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MORTGAGE ACTIONS AND THE STATUTES OF LIMITATIONS.

The Supreme Court of Canada has in the case of *Smith* v. *Darling*, 55 S.C.R. 82, affirmed the decision of the Appellate Division of the Supreme Court of Ontario, 36 O.L.R. 587, and it may now be taken to be settled that the disability clauses of the Statute of Limitations (R.S.O. c. 75) do not apply to actions of foreclosure or redemption.

That an action for redemption against a mortgagee in possession in Ontario is "an action to recover land," no one who is familiar with the present procedure of the Supreme Court of Ontario can have any reasonable doubt, because in the action the defendant may be ordered on payment of what, if anything, may be found due to him, to deliver up possession of the mortgaged lands to the plaintiff. Under the former procedure in equity an action of ejectment might have been necessary in order to enable the plaintiff to get possession, as was the case in actions of foreclosure at one time in England, see *Heath* v. *Pugh*, L.R. 6 C.P.D. 345, but even in that case it was held that an action of foreclosure was "an action to recover land" and stayed the running of the statute. But it is many years since both in actions of foreclosure, and redemption, in Ontario, the Court has been authorized to give complete relief in the action, including the right to order delivery of possession of the lands in question.

Both redemption and foreclosure actions being "actions to recover land," why should they be subject to any other period of limitation than any other actions to recover lands? Bacon, V-C., in *Forster* v. *Patterson*, L.R. 17 Ch. D. 132. suggested that it might be out of legislative sympathy for mortgagees that the disability clauses were not applied to redemption actions; but even if the suggestion were well founded in fact, it is ill founded in reason;

and we think the Provincial Legislature would do well at its next session to amend s. 40 of the Limitations Act by inserting the words "or to redeem, mortgaged lands, or enforce payment of money charged on lands."

But if the case of *Smith* v. *Darling* is an unsatisfactory decision what are we to say to *Martin* v. *Evans*, 39 O.L.R. 479, where, after twenty years delay, a judgment and final order of foreclosure were set aside; and the pendency of the action of foreclosure was held to save the right of the defendants to redeem the mortgaged lands?

The facts of that case were certainly peculiar and the proceedings appear to have been conducted with a strange disregard of the practice of the Court, and yet where a defendant seeks relief against proceedings the usual rule is "*vigilantibus non dormientibus æquitas subveniat*," but in this case a defendant's slumber of twenty years was held not to be sufficiently prolonged to disentitle him to set aside the proceedings of which he complained. It must, of course, be borne in mind that part of the mortgaged property, in respect to which the defendant claimed the right to redeem, was originally a reversionary interest which had only recently fallen into possession; which fact seems to have aroused the sleeping defendant to activity.

CONSCIENTIOUS OBJECTORS AND PACIFISTS.

Those persons of the above named classes who have consciences are entitled to fair treatment. This they do not always get, for the simple reason that the great majority of "conscientious objectors" are conscienceless shirkers, and the former have to suffer for being in bad company. If one of these objectors is prepared to serve in some capacity, however menial, and is prepared to take the same pay for doing it as a private in the ranks, he should not be compelled to engage in actual warfare. On the other hand, an objector who claims exemption, but declines to submit to such reasonable conditions as may be imposed, would very properly be compelled to don khaki and get to work in the trenches.

Those who have the adjudication of such cases have a difficult task to perform, but the above suggestion is the only one that seems to meet the case. The appropriate remedy, however, can only be had by legislation, but in this country there is no Parliament at present to enact it. It is said that in England the appropriate remedy will shortly be applied.

Some time ago *The Spectator* published a letter on this subject, in which the writer took the ground that any person claiming exemption on account of conscientious scruples against fighting or taking life, and thereby refusing to defend the country which protects him, is not entitled to the protection, benefits and privileges accorded to those who were prepared to defend their liberties. The strongest and best statement which we have seen on the subject curiously enough appears in a leading article in *The Christian*, the most prominent religious paper of England. The writer demands that those who thus refuse to bear the burden of citizenship should not only be disfranchised but should also be deprived of all protection from the law; that they are, in fact, "outlaws," using the term in its original sense. Being outside the law they cannot claim its benefits—they have logically and reasonably no right to claim protection against personal injury; and have no right therefore to appear as litigants in the courts, either as plaintiff or defendant. If they are really conscientious in their objections and are gifted with ordinary common sense they must see the reasonableness of this proposition.

It is time that all those who live in a country, and claim the protection and enjoy the privileges of citizenship, should in this matter and in all others of a cognate character realize their responsibility as well as their privileges.

The law is that those who "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere" (25 Edw. III., ch. 2), are guilty of high treason; and it will be remembered that a prominent citizen of the Empire was recently hung for a breach of the above statute. There are those in this country who have transgressed this statute, but have not suffered the fate of Sir Roger Casement. It is just as well, however, that they should be reminded that this old statute is still in force.

Our cotemporary, the *Law Times* (Eng.), refers to this subject as follows:—

"The debate in the House of Lords on Wednesday last will do much to clear the air of a lot of cant that has been current recently with regard to the punishments awarded to those persons who refuse to perform any military or national service. The true conscientious objectors are few in number, and may be described as those persons who hold genuine convictions based on religious or moral grounds. With these misguided people a certain amount of sympathy may be felt, and any vindictiveness towards them should be deprecated. By far the greater number of those who are now undergoing punishment are not conscientious objectors at all, but may be classed as objectors to military or national service on political, social, or personal grounds. To these persons no leniency whatever should be shewn, and we are glad to see that for the future punishments awarded by courts-martial are to stand, and there will be no successive punishments. The tribunals—local, appeal, and central—have done good work separating the sheep from the goats, and very few mistakes as to category have occurred."

There is another class in the community which requires prompt and effective treatment from time to time. Pacifists happily are neither a large nor an influential body. Their vaporings, however, in such times as these are harmful, as well as disloyal. It is when such men as Lord Lansdowne, who has occupied most prominent positions in the councils and government of the Empire, writes as he has done that this subject comes prominently before us. It may be, as has been suggested, that his intellectual powers are waning, or that he has come under baneful influences; but, however that may be, he and others who speak as he has done are at least anti-British, and to that extent "give aid and comfort to the King's enemies." It will be remembered by some that when the Marquis of Lansdowne was Secretary of State for War, previous to the South African War, he did not even take the trouble to open reports sent him officially by the Director of Military Intelligence, which would have given much valuable information as to the doings of the Boers in their preparations, resulting in the British suffering great harm and loss, a result which will also follow more or less from his recent utterances.

It is said that the British Government will shortly take strong measures to prevent the promulgation of peace propogandas. This may be an interference with what we call the right of free speech, but under some circumstances and when the Empire is fighting for its life, free speech is sometimes veiled treason.

Those who have followed the career of Lord Lansdowne will not be much impressed by his foolish and mischievous utterances. Things are soon forgotten, but the record of the finding of the Royal Commission to enquire into the military preparation for the war in South Africa so damaged his reputation that his views on any subject connected with either peace or war are of little consequence. The finding of this Commission, on which sat some of the very best men of the Empire, was a damning verdict of ignorance, incapacity and wilfull blindness on the part of those who at that time were at the head of the British Government. Lord Milner was probably the principal offender. But the man most culpable from the official military standpoint was the Secretary of State for War, Lord Lansdowne. His culpability was that, being officially responsible for the sufficiency and efficiency of the military forces of the Empire, he allowed its armaments to become so grossly insufficient that three months of war with two small republics emptied our arsenals—that he was guilty of criminal negligence in omitting to inform himself of or to listen to the elaborate information supplied to him by the Military Intelligence Department, notwithstanding the repeated warnings of his military advisers, with the result that it was not until three weeks before the outbreak of war that he awoke to the fact that the Orange Free State was about to take the field against us—that although on September 5th he became convinced that war was inevitable he not only made no preparation to meet the Boer attack for seventeen days, but actually on September 16th cancelled an order for 1,000 mules which were urgently needed for transport purposes—that he took no adequate measure to provide reinforcements and discouraged every proposal made by volunteers to strengthen our forces in South Africa until after our three-fold defeat in December—that he in effect caused the retirement of one of England's most valued and brilliant

officers, the Director of Military Intelligence, Major-General Sir John Ardagh, leaving him under the stigma of having neglected his duties, although he had in his own possession evidence which proved the opposite and that he and not his subordinates was to blame.

The finding of the Commission was in effect that the only men who did their duty faithfully and well were Sir John Ardagh, his colleague Major Altham, and Gen. W. F. Butler. All the rest, including Lord Salisbury, Lord Milner, Lord Lansdowne, Joseph Chamberlain, Mr. Balfour, etc., were more or less severely criticised. Of Sir John Ardagh and his colleague it was said that the thanks of Parliament were due to them for their services and that they were entitled to a formal expression of regret that their good work should have been so shamefully misrepresented, and themselves cruelly calumniated by the conduct of their chief whom they had so loyally and faithfully served.

This is the man who now presumes to tell those who are directing the affairs of the Empire and those who are fighting its battles that they should revise their views as to a continuance of the war. His criminal negligence at the time of the Boer war is now supplemented by his "giving aid and comfort to the King's enemies" by suggesting peace and thereby discouraging and hindering those who are bravely and loyally struggling to uphold the right against the vilest tyranny and savagery that the world has ever seen.

THE DUCHESS OF KINGSTON'S CASE.

