentioned, it would be difficult to point out any special features of the English Municipal Act that would bear transplanting to a different environment. The English cities are well managed in spite of some of the provisions of their laws. But one thing they have which we have not, and which lies at the root of all our troubles. They have stable and permanent civic government. They get it in two ways: first, their city councils are elected for three years, not for one; secondly, the actual civic administration is placed in the hands of permanent officials, scarcely interfered with by aldermen or councillors.

One looks into the subject of civic administration in Germany with peculiar interest, because their problems are largely our own. Nearly all the German cities are the product of the last thirty or forty years. During that time they have grown faster than those of the United States and Canada. Their older cities have been rebuilt. Their problems of government are intensely modern, their methods of meeting these problems more truly democratic, than anything we know.

There, as in England, we find that the outstanding feature of their city government is its permanence. The Germans manage their cities as any great business is managed. The wealth of these cities is astounding. Several of them own over half the land inside the city limits. Frankfort, which is one of these, and smaller than Toronto, has spent over $50,000,000, in the last ten years, in the purchase of land. Berlin owns 40,000 acres. A long list of these city possessions might be added did space permit. But it may suffice to say that so rich and so well managed are these German cities that in one thousand five hundred of them it is unnecessary to levy any municipal taxes; all the expenses of these places are met out of their own yearly revenues.

How is it accomplished?

1. The members of the council are elected for six years, one-third of them retiring bi-annually.

2. The actual administration of the city is in the hands of a

board of paid magistrates, practically appointed for life, and pensioned on retirement.

3. The mayor is a municipal expert, appointed practically for life. Mayor Adickes, of Frankfort, the greatest municipal expert in Europe, has been in office for twenty-seven years.

The mayor and the magistrates manage the city; the council is merely a deliberative and legislative body.

There are many features of the German system that would not flourish in our soil. But it is surely possible to attain, in our own way, and under our local conditions, something of the element of permanence, without which we must continue to suffer enormous waste, confusion, incoherence of civic policy, and constantly increasing taxes.

I would suggest, therefore, that:

1. Our councillors should be elected for longer periods.

2. Matters of actual civic administration should be taken out of their hands.

3. The heads of civic departments should be paid officials, responsible to the councils, but having complete authority in all matters of administrative detail.

4. In our largest cities these permanent officials might constitute the boards of control. As they are at present, controllers are an anomaly, and only serve to lower the calibre of the other members of the city council.

It is impossible within the limits of a single article to elaborate these points. They are here set out in bald outline. The question of the mayor needs serious consideration. Under any permanent system of civic rule, he must either come to be a municipal expert, and have a long term of office, or he must degenerate into a mere figure-head, and leave the real administration of the city's affairs to a competent permanent official.

We cannot have really wise and efficient civic government in Canada until we succeed in enlisting the active sympathy and self-sacrificing service of our best citizens. We cannot do that until our city management takes on the aspect of permanence.

J. O. MILLER.

THE ENGLISH REPORTS ANNOTATED.

The profession in this country as well as in England and all English speaking countries will be glad to know that the Canada Law Book Company in affiliation with the leading law publishers in England are producing a new annotated series of Reports which will give all the English Cases from the year 1865 down to date of issue.

The necessity for this reprint arises in two ways; in the first place, from the fact that the volumes of reports covering the year 1865 and many subsequent years are unobtainable except at prohibitory prices, so that for all practical purposes they may be said to be extinct. And secondly, because the profession are now demanding scientifically reported decisions, and the assistance given by such a system of reports as is now coming into favour.

The general scheme to be followed in these with regard to annotations, etc., is analogous to that of the English Reports Reprint from 1300 to 1865. These proved a great success, so much so, that the supply is nearly exhausted.

The present series will not only give all the cases, but will also provide some very important helps to the reader; for example:—

(1) Many of the headnotes which have been badly prepared will be rewritten so as to give a dependable summary of the case in concise form. (2) The references of the standard law classification now coming into general use will be added, so that cases of similar character can be quickly reached. (3) The publication of a complete table of cases alphabetically arranged giving the names of every decision reported during the period since the Judicature Act. (4) Every case will be annotated stating definitely whether, where and when it has been overruled, followed, criticised, explained or referred to, and all overruled cases will be so noted.

By this system cases no longer authoritative need not trouble either the Bench or Bar. This feature alone makes the work invaluable.

We are informed that the first volume will appear sometime next month. There will be not over 100 volumes altogether. The hope of the publishers is to complete from two to three volumes every month, which would result in the whole series being brought down to date within about three years.

This series marks a new era in law reporting. Hitherto the lawyer has had to be content with a bald report of the judgment and a summary of the finding of the court or judge. To be certain that a case which appears to be in point is still sound law, necessitates further search. The new system for reasons which must appeal to every practitioner has evidently come to stay, and the sooner members of the profession realise this the better it will be for them in the preparation of their briefs. It will also have a far reaching, and perhaps more important effect, viz., that of clarifying the legal atmosphere and facilitating the administration of justice.

THE LAW'S DEBT TO ANNOTATED CASES.

The value of intelligent and more or less exhaustive annotations on current cases of importance, such as in Canada one finds in the "Dominion Law Reports," is emphasized in an article which recently appeared in *Case and Comment*. This article, we notice, was copied into the *Law Times*, recognized as one of the leading authorities in Great Britain in such matters. Its appearance there is some indication of the approval by that journal of the annotation system; a system which is already popular with the profession on this side of the Atlantic, and which must soon be adopted in more conservative England for the benefit of the profession there. We give this article to our readers in extenso as follows:—

"Against the many acknowledged virtues of the common-law system of law deduced from reported precedent, virtues such as adaptability, flexibility, and capacity for self-development and growth, have continually been set the alleged demerits that it

was unscientific, that it was crude and formless, that it was too slow in its responses to new conditions. The facts that in all important English speaking communities the common law, with its system of precedents, furnishes the basis of all law; that it has there survived the test of use and experience; that the essential justice in the English and American laws is surpassed by no other system and approached by few other nations, ought to persuade one that the common law is thoroughly systematic and unscientific; because an unsystematic and unscientific system could not probably produce the very qualities wherein it excels. If it were the sole product of judges legislating under the guise of deciding, and if the labours of the judges were left untouched to serve as the final contribution to the evidences of the unwritten law, chaos, delay, and uncertainty might be expected as the result; but the common law has never been a purely judicial product, however true it may be that the cases have been such. For, to use a common quotation, 'the law is in the cases, but the cases are not the law.' Therefore, to know and state the law requires a post-judicial operation, just as it requires the office of lawyers to evoke the decision which contains the law.

"Three classes of lawyers, then, have made the common law —the advocates, the judges, and the writers, and each one of these classes has played a vital and an indispensable part. The advocate has presented the question, the court has decided, and the writer has recorded and expounded the precedent, each limited to the particular occasion and duty. Because of that limitation their correlative tendency has been to keep each other's operations true, and their combined skill has solved many problems that no a priori system of laws or codes could have coped with.

"Now the reason that the system of precedents has not produced an unscientific and chaotic law, and that the law has not been overwhelmed in mere numbers of precedents of widely varying worth and authority, is because it was the special business of the writers to deal with and prevent those particular tendencies. From the beginning they have done that work by

devising methods and forms of books suitable to the needs of their times. They have so far done it well, and so long as 'man can do what man has done,' we may expect them to do it well.

"Of the writers there are three prime classes, viz., the reporters, the digesters, and the commentators whose work is now principally done by the annotators. None of these classes is very distinct, though their functions cleave sharply. Ofttimes the work of performing two or more of these functions, such as reporting and annotating, has been done by one writer and published in the same book or set of books. Often, if not usually in the present day, such work is done by a highly organized and coordinated staff of writers, for in no other way can the mass of current and past decisions be managed.

"The work of the reporter and that of the digester of cases is familiar, and the forms in which their work appears in print are not greatly various. They need no testimonial or any introduction to a profession that has known them both by name for hundreds of years. But the commentator and his modern progeny, the annotator, is a writer of many degrees and differences. His work and methods have been forced through many developments, and undergone many changes. Some have taken the name of annotator who were not worthy, while there are 'commentaries' and treatises that are really nothing but digests. There are real commentaries nevertheless in this day, such as the Criminal Law Treatises of Wharton, Wigmore's Evidence, and Labatt's Master and Servant, and others equally well-known. We can pass from all these to the annotators, for this is frankly a special plea in their behalf. They are now doing what may, perhaps, be as great a work for the common law as ever has been done, and that is the rectification and harmonizing of it into uniformity and systematic accuracy.

"For several centuries in the history of the common law the need for such work was amply supplied by the great commentatorial and institutional works of Coke, Hale, Blackstone, and Kent, and the special treatises contemporary with them. Precedents were not numerous then as compared to now, and the

office of the writer was as much to suggest the undeveloped doctrine for which no precedent existed as it was to reconcile and elucidate. Nevertheless there were annotators in those days worthy of the name. Occasionally they combined annotating and reporting, of which Serjeant Williams' notes to Saunders' reports may be noted as an example. His note to *Pordage* v. *Cole*, 1 Wms. Saund. 319, 18 Eng. Rul. Cas. 601, on Mutual Covenants in Contracts, is cited specially scores of times in the later books of reports, and may be said to have established for the law a systematic conception and analysis of that difficult subject. Very much of the work in Coke's Reports is essentially annotation. It does not avow that character by a typographical arrangement separate from the report of the case, as we do now. Indeed, it is run into the body of the opinion, and at most is distinguished by the words, 'But note reader that,' etc., with which Coke was wont to introduce his own observations. Nevertheless it is annotation, and though Coke was sometimes criticized for it, as in the words of Lord Holt, who accused him of 'improving' the reports (see *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 5 Eng. Rul. Cas. 247, at 252), yet time has vindicated the work of Coke, and left such criticisms of bookish rather than practical interest. One eminent work of annotation, known well to all the old lawyers was that in Smith's Leading Cases (vol. 1, 8th ed., p. 199), the forerunner of the great sets of selected cases of this day with their elaborate and exhaustive annotations.

"It is because of the great augmentation in the number of reported cases, due largely to the multiplication of separate jurisdictions in the United States, that to-day's problem for the special labours of the annotator has existed. When jurisdictions were few, and precedents not numerous, the practitioner and the judge were able and had the time to thread the reason and principles of the law through the cases well enough without the help of a modern annotation. There were not multitudes of subtly applied illustrations of general principle to minutely variant facts. Instead of fifty there were a dozen jurisdictions, perhaps, to diverge from uniformity of doctrine and furnish con-

fusion of authority, or, which was just as bad, the appearance of confusion. There were few of the anomalous or exotic doctrines such as the water laws, the mining laws, or the adapted civil-law institutions, which the western and south-western States brought into the body of American law and the over-sea colonies into the body of the English law. Up to that time the practice of a careful lawyer was to read all the decisions of his own state as they were handed down, and it was not a great task to do it.

"Almost contemporaneous with the great augmentation of cases, in fact one of its consequences, began the development of the modern digest or cyclopedia. While these were necessary and invaluable contributions to legal literature, and by no means to be disparaged by any comparison, they did have the effect to reveal to the every-day lawyer either 'too many cases in point' or else by a distributive analysis that he did not follow they placed analogous and cognate cases in different topics, and he failed to find them. Either condition was unbearable, and, if the lawyer had been left to himself, irremediable. It began to be said that there were too many cases reported, too much authority, and some even wished for another Alexandrian burning of all the law books so that we might start anew. By poetic license the law was pictured as 'a codeless myriad of precedents, a wilderness of single instances,' which it never was and is not now. Nothing was wrong but that the common law had been growing and had outgrown the older forms of law books. The very same complaint was made by Justice Buller in 1786 (*Birch* v. *Wright*, 1 T.R. 383, 15 Eng. Rul. Cas. 626), when he suggests 'wading through all of the old books' to 'find a great collection of cases' in Comyn's Digest. Two years later, in 1788, Tomlin's Repertorium Juridicum (Dublin, 1788) announced in its preface that a 'vast accumulation of cases,' amounting to 25,000 in forty years, necessitated an easy mode of reference to them, to wit, what we would call an index digest. We have 25,000 cases each year to deal with, and do it with skill that Tomlin or Comyn never dreamed of.

"The truth is that in an evolutionary system of law like ours, wherein we generalize from cases to doctrines, there can not be

too many cases. The law is enriched, and not smothered, by its many cases. But the generalizing must be done by careful and accurate method and with adequate expenditure of time, neither of which the lawyer can be expected to bring to such work. And so it has come to pass that, after the work of the great commentators, and in sequence the work of the digesters, has been done, need has developed the modern annotator and his methods. His work relieves the common law from the necessity of a Justinian or a Napoleon to recodify our law; for when a 'conflict of authorities' is rightly and patiently examined, and the cases explained in a good annotation, the conflict is often found to have been an appearance, and not a reality, or else the true and the fallacious are sifted so thoroughly that the lawyer as he reads is freed from doubt and vexation.

"Such work as this that the annotator does cannot be done in a digest or a text-book, or by any other known method than annotation of some well-chosen case. (See note on Rule in *Shelley's Case*, 29 L.R.A. (N.S.) 963, for example.) There are thousands of trite and commonplace cases fit only to be data from which the law may be deduced, or perhaps only to be illustrations of long settled and well-understood rules. They must be reported in some way, if only that time and the general judgment of lawyers may assign to them their true value among the precedents of the law. On such cases annotation is too valuable to be wasted. They present nothing that requires more than the reporter and the digester can give, until the time when the annotator shall need to compare them with all the other trite or commonplace cases in the production of some exhaustive and clarifying treatment of an important doctrine.

"It is implied in the foregoing statements that the province of the annotator is chiefly within those departments of the law that are conflicting or vexatious, or full of varying minutiæ, or novel, requiring the aid of difficult analogies because direct precedents are lacking, but it is not meant to exclude another form of annotation; namely, that which collates the citations of earlier cases and so arranges them as to shew the history and influence

of each decision. These annotations, sometimes known as 'extra annotations,' trace judicial influences, while the others trace and co-ordinate doctrines and rules. They serve different and equally important purposes, though the critical annotation is of greater utility than the extra annotation, and requires more editorial skill in its preparation. Both classes of annotations, as distinguished from those so-called annotations which are merely collections of references, tend to harmonize and unify the common law of all the many jurisdictions, and in some degree to establish their general statutory law on a common basis of principle and reason. They do this by shewing what the law is, and its reason, in the difficult and obscure parts which neither digest nor text-book professes to do. Being narrow in its subject and intensive in its treatment, an annotation is specially designed to supply a process in the evolution of the law wherein all other forms of law books 'by reason of their universality are deficient.' They thus keep the common law of all English speaking people a living and growing law, which neither breaks down into chaos under sheer numerical weight of precedents, nor is thrust aside for some petrifying code of substantive law; and if uniform laws in all the states shall ever be generally enacted they will have been made possible largely by the years of sifting and settling that the patient labours of the annotators of to-day have given the precedents. Their contribution to the common law is in keeping it true and uniform in principle, in freeing it from multifariousness of illustration, in adapting it by analogies to new conditions. That common law, which we believe to be the most excellent of systems, has been kept for us by the writers in the law. Each class of writers has had its part. None has done more than the annotators, and by no other means than annotation could their part have been done."

LAWYERS AS TAX COLLECTORS.

The payment of annual fees to the Law Society of Upper Canada by solicitors brings up again something which the profession has felt to be a grievance, and one which the late Mr. Thomas Hodgins, K.C., Master-in-Ordinary and Judge in Admiralty of the Toronto District, often declaimed against, and that is the unfairness of charging the legal profession with the collection of a certain portion of the taxes of the Province of Ontario. Why should they have to be out of pocket for a considerable time what they pay for stamps, and, not infrequently for all time, owing to the failure of clients to pay their bills? And why should they not be paid for their services as tax collectors? It is bad enough to impose this burden upon them; but it is entirely unfair and dishonest to compel them to do it for nothing.

Under the new tariff these stamps are a large item in bills of cost. For example, we have now to pay $2 on the issue of a writ instead of $1 as formerly; the fee on entering an appearance was 20c., it is now $1. Other charges are also increased.

It may be true that the new tariff makes some changes which may possibly increase lawyers' fees, but so little, on the whole, as not to be worth mentioning. So that, in this regard, we are no better off than we were before, and have to collect more taxes. And here we may be permitted to call the attention of the judges who prepare the tariff to the fact that the present increased cost of living bears just as hardly on the legal profession as it does upon others.

The annual bill rendered by the Law Society for fees includes an item for the Ontario statutes, which has to be paid in addition to the annual fees, either through the Law Society or through a book-seller. This amount goes to swell the provincial surplus, and enables politicians to brag of what they are doing for the country. If the statutes were given free to the profession, as they are to Justices of the Peace, who, by the way, scarcely ever look at them, and most of whom could not understand them if they did, it would be a small solatium.

It cannot be said that the Law Society of Upper Canada has ever taken too much interest in the welfare of the profession, and this has largely given rise to the formation of the Ontario Bar Association. But neither of these bodies have taken this matter up. If they represent the profession they certainly should do so. We recommend it to their consideration.

RIGHTS OF PREFERENCE AND ORDINARY SHAREHOLDERS.

A case has recently been decided in England by the House of Lords, which will shew to ordinary shareholders, or in other words, shareholders who hold common stock as distinguished from preference stock, how near they have been to the edge of a precipice. The common sense view of the situation taken by the House of Lords has saved them from falling over, a result which would have been disastrous to some of these common stock holders, and would have seriously complicated innumerable stock transactions.

There are, of course, various kinds of preference stock and of common stock, and their relation one to the other varies in different companies; but we doubt if, in the majority of cases, there has been any care taken to guard against the possibility of preference shareholders claiming some benefit from dividends beyond the rate specified in the letters patent, articles of association or by-laws, as the case may be.

The contention of the preference shareholders in the case referred to by our English contemporary, the *Law Times*, appears in the article from that journal which we now give to our readers, some of whom may be interested for clients who hold one or other of these different kinds of shares. A decision of the House of Lords does not, of course, bind us in this country, but in all probability their views would be accepted by the courts here. The article is as follows:—

"Mr. Justice Sargant's decision in the recent case of *Re*

National Telephone Company, Limited, 109 L.T. Rep. 389, was that, where preference shareholders are allowed a preferential right either as to dividend at a specified rate or in a winding-up, that is a definition of the whole of their rights. Any other right is, in effect, negatived. His Lordship's ruling was based on the canon of construction which was applied by the Court of Appeal in *Will* v. *United Lankat Plantations Company, Limited,* 107 L.T. Rep. 360, (1912), 2 Ch. 571. And as we ventured to remark when commenting upon the decision of the Court of Appeal in that case (see 134 L.T. Jour. 131), the strong argument in favour of the correctness thereof was that never before had the point there dealt with been raised in any reported authority. Although preferential dividends formed the subject of the decision in *Henry* v. *Great Northern Railway Company,* 1 DeG. & J. 606, no such claim as was made in *Will's* case (ubi sup.) was ever suggested. As appears from Palmer's Company Precedents, 11th ed., vol. 1, p. 814, the assumption has always been that the appropriation of a preferential dividend at a specified rate to preference shareholders deprived them of the right to any further participation in the profits of their company in the absence of any direction to the contrary. Exclusion from such right followed, it was conceived, as a matter of course, not only from the fact of their preferential claim both to dividend and capital, but also because the payment of a better dividend than was allocated to the ordinary shareholders was the common feature of preference shares. The opinion that we deferentially expressed that the Court of Appeal, in reversing the decision of Mr. Justice Joyce in the court of first instance, had come to a right conclusion, has since been justified by the decision of the House of Lords (noted ante, p. 6). The holders of preference shares were held to be only entitled to a cumulative preferential dividend of 10 per cent, per annum that being the rate that was fixed by the special resolution under which they were issued—and were not entitled to rank pari passu with the ordinary shareholders against any surplus profits available for distribution. The supposition seems to have been that so long

as the ordinary shareholders were first placed on an equality with the preference shareholders, by having appropriated to them a dividend of the same amount as was receivable by the latter—that is to say, 10 per cent.—then all the shareholders were entitled to have all the surplus profits apportioned pro ratâ among them. But to have given effect to that contention would have necessitated overriding the interpretation that experience shews it has been the custom to place upon the old form of article of association which is commonly adopted. And the reason for it has been that preference shareholders are allowed a dividend that does not vary with the profits yielded each year by a company's transactions. Mr. Justice Sargant in *Re National Telephone Company, Limited* (ubi sup.) referred, it will be noticed from our report of his judgment, to the decision of Mr. Justice Swinfen Eady (as he then was) in *Re Espuela Land and Cattle Co.*, 101 L.T. Rep. 13, (1909), 2 Ch. 187. But his Lordship did not think that the learned judge intended to lay down any absolute canon of construction. If he did so, however, it is now completely superseded. In the earlier editions of Sir Francis Palmer's work, the article suggested as a precedent merely provided that the surplus profits (or the residue of the surplus profits) should be divided among the members in proportion to the nominal amount of the capital (or the number of shares) held by them respectively. Notwithstanding the generally accepted meaning of that provision, the learned author has recognised that it might easily be open to misconception. Accordingly, express words negativing the rights of preference shareholders to participate in further profits now appear in the form in the Company Precedents, in order, as is stated in a note thereto, to preclude any question on the point. This is an infinitely superior course to pursue. For it entirely prevents any false hopes being raised in the minds of applicants for preference shares who naturally enough may be profoundly ignorant of the decision which has now been pronounced by the House of Lords. Anything to avoid the possibility of intending shareholders being misled should invariably be laid hold of as the just and proper system."

PITT, THE YOUNGER, AS A BARRISTER.

It has been the privilege of the Honourable Society of Lincoln's Inn to include among its members many men who have become distinguished statesmen. Among the most eminent of the names which have been inscribed on its books is that of the younger Pitt. The rapid political success which Pitt attained early diverted his attention from the practice of the law to the House of Commons, but there can be no doubt that, if he had remained at the Bar, he would have secured a brilliant career. With his appointment to the office of Chancellor of the Exchequer at the age of twenty-three, his legal career came to an end, but he did not lose his interest in the profession. He long kept up his connection with the Western Circuit, of which he was a member, and Lord Stanhope relates that, after he was Minister, he continued to ask his old circuit friends to dine with him, treating them with the old cordiality and kindness. At Pitt's instance an annual dinner took place for some years at Richmond Hill, which was attended by Lord Erskine, Lord Redesdale, Sir William Grant, Mr. Leycester, Mr. Jekyll, and other prominent lawyers.

Lord Brougham, in the chapter of reminiscences which he published under the title of "Recollections of a Deceased Welsh Judge," gives an interesting account of Pitt's early life. The future Minister lived with St. Andrew St. John, afterwards Lord St. John, in a double set of chambers within the same outer door, in Old Buildings, now Old Square, Lincoln's Inn. It was while residing here that Pitt made his first essay in public speaking. Pitt had often practised speaking as well as composition under the superintendence of his father, but he was desirous of trying how his voice and his nerves would stand the test of a public assembly. Putting on a mask, as was the mode in those days, he went, accompanied by St. John, to one of the numerous debating places of the time. Brougham suggests that it was Mrs. Cornelly's that was visited by the future Minister. There Pitt made his first essay in oratory, with, it need hardly be said, the utmost success. St. John used to say that Pitt from

the first had a special liking for legal discussions. He was a regular attendant at the Court of King's Bench, and used to dine afterwards at a law club, as was the universal custom at that time among lawyers. At dinner he took the most unceasing and lively interest in all the professional conversation of the table. The hour of the dinner was four, and the bill was called for at six, and after dinner all departed to chambers. The law clubs have long given way to the West End clubs—an innovation that Brougham regretted, because it deprived the young lawyer and the student of the benefit of hearing cases and points that arose in the Courts familiarly discussed by lawyers of experience. In 1781, Pitt, having become Member of Parliament for Appleby, joined one of the clubs near St. James's Street; but it was his habit, even when he dined at the West End of the town, to come back to Lincoln's Inn early enough to make sure of getting in before the wicket was shut at twelve o'clock. He did not go to chambers, but to Will's Coffee-house, which was situated within Lincoln's Inn, and which was, by order of the Society, closed at midnight. There Pitt sat down with a newspaper, a dry biscuit, and a bottle of very bad port wine, the greater part of which he finished cold, whatever he might have eaten or drunk at dinner.

Pitt, as might have been expected, joined the Western Circuit. His father's old connection with Bath, and the family property in Somersetshire, naturally influenced him in making his choice. Among those who were contemporary with him on circuit were William Grant, afterwards Master of the Rolls, John Freeman Mitford, afterwards Lord Redesdale and Lord Chancellor of Ireland, and William Adam, afterwards Lord Chief Commissioner of the Scottish Jury Court. It is interesting to mention that he filled the post of "Recorder," an office in which he was succeeded by another future statesman, Tierney. He described his first experience of circuit in a letter to his mother:—

DORCHESTER, August 4, 1780.

"You will be glad to have early information of my having arrived prosperously at this place, and taken upon me the character of a lawyer. I have indeed done so, yet no other-

wise than by eating and drinking with lawyers; and so far I find the circuit perfectly agreeable. I write this in the morning lest I should not have time after. There is not, to be sure, much probability of my being overwhelmed with business, but I may possibly have my time filled up with hearing others for the remainder of the day. . . . My gown and wig do not make their appearance till two or three hours hence, as great part of the morning is taken up by the judge's going to church, where it does not seem the etiquette for counsel to attend."

Pitt did not receive many briefs on circuit, but he showed his ability in what work he did. At Salisbury, in the summer of 1781, he was employed by Mr. Samuel Petrie as junior counsel in some bribery causes that had resulted from the Cricklade Election Petition. There are reports of two speeches that he made in these causes, but neither report extends to more than a few lines. In giving judgment on the point which the second of these speeches involved, Mr. Baron Perryn said, that "Mr. Pitt's observations had great weight with him." It is also recorded that, while acting as counsel for Petrie, Pitt received some high compliments from Mr. Dunning, the leader of the Bar. Nor was this his only exhibition of capacity as an advocate. "I remember also," wrote Mr. Jekyll, one of his brother barristers on the circuit, "that in an action of crim. con. at Exeter, he manifested as junior counsel such talents in cross-examination that it was the universal opinion of the Bar that he should have led the cause."

In London Pitt was equally assiduous in his attention to his profession. Mr. Justice Rooke used to relate how Pitt had dangled several days with a junior brief, and a single guinea fee, waiting till a cause of no sort of importance should come on in the Court of Common Pleas. On another occasion, on a motion for a Habeas Corpus in the case of a man who was charged with murder, in the Court of King's Bench, Mr. Pitt made a speech which excited the admiration of the Bar, and drew down some words of praise from Lord Mansfield, He was retained as junior to Erskine in the case of *Rex* v. *Bate Dudley*.

Dudley, who was proprietor of the *Morning Post*, was charged with publishing a libel, and Erskine obtained an acquittal against the summing up of Lord Mansfield. Brougham hints that Pitt was not impressed by his leader on this occasion.

It is evident that Pitt, as a young barrister, was forming decided opinions about those with whom he came into contact. He took a strong dislike to Mr. Justice Buller, an able, but domineering, and almost brutal judge. Lord Mansfield, when he retired from the post of Lord Chief Justice, tried to prevail on the Ministry to appoint Buller as his successor. "But Mr. Pitt," says Brougham, "while at the Bar, had seen things in that able and unscrupulous magistrate, which made him resolve that no such infliction should fall on the English Bench." The principal cause of offence in Buller was his conduct in a trial at Bodmin, affecting the political rights in one of the pocket boroughs of the Buller family. Buller, who had presided, had shewn undue partiality for his own connections, and had disgusted the young barrister, who was quietly taking stock of the judge's behaviour. Thurlow pretended that it was he who had secured the appointment of Kenyon, and declared that he had "hesitated long between the corruption of Buller and the intemperance of Kenyon." But it was Pitt, and not Thurlow, that had effectually prevented the appointment of Buller as Lord Chief Justice.

It was, in great measure, to the early friendship of Pitt that Richard Pepper Arden owed his great success. It is related by James Grant, that Pitt and Arden became acquainted through the accidental circumstance of their occupying chambers on the same staircase in Lincoln's Inn. It was by Pitt's interest that Arden was created successively Solicitor-General and Attorney-General, and it was Pitt who made him Master of the Rolls in 1789, and secured his elevation to the Peerage as Lord Alvanley.

In 1782 Pitt's attention was turned for ever from the Bar by his appointment to the office of Chancellor of the Exchequer. It is probable that if he had continued to practise, he would have become one of the ornaments of his profession. Lord Campbell said that he had heard much speculation as to the

probable success of the younger Pitt, if he had remained at the Bar. "I think," said Lord Campbell, "that it must have been splendid; but unless he had exhibited greater variety of manner, and a more familiar acquaintance with the common feelings of mankind, it never could have approached that of Lord Erskine." He goes on to add, with regard to Pitt's life-long rival, that Fox, in arguing questions of law at the trial of Hastings, excited the astonishment and admiration of the judges, and he expresses the opinion that, in every branch of forensic practice, Fox would have been supreme.

Pitt became a bencher of Lincoln's Inn, and his name crops up in the curious and rather interesting case of *The Earl of Rosslyn and Another* v. *Jodrell*, 1815, in Campbell's Reports. In that case, a barrister of Lincoln's Inn, who had not paid his commons and other dues, was sued on the bond which he gave to the Society on his being called to the Bar. He objected to pay, because he was dissatisfied with the manner in which benchers were elected, and with the management of the affairs of the Society. Scarlett, who appeared for the recalcitrant barrister, said that Mr. Jodrell, who had given much attention to the subject, found that the benchers, generally called "The Ancients of the House," were actually the senior members of the Society, venerable for their years and their learning; while the benchers had of late years been inexperienced young men, many of them unconnected with the law, who were preferred by political influence. This he considered such a change in the constitution of the council formed by the benchers, as to render their orders a nullity, and to dispense even with the payment of the ancient dues of the Society, which were now, he said, so liable to be abused. Sir William Garrow, the Attorney-General, in reply, observed that the Society had had the honour to have the late Mr. Pitt and Mr. Perceval as benchers, and that Lord Sidmouth, Mr. Vansittart, and several other eminent politicians were so then, but they had all been called to the bench on being appointed to the office of Chancellor of the Exchequer, or some other high situation in the law.—*Law Magazine and Review.*

REVIEW OF CURRENT ENGLISH CASES.

LIBEL—PRIVILEGED OCCASION—TRADE PROTECTION—COMMUNICATION TO MEMBERS NOT PRIVILEGED—PRIVILEGE FOUNDED ON GENERAL INTEREST OF SOCIETY—JOINT TORT—SEVERAL DEFENDANTS—SEPARATE JUDGMENTS—SEPARATE ASSESSMENT OF DAMAGES AGAINST JOINT TORTFEASORS—PLEADING—EVIDENCE—UNINCORPORATED ASSOCIATION.

Greenlands v. *Wilmshurst* (1913) 3 K.B. 507. This was an action for libel brought against three defendants, Wilmshurst, The London Association for Protection of Trade, an unincorporated association formed for the purpose of trade protection, and Hadwin, the secretary of the Association. The libel complained of was contained in certain communications made by the defendant Wilmshurst to the defendant Association, and in communications made by the secretary of the Association to its members, prejudicially affecting the financial standing of the plaintiff. No point is raised apparently as to the constitution of the suit, though it seems at the outset doubtful how far a voluntary unincorporated association can be effectively sued as if it were in fact a corporation. Although the evidence disclosed that the libels complained of were in fact two separate libels, one by Wilmshurst and the other by the other two defendants, yet the pleadings alleged a joint libel by all three and no amendment was made, and the action proceeded to trial and the case was disposed of as if it were in fact a joint libel, but the jury assessed £750 damages as against Wilmshurst and £1,000 as against the other two defendants. The facts as proved showed that Wilmshurst as a correspondent of the Association had made a false report of the plaintiff's financial standing, which was subsequently communicated to members of the Association who were contemplating selling goods to the plaintiff. The main question was whether the report was not, in the circumstances, a privileged communication. Lord Alverstone, C.J., who tried the action, held that the report was not privileged and gave judgment for the plaintiffs for the amounts respectively awarded against the defendants. On appeal by the defendants the Court of Appeal (Williams and Hamilton, L.JJ., and Bray, J.) affirmed the decision that the report was not privileged, (Bray, J., dissenting) but held unanimously that the judgment must be vacated and a new trial had because the tort complained of, being alleged by the pleading to be joint, there could not be separate assessments of damages

against the defendants, but there could be only one assessment and one judgment against them all, and, moreover, that the damages assessed were excessive. The majority of the Court of Appeal decided to follow the judgment of the Judicial Committee in *Macintosh* v. *Dunn* (1908) A.C. 390, on the question of privilege, whereas Bray, J., inclined to the view of the American courts and thought the case governed by *Waller* v. *Loch*, 1881 7 Q.B.D. 619. The law on the subject is very elaborately discussed by the members of the Court of Appeal.

SALE OF GOODS—AUCTION—MISLEADING CATALOGUE—MISTAKE OF BIDDER AS TO LOT OFFERED FOR SALE—ACTION FOR PRICE —PARTIES NOT AD IDEM.

Scriven v. *Hindley* (1913) 3 K.B. 564. This was an action to recover the price of goods sold at auction. The defendant set up that he had made a mistake as to the goods being offered for sale. The auctioneers were instructed to offer for sale certain bales of hemp and tow. The defendant intended to buy hemp, and when the auctioneer was offering bales having the same marks as the hemp he made a bid therefor which would be an extravagant price for tow and the lots were at once knocked down to him. He afterwards discovered that the goods knocked down to him were tow and not hemp and he repudiated the contract. The jury found that the auctioneer intended to sell tow and the defendant intended to buy hemp, and that the form of the catalogue and the negligence of the defendant's manager in not more closely examining the samples at the show room and identifying them with the lots in the catalogue, contributed to the mistake. Laurence, J., on these findings held that the parties were never *ad idem* as to the subject matter and therefore that there was no contract of sale, and that the finding as to negligence was immaterial as the defendant owed no duty to the plaintiffs to examine the samples.

TRADE MARK — REGISTRATION—DISTINCTIVE MARK — INITIAL LETTERS—TRADE MARKS ACT, 1905 (5 EDW. VII. c. 15), s. 3; s. 9(5)—(R.S.C. c. 71, s. 11).

The Registrar of Trade Marks v. *Du Cros* (1913) A.C. 624. This was an appeal from the decision *In re Du Cros* (1912) 1 Ch. 644 (noted ante, vol. 48, p. 387). The question was whether the initial letters "W. & G." in fancy script were registrable as a trade mark. Eve, J., held that the mark was not distinctive and was not registrable, but the Court of Appeal allowed the

applicants to proceed with the application when after advertisements had been issued and oppcnents heard the registrar would be in a better position to say whether registration should be permitted. The House of Lords (Lords Shaw, Mersey and Parker) held that initial letters were not a distinctive mark, and were not registrable as a trade mark, and the order of the Court of Appeal was reversed and the order of Eve, J., affirmed, the claim being regarded as "an illegitimate attempt on the part of the applicants to take exclusive possession of a p rt of the alphabet."

SHIP--BILL OF LADING—CONDITION EXEMPTING SHIP FROM RESPONSIBILITY FOR OBLITERATION, OR ABSENCE OF MARKS ON GOODS—LIABILITY ARISING FROM UNMARKED GOODS.

Sandeman v. *Tyzack & Branfoot SS. Co.* (1913) A.C 680. This was an action brought by a steamship company to recover freight. The goods in respect of which the freight was claimed consisted of a number of bales of jute, which, with a quantity of other bales of jute for other consignees, were shipped on the plaintiffs' vessel. The bill of lading provided that the plaintiffs were to be liable for the number of packages mentioned unless errors or fraud be proved, and that they were not to be liable for inaccuracies, obliteration or absence of marks, numbers or description of goods shipped. On the arrival of the ship at its destination fourteen marked bales were missing, but there were eleven bales, part of the cargo, remaining which were unmarked and which none of the consignees would accept. The defendants counterclaimed for a shortage of six bales. The plaintiffs contended that the defendants were bound to accept six of the unmarked bales which remained, and the Court of Session so held, but the House of Lords (Lord Haldane, L.C., and Lords Loreburn, Shaw, and Moulton) reversed this decision, holding that the defendants were not bound to accept six of the unmarked bales, and that the plaintiffs were liable for the full value of the six bales not delivered.

RESTRAINT OF TRADE—AGREEMENT BY EMPLOYEE NOT TO ENGAGE IN SIMILAR BUSINESS TO THAT OF EMPLOYER—REASONABLENESS OF RESTRICTION—INJUNCTION.

Mason v. *Provident Clothing & S. Co.* (1913) A.C. 724. This was an appeal from the judgment of the Court of Appeal (1913) 1 K.B. 65. The action was brought to enforce an agreement whereby the defendant, an employee of the plaintiff's in the busi-

ness of clothiers, had agreed that he would not, within three years after leaving their employ, be engaged in or carry on a similar business to the plaintiffs within twenty-five miles of London or within twenty-five miles of any place where the defendant should have been employed by the plaintiffs at any time during the continuance of the agreement. The County Court, in which the action was commenced, granted an injunction, which was reversed by a Divisional Court (Pickford and Avory, JJ.), which decision in turn was reversed by the Court of Appeal (Williams, Kennedy and Buckley, L.JJ.). The House of Lords (Lord Haldane, L.C., and Lords Dunedin, Shaw and Moulton) have now reversed the judgment of the Court of Appeal, and restored the judgment of the Divisional Court, setting aside the injunction granted by the County Court. The Divisional Court had, however, decided the question on the ground that the agreement was too vague, because "London," as a place of description, was too indefinite, and because in an earlier part of the agreement it was described as being in the County of Middlesex, whereas London is now itself a county, and is not in Middlesex. The House of Lords, however, disposed of the case on the broader ground that the restriction was unreasonably wide. As Lord Moulton remarks, it is sad to think that in this case the appellant has to go through four courts before he could free himself from the unreasonable restraint which he had imposed on himself by his covenant. According to the report he arrived at the court of last resort in forma pauperis as might be naturally expected.

EXECUTION—FIERI FACIAS—UNPATENTED MINING CLAIM IN ONTARIO—SEIZURE AND SALE—MINING ACT OF ONTARIO (8 EDW. VII. c. 21) ss. 35, 59, 72-74, 77, 78—EXECUTION ACT (9 EDW. VII. c. 47 (ONT.)).

Clarkson v. *Wishart* (1913) A.C. 828 is an appeal from the High Court of Justice of Ontario. The simple point being whether a judgment debtor's interest in an unpatented mining claim is exigible under a fieri facias against the goods and lands of the debtor. The sale was made by the Sheriff of the interest under a fi. fa. as of a chattel, and not as land. The mining recorder refused to register the purchaser as owner of the debtor's interest, and on appeal to the Mining Commissioner he held that the interest of the debtor in the claim was merely that of a tenant at will and was not exigible. The Divisional Court

affirmed the judgment of the Mining Commissioner. The Judicial Committee of the Privy Council (Lords Atkinson, Shaw and Moulton) have reversed the decision of the Divisional Court. The questions before the Committee were: What is the nature of an interest in an unpatented mining claim, is it land or is it a chattel? And secondly, whatever the interest may be is it saleable under a fi. fa. goods? By reference to the Mining Act their Lordships were led to conclude that the reference to a tenancy at will in the Act has reference solely to the relations of the claimant to the Crown before patent issued, but that the Act confers on the owner of such a right a substantial interest, entitling him to work the claim and to assign his interest which is not liable to forfeiture except for mistake or fraud; and that such interest falls within the category of "lands" within the meaning of the Execution Act. The judgment, however, fails to deal with one point which is expressly raised, namely, whether assuming the interest is saleable in execution could it be sold under a fi. fa. goods? Does the judgment mean, although it does not say so, that the interest in an unpatented mining claim is a chattel interest? It seems unfortunate that this point was not explicitly dealt with. It would almost seem as if this part of the argument of the counsel for the respondent had been lost sight of. We should incline to the view that the Judicial Committee held that although the right was an interest in land, yet it was merely a chattel interest.

RAILWAY—LEVEL CROSSING—DUTY TO SOUND WHISTLE—SHUNTING ENGINE—BREACH OF STATUTORY DUTY—CANADIAN RAILWAY ACT (R.S.C. c. 37), ss. 274-276.

Grand Trunk Ry. v. *McAlpine* (1913) A.C. 838 was an appeal from the King's Bench of Quebec and turns upon the construction of the Canadian Railway Act (R.S.C. c. 37), ss. 274-276. Sec. 274 provides that where a train is "approaching a level crossing the engine whistle must be sounded at least eighty rods before reaching the crossing." And s. 276 provides that when in any city, etc., a train is passing along a highway and is not headed by an engine, the company is to station on the part of the train or tender of the engine which is foremost a person to warn persons standing on a crossing or about to cross the track. The plaintiff in the action had been struck down by an engine which was engaged in shunting, and which never crossed more than 100 yards—and, therefore, did not get 80 rods away from the

crossing. Their Lordships held that s. 274 did not apply to such a state of circumstances. As regards s. 276 it appeared by the evidence that a man on the tender of the engine which struck the plaintiff had shouted to him, and seeing that he paid no attention gave the engineer a signal to stop, which their Lordships considered a sufficient compliance with the section, and that a direction to the jury that the warning was not sufficient unless heard by the plaintiff was erroneous. The case is somewhat peculiar as being a judicial opinion on the law affecting the case after the action had in fact been compromised at the suggestion of the Committee.

BANKER—CROSSED CHEQUE—PAYMENT BY CHEQUE—OSTENSIBLE AUTHORITY—ESTOPPEL—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. c. 61), s. 79—(R.S.C. c. 119, ss. 171, 172).

Meyer v. *The Sze Hai Tong Banking Co.* (1913) A.C. 847. This was an appeal from the Supreme Court of the Straits Settlements. The plaintiffs were opium merchants carrying on business in Singapore, and one Abed was in their employment as collector and cashier, and by his direction certain cheques of customers drawn on the defendant bank and crossed generally were taken to the defendants' bank to be cashed. The defendants paid these cheques by handing to the bearer a cheque for the same amount drawn by defendants on another bank in favour of the plaintiffs or bearer. It was the duty of Abed to pay the money so received into the plaintiff's bank account, but in breach of his duty he paid the cheque received from the defendants' into his own account and misappropriated the proceeds; on three subsequent occasions similar transactions and misappropriations took place. On the evidence the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Shaw, De Villiers and Moulton and Sir Samuel Griffith) held that Abed had ostensible authority from the plaintiffs to receive payment by cheques, of the cheques belonging to the plaintiffs so presented. The question at issue was whether the defendants were liable to pay over again to the plaintiffs the moneys which had thus been misappropriated by Abed. The Chief Justice who tried the action dismissed it on the ground that the proximate and effective cause of the plaintiffs' loss was the fraud of their own cashier and not the payment of the cheques otherwise than through a banker, and that the damages claimed were too remote. The Supreme Court affirmed his judgment on the ground that

the plaintiffs were precluded by their pleadings from claiming for the wrongful conversion of the cheques. Their Lordships, the Judicial Committee, dismissed the appeal, holding that though the cheques of the plaintiffs had been paid within the meaning of the Bills of Exchange Act, s. 79(2) (R.S.C. c. 119, s. 72), yet that the plaintiffs were estopped from denying the authority of Abed, their cashier, to receive payment in that manner and, therefore, their action failed.

COMPANY—CONTRACT TO TAKE SHARES—FRAUDULENT MISREPRESENTATIONS IN REPORT OF A DIRECTOR INCORPORATED IN PROSPECTUS—RESPONSIBILITY OF COMPANY FOR TRUTH OF STATEMENTS IN REPORT.

Mair v. *Rio Grande Rubber Estates* (1913), A.C. 853. This was an action by a shareholder of the defendant company to rescind a contract to take shares on the ground of fraudulent misrepresentations as to the property of the company contained in a report of one of the directors which was incorporated in a prospectus issued by the company, and on the faith of which the plaintiff entered into the contract. The case came before the Court of Session apparently on a proceeding in the nature of a demurrer to a statement of claim, and it was argued that the defendants were not liable for misrepresentations in the report and, therefore, the allegations as to misrepresentations therein were irrelevant, and the Court of Session so held and dismissed the action. The House of Lords (Lord Haldane, L.C., and Lords Shaw and Moulton) were of the opinion that the defendant company was responsible at all events for the absence of fraud in the misrepresentations contained in the report made by its agent. The case was, therefore, remitted to the court below with a declaration that the pursuer is entitled to proof of his averments, which we presume means that the plaintiff was entitled to prove his case.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Meredith, C.J.C.P.] [14 D.L.R. 232.

RE SCHOFIELD AND CITY OF TORONTO.

Criminal law — Procedure — Preliminary examination — Municipal corporation as defendant—Leave to prefer indictment.

A private prosecutor seeking to criminally charge a municipal corporation with maintaining a nuisance in respect of a part of the municipality's sewage system should ordinarily initiate the proceedings before a magistrate and not be granted leave by a superior court to prefer an indictment against the municipal corporation where no preliminary enquiry has been held by a magistrate.

Raney, K.C., for applicants. *DuVernet*, K.C., for Crown. *Geary*, K.C., for City.

Meredith, C.J.O., Maclaren,
Magee and Hodgins, JJ.A.] [14 D.L.R. 257.

RE MODERN HOUSE MANUFACTURING CO.
DOUGHERTY AND GOUDY'S CASE.

Corporations and companies—Liability of shareholders as contributory—Contract to pay for shares in property.

A person cannot be held as a contributory in a winding-up proceeding in respect to shares in a company incorporated under the Ontario Companies Act, issued as fully paid and alloted to him in consideration of his agreement to convey land to the company, notwithstanding he fails to make the conveyance, where there was no subscription or other contract by which any cash value was placed upon the shares; the default did not entitle the company to treat the shareholder as holding the shares subject to call.

Re Modern House Mfg. Co., Dougherty and Goudy's Case, 12 D.L.R. 217, affirmed on an equal division; *Re Alkaline Reduction*

Syndicate Ltd., 45 W.R. 10, *Re Railway Time Tables Publishing Co.*, 42 Ch. D. 98, and *Re Cornwall Furniture Co.*, 20 O.L.R. 520, specially referred to.

G. F. Shepley, K.C., for liquidator. *W. M. Douglas*, K.C., for respondents.

Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A.] [14 D.L.R. 279.

BELL *v.* GRAND TRUNK R. CO.

Railways—Accidents at crossings—Liability for—Previous accident—Excessive speed—Signals.

Held, 1. By reason of the provisions contained in s. 275 of the Railway Act, R.S.C. 1906, c. 37, as to the making of reports and inspection of accident occurring at railway crossings, that part of the section added by 8-9 Edw. VII. (Can.) c. 32, prohibiting a speed of more than 10 miles an hour by trains at certain crossings not protected to the satisfaction of the railway commission where accidents resulting in bodily injury or death had previously occurred, must be held to be limited in the latter respect to accidents of which the railway company is fixed with notice by reason of physical impact occasioning the same or by reason of the train employees actually becoming aware of the accident so as to report it; a previous accident by a horse taking fright at a passing train after passing over the crossing will not bring the sub-s. (4) into operation where it was not observed by the railway employees so as to call upon them to make a report.

2. An instruction to the jury, in an action for injuries sustained by a collision at a highway crossing, that it was negligence to run a train through a thickly settled portion of a town or village at more than ten miles an hour, is erroneous, unless qualified by stating in effect the exceptions contained in s. 275 of the Railway Act, R.S.C. 1906, c. 36, permitting a greater rate of speed where the crossing is protected in accordance with an order of the Railway Commissioner or other competent authority.

Grand Trunk R. Co. v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, followed.

3. In an action for injuries sustained at a highway crossing by being struck by a train an instruction to the jury that the

law requires the whistle of the engine to be sounded more than eighty rods away (which was done near another crossing more than eighty rods distant), and that the evidence shewed that the bell was not rung for the latter crossing, is erroneous, and entitles the railway company to a new trial, where the failure to ring the bell was the only negligence on which a verdict for the plaintiff could be sustained, and the jury stated that they "believed that the bell was not ringing continuously," such answer being too ambiguous to sustain the verdict.

D. L. McCarthy, K.C., for appellants. *W. Laidlaw*, K.C., and *E. H. Cleaver*, for plaintiff, respondent.

Province of Manitoba.

COURT OF APPEAL.

Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A.] [14 D.L.R. 298.

RE ALARIE AND FRECHETTE.

1. *Mortgage—Enforcement—Mortgage under Torrens system.*

The court will not direct the registration of a final order of foreclosure made in a court proceeding as under the old registry system against lands in Manitoba subject to the Torrens system of title registration, upon a mortgage made under sec. 99 of the Real Property Act, R.S.M. 1902, ch. 148; the compulsory transfer of the mortgagor's title can be accomplished only by a proceeding in the land titles office under secs. 113 and 114 of the Real Property Act (Man.).

2. *Land titles—Mortgages—Under Real Property Act—Foreclosure—Procedure.*

Since the 1911 statute, 1 Geo. V. (Man.) ch. 49, the only way in which a Torrens system mortgage made under sec. 99 of the Real Property Act, R.S.M. 1902, ch. 148, can be foreclosed and the title of the mortgagor divested to the mortgagee is by a proceeding in the land titles office under secs. 113 and 114 of the Act, and not by the ordinary foreclosure action and final order of foreclosure applicable to lands not under the Torrens system.

Smith v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618; and *National Bank of Australasia* v. *United Hand-in-Hand*

Co., 4 A.C. 391, followed; and see Annotation at end of this case.

H. P. Blackwood, for petitioner. *C. P. Wilson*, K.C., for district registrar.

ANNOTATION ON ABOVE SUBJECT.

The various Land Titles Acts prescribe the manner for mortgaging land registered thereunder by the execution of a memorandum of charge which in some provinces takes effect as a security only, and not as a transfer of the title to the encumbered land: see 6 Edw. VII. (Alta.) ch. 24, secs. 60, 61; 2 Geo. V. (B.C.) ch. 15, sec. 7; R.S.M. 1902, ch. 148, secs. 99, 100; 1 Geo. V. (Ont.) ch. 28, sec. 30; R.S.S. 1909, ch. 41, secs. 87, 91. However, the statutes of British Columbia and Ontario are silent as to the effect of such a mortgage as a transfer of the mortgagor's title.

In all of the provinces with the exception of Manitoba, jurisdiction is expressly conferred on some Court, in addition to cumulative remedies in the land titles office, in respect to proceedings to enforce payment of moneys secured by mortgage or encumbrances under the Land Titles Acts, or to enforce observance of covenants, agreements or stipulations therein, or for the sale of the encumbered lands, or to foreclose the estate or claim of any person in or upon the same, or to redeem or discharge any land from any such mortgage or encumbrance. Thus, in Saskatchewan the Supreme Court has jurisdiction (R.S.S. 1909, ch. 41, sec. 93); while in the North-West Territory and Yukon it is conferred on stipendiary magistrates (R.S.C. 1906, ch. 110, sec. 99). In Ontario it is provided by 1 Geo V. ch. 28, sec. 34, that, subject to any entry to the contrary on the register, the registered owner of the registered charge may enforce it by foreclosure or sale, in the same manner and under the same circumstances in and under which he might enforce it if the land had been transferred to him by way of mortgage subject to a proviso for redemption. In Alberta, by virtue of the Real Property Act, 6 Edw. VII. ch. 24, sec. 62, proceedings for the foreclosure of such mortgages are to be taken in the Supreme Court of the province; but it has been held that under such section a Master of the Supreme Court does not have jurisdiction to make a foreclosing or vesting order: *Re Land Titles Act* (Alta.), 11 D.L.R. 190. Where land is sold in satisfaction of a mortgage pursuant to a decree of a Court providing that on confirmation of the sale by a Judge, the title to the encumbered land shall vest in the purchaser, the latter, on confirmation of the sale, is entitled to be forthwith registered as owner of the land: *Canadian Pacific R. Co.* v. *Mang*, 1 Sask. L.R. 219.

But the Manitoba Real Property Act, R.S.M. 1902, ch. 148, differs from those of other provinces by providing, like those of Australia, a distinct and separate proceeding for the foreclosure of mortgages made under the Act, without conferring jurisdiction on any Court therefor. Thus, secs. 113 and 114 of the Act provide for a proceeding in the land titles office before the registrar, for the foreclosing of such mortgages and the vesting of title in

the mortgagee. However, the Act was amended by 5 & 6 Edw. VII. ch. 75, sec. 3, so as to confer jurisdiction over mortgages on any competent Court, notwithstanding anything to the contrary in the Act; but this amendment was repealed by 1 Geo. V. ch. 49, sec. 7; so that at present, as laid down by the Court in *Re Alarie and Frechette* (the case above reported), there is no jurisdiction in any Court to foreclose such a mortgage by means of the ordinary foreclosure decree.

So in Australia, from which country the Torrens system is derived, it has been held that a mortgage made in conformity with the provisions of the Land Titles Act cannot be foreclosed by a Court proceeding, where another method of divesting the mortgagor's title is provided by the Act: see *National Bank of Australia* v. *United Hand-in-Hand, etc., Society*, 4 A.C. 391; *Greig* v. *Watson*, 7 Vict. L.R. 79; *Long* v. *Town*, 10 N.S.W. (Eq. R.) 253. The reason for this doctrine is that a mortgage made under the Land Titles Act differs from a common law mortgage in that no estate in the encumbered land is vested by the instrument in the mortgagee, the mortgage taking effect as a charge or security only with certain statutory methods pointed out for divesting such title; and that consequently the mortgagee's powers are dependent upon such provisions: *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, affirming 20 Man. L.R. 522; *Long* v. *Town*, 10 N.S.W. (Eq. R.) 253; *Colonial Investment and Loan Co.* v. *King*, 5 Terr. L.R. 371. In *Greig* v. *Watson*, 7 Vict. L.R. 79, it was said that the legislature by providing for the foreclosure of mortgages made under the Land Titles Act, intended to make such method exclusive. And to the same effect see the remarks of the Court in *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, affirming 20 Man. L.R. 522.

But where land is mortgaged under the general law, and subsequently the land is brought under the Land Titles Act, the mortgage may be foreclosed under the old system: *Re Smith*, 15 Australian L.T. 85.

The *Alarie* case, above reported, deals only with the effect of a final order of foreclosure made in the ordinary suit for foreclosure or sale and does not deal with the effect as *res judicata* which the decree might have on an application made in the statutory method before the land titles officer. It merely affirms as a rule of practice that the decree is not an extinguishment of the mortgagor's title where the special statutory system of foreclosure is applicable, and that an application must still be made in the land titles office as might have been done apart from the Court proceedings.

The land titles registrar would then have to consider proofs of default, and on this score the decree may operate so as to conclude the mortgagor from again setting up questions of fact which had been decided against him in the mortgage action: see *Re Woodhouse*, (Ont.) 14 D.L.R. 285.

The Court presumably still retains its powers *in personam*, although the transactions may relate wholly to lands subject to the transfer and registry provisions of the Torrens system. Where the registered owner is within the jurisdiction, it may still be that in an action properly framed the Court may, by its decree against him, direct that he should execute and deliver all necessary transfers in favour of the mortgagee.

The mortgagor, on the other hand, might have some reason to complain if he were deprived of any of the periods of delay provided by the statutory procedure, particularly if the entire security were under the Torrens system. What liberty the Court could properly take in setting off, against the period for redemption which the land titles officer might or must allow, the period ordinarily allowed by the Court practice, does not appear to have come up for decision.

An interesting question would be raised if several properties were mortgaged in one transaction and for one sum, and only one of the properties was subject to the Torrens system. There might and probably would be separate mortgage documents and each of these might charge each property with the entire indebtedness.

In such case if an ordinary foreclosure action were brought as to the major portion of the security not having a Torrers title, it would be convenient to include also the Torrens system property. In fact it would have to be provided for to the extent of directing the mortgagee to discharge it along with the rest of the properties in case the mortgagor redeemed. So also in the case of collateral mortgage securities, it may well be that the mortgagor would have no separate and independent rights in equity in respect of the Torrens system mortgage, and that the circumstance might justify the Court in making a personal order against the mortgagor regardless of the statutory procedure for foreclosure and sale under the Real Property Act (Man.) or other Torrens system statutes.

Where the land titles officials have the exclusive jurisdiction as to the actual transfer of title the Court might not be able to vest the title of the defendant disobeying the decree in the party entitled to obtain it, but it might enforce its order by sequestration proceedings or by proceedings in contempt involving the personal imprisonment of the defaulter.

Province of Alberta.

SUPREME COURT.

Stuart, Beck, Simmons, and Walsh, JJ.] [14 D.L.R. 333.

STEPHENS *v.* BANNAN AND GRAY.

1. *Land titles (Torrens system)—Caveats—Filing in land titles office—Priority.*

Of two persons each acquiring interests from a common source in the same land under unregistered contracts for its sale, the one first filing a caveat in the land titles office will, under the Land Titles Act, Alta. Stats. 1906 (6 Edw. VII.) ch. 24, relating to the filing of caveats, be entitled to priority in the absence of fraud even though he may have had notice of

the other's equitable interests in the land. (*Per* Beck, Simmons and Walsh, JJ.)

McKillop v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, and *Sydie* v. *Sask. and Battle R.L. & D. Co.*, 14 D.L.R. 51, considered; and see Annotation at end of this case.

2. *Vendor and purchaser—Payment of purchase money—Recovery of—Failure of title.*

Where one of two vendees, both of whom claim the same land under unregistered contracts of sale from the same common source, is entitled to priority by reason of first filing a caveat in the land titles office, the other may recover from his vendee all payments made by him under the contract, with interest, together with the costs of investigating the title, or incident thereto. (*Per* Beck and Simmons, JJ.)

O. M. Biggar, K.C., for defendant Bannan, appellant. *G. B. O'Connor*, K.C., for defendant Gray, respondent

ANNOTATION ON ABOVE SUBJECT.

The general question as to what constitutes a "caveatable interest" and who is entitled to file a caveat is considered in an annotation to *Re Moosecana Subdivision and Grand Trunk Pacific Branch Lines*, 7 D.L.R. 674, 675.

In this note the question considered is what priority is acquired by the filing of a caveat.

By filing a caveat in the land titles office one who acquires a right in land under an unregistered agreement of sale, will have priority over a person claiming under a prior agreement, of which the caveator did not have notice when acquiring his interests in the land: *Brooksbank* v. *Burn*, 3 Alta. L.R. 351. And one who first acquires the right to purchase land will, by filing a caveat, have precedence over a person claiming to be a subsequent purchaser: *Edgar* v. *Caskey* (Alta.), 4 D.L.R. 460.

Where one holding an interest in land under a contract of purchase agrees to sell the land to another person, but subsequently sells it to a third person, who did not have knowledge of the prior agreement to sell, the former, by filing a caveat before the latter, paying all of the purchase money and receiving an assignment of the original vendee's agreement (which receives the approval of the original vendor as required by the terms of the agreement) will acquire priority over such third person, and can obtain specific performance of his agreement: *Alexander* v. *Gesman*, 4 Sask. L.R. 111, affirmed (*sub nom. McKillop* v. *Alexander*), 1 D.L.R. 586; 45 Can. S.C.R. 582.

But where a person agrees to purchase land under a contract which prohibits the assignment of the agreement except for the whole of the vendee's interest, and then only with the approval of and countersigning

by the vendor, one to whom the vendee agrees to sell a portion of the land does not acquire priority, by the filing of a caveat, over a third person who for value and without notice of the caveator's claim with the approval of the original vendor, took an assignment of the original vendee's entire interest: *Re Green* (Sask.), 9 D.L.R. 301.

A person who sells land under an agreement that the purchaser should give back a purchase money mortgage thereon which he failed to do, will, by filing a caveat, acquire a superior right over a mortgage subsequently given by the purchaser to a third person: *Thompson* v. *Yockney* (Man.), 8 D.L.R. 776. And a mortgagee, whose mortgage by reason of a defective description of the land, cannot be registered, may protect his rights against subsequent encumbrances by filing a caveat: *Reeves* v. *Stead* (Sask.), 13 D.L.R. 422.

A vendee in a contract for the purchase of land does not, by the filing of a caveat, acquire priority over an execution lodged against the land before the making of the agreement of sale: *Re Price*, 5 Sask. L.R. 318, 4 D.L.R. 407. And where, by reason of a misdescription of the land, a mortgage given by a vendee who had not acquired title, was not subject to registration, and the mortgagee filed a caveat, the priority thus acquired against executions subsequently lodged against the vendee is lost by the mortgagee, on the vendee acquiring title to the land, taking and registering a new mortgage and voluntarily discharging his caveat: *Rogers Lumber Co.* v. *Smith* (Sask.), 8 D.L.R. 871.

In *Arnot* v. *Peterson*, 4 Alta. L.R. 324, 4 D.L.R. 861, Beck, J., in speaking of the effect of sec. 97 of the Alberta Land Titles Act, 6 Edw. VII. ch. 24, which declares that "registration by way of caveat . . . shall have the same effect as to priority as the registration of any instrument under" the Act, in effect, said that such priority applies only to those claiming under the same root of title, and that the one first filing a caveat would thereby acquire priority over the other; but that priority could not be thus acquired where the caveator and the caveatee claimed under a different root or title.

Harvey, C.J., Beck, Simmons, and Walsh, JJ.] [14 D.L.R. 193.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

1. *Damages—Measure of compensation—Condemnation or depreciation by eminent domain—Value—Estimate as of what time—Land taken by railway to obtain gravel.*

Compensation for land taken by a railway company under s. 180 of the Railway Act, R.S.C. 1906, ch. 37, to obtain a supply of material for the construction, maintenance or operation of a

railway, is to be made as of the time when the company takes possession of the land. (*Per* Harvey, C.J., Simmons and Walsh, JJ.)

2. *Railways—Construction—Filing plans with Railway Board—Necessity—Plan for taking land to obtain construction materials.*

Sec. 160(2) of the Railway Act, R.S.C. 1906, ch. 37, providing that copies of the plans, etc., of a railway, when sanctioned by the Board of Railway Commissioners, shall be deposited in the office of the registrar of deeds for the district or county to which they relate, does not apply to or require the registration of plans prepared under s. 180 of the Act, for the compulsory taking of land to obtain stone, gravel, earth, etc., for construction or maintenance purposes. (*Per* Harvey, C.J., Simmons and Walsh, JJ.)

3. *Eminent domain—Appeal—Where evidence sufficient to sustain award.*

Where, in an arbitration proceeding, the appellant's evidence was directed to establishing damages on a wrong basis, and, on appeal, he does not seek a rehearing on that ground, but insists that such evidence was proper, the award will be upheld if there is any evidence to sustain it. (*Per* Harvey, C.J., and Walsh, J.)

Frank Ford, K.C., for Trusts and Guarantee Co. *A. B. Cunningham*, for Saskatchewan Land and Homestead Co. *O. M. Biggar*, K.C., and *Geo. A. Walker*, for Calgary and Edmonton R. Co.

Bench and Bar

Mr. A. H. O'Brien having retired from the position which he filled with so much advantage to the Dominion Government as Law Clerk to the House of Commons, will, after this, resume his place as Assistant Editor of this journal. Mr. F. H. Gisborne, late assistant Deputy Minister of Justice, will now, under the title of "Parliamentary Counsel," perform the duties which formerly devolved upon the Law Clerk, an office which was abolished under the recent reconstruction of the department. In recognition of Mr. O'Brien's services, Dr. Sproule, Speaker of

the House of Commons, during the last session of Parliament, appointed Mr. O'Brien "Counsel to the Speaker." This is a new position in the Canadian Parliament, although it has for many years existed in the British House. Mr. O'Brien is now engaged on a revised and enlarged edition of his work on Conveyancing Forms, so well known to the profession. This and other work prevented him, as we understand, from editing the recent edition of Barron & O'Brien on Chattel Mortgages, which work was done by someone else, but no doubt with satisfaction to the profession.

The subject of women being admitted to practice as solicitors has again arisen in England. An amount of people having unanimously upheld the decision of Mr. Justice Joyce that women have no such claim and that no Legislature has destroyed the disability under the Legislatures Act of 1843. As we are more liberal in this country, perhaps we may have an addition to our population in reason of this ruling.

JUDICIAL APPOINTMENT.

Samuel Davies Schultz, of the city of Vancouver, Province of British Columbia, Barrister-at-law; to be Judge of the County Court of Vancouver, in the said Province. (Dec. 4, 1913.)

Flotsam and Jetsam.

Divorce cases are always more or less demoralising—frequently disgusting, sometimes pathetic and occasionally amusing. The following belong to the latter class:—

Edward Quive was granted an absolute divorce, by Judge Sergent in a San Francisco court recently. Quive, who is only five feet tall, weighs 90 lbs. while his wife acknowledges 180 lbs. "My wife called me a Tom Thumb," Quive told Judge Sergent. "But before our marriage she used to say I was cute. Time and again she has slapped my face, spanked me, locked me out of the house and insulted my relatives."

Mrs. L. D. Gilson was given a divorce from William Gilson by District Judge Allen, Denver, Col. "I didn't love him to start with," she explained on the witness stand, "and I told

him so. I merely respected him, but thought we could get along. But his kisses and caresses were so numerous I couldn't do my work. He approached me every minute and hour of the day. He would kiss me fifty times a day and fifty kisses at a time. Then he kept me awake half the night kissing me. He would only quit when I would remonstrate bitterly."

The following story of the new Lord Chief Justice is told by a correspondent. I was once (he writes) in the old Court of Appeal, when Mr. Rufus Isaacs, as a junior, was arguing a case before the court over which Lord Esher presided. Lord Esher had the disconcerting habit of breaking in upon counsel, especially juniors, in the middle of their argument with questions—a practice which may have shortened tedious cases, but was not altogether fair to its victims. In this instance he fired off posers time after time at the counsel, and every time Mr Isaacs with perfect courtesy and good humour would drop his argument, take up the new question, deal with it, and then return. "As I was submitting to your Lordships——" and so on. Lord Esher in a few minutes would thrust in another question, and once more counsel's imperturbable coolness and confidence would deal with it. At the close of the argument Lord Esher—a grim old man with a face like a Chinese idol—spoke to the other Lord Justice, and then said, "The Court desires me to thank you, Mr. Isaacs, for the manner in which you have argued this case." Counsel's pallid face flushed at this unprecedented compliment, and quite a little thrill ran round the solicitors and barristers' clerks in court.—*Ex.*

A judgment recently delivered in Saskatchewan of *Meighen v. Knappen* brings up an interesting question of law, and we may be indebted to the Solicitor-General for the settlement of a doubtful point. It appears that he obtained a judgment some years ago for payments due him on a sale of land to the defendant. Since the date of the judgment the plaintiff also obtained an order for foreclosure; and now it would appear that the defendants claim that the money judgment cannot be enforced, as the plaintiff has the land back. If the case goes further it will decide an interesting point of law as to which there has been a divergence of opinion.