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*MARRIAGE AND DIVORCE IN CANADA.**

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* The scope of this article, prepared by Fraser Raney, M.A., LL.B., Barrister, with an introduction by W. E. Raney, K.C., appears by the following summary. Part I. appeared in the last issue; parts II and III are given in this number, and the remainder will appear in next issue.

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PART II.

1. CAPACITY FOR MARRIAGE.

The following definition expresses in popular form the idea that marriage is more than a contract; it is, as Story says, an institution. It is both a contract and a status resulting from a contract.

"Marriage is a bond between husband and wife which is based on nature and sanctioned by law, and which has as its object that they shall live together for life in the closest community to the exclusion of all other men and women."[41]

41. Renton & Phillmore, "Comparative Laws of Marriage and Divorce," London (1910), at p. 1.

The qualifications required by the law to enable a man and woman to enter into the contract of marriage may be classified as positive and negative.[42] The former are the essential requirements without which no marriage can exist; if these are not complied with the marriage is *ipso facto* void. The latter are restrictions, the breach of which does not render the marriage void, but (a) may render it voidable or (b) may subject the offending parties to penalties.

A void marriage is good for no legal purpose. Its validity may be attacked by any one at any time and the invalidity subsists without the judgment of any Court. Such, for instance, would be a marriage where either party had contracted a previous and still existing marriage, or where either party is under fourteen or an idiot A voidable marriage, on the other hand, is one in the constitution of which an imperfection exists which can only be inquired into during the lifetime of the parties in proceedings by one of them to have it declared void. If such a marriage is not attacked by one of the parties whilst the other is still alive, it is as good as any other, and it cannot be attacked collaterally either during the lifetime of the parties or afterwards. Circumstances which would give ground for such proceedings in the provinces having Courts with jurisdiction to entertain them are impotency, error, fraud, duress, or the want of the consent of parents.

2. Circumstances rendering the Marriage void.

(1) *The legal age of marriage.*—According to the civil law a valid marriage could not be contracted by a man under the age of fourteen or by a woman under the age of twelve years unless to prevent illegitimacy. This provision was adopted by the English common law and remains the law of all the provinces of Canada except Ontario, where the age is fourteen for both men and women,[43] and Manitoba, where it is sixteen.[44]

42. *Ib.* at p. 76.

43. R.S.O. (1914) ch. 148, sec. 16.

44. Statutes of Manitoba (1906), 5 & 6 Edw. VII. ch. 11, sec. 16.

(2) *Insanity* is a bar to marriage on the ground that without reason there can be no consent. Mere weakness of understanding is not enough. It is necessary that the insanity should have existed at the time of the alleged marriage. A valid marriage may be entered into in a lucid interval, provided the individual has not previously been found a lunatic by commission.

Drunkenness at the time of the marriage may or may not be a ground for nullity, depending upon the circumstances of each case.

(3) *Existing previous marriage.*—If there is an existing valid marriage on the part of either of the spouses, the subsequent marriage is bigamous and void and the offending party is liable to the penalty provided by the Criminal Code.

3. CIRCUMSTANCES RENDERING THE MARRIAGE VOIDABLE.

(1) *Impotence.*—At common law capacity for consummating marriage is implied in the marriage contract, and its absence renders a marriage voidable. A suit for nullity on this ground, however, must be brought within a reasonable time and during the lifetime of the parties. Neither party may set up his or her impotency for the purpose of dissolving the marriage.[45]

In the Province of Quebec such an action must be brought within three years of the marriage.[46]

(2) *Consent, error, fraud or duress.*—According to the common law the will or free consent of the parties is the very essence of the contract. If, therefore, a marriage is entered into when the parties or one of them is acting in error or is subject to fraud or duress, the marriage may be set aside by this party.

Error may be as to person, condition, fortune or quality according to the common law. If a party is tricked into marrying the wrong person, this is a ground for having the marriage set aside. The other three kinds of error—as to condition, *i.e.*, whether slave or free; as to fortune—whether rich or poor; and as to quality, whether a virgin or not, or of noble birth or not—are now of no avail.

45. *Norton* v. *Seton* (1819) 3 Phillmore's Reports, p. 147.

46. Civil Code of Quebec, Art. 117.

Fraud is a good ground for having a marriage set aside, especially if the person defrauded is an infant. In the case of adults the fraud perpetrated must be in respect of the essentials and not mere accidentals of the marriage. If the fraud is the fraud of third parties relief will not be granted.

Duress or force may be either corporeal or mental. In either case a marriage brought about by these means may be set aside. The amount of coercion required to be proved varies with the strength of the person affected. Fear of harm happening to the party coerced or to some third person must be established.

The provisions of the Civil Code of Quebec are the same as the common law in this respect, but after six months' cohabitation, and after having acquired full liberty or become aware of the error, the person coerced or in error, as the case may be, cannot have the marriage annulled.[47]

(3) *Relationship within the prohibited degrees.*—Consanguinity is the relationship of parties who are descended from the same ancestor, and is either in the direct or collateral line. In the direct line of ancestors and descendants, marriage is absolutely unlawful, however remote the relationship may be. In the collateral lines all beyond the third degree according to the civil law computation may contract valid marriages. Thus, first cousins may intermarry. Affinity is the relationship which arises from marriage, and is an impediment to the same extent as consanguinity, with the exception that Dominion legislation has permitted marriage between a man and his deceased wife's sister or niece.

In England since Lord Lyndhurst's Act (1835) all marriages between persons within the prohibited degrees of consanguinity and affinity are "absolutely null and void to all intents and purposes whatsoever."[48] But Lord Lyndhurst's Act has been held not to be applicable in Canada, and Canadian marriages within the prohibited degrees are therefore merely voidable as such marriages were in England before 1835, not "absolutely null and void."

47. Civil Code of Quebec, Arts. 148 & 149
48. Imp. Stat., 5 & 6 Wm. IV. ch. 54.

It will be noted that whilst by virtue of the Dominion legislation above referred to a man may lawfully marry his deceased wife's sister or his deceased wife's niece, he may not marry his brother's or his nephew's widow, and a woman may not marry her deceased husband's brother or his nephew or her deceased sister's husband. It is also to be noted that this prohibition extends to the half-blood, and includes illegitimate relationships. The table of prohibited degrees as set out in the appendix to the Ontario Act is in force in all the provinces.[49]

(4) *Spiritual or official positions.*—The Quebec Civil Code provides that the "impediments recognized according to the different religious persuasions as resulting from relationship, affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities."[50]

It has been held by the Quebec Courts that under this provision the Roman Catholic Church has power over its own members to annul the marriage of a person who has taken solemn vows as a monk or nun or is in holy orders.

"According to the jurisprudence of the country, the sentence of the Roman Catholic Bishop, regularly pronounced and deciding as to the validity or nullity of the spiritual and religious tie of

49. R.S.O. (1914) ch. 148

A man may not marry his	
Grandmother,	Wife's daughter,
Grandfather's wife,	Son's wife,
Wife's grandmother,	Sister,
Aunt,	Granddaughter,
Uncle's wife,	Grandson's wife,
Wife's aunt,	Wife's granddaughter,
Mother,	Niece,
Stepmother,	Nephew's wife,
Wife's mother,	or his
Daughter,	Brother's wife.
A woman may not marry her	
Grandfather,	Daughter's husband,
Grandmother's husband,	Brother,
Husband's grandfather	Grandson,
Uncle,	Granddaughter's husband,
Husband's uncle,	Husband's grandson,
Father,	Nephew,
Stepfather,	Niece's husband,
Husband's father,	Husband's nephew,
Son,	or her
Husband's son,	Husband's brother.

50. Civil Code of Quebec, Art. 127.

marriage between Roman Catholics, can and ought to be recognized by the Superior Court."[51]

In view, however, of the opinions of the majority of the Judges of the Supreme Court of Canada in answer to the questions submitted to the Court as to the authority of the Parliament of Canada to enact the proposed Marriage Act of 1912,[52] it seems probable that this pronouncement of the Quebec Court is not good law and would not be approved by the Supreme Court of Canada.

(5) *Difference of religion.* —While difference of religion of the contracting parties is not an impediment to a lawful marriage in any part of Canada, the Roman Catholic Church in Quebec has recently made a determined effort to establish its authority to declare invalid a marriage between two Roman Catholics or between a Roman Catholic and a Protestant, unless performed by a Roman Catholic priest. The Papal decree known as Ne Temere, which came into force on Easter Sunday, 1908, promulgated this doctrine. A majority of the Judges of the Supreme Court of Canada are, however, of the opinion that this decree is only binding on the consciences of members of the Roman Catholic Church, and cannot be given effect to by the Civil Courts of Quebec.[53]

(6) *Marriage of minors of legal age—Consent of parents.*—But in one respect Ontario has gone further than any of the other provinces. In 1907 the Provincial Legislature passed an Act[54] providing that where a form of marriage has been gone through between persons one of whom is under the age of eighteen, without the consent of the parent or guardian, the Supreme Court of the Province shall have jurisdiction in an action brought by the party who was under the stipulated age, to declare the marriage invalid, provided the parties have not lived together as man and wife and provided that the action is brought before the plaintiff attains

51. *Laramee* v. *Evans* (1880) 24 Lower Canada Jurist, p. 235; *Trowberg* v. *Terrill* (1900) 6 R. de J., p. 143.

52. See *In re Marriage Laws*, 46 S.C.R., p. 132.

53. *Ib.*

54. Now R.S.O. (1914) ch. 148, secs. 36 and 37.

the age of nineteen. The constitutionality of this Act has been doubted by high authority.[55] The other provinces have contented themselves with enacting legislation intended to discourage such marriages, without, however, affecting their status once the contract has been entered into. These acts contain provisions intended to insure publicity and that the parties are of competent age to marry without parental consent or that such consent has been given, and are all modelled after the English Act of 1834.[56] Quebec, Nova Scotia, British Columbia, the North West Territories, Alberta and Saskatchewan require parental consent, if the parties are under twenty-one, with the exception that in the North West Territories and Alberta and Saskatchewan where a female over eighteen and under twenty-one is living apart from her parents and earning her own living, their consent is not necessary. Manitoba and New Brunswick fix the age of emancipation in this respect at eighteen for both sexes. In Quebec a marriage contracted without the required consent can only be attacked by those whose consent was required, and then only within six months after the marriage.[57]

It is to be noted that it is only in respect of clandestine marriages, that is to say, the marriage of a person under the age of eighteen without consent of his or her parents, that Ontario has asserted its jurisdiction. Theoretically a marriage may be avoided in any province of Canada on the other grounds above indicated, but in Ontario these other grounds are practically a dead letter for want of a forum competent to make the declaration. Moreover, the jurisdiction of the Ontario Legislature to establish such a forum is doubtful.[58]

(7) *Communicable disease or feeble-mindedness.*—The fact that one of the contracting parties may have a communicable and incurable disease, the presence of which is not known to the other, is no legal ground for attacking the marriage and will not subject the party to any penalty at law. Nor is it a legal objection that

55. *May* v. *May* (1910) 22 O.L.R., p. 559.
56. Imp. Stat., 4 Geo. IV. ch. 76.
57. Civil Code of Quebec, Arts. 150 & 151.
58. *May* v. *May* (1910) 22 O.L.R., p. 559.

one or both of the parties are mentally defective, provided only that the deficiency falls short of what the Courts would recognize as insanity or idiocy, in which latter case the marriage would be void *ipso facto*.

PART III.

1. The Marriage Ceremony.

(1) *The three main classes of marriage ceremonies.*—(*a*) The purely civil ceremony, characteristic of France and Germany, and permitted in Great Britain, the United States, and Western Canada. (*b*) The purely religious, characteristic of Russia and other countries under the sway of the Greek Church. (*c*) The mixed civil and religious ceremony, characteristic of Great Britain, Canada, and many other parts of the British Empire.

By the canon law, the intervention of a priest was not essential to the validity of a marriage.[59] It has been held, however, though not without much dissent, that the English common law requires the presence of a priest.[60] Whether or not, on account of our different local conditions, this requirement of the common law is applicable to Canada, was for some time a subject of debate. It was finally held that, in the absence of legislative provision, this rule is to be followed, except where the country is so barbarous that a proper ceremony is impossible.[61]

In Ontario marriages irregularly celebrated are valid at the end of three years from the date of the ceremony, or on the death of either party within that period, if they have cohabited as man and wife. This is subject to the proviso that there was no legal disqualification to marry, and that neither party was lawfully married within the three years to anyone else.[62] Manitoba and other Provinces have similar provisions.

Prince Edward Island, British Columbia, the North-West

59. *Renton* v. *Phillmore*, *supra*, at p. 177.

60. *The Queen* v. *Millis* (1844) 10 C. & F., p. 534.

61. *Connolly* v. *Woolwich* (1867) 11 Lower Canada Jurist, p. 197.

62. R.S.O. (1914) ch. 148, sec. 35.

Territories and the Provinces of Alberta and Saskatchewan[63] have made provision for the performance of the marriage by civil officials in no way connected with any religious body or organization.

With some minor exceptions, the provincial laws as to the solemnization of marriage are much alike. The latest Ontario statute[64] may be taken as typical.

(2) *Who may solemnize marriage.*—In Ontario the following persons, being men and resident in Canada, may solemnize marriage: (*a*) Ministers and clergymen of every church duly ordained or appointed; (*b*) elders chosen by the Disciples of Christ Church for that purpose; (*c*) any duly-appointed Commissioner or Staff Officer of the Salvation Army commissioned to solemnize marriage: (*d*) elders or other officers of the Farringdon Independent Church chosen for that purpose, whose appointment has been previously filed in the office of the Provincial Secretary. Marriages according to the usages of the Quakers are also valid.

In Nova Scotia there is a provision requiring a provincial certificate as well as authorization by the congregation in the case of Salvation Army officers. Prince Edward Island requires such a certificate if the applicant for the privilege of performing the ceremony is not a regularly ordained clergyman. New Brunswick requires that all clergymen performing the ceremony be registered. Alberta also requires every religious denomination to send a list of persons authorized to perform marriages to the Vital Statistics Department every six months.[65] British Columbia requires a clergyman to have resided within the Province for one month before performing the ceremony.

British Columbia, the North-West Territories, Alberta and Saskatchewan, as already stated, allow civil marriages; British Columbia by registrars appointed under the Provincial Marriage

63. See Stat. Prince Edward Island, 6 Vict. ch. 8 (Sched.); 2 Wm. IV. ch. 16, secs. 4-6; Consolidated Ordinances of the North West Territories (1898) ch. 46; Rev. Stat. Saskatchewan (1909) ch. 132. Marriage Ordinance in force in the North West Territories (ch. 46 *supra*) is also in force in Alberta.

64. R.S.O. (1914) ch. 148.

65. Statutes of Alberta (1908) ch. 20, sec. 23, sub-sec. 4.

Act, and the North-West Territories, Alberta and Saskatchewan by Marriage Commissioners appointed by the Lieutenant-Governor in Council. In Prince Edward Island there is no direct authority given to justices of the peace to perform the marriage ceremony, but the statute appears to contemplate that marriage may be lawfully celebrated by license before a justice of the peace according to the form of the Common Prayer Book.[66]

In Quebec, priests, rectors, ministers, and other officers authorized by law to keep registers of acts of civil status, are qualified to perform the marriage ceremony.[67] As already stated, this is subject to the right of any religious denomination to impose penalties (not enforceable by the civil law) upon members of its communion who are married otherwise than by a priest or minister of their own church.

(3) *Authorization of marriage—Banns or license.*—The necessity of giving notice of the marriage, either by publication of banns or by obtaining a certificate or license after making the required affidavit, is common to the laws of all the Provinces. The differences are as to details only. The Ontario Act may again be taken as typical.

This Act provides that no minister or other authorized person shall solemnize any marriage, unless duly authorized so to do by license or certificate under the Act, unless the intention of the parties to intermarry has been published as required by the Act. Such publication must be by announcement once before or after the Sunday service from the pulpit in the pastoral charge where one of the parties has resided for at least fifteen days immediately preceding the publication. The marriage must take place not sooner than one week or later than three months from the publication. Licenses and certificates are issued by persons appointed by the Lieutenant-Governor. No irregularity in the issue of a license or certificate, where it has been obtained or acted on in good faith, will invalidate a marriage solemnized in pursuance thereof.

66. See Stat. Prince Edward Island, 3 Vict. ch. 8 (Sched.); 2 Wm. IV. ch. 16, secs. 4-6.

67. Civil Code of Quebec, Art. 129.

An affidavit setting forth where the marriage is to be performed, that there is no legal bar to the marriage (such, for example, as consanguinity within the prohibited degrees), as to residence in the city, county or district for fifteen days or proper publication of notice in lieu of residence, as to the age and condition of life of the parties, and as to the consent of parents (where necessary) must be sworn before the license to marry will be issued.[68]

Nova Scotia and the North-West Territories require publication of the banns on two consecutive Sundays, British Columbia on three. Manitoba has a provision dispensing with publication of the banns at the request of the head of a church, and this dispensation operates as a marriage license. In Quebec banns must be published three times unless a dispensation has been obtained.[69] Notice is published by the Registrar or Marriage Commissioner in British Columbia, the North-West Territories, Alberta and Saskatchewan, in lieu of banns where a civil marriage is to be performed.

(4) *Time, place, and witnesses.*—The provisions as to these requirements are all intended to conduce to publicity.

In Ontario a marriage must be performed between 6 o'clock in the morning and 10 o'clock at night, unless the clergyman officiating is satisfied that exceptional circumstances exist. The marriage need not take place in a consecrated church or chapel. Two adult witnesses must be present and must affix their names as witnesses to the record in the register.

Similar rules are in force in the other Provinces. British Columbia requires that civil marriages take place between 10 o'clock in the forenoon and 4 o'clock in the afternoon, and that all marriages must be "with open doors." Nova Scotia makes no provision at all as to time and place. In Quebec a marriage must be performed at the domicile of one or other of the parties, or the clergyman officiating is bound to verify and ascertain the identity of the parties.[70] Two witnesses are also necessary in Quebec.

68. R.S.O. (1914) ch. 148, sec. 19.
69. Civil Code of Quebec, Art. 57-59.
70. Civil Code of Quebec, Art. 63.

2. Registration of Marriages.

In Ontario a clergyman is required to enter in a register kept by him, immediately after the marriage, full particulars as to the name, age, occupation, religion, etc., of the persons married. Every issuer of marriage licenses