There are some litigants who attain a sort of legal immortality by reason of cases in which they may happen to have been concerned being always quoted by their names. For instance, there is our old friend "Taltarum" with whose case we have had a friendly acquaintance ever since we began to explore the mysteries of the law of real estate. There is the immortal "Shelley," not by any means the poet of that name, but he whose "case" is discussed in so many pages of our law reports, not to speak of many other individuals whose cases are "as familiar in our mouths as house-

hold words." Not the least well known of these legal immortals is "the Duchess of Kingston" a frail beauty of the days when George the Second and George the Third were Kings. "The Duchess of Kingston's case" is to be found among Smith's Leading Cases, and it is reported at length in 20 State Trials, p. 355; but probably not very many of those who find the case quoted as authority take the trouble to find out what was the nature of this *cause celèbre*. If they were to do so they would find it really more entertaining than many a novel; and because we believe its particulars are not very generally known we think it worth while to give some account of it.

It is interesting not only for the various questions of law raised in the course of the trial, but also for the romantic incidents which gave rise to the prosecution, because the case was a prosecution before the Peers for bigamy, or polygamy as it is styled in the Royal Commission directing the trial.

One peculiarity about the case is this, that the accused was found guilty and therefore she was not in fact "the Duchess of Kingston," and the case which has been quoted so oft as "the Duchess of Kingston's case" was not really the Duchess of Kingston's, but the Countess of Bristol's.

The case illustrates the loose state of the marriage laws in the time of George II. The heroine of the case was born Elizabeth Chudleigh and at the time of her first marriage she was a maid of honour to the Princess Royal. In the month of June, 1744, she met the Hon. Augustus John Harvey at the Winchester races, he being then a youth of seventeen, and in the Naval service, Miss Chudleigh was then eighteen and she was on a visit at a place near by called Lainston, where her aunt, a Mrs. Hamner, was staying. Lainston was a diminutive parish. It consisted of the house in which Miss Chudleigh was staying and a church which was in the garden of the house. Mr. Harvey visited Miss Chudleigh at this house, and a secret marriage between them was agreed on, and the Rev. Mr. Ames, the parson of Lainston, agreed to solemnize it. About eleven o'clock at night the bridal pair, accompanied by the aunt, Mrs. Hamner, and two gentlemen went to the church in the garden, and the marriage was solemnized

by the light of a candle carried in the hat of one of the gentlemen. Besides the parties above mentioned, a confidential servant named Ann Cradock was present, she being charged to take care that none of the other servants should have any notice of what was going on. Why it was that the marriage was to be kept secret does not clearly appear. It is alleged because of certain circumstances in Mr. Harvey's family; the tender years of the bridegroom and his inability to maintain his bride, and the probable unwillingness of the latter to forfeit the post she held as maid of honour, may also have had weight in determining to keep the marriage secret. The union resulted in the birth in 1746 of a son, who, however, shortly afterwards died in infancy. This fact also was kept secret from all but a few persons. Thereafter a coolness arose between the parties, and they ceased all cohabitation, the lady continuing to pose as a spinster. In 1759, after she had been living separate from her husband about twelve years, the eldest son of the Earl of Bristol having died, the lady's husband became heir apparent to his father with the immediate possibility of succeeding to the peerage, as his father was ill. His wife then bethought her that, in case such an event happened, it might be desirable to have some authentic record of her marriage She accordingly proceeded to Winchester where Mr. Ames then lived, and found him, on what proved to be his death bed. A book was procured and an entry of the marriage was made by him therein. This book was sealed up and left with a friend of the lady, to be guarded as a secret not to be disclosed unless required by the lady. The person with whom it was deposited, however, died and the book was found after his death by a member of his family, and being apparently a parish register was forthwith handed over to the rector of the parish of Lainston, in whose custody it subsequently remained, and proved eventually a part of the evidence for the prosecution. The Earl of Bristol having recovered his health, the prospect of the husband's succession to the title became more remote, and the Duke of Kingston having become enamoured of the lady she seems to have resolved that the attractions of a ducal coronet were superior to those of an earl's. In the "*National Biography*" it is said she became the Duke's

mistress: at all events her husband threatened her with a suit for divorce, and intimated that she should assist him in getting a decree in the Ecclesiastical Court, with a view to his ultimately getting an Act of Parliament dissolving the marriage. This she indignantly refused to do; but as both parties were really desirous of getting rid of the marriage, it was thought by the legal advisers of the lady that the desired result might be attained by a suit for jactitation of marriage, which the lady should bring against her husband. This suit was accordingly brought, and not very strenuously defended by the husband, and, for lack of proof of any valid marriage having taken place, a decree was pronounced in the lady's favour. She appears to have been advised that she might now safely marry the Duke who was anxious to marry her, though he declined to do so until the doubts as to the first marriage were set at rest. The Duke it appears was cognizant of the proceedings in the jactitation suit, and took a warm interest therein, and shortly after the decree was pronounced went through a form of marriage with the lady. During his lifetime no question was raised as to the validity of this pretended marriage, but after his death his nephew, who was his heir at law, instituted proceedings in Chancery, and also a criminal prosecution for bigamy against the lady. She claimed a right to be tried for the alleged crime by her peers, and as, even if she was not the Duchess of Kingston, she must have been the Countess of Bristol, for by this time her husband had succeeded to the title, it is clear her claim was well founded, and was acceded to; and a Royal Commission was issued for her trial before the Peers in the Court of of the Lord High Steward. Accordingly, on the 15 April, 1776, the trial began. The stately ceremony which marked the proceedings is duly recorded in the pages of the State Trials and the names of the numerous peers who took part in the trial are to be found on p. 623. The prosecution was led by Attorney-General Thurlow (afterwards a Lord Chancellor). The judges of the Common Law Courts were in attendance. Lords Mansfield and Camden took part, but whether in their capacity as peers, or as common law judges is not clear, possibly there were there in both capacities. Lord Camden certainly spoke for the judges on the

questions of law submitted to them. At all events there was a great array of legal talent both at the bar and among the peers, and it is for that reason that the conclusions of their Lordships on the various legal points arising in the course of the trial constitute such high authority.

The case was remarkable for the singular step taken *in limine* by the prisoner at the bar. After the reading of the indictment, to which she pleaded "not guilty" and claimed to be tried "By God and my peers," and before the case was opened by counsel for the Crown, she claimed the right to put in evidence the decree in the jactitation suit, which she claimed constituted a bar to the prosecution. This point was argued at some length by counsel, but was disallowed. The evidence was then called, the record of the marriage which the prisoner had herself procured to be made was read against her, and Ann Cradock, the confidential servant, testified to the fact of the marriage: all other eye-witnesses being then dead. In the course of the trial several questions of law arose. (1) As to the effect of a judgment in a suit for jactitation of marriage. How far, if at all, it is conclusive.—How far, if at all, it may be controverted. The points decided have a wide reaching effect on the law of evidence. It was held that the judgment in question was not conclusive, and, even if it were conclusive between the parties, it would not be so as against the Crown, or a third party. (2) Then there was the claim of the surgeon who had witnessed the birth of the child, that he should not be required to disclose facts learned by him professionally to the prejudice of his patient, which was disallowed. (3) The claim of a noble lord that he should be excused from answering as to private and confidential statements made to him by the accused, which was also disallowed. (4) The claim of a solicitor of the Earl of Bristol to be excused from disclosing what he had learned from Ann Cradock when he was making investigations on behalf of the Earl in the jactitation proceedings, which was also overruled as the fact in question was not "a secret of his client."

But the case is also interesting for the light it throws upon that extraordinary method devised by our ancestors for alleviating the savagery of the former criminal law of England, and known as "benefit of clergy."

Benefit of clergy was something like the well known dog law, that a dog is entitled to have one bite, because, according to this privilege accorded to certain criminals, they might commit one felony with practical impunity. This privilege by a singular inconsistency was accorded to the literate members of the community, who by reason of their superior intelligence ought to know better than to commit crimes, while it was denied to the most ignorant who had more excuse for falling into crime. The capacity to read however was the sole condition required to constitute the criminal "a clerk" and thus entitled to claim the benefit of clergy. For many felonies, bigamy included, benefit of clergy was claimable by the convict. But here again the old English criminal law made a further distinction in criminals. Commoners who claimed the benefit were to be burnt with a hot iron in the presence of the court "on the brawn of the thumb" with the letter M in case of murder, and with the letter T for any other offence, and were further subject to imprisonment for a period in the discretion of the court not exceeding a year; but (as their Lordships, on the advice of the Common Law judges, found in the Duchess of Kingston's case) a peer and a peeress were exempt both from burning in the hand, and also from imprisonment. The result of this celebrated trial was therefore somewhat lame and impotent, for, although the culprit was found guilty of the offence charged yet, by reason of the privilege above referred to, the sentence of the court was "Madame, you are discharged, paying your fees."

The marriage in question appears to have been solemnized without the prior publication of banns, and it was not till 18 years after the marriage in question in this case that the law was, by 26 Geo. II. c. 33, amended so as to invalidate marriages so solemnized. At the time the marriage took place it was the law according to the Book of Common Prayer that banns of marriage should be published, and the book of Common Prayer was then and still is a schedule to an Act of Parliament, but at that time a marriage otherwise valid could not be declared null merely for the omission of the publication of banns and here we may remark that the 26 Geo. II. c. 33, though repealed by the Imperial Stat., 4 Geo. IV.

c. 76, would probably be held to be still in force in Ontario, and by that statute a parson, solemnizing a marriage as Mr. Ames solemnized Miss Chudleigh's marriage with Mr. Harvey, would be guilty of a felony. The Ontario Marriage Act (R.S.O. c. 148) requires that either a licence or banns should precede a marriage, but it does not expressly invalidate marriages solemnized without either of those preliminaries. That a marriage without banns, and without license, would be null and void therefore is by no means clear; having regard to the Duchess of Kingston's case, we are inclined to think it would not in Ontario.

How it may be in other parts of the Dominion we are not able to say; but on this point as on all others connected with marriage there ought to be a uniform law throughout the Dominion. It ought not to be possible for a marriage to be null and void in one Province and valid in another. But in order intelligently to deal with the subject of marriage, the legislator needs to be fully informed both as to the religious and temporal aspects of the subject to be dealt with, and to be able clearly to distinguish between those fundamental principles which all Christians admit, and those which are merely the ecclesiastical rules of some particular part of the Christian fold, and have not, and ought not to have, any universal application.

NOTES FROM THE ENGLISH INNS OF COURT.

The Unwritten Law.

Lawyers throughout the Empire will have read with some concern the report of a recent case at the Old Bailey in which an officer was acquitted on a charge of murder. It is difficult to say what the defence really was. The accused came home to find that his wife was being bothered by another man whose character was none of the best. He went to chastise the offender with a heavy whip. There was a scuffle, in the course of which the lady's lover was killed. The crime was murder or nothing. The prisoner, who was defended by Sir John Simon, gave no

evidence on his own behalf. Counsel for the Crown contended before the jury that in law there was no answer to the charge. The deceased man had not been caught *flagrante delicto;* there was no evidence that the accused had acted in self defence. The learned judge, too, drew attention (as he lawfully might) to the fact that the prisoner had not denied the charge on oath and he also spoke of the dangerous precedent which would be created if the prisoner acted upon any unwritten law. Yet the jury acquitted the prisoner. They feared, possibly, that a verdict of guilty even with a recommendation to mercy which would certainly have been accorded by the King, might have lost the prisoner his commission.

The Law Officer's Right of Reply.

This case has drawn attention to a peculiarity of criminal procedure in England. Had one or other of the Law Officers attended in person he could have exercised the right of reply. In other words, the prosecution would have had the last word with the jury. But it is extremely doubtful whether even Sir Frederick Smith at his best could have done anything to prevent the jury doing what they did. And who can blame them? A man who annoys the wife of another man who is serving at the front is not likely to get much sympathy. The maxim *inter arma silent leges* may, however unconsciously, have influenced the minds of the jurors. As to the Law Officer's right of reply, this still exists notwithstanding the Criminal Evidence Act. Sir Edward Clarke, who was once Solicitor-General, has often contended for its abrogation, but many great law officers have said that its occasional exercise is essential to the administration of justice.

Mr. Birrell, M.P.

The Rt. Hon. Augustine Birrell, M.P., has informed his constituents that he does not intend to seek re-election in the new Parliament when the time comes for that body to be called into existence. Mr. Birrell is a man of many attainments. He

may be variously described as lawyer, politician, or library genius. His career as politician scarcely invites comment in these pages; but it is fair to say this. After the unhappy disturbances in Dublin—my native city—Mr. Birrell who had been Chief Secretary for Ireland, tendered his resignation which was accepted. His *apologia* which was heard in the House of Commons on May 3, 1916, was worthy of the man. He took the whole blame for everything upon himself. Yet in the light of subsequent events it is fairly obvious that in all that he did and seemed to leave undone he was but carrying out a policy settled by others—his masters—a policy of attempted conciliation which has been and still is being practised in Ireland. As to whether it will succeed time will show. In the meantime let us reserve judgment upon one of those who was ordained to practise it. Having said this much, let us leave him as politician, only to wait upon him once more as lawyer and man of letters.

Mr. Birrell, K.C.

Mr. Birrell was for many years at the Chancery Bar. He is a lawyer of no means attainments. He might have achieved a greater success had he not been lured into politics—had he confined his literary efforts to deeds and pleadings. But the law is a jealous mistress. "Among lawyers" he has been heard to say with some pathos, "I am a literary man." Among literary men "I am spoken of, with bated breath, as a lawyer!"

The present writer, having read most of his works, can certainly claim to be one of the lawyers here mentioned; and even if the lawyer is not, ordinarily speaking, of a literary turn he will find much amongst Mr. Birrell's essays to fascinate and engross his attention. For this author has by no means confined himself to writing essays on literary subjects. Nor is he merely—though he may be largely—a critic in the ordinary sense. He has struck out a line of his own. He wanders along paths where law and literature meet. He explores regions into which your literary genius dare not venture. Here he is unrivalled. "A literary man" wrote Dr. Johnson "should always have lawyers to converse with!" In Mr. Birrell's case there was no need.

Some of His Legal Writings.

It is true that of his purely legal writings those best known first came into being as lectures. A book on "*The Powers and Duties of Trustees*" may now be found in the law library. Birrell gave lectures on this subject to the students of the Inns of Court, and these were subsequently published. They are fascinating reading. They abound in that whimsical humour for which their author is famous. It used to be said that in the course of them he told the students: "One of the chief functions of a trustee is to commit judicious breaches of trust." But I have been unable to find this *dictum* on the printed page. On another occasion he lectured on "*Changes in Equity procedure and principles in the 19th century.*"

This was one of a series of lectures delivered by various experts at the beginning of the present century. They were all published in book form *sub nomine* "*A Century of Law Reform.*" Mr. Birrell's lecture will there be found. His description of the old Chancery proceedings is magnificent. He once wrote an essay on "*Contempt of Court*" being a review of a work on that subject in which he points out what is indeed known to most lawyers that it is a contempt to assault a process server. He then goes on: "How necessary it is to protect the humble officer of the law who serves writs and subpœnas is proved by the case of one Johns, who was rightly committed to the Fleet in 1772, it appearing by affidavit that he had compelled the poor wretch who sought to serve him with a subpœna to devour both the parchment and the wax seal of the court and had then, after kicking him so savagely as to make him insensible, ordered his body to be cast into the river." An essay on "*Contempt of Court*" may be found in the volume entitled "*In the Name of the Bodleian.*" His partial definition of "Contempt" is worth reading:

"An ill disposed person," he writes, "may exhibit contempt of court in divers ways—for example, he may scandalize the court itself, which may be done not merely by the extreme measure of hurling missiles at the presiding judge or loudly contemning his learning or authority, but by ostentatiously reading a newspaper in his presence or laughing uproariously at a joke made by somebody else."

In this volume, too, may be found another piece in which he was discussing a recent Act of Parliament which had deprived certain persons of valuable property. He treats of title, and says: "There is no other way of holding property than by legal title. Sometimes that title has been created by an Act of Parliament, and sometimes it is a title recognised by the general laws and customs of the realm, but a legal title it has got to be. Titles are never matters of rhetoric, nor are they *jure divino*, or conferred in answer to prayer: they are strictly legal matters, and it is the very particular business of courts of law, when properly invoked, to recognise and enforce them."

Miscellaneous Legal References.

The lawyer who reads Birrell will find more in him to amuse and interest than any casual reader. Scattered up and down through his writings are to be found numerous passages which appeal at once to the legal mind Indeed, the very sentences, the words and language used, though never dull are redolent of law. As a last quotation, let me give a description of the calling of a barrister-at-law, which is taken from the essay "Of Actors." After mentioning a celebrated actor who had wished to be a member of the legal profession, Mr. Birrell goes on: "He did not like his children to come and see him act, and was always regretting—heaven help him! that he wasn't a barrister-at-law. Look on this picture and on that! Here we have Macbeth, that mighty thane; Hamlet, the intellectual symbol of the whole world of modern thought; Strafford in Robert Browning's fine play; splendid dresses, crowded threatres, beautiful women, royal audiences; and on the other side, a rusty gown, a musty wig, a fusty court, a deaf judge, an indifferent jury, a dispute about a bill of lading, and ten guineas on your brief—which you have not been paid, and which you can't recover—why, 'tis Hyperion to a satyr!'"

LIABILITY OF HOUSEHOLDERS FOR INJURIES TO INVITEES.

An interesting case was recently before Mr. Justice Bailhache, raising questions which might readily arise at any time, touching the liability of any one of us for damage caused to some person coming to our house who suffers some injury through the state of our premises. The case deals with the position of the householder where a tradesman or other person, lawfully upon the premises with the permission of the householder, meets with some unexpected accident through some unknown defect in the state of the premises. It is the sort of question which might face a householder at any moment. There are a number of authorities which deal with the point, and we propose in this article to examine the position in the light of these authorities, and incidentally to point out the significance of the recent case to which we have referred.

In the first place, we find that there is a duty owed by those in possession of the premises to those who come lawfully on to the premises. This duty can hardly be said to be thrown on the occupier of premises by the general law of negligence. It is hard, no doubt, to find the true basis of the ground. The case which we are discussing must be distinguished from the case of a person erecting a building for profit and inviting persons to make use of the building in consideration of the payment of money. The case of *Francis* v. *Cockrell*, 23 L.T. Rep. 466, L. Rep. 5 Q.B. 501, stands half-way between the two. There the committee of certain steeplechases, held yearly at Cheltenham, caused a stand to be erected to enable people to view the races. The stand had been so erected yearly for some past years. But on this occasion the stand collapsed and injured the plaintiff, who brought an action against one of the persons interested in getting up the races, and who had on behalf of himself and others employed a good firm of contractors to carry out the erection of the stand. Except, apparently, that the moneys received from those making use of the stand and from letting the refreshment room in the stand building were paid into the race fund for the general benefit of the

races, the defendant had no pecuniary interest in the money received from the stand. The Court, however, held that the plaintiff could maintain an action.

In the last-mentioned case the Court clearly felt some difficulty in defining the precise ground on which the action could be maintained. Chief Baron Kelly, although stating that there was clearly no express contract between the parties, took the view that there was an implied contract. He held that it was immaterial for what purpose the money was paid, and considered it sufficient that the defendant, having possessed himself of the stand, impliedly promised that the defendant, having paid his entrance money, should have a seat on the stand during the steeplechase. His Lordship held that the general proposition of law that where a man engages to supply another with a particular thing for a pecuniary consideration, he impliedly contracts that the thing is fit for the purpose, applied to the case before the Court, subject only to this qualification, that he did not contract against defects in the thing not only not known to the person contracting, but undiscoverable by the exercise of reasonable skill and diligence or by any ordinary and reasonable means of inquiry and examination. The judgment of Baron Martin was much to the same effect. Baron Channell, however, remarked that had the defendant built the stand for his own profit the case would have been quite clear. On the authorities his Lordship thought that the fact that he got no individual benefit from the money made no difference. Mr. Justice Montague Smith considered that a contract of this kind threw a duty on the defendant, and that the defendant had in effect promised that due care and skill had been used in the construction of the stand. But his Lordship thought that the obligation could be put in another way—namely, that there was an implied promise that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so. Negligence having been found on the part of those who had constructed the stand, his Lordship was of opinion that the defendant was liable for that negligence.

We have taken the case of *Francis* v. *Cockrell* (*sup.*) as our

commencing point, for it illustrates the difficulty of arriving at the true ground for saddling the responsibility for an accident to a person making use of another's premises with the permission of that other person. In that case it was regarded as founded on contract. Now let us see if this be the true ground where there is no consideration passing. In an Irish case—*Sullivan* v. *Waters* (14 Ir. C.L.R. 460)—Lord Chief Baron Pigot, who fully examined the law as it then stood, expressed himself unable to ascertain and lay down any satisfactory general rule. But in an earlier case —*Quarman* v. *Burnett* (6 M. & W. 499)—Baron Parke in delivering the judgment of the court observed that the rule of law might be that where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and his Lordship observed that such injuries are nuisances.

We now come to the most important case of all—*Indermaur* v. *Dames* (14 L.T. Rep. 484; L. Rep. 1 C.P. 274)—where the law was carefully considered. The facts in that case may be briefly stated as follows: The premises of the defendant, who was a sugar refiner, consisted of a building adapted to the ordinary uses of the trade. Incidentally there was a shoot or hole in the floors of the building through which sugar was lowered or raised as occasion required. When not so used, the hole served as a means of ventilation. Apparently the light on the premises was necessarily subdued. The plaintiff was a journeyman fitter employed by a patentee who had fixed a patent gas regulator upon the premises. Part of the contract between the patentee and the defendant involved the testing of the gas jets in the building, and it was in the course of this work that the plaintiff fell through the hole and was injured. The court found that there was evidence of neglect on the part of the defendant and, in effect, that the defendant had not taken reasonable care to prevent an accident of the kind, and in such circumstances, arising.

The main point brought out by the court in the last-mentioned case was the distinction between the rights of a mere licensee upon another's premises and the rights of a person who is in effect on the premises in the course of business. This distinction had from

time to time been drawn in previous cases. Thus Baron Alderson in the case of *Southcote* v. *Stanley* (1856, 1 H. & N. 247) laid it down in the course of the argument that there is a distinction between persons who come on business and those who come on invitation. While Baron Bramwell in the course of his judgment said that if a person asked a visitor to stop at his house and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, the latter could maintain no action. Again in the case of *Chapman* v. *Rothwell* (1858, E.B. & E. 168) Mr. Justice Erle remarked that there was a distinction between a visitor who must take care of himself and a customer who as one of the public is invited for the purpose of business carried on by the defendant.

In *Indermaur* v. *Dames* (*sup.*) Mr. Justice Willes in delivering the judgment of the Court of Common Pleas dealt with the position of a person who resorts to the premises in course of business. His Lordship said that a customer was only one of a general class of persons coming to premises by the invitation express or implied of the occupier. The learned judge laid it down that members of this class are entitled to protection from danger, and are entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trapdoor left open, unfenced, or unlighted. Taking the instances of a customer at a shop, his Lordship said: "This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns him; and if a customer were, after buying goods, to go back to the shop in order to complain of their quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit."

The judgment in the last-mentioned case is important in that it in the first place distinguished the two classes of persons coming to the premises, in the second place defined more clearly than

heretofore the exact class of person entitled to what we may call the higher degree of protection, and in the third place defined the nature or degree of protection. As to the first point, the distinction was drawn in the judgment of the court between mere visitors or volunteers resorting to the premises on the one hand, and on the other hand persons who go, not as mere volunteers or licensees or guests, but who go upon business which concerns the occupier, and upon his invitation express or implied. As to the second point, the persons who are entitled to the higher degree of protection sufficiently appear from the distinction so drawn. As to the third point, the court considered it settled law that a person, going to the premises upon the invitation express or implied of the occupier, if using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

The case of the owner of premises let as flats who fails to keep the common staircase in a proper state of repair and free from danger, and who may thereby become liable to persons using the staircase at the invitation express or implied of a tenant, may be here mentioned. But it appears to us that although cases of this kind are often cited in support of the general doctrine laid down in *Indermaur* v. *Dames* (*sup.*), these cases very readily obscure the true nature of the doctrine, for the fact of letting premises with a common staircase raises a different relationship in point of law. However, the case of *Miller* v. *Hancock* (69 L.T. Rep. 214; (1893) 2 Q.B. 177) may be cited here. In that case the court held that there was an implied obligation upon the owner of the premises to keep the staircase in repair, and that the ordinary rule of easement law that he who owns the easement must do the necessary repairs for the enjoyment of the easement did not apply.

There is one type of case which, although connected with the duties of occupiers of premises towards other persons, we do not intend to deal with. This is the case of injury to passers-by, who, through some defect of the premises, are injured, not as invitees, but as mere members of the public using the highway adjoining the premises. Although these highway cases stand on a peculiar

footing, we may mention here the case of *Tarry* v. *Ashton* (34 L.T. Rep. 97; 1 Q.B. Div. 314). The facts in that case may be briefly stated as follows: The defendant occupied a house from the front of which a large lamp hung over the highway. The lamp fell on the plaintiff and injured her while making use of the highway. The lamp was out of repair through decay, but this was not, as the jury found, known to the defendant. The fall was caused by the fall of the man who was working at the lamp. His ladder slipped owing to the wet and windy weather, and to save himself he clung to the lamp. The fastening of the lamp to the premises was, on examination after the accident, found to be in a decayed state. This man was employed by the defendant for the purpose of blowing water out of the gas pipes. The court held that the defendant was liable.

In the recent case of *Pritchard* v. *Peto* ((1917) 2 K.B. 173), which is the case we referred to in the opening lines of this article, the plaintiff was an "invitee." He was on the doorstep of the premises, and when there a piece of the cornice from the top of the house fell on him, injuring him. It was admitted by him that the house was in apparently good repair, and that the defendant, the occupier, did not know of the defect in the cornice. The defect was an old one due to the action of the weather upon the cement. The learned judge—Mr. Justice Bailhache—held that the defendant owed the same duty to the plaintiff as was owed to the plaintiff in *Indermaur* v. *Dames* (*sup.*), which was quite a different duty to that owed by the defendant to the plaintiff in *Tarry* v. *Ashton* (*sup.*). But his Lordship pointed out that it was necessary to show that the defendant was or ought to have been aware of the decay of the cornice, whereas it was admitted that she was ignorant of it, and it was not shown that the fact of her ignorance was due to neglect of some reasonable precaution. In the circumstances the plaintiff failed in the action.

In these days, when it is hard to get repairs, even of the most urgent kind, effected, householders can but feel some anxiety about the state of their premises, and, in particular, whether that state of disrepair will not lead to some accident to those upon their premises as "invitees." In the recent case, however, to which we have just referred the latent defect does not appear to

have been in any way due to the war. How far war circumstances would be an element in deciding the question of negligence in such cases has yet to be determined.—*Law Times.*

SEIZURE OF GERMAN-OWNED PROPERTY.

The Trading-with-the-enemy Act of the United States provides for the appointment "of an official known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy," etc.

Acting under this statute the President by executive order of October 12, 1917, empowered the alien property custodian "to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall perscribe, of any money or other properties owing or belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the Trading-with-the-enemy Act, which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held."

Provision is made for the payment to the alien-property custodian of any indebetedness owing to an alien enemy or for the delivery to him of any property belonging to such enemy, even though such payment or delivery may not be mandatory under the terms of the Act.

The property to be seized under the legislation to which we are referring is captured not as booty of war, but to prevent it from being used for purposes of hostility against the United States.—*Case and Comment.*

An adult daughter who is a competent automobile driver, in taking a car in which her father has a partnership interest for business purposes, with his implied consent, for a pleasure trip on which her mother accompanies her, is held not to be the servant of her father, in *Woods v. Clements*, L.R.A. 1917E, 357, so as to render him liable for an injury inflicted by her negligence upon a traveler on the highway.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SHIP — CHARTERPARTY — BILL OF LADING — CONSTRUCTION — CONDITION IN CHARTERPARTY THAT BILL OF LADING TO BE "CONCLUSIVE PROOF OF CARGO SHIPPED"—INCORPORATION OF CONDITIONS OF CHARTERPARTY IN BILL OF LADING.

Hogarth Shipping Co. v. *Blyth* (1917) 2 K.B. 534. This case turns upon the construction of a bill of lading. The bill of lading in question was for a specified number of bags of sugar, but it was qualified by the words "weight measure quality contents and value unknown" but it also contained the words "freight and all other conditions and exceptions as per charterparty." The charterparty contained the following clause "The Captain to sign eastern trade bills of lading which are to be deemed to be conclusive proof of cargo shipped, and their conditions to form part of this charterparty." At the port of discharge there was a shortage in the number of bags, but evidence was given that all the bags placed on board had been delivered. The question was then raised whether such evidence was admissible in the circumstances. Lush, J., on a case stated by arbitrators, thought that the conclusive clause in the charterparty was incorporated in the bill of lading, but it was conclusive only as to the number of bags but not as to their contents, and that it was open to the shipowners to shew that they had delivered all the sugar put on board. The Court of Appeal (Eady, and Scrutton, L.JJ., and Bray, J.), came to the conclusion that the conclusive clause in the charterparty was not incorporated at all in the bill of lading, because it was inconsistent with the express terms of the bill of lading, which stated that "weight measure quality contents and value unknown," Scrutton, L.J., and Bray, J., were of the opinion that the only conditions of the charterparty incorporated in the bill of lading were such, if any, as were to be performed by the consignee, including therein obligations on the shipowner, qualifying or relevant to such conditions. It may be observed that the appeal from Lush, J., was dismissed, but that learned Judge held that the shipowners were liable for the value of the missing bags, but not for their alleged contents, and all the judges of appeal consider that the shipowners were not liable even to that extent, and therefore if there had been a cross-appeal it would have been allowed.

ARBITRATION—POWER OF ARBITRATOR TO ORDER SECURITY TO BE GIVEN FOR COSTS—ARBITRATION ACT 1889 (52-53 VICT. C. 49) S. 2, 1ST SCHEDULE CLS. (*f*) (*i*)—(R.S.O. c. 65, s. 6, SCHED. A. CLS. (*i*) (*l*).)

In *Re Unione Stearinerie Lauza & Weiner* (1917) 2 K.B. 558. In this matter the simple question was whether or not an arbitrator has under the Arbitration Act, s. 2, and the form of submission set out in the schedule to the Act (see R.S.O. c. 65, s. 6 and sched. A., cls. (*i*) (*l*).) any power to order a party to the reference to give security for the costs of the opposite party. A Divisional Court (Lord Reading, C.J., and Avory, and Shearman, JJ.), decided that he had not that power.

MAINTENANCE OF SUIT—MAINTAINED ACTION SUCCESSFUL—LIABILITY OF MAINTAINER.

Neville v. *London Express Newspapers* (1917) 2 K.B. 564. The Court of Appeal (Eady and Scrutton, L.JJ., and Bray, J.), have dismissed an appeal from Lord Reading, C.J. (1917), 1 K.B. 402 (noted *ante* p. 179), holding that an action for unlawfully maintaining an action will lie against the maintainer, notwithstanding that the action maintained proved to be successful.

LANDLORD AND TENANT—COVENANT BY LESSEE FOR SELF AND ASSIGNS NOT TO SUB-LET WITHOUT LESSOR'S CONSENT—SUB-LEASE—FURTHER SUB-LEASE BY SUB-LESSEE WITHOUT CONSENT—LIABILITY OF LESSEE.

Mackusick v. *Carmichael* (1917) 2 K.B. 581. This was a counterclaim by a lessor against his lessee for breach of covenant by the lessee that he and his assigns would not sub-let the demised premises without the consent of the lessor. The circumstances were that the lessee had sub-let part of the demised premises with the consent of the lessor, and that this sub-lessee had sublet without the leave of the lessor. The question therefore to be determined was whether the sub-lessee was "an assign" of the original lessee within the meaning of the covenant, and Atkin, J., held that she was not.

CHARTERPARTY—DEMURRAGE—ARRIVAL OF SHIP IN OR OFF PORT OF DISCHARGE—CONDITION PRECEDENT TO RUNNING OF LAY DAYS—USELESSNESS OF ARRIVAL.

Owners of S. S. Platá v. *Ford* (1917) 2 K.B. 593. This was an action by shipowners for demurrage. The charterparty provided that the ship should discharge her cargo at a certain rate "time to count twenty-four hours after arrival in or off port

of destination whether berth available or not." Her port of discharge was Havre and in the course of her voyage she received notice that if she went to Havre she would be sent back to Cherbourg, a distance of 75 miles, to await her turn when she could be received at Havre. Accordingly the vessel put in to Cherbourg and remained there several days until she received permission from the French authorities to proceed to Havre. Bailhache, J., on a case stated by an arbitrator held that the lay days did not begin to run until the vessel actually arrived in or off Havre; and the fact that it would have been useless to proceed there sooner than she did did not excuse her arrival at Havre as a condition precedent to the running of lay days.

CHARTERPARTY—TIME CHARTER—HIRE TO CEASE ON LOSS OF SHIP—REQUISITION OF SHIP BY ADMIRALTY—LOSS BY WAR RISKS—RIGHT OF CHARTERERS TO SHARE IN ADMIRALTY COMPENSATION.

London American M. T. Co. v. Rio de Janerio T. L. & P. Co. (1917) 2 K.B. 611. This was an action by shipowners to recover the amount due for hire of a vessel under a charterparty. The charterparty was made in 1914, and provided for the use of the vessel by the charterers for a period of eight years, but, if the ship was lost in the meantime, hire was to cease from the day of its loss. The vessel was requisitioned by the Admiralty on the terms that if she was lost by war risks compensation based on her value would be paid. Shortly afterwards the vessel was sunk by the enemy. The defendants the charterers claimed to be entitled to a share of the compensation payable by the Admiralty; and the action was brought to determine whether or not they had any such right, and Rowlatt, J., who tried the action, held that the compensation was in the nature of insurance money, and that the rights of the charterers having ceased the moment the vessel was lost, they had no right to participate in the compensation.

ADMIRALTY—MARITIME LIEN—DISCHARGE OF LIEN BY VOLUNTEERS AFTER SALE OF VESSEL—ACTION IN REM FOR REIMBURSEMENT—DOCTRINE OF SUBROGATION.

The Petone (1917) P. 198. This case involved the consideration of the doctrine of subrogation. The circumstances of the case were briefly as follows: The plaintiff's claim was *in rem* against the *Petone* for wages paid to the master and crew and for disbursements made by the master, which the plaintiffs had paid when acting as agents of former owners of the vessel, in order to effect a sale of it. No assignment had been made to the

plaintiffs of the claims which they thus discharged, and which constituted a maritime lien on the vessel. The vessel was sold, and subsequently re-sold to the defendants. The plaintiffs claimed to be subrogated to the rights of the master and crew in respect of the claims which they had thus paid off: but Hill, J., held on an application to set aside the writ as disclosing no cause of action, that, in the absence of any assignment of the claims of the master and crew, the plaintiffs were not entitled to any lien in respect of the payments they had made, and the writ was accordingly set aside.

PRIZE COURT — TRADING BETWEEN FOREIGN AND BRITISH BRANCHES OF ENEMY FIRM—GOODS TRANSMITTED TO BRANCH IN ENGLAND OF ENEMY FIRM.

The Achilles (1917) P. 218. Evans, P.P.D., in this case held that goods shipped after the outbreak of the war on a British vessel by the Bangkok branch of an Austrian firm, and delivered to the warehouse of the firm in Manchester, were liable to condemnation as prize.

ADMIRALTY — SALVAGE — NEUTRAL VESSEL — CARGO OF MUNITIONS FOR FRENCH GOVERNMENT—ATTACK BY SUBMARINE—SERVICES RENDERED BY BRITISH ARMED TRAWLERS.

The Carrie (1917) P. 224. This was a claim for salvage by the officers and crews of two British armed trawlers. The vessel salved was a Swedish vessel carrying munitions for the French Government. She was stopped by an enemy U-boat and her crew ordered to take to the boats. The submarine was preparing to sink her, when two British armed trawlers appeared, and she desisted. The crew refused to return to the vessel and the trawlers took her in charge and brought her to port. It was contended that in performing this service they were merely performing a public duty in protecting the property of the French Government, but Hill, J., held that such public duty did not extend to the vessel itself, and that the salvage was not only from attack by the enemy, but also, owing to the action of the crew, a salvage from maritime perils and he awarded £750.

COMPANY—MEETING—VOTING BY PROXY—APPOINTMENT OF PROXIES TO BE LODGED TWO DAYS BEFORE MEETING—ADJOURNED MEETING—APPOINTMENTS OF PROXIES LODGED AFTER MEETING BUT BEFORE ADJOURNED MEETING.

McLaren v. *Thomson* (1917) 2 Ch. 261. This was an appeal from the decision of Astbury, J. (1917) 2 Ch. 41 (noted *ante* p. 339), holding that where the articles of a limited company require

the appointments of proxies to be lodged two clear days before the meeting at which the proxies are to act, the article is not complied with by lodging the appointments after the meeting is adjourned and two days before the day to which it is adjourned. The Court of Appeal (Eady, Bankes and Warrington, L.JJ.) agreed with Astbury, J., and dismissed the appeal.

WAR—PATENT OF ALIEN ENEMY—PETITION FOR REVOCATION OF PATENT—APPLICATION TO AMEND PATENT BY DISCLAIMER.

In re Stahlwerk (1917) 2 Ch. 272. This was a petition to revoke a patent of invention. The respondent was an alien enemy and asked that the patent in question might be amended by way of disclaimer. Sargant, J., held that this was by way of defence and therefore the respondent, though an alien enemy, was competent to ask that relief.

COMMISSION AGENT—CONTRACT FOR INDEFINITE PERIOD—DETERMINATION OF CONTRACT—"REPEAT ORDERS"—CONTINUANCE OF COMMISSION AFTER AGENCY TERMINATED.

Levy v. *Goldhill* (1917) 2 Ch. 297. The plaintiff in this case, in the course of travelling for his own business, obtained orders for other traders on terms of commission, and for this purpose the defendant agreed with the plaintiff as follows "I agree to pay you half profits on receipt of orders (provided the customer is good), same applies to repeats on any accounts introduced by you." The defendant subsequently terminated the relation instituted by the agreement, without giving any prior notice of his intention to do so. The plaintiff claimed that the defendant was not entitled to terminate the agreement without notice, and also claimed commission on "repeat" orders received by the defendant after the termination of the agreement. Peterson, J., who tried the action, held that there was no employment of the plaintiff by the defendant in the strict sense, and that the defendant was entitled to terminate their relations without notice, but he also held that the plaintiff was entitled to commissions on orders whenever received if they came from customers whom he had introduced to the defendant. He held that there had been a breach of the agreement because the defendant had repudiated his liability to pay commission in respect of repeat orders, and in discussing the measure of damages he says: "What has to be ascertained is the present value of the probability or possibility of the defendant receiving orders in the future from customers who were introduced by the plaintiff before the relations between him and the defendant were terminated." An inquiry we may observe of a somewhat difficult nature.

Reports and Notes of Cases.

Province of Alberta.

SUPREME COURT, APPELLATE DIVISION.

Harvey, C.J., Scott, Stuart, and Beck, JJ.] [37 D.L.R. 171.

Re Small Debts Recovery Act.

Constitutional law—As to judiciary—Appointive powers—Justices of Peace.

The Small Debts Recovery Act (Alta.), which confers a limited civil jurisdiction on Justices of the Peace, is within the legislative powers of a province, under sec. 92 (14) of the B.N.A. Act, as to its administration of justice, and is no encroachment upon the Dominion appointive powers as to the judiciary under sec. 96 of the B.N.A. Act.

See also *Polson Iron Works* v. *Munns* (Alta.), 24 D.L.R. 18 (annotated); *Colonial Investment* v. *Grady*, 24 D.L.R. 176, 8 A.L.R. 496; *Kelly* v. *Mathers*, 23 D.L.R. 225, 25 Man. L.R. 580; *Re Farmers Bank*, 28 D.L.R. 328, 35 O.L.R. 470.

H. H. Parlee, K.C., for the Act.
Frank Ford, K.C., contra.

ANNOTATION ON ABOVE CASE FROM 35 D.L.R.

The Alberta Act for expediting the decision of constitutional and other legal questions is as broad in its terms as our own Ontario Act, R.S.O. 1914, c. 85, authorizing the Lieutenant-Governor-in-Council to refer to the Supreme Court 'any matter which he thinks fit to refer'; and the Act referred in the principal case is, not an actual existing statute, but only a proposed Act. I merely mention this to save any future investigator wasting as much time as the writer of the present note wasted in hunting for the statute among the Alberta Acts. True, Harvey, C.J., says in his opening sentence that it is only "a proposed Act"; but sometimes the things one is most likely not to notice are those which lie immediately under one's nose.

It is a strange thing that although over fifty years have passed since the Confederation Act came into force, no authoritative and comprehensive interpretation of s. 96 which provides as follows:—

> 96. The Governor-General shall appoint the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick,

has yet been given. The ambition of the present writer is to contribute

something towards that end. In the meanwhile the judgments which come the nearest to a comprehensive interpretation appear to be those of the principal case, and that of Weldon, J., in *Ganong* v. *Bayley* (1877), 1 P. & B. 324, which is referred to only very slightly in the above judgment of Harvey, C.J. None of these judgments, however, state the jurisdiction possessed at Confederation by the courts referred to in s. 96 as "District and County Courts;" and, with submission, an examination of the pre-Confederation statutes shews one or two errors of fact.

Weldon, J., in *Ganong* v. *Bayley*, says:—

> "At the time of the passing of the Confederation Act, there were Superior Courts in all the provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada there were the districts of Gaspe, of Saguenay, and of Chicoutimi; there were the County Courts existing in Upper Canada, and (*sic*) subsequently were established in New Brunswick, Nova Scotia, and Prince Edward Island. It appears to me these were the courts that the Governor-General was to appoint the judges to, when established, or as vacancies may occur, and to provide for them salaries, allowances, and pensions. There were, also, at the time of the passing of the Confederation Act Commissioners' Courts for the summary trial of small causes in what is now the Province of Quebec, and there were Division Courts in Ontario. No reference is made to them in the said Act."

To expand this passage in the judgment of Weldon J. may be said to be the principal object of this note. I shall not dwell on the subject of "Superior Courts." I dealt with that portion of the section to the best of my ability in an annotation to the case of *Polson Iron Works* v. *Munns* (1915), 24 D.L.R. 18. I may, however, supplement what is there said by a reference to *Colonial Investment and Loan Co.* v. *Grady* (1915), 24 D.L.R. 176, 8 A.L.R. 496; and *Re Public Utilities Act, City of Winnipeg* v. *Winnipeg Electric R.W. Co.* (1916), 30 D.L.R. 159, 26 Man. L.R. 584. Neither shall I labour the point taken by Sir John Thompson in his famous Report on the Quebec District Magistrates Act, 1888 (Hodg. Prov. Legis. 1867-1895, p. 358 *seq.*), that the words "Judges of the Superior, District and County Courts," include all classes of judges like those designated, and not merely the judges of the particular courts which at the time of the passage of the Federation Act happened to bear those names. The judgments in the principal case support this, if anything more than common sense need be appealed to; and reference may also be made to *In re Small Debts Act* (1896), 5 B.C. 246; and *Burk* v. *Tunstal*, 2 B.C.R. 12; *King* v. *King* (1904), 37 N.S. 294; and Prov. Legisl. 1901-3, p. 33.

My object in the present note is to deal with the meaning and effect of the words "District and County Courts in each province," in the section. Incidentally it will, I think, appear that Beck, J., has erred in supposing that there were County Courts in all the provinces when the Confederation Act was passed on March 29th, 1867; and also in supposing that there was, at that time, "neither in the Province of Quebec or in any other province, any court whose legal appellation was District Courts."

There were District Courts, and District Court Judges in Upper Canada which I shall deal with first. That there were County Courts in Upper

Canada is not disputed, and anyone who looks at the Canadian Almanac for 1867, which is in Osgoode Hall Library, can see their names and counties. And as to District Court Judges, C.S.U.C. 1859, c. 128, provides as follows:—

"92. The Governor may, from time to time, by proclamation under the great seal declare that from and after a certain day to be named therein, a certain part or certain parts or the whole of the unorganised tracts of country in this province bordering upon and adjacent to Lakes Superior and Huron, including the Islands in those Lakes which belong to this province, and also all other parts of Upper Canada which are not included within the limits of any County or Township, shall form a Provisional Judicial District, or Provisional Judicial Districts, and define the limits of such Provisional Judicial District or Districts . . .

94. The Governor may appoint in each such Provisional Judicial District a fit and proper person being a barrister of not less than five years standing at the Bar of Upper Canada *to be a judge therein*, and such judge shall have the same powers, duties, and emoluments, and be paid in the same manner as a County Judge in Upper Canada, and he shall hold his office during pleasure and shall reside within the limits of his Provisional Judicial District . . .

96. The laws now in force with respect to the holding of Courts of Quarter Sessions of the Peace, County Courts, and Division Courts in the several Counties in Upper Canada and to the composition, power *and jurisdiction* of such Courts respectively . . . shall extend and apply to such Provisional Judicial Districts, and such Districts shall be deemed and held to be Counties for all and every the purposes of such laws."

The jurisdiction of such Upper Canada District and County Court Judges on March 29th, 1867, the date of the passing of the British North America Act, 1867, is set out in C.S.U.C. (1859), c. 15, there being no amendment before Confederation. This Act provides as follows:—

"16. The said courts shall not have cognizance of any action:

1. Where the title to land is brought in question; or

2. In which the validity of any devise, bequest or limitation under any will or settlement is disputed; or

3. For any libel or slander; or

4. For criminal conversation or seduction; or

5. Of any action against a Justice of the Peace for any thing done by him in the execution of his office if he objects thereto.

17. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction and hold plea:

1. In all personal actions where the debt or damages claimed do not exceed the sum of $200;

2. In all causes and suits relating to debt, covenant and contract, to $400, when the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant; and

3. To any amount on bail bonds given to a sheriff in any case in a County Court, whatever may be the penalty; and

4. On recognizances of bail taken in a County Court, whatever may be the amount recovered or for which the bail therein may be liable.

33. The County Courts in Upper Canada shall possess the like jurisdiction and authority in respect of the matters hereinbefore mentioned as was possessed by the Court of Chancery on May 23, 1853.

34. Any person seeking equitable relief may (personally or by attorney) enter a claim against any person from whom such relief is sought, with the Clerk of the County Court of the County within which such last mentioned person resides, in any of the following cases, that is to say:

1. A person entitled to and seeking an account of the dealings and transactions of a partnership dissolved or expired, the joint stock or capital not having been over $800;

2. A creditor upon the estate of any deceased person, such creditor seeking payment of his debt (not exceeding $200) out of the deceased's assets (not exceeding $800);

3. A legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy (not exceeding $200 in amount or value) out of such deceased person's personal assets (not exceeding $800);

4. A residuary legatee, or one of the residuary legatees of any such deceased person seeking an account of the residue and payment or appropriation of his share therein (the estate not exceeding $800);

5. An executor or administrator of any such deceased person seeking to have the personal estate (not exceeding $800) of such deceased person administered under the direction of the judge of the County Court for the County within which such executor or administrator resides;

6. A legal or equitable mortgagee whose mortgage has been created by some instrument in writing, or a judgment creditor having duly registered his judgment, or a person entitled to a lien or security for a debt seeking foreclosure or sale or otherwise to enforce his security, where the sum claimed as due does not exceed $200;

7. A person entitled to redeem any legal or equitable mortgage or any charge or lien and seeking to redeem the same, where the sum actually remaining due does not exceed $200;

8. Any person seeking equitable relief for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of $200;

35. Injunctions to restrain the committing of waste or trespass to property by unlawfully cutting, destroying or removing trees or timber, may be granted by the judge of any County Court, and such injunctions shall only remain in force for a period of one month, unless sooner dissolved on an application to the Court of Chancery; but the power to grant such injunction shall not authorize the prosecuting of the suit in the County Court, and the injunction may be extended and the suit further prosecuted to judgment or otherwise in the Superior Court in the like manner as if the same had originated in that court."

The existence of such District Court judges as above mentioned in Upper Canada would alone account for the word "District" in s. 96.

In Quebec, however, the term "District" was an alternative to the term "Circuit," although the latter was generally used. Thus C.S.L.C. 1861, c. 76, provides:—

"5. Lower Canada is and shall be divided into twenty Districts, in the manner set forth in the following schedule . . .

6. [Established certain new Districts.]

7. There shall be the same officers connected with the administration of justice in each of the new Districts as in the old Districts, subsisting immediately before the time when the said new Districts were constituted . . .

C. 79, s. 1. A Court of Record to be called the Circuit Court and having jurisdiction throughout Lower Canada shall continue to be holden every year in each of the Districts and Circuits in Lower Canada, by one of the judges of the Superior Court.

S. 2. The Circuit Court shall have cognizance of and shall hear, try and determine all civil suits or actions, as well those where the Crown may be a party as others (those purely of Admiralty jurisdiction excepted), wherein the sum of money or the value of the thing demanded does not exceed $100, and wherein no writ of *capias ad respondendum* is sued out.

C. 82, s. 29. Whenever any real property is situate partly in one District or Circuit, and partly in another, the plaintiff may bring any real, or mixed action in regard to such real property in either of the said Districts or Circuits at his option . . ."

But, as Sir John Thompson tells us in his report on the Quebec District Magistrates Act, 1888, "the Circuit Court was at the time of the Union, in one sense, a branch of the Superior Court. The powers and duties of Superior Court judges included the powers and duties of Circuit Court judges. When the Governor-General appointed a judge of the Superior Court under s. 96 of the British North America Act, the appointment carried with it an appointment as Circuit Court judge." See Legislative Power in Canada, pp. 145-6.

Therefore, strictly speaking, I, perhaps, need not have referred to the Quebec Circuit Court here, but the fact that "District" was an alternative name to "Circuit" helps to explain the use of the word "District" in s. 96.

As to New Brunswick, County Courts were not established there until the passing of 30 Vict. c. 10, on June 17, 1867. This is entitled, 'An Act to establish County Courts.' But as it was passed before July 1, 1867, when the Federation Act came into force by proclamation, and it may, possibly, be contended that s. 96 of the latter Act extends to judges appointed under it, I will deal also with it. It provides, as follows, as to the jurisdiction of the new County Courts:—

"7. The courts shall not have cognizance of any action:

1. Where the title to land is brought in question; or

2. In which the validity of any devise, bequest, or limitation is disputed except as hereinafter provided; or

3. For criminal conversation or seduction; or

4. For breach of promise of marriage; or

5. Of any action against a Justice of the Peace for any thing done by him in the execution of his office.

8. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction and hold plea in all personal actions of debt, covenant, and assumpsit, when the debt or damages claimed do not exceed the sum of $200, and in all actions of tort when the damages do not exceed $100, and in action on bail bonds given to the sheriff in any case in a County Court whatever may be the penalty or amount sought to be recovered."

S. 25 adds jurisdiction in the case of over-holding tenants; and s. 35 a certain jurisdiction in criminal cases.

As to Nova Scotia; County Courts were not established till the Act, 37 Vict. c. 18, 'An Act to establish County Courts,' assented to May 7, 1874. I, therefore, am not called upon to deal with them here as they cannot, probably, affect the interpretation of s. 96, but it may be stated that the exceptions to their jurisdiction are the same as in the case of New Brunswick, while in actions *ex contractu*, the limit is $400, and in actions of tort the limit is $200.

Lastly, as to Prince Edward Island, there do not appear either on March 29, 1867, or on July 1, 1867, to have been any courts called "County Courts" or "District Courts," but 23 Vict. c. 16, passed on May 2, 1860, being "An Act relating to the recovery of small debts," empowered the Lieutenant-Governor-in-Council "to constitute and appoint within each of the Counties of this Island not more than seven courts for the recovery of small debts, and to appoint in each court *three judges or commissioners* to adjudicate in each court, each court to have jurisdiction only within the County in which it is held, except in the cases hereinafter mentioned; provided always, that if, by reason of sickness or other unavoidable cause, not more than two *commissioners* shall be present on any day appointed for the hearing of cases, in any of the said *Courts of Commissioners* . . ."

Throughout the Act these courts are called "Courts of Commissioners" (*e.g.*, secs. 6, 35, 47, 96, 98, 99), and the judges are spoken of as "Commissioners," or (s. 78) "Commissioners for the County."

Sec. 7 provides:—

"The said courts shall have jurisdiction in matters of debt and trover for the recovery of sums not exceeding £20 (exclusive of interest), but not in any action brought for the recovery of any sum arising upon any contract or case when the title to real estate or boundary lines must be adjudicated upon, nor to any sum won by means of any wages or gaming, nor to any penalty incurred by any Act of this Island, unless so directed by any such Act, nor to any debt whereof there has not been a contract, undertaking or promise to pay within six years before the commencement of the action."

Sec. 8 provides that:—

"No action or suit, except the same commences by *capias* as hereinafter mentioned, for any sum for rent due upon any lease or demise or agreement for a lease or demise of any lands, houses, tenements or hereditaments in this Island, whereof the area shall exceed one acre of land, whether in writing or by parol, or for rent due between landlord and tenant, in respect of the occupation of any such lands, houses, tenements, or heredita-

ments shall be commenced in any court to be constituted under this Act, unless the sum or amount demanded cannot in any way be made the subject of a distress . . ."

This Act was amended by an Act, 25 Vict. c.6., assented to on April 17, 1862, repealing certain sections of the original Act prohibiting the arrest or imprisonment of any person on *mesne* or final process unless the sum for which the person was arrested or imprisoned amounted to more than £10, and making some new provisions in that matter. In this Act the judges are spoken of as "Commissioners."

So in the subsequent P.E.I. Acts, 27 Vict., c. 16, passed May 2, 1864, 29 Vict., c. 15, passed May 11, 1866, and 30 Vict., c. 4, passed May 17, 1867, authorizing the establishment of additional Small Debts Courts at certain places, the judges are spoken of as "Commissioners," or "Judges or Commissioners," or, in a marginal note, as "Small Debt Commissioners."

Nowhere are these Prince Edward Island Judges spoken of as "District Judges" or "County Court judges," and, therefore, it seems safe to say that the jurisdiction exercised by them throws no light on s. 96; but that the jurisdiction which will bring a judge within what is meant by "Judges of District and County Courts," is to be measured by reference to that exercised by the County Court Judges and District Court Judges in Upper Canada at Confederation; and possibly by that exercised by County Court Judges in New Brunswick under the New Brunswick Act above referred to.

In conclusion, I may add that the power to appoint County and District Court Judges in s. 96 of the British North America Act appears to carry with it the power to remove, although s. 99 applies only to Superior Court Judges: *Re Squier* (1882), 46 U.C.R. 474. See also *Niagara Election case* (1878), 29 C.P. 280; an article on the constitution of Canada, 11 C.L.T. 145, *seq.*; Todd's Parl. Gov. in Brit. Col., 2nd ed., pp. 46-7, 827, *seq.*, who treats, also, of powers of removal still existing under Imp. 22 Geo. III., c. 75; and an article on the right to remove County Court Judges, 17 C.L.T. 445, R.S.C. 1906, c. 138, provides for the removal of County Court Judges by order of the Governor-General-in-Council in certain cases.

Toronto. A. H. F. LEFROY.

Province of Ontario

FIRST DIVISION COURT OF THE COUNTY OF WATERLOO.

MANUFACTURERS LIFE INSURANCE CO. v. WILSON.

Life insurance—Contract—Promissory note given for premium—Nonpayment—Whether policy thereby avoided.

READE, Co., J.:—This action was brought to recover the amount of a promissory note made by the defendant in part

payment of the first year's premium on an insurance effected by the defendant with the plaintiffs.

In this contract with the plaintiffs the defendant undertook to accept the policy when issued and to pay the first year's premium, and also agreed that the policy should not take effect until it had been delivered and the first premium paid, and in the event of such or any premium being settled in whole or in part by cheque or note which is not paid when due the company should not be liable if death occur thereafter. The policy was issued and delivered to the defendant, but the note was not paid as agreed, and endorsed upon the policy is a condition that if any note or other obligation given in payment of a premium or any part thereof be not paid when due the policy shall be utterly void, but the note, cheque or other obligation shall nevertheless be paid.

It was clearly a part of the original contract between the plaintiffs and defendant that the continuance of the plaintiffs' liability upon the policy beyond the maturity of the note given should depend upon payment of the note or premium, and it is equally clear that it was a mutual agreement by and between the parties that the first year's premium should in any case be paid. It may well be understood that the insurance company would not enter into a contract for insurance and take all the necessary preliminary trouble of effecting and insuring and paying in most cases a commission on same, except upon the agreement that at least the first premium should be paid, and the express proviso in the condition endorsed on the policy that the note given shall nevertheless be paid, although for default in payment the policy should be void, is only an acceptance by the company of the defendant's undertaking that the first premium should be paid by him, and does not constitute an additional or extra condition in favour of the company to which the defendant had been no party. As a condition precedent to the acceptance by the plaintiffs of the defendant's application for insurance he expressly offers and they agree that in any case the first premium shall be paid. There is no provision for apportioning the premium under any circumstance as to death or otherwise and I cannot find that the defendant has the privilege in such a case of cancelling his own contract in that respect and considering the policy void for that purpose, by his default he can render the policy void, but he cannot by so doing render void his express contract that if the company accept his application and deliver to him a policy such as he applies for he will at least accept the same so far and for so long as to pay the first premium thereon, and I cannot find any

failure of consideration on the part of the company in respect of anything that they agreed to do. They have complied with their contract and the defendant must comply with his.

The case of *Royal Victoria Life Ins. Co.* v. *Richards*, 31 O.R. 483, is quite distingusihable from this and other cases. In some of these the policy was never accepted, and in others the policy was received, but in this particular case it was acted on and in force for some time.

Book Reviews.

Trial of Sir Roger Casement. By GEORGE H. KNOTT, M.A. (Edin). of the Middle Temple, Barrister-at-law. Toronto: Canada Law Book Company, Limited.

This was a trial for high treason resulting in the conviction of the accused. It naturally excited considerable interest, the prisoner having occupied a good position in society, and having held office under the British Government. The story is so well known that it is unnecessary to refer to it. From a legal standpoint it is of interest so far as it interprets the old statute of 25 Edw. III. chap. 2, known as the Treason Act of 1351. Mr. Justice Darling who gave judgment on the appeal thus refers to it: "The statute says, 'Whereas divers opinions have been before this time in what case treason shall be said, and in what not, the King at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth,' which is the statute of Edward III., and various treasons are defined and after the treason of levying war against the King in his Kingdom, there is defined because it is only, as has often been said, declaring common law, this particular treason." The words as translated and appropriate to this charge are "or be adherent to the King's enemies in his realm giving to them aid and comfort in the realm or elsewhere." It is the construction of those few words which gave rise to the argument addressed to the Court before whom the appellant was tried. The point raised by Mr. Sullivan, who appeared for the prisoner, was that the statute had neither created nor declared that it was an offence to be adherent to the King's enemies beyond the realm of the King and that the words meant that the giving of aid and comfort outside the realm did not constitute a treason which could be tried in this country, and that the only person who gave aid and comfort outside the realm was himself within the realm. The case was tried before the

Lord Chief Justice, Viscount Reading. On a motion to quash the indictment it was upheld and the defendant found guilty. The Court of Appeal upheld the verdict and dismissed the appeal, and the prisoner shortly afterwards suffered the extreme penalty of the law. He was ably defended by the eloquent counsel who was appointed for that purpose, and the trial was conducted with the fairness with which criminals are always treated in British courts.

The Law of Trade Marks and Designs in Canada. By RUSSEL S. SMART, B.A.,M.E., Toronto. Canada Law Book Co. Ltd. Cromarty Law Book Co., 1112 Chestnut St., Philadelphia. 1917.

This is in effect a continuation of the compend of information contained in volume 3 of the Commercial La Reports (annotated) published in 1904 by the Canada Law Book Co., edited by Mr. W. R. P. Parker. The present author has given us all the information contained in the volume referred to, together with a review of the cases affecting trade marks and designs up to the present time. At the end of the volume we have the Acts on the above subjects, the rules and forms, together with a classification of the British Act of 1905.

It will be seen, therefore, that the whole subject is covered, and it will be a great convenience to practitioners to have it all in one compact volume. Mr. Smart has done his work exceedingly well, as have also the publishers and printers. We are glad to see the use of large readable type as well as the convenient and logical arrangement of the salient features of the subjects under discussion.

Bench and Bar

APPOINTMENTS.

Hon. Wm. Pugsley, of the City of St. John, New Brunswick, K.C., to be Lieutenant-Governor in and over the Province of New Brunswick, vice his Honour Gilbert White Ganong, deceased (November 6th).

Hon. John Douglas Hazen, of the City of Ottawa, K.C., to be Chief Justice of the Appeal Division of the Supreme Court of New Brunswick and Judge of the Chancery Division of that Court (November 6).

Hon. John Douglas Hazen, Chief Justice of New Brunswick, to be Local Judge in Admiralty of the Exchequer Court for the Admiralty District of New Brunswick. (Nov. 9.)

Angus Lorne Bonnycastle of the City of Winnipeg, Manitoba, Barrister, to be Judge of the County Court of the Dauphin Judicial District in the said Province. (Nov. 13.)

War Notes.

Dreamers are still wasting time, paper and ink in discussing a "World Court" to settle international disputes and the when and how of a "lasting peace." But there will be no lasting peace until the milienium; and there will never be a World Court that will sit, tho' there will be some day soon a dictator who will arise to exercise a baneful bloody tyranny until he is dethroned by the One who shall "rule the nations with a rod of iron."

Flotsam and Jetsam.

The Problem of the Criminal Insane.

Every year, writes Dr. Paul E. Bowers in the November *Case and Comment*, society is unjustly sending to prison hundreds of insane and feebleminded persons who, in the course of their mental disturbances, have violated the penal laws. This culpable practice of punishing the mentally sick should, "in the course of justice," cease.

Society is being poorly protected when it sends insane and mentally defective individuals to penal institutions and then releases them from custody uncured, merely because their sentences have expired. Yet this irrational procedure is being continuously practised by our courts and boards of parole in all the States of the Union.

The Wisdom of Lawyers.

Judges and lawyers have contributed a liberal share to the stock of popular sayings.

It is Francis Bacon who speaks of matters that "come home to men's business and bosom," who lays down the axiom that "knowledge is power," and who utters that solemn warning to enamored benedicts, "He that hath a wife and children hath given hostage to fortune."

We have the high authority of Sir Edward Coke for declaring that "corporations have no souls," and that "a man's house is his castle."

The expression, "An accident of an accident," is borrowed from Lord Thurlow. "The greatest happiness of the greatest number" occurs in Bentham, but as an acknowledged translation from the jurist Becaria.

It is John Seldon who suggests that by throwing a straw into the air one may see the way of the wind.

—*Case and Comment.*

EXPERT TESTIMONY.

One of the common faults of experts is the desire to use many technical words, and thus confuse court and jury. In a case mentioned by Gilbert Stewart in his work on "Legal Medicine," a surgeon was called to testify on a trial for assault. He stated that he found the injured man "suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissues, which were in a state of tumidity." Now, of course, after a jury listened to such a description, it would seem that the patient was about to die or that his condition was exceedingly dangerous, while, as a matter of fact, the eminent follower of Hippocrates was describing an ailment which we commonly call "a black eye."

Mr. Justice Lush, one of the Judges of the King's Bench Division, England, to which he was appointed in 1915, died last month at what is called in England the "early age" of sixty-one. Though said not to be a very profound lawyer nor a very eloquent advocate, the late judge commended himself to the Bar by his force of character, thoroughness, shrewd common-sense and practical ability. His professional career commenced with his being a Solicitor, not going to the Bar until the age of four and thirty. His business experience doubtless added much to his usefulness as a judge.

The California Law Review in a recent issue gives reasons why the Code States of our neighbours to the south of us should adopt a Uniform Sales Act, and to that extent meet the convenience of the public. This reminds us of the necessity which exists in having a uniform system of laws and legal procedure for the Dominion of Canada. This should not be hampered by any tradition of the past or any mere matter of sentiment.

ANALYTICAL INDEX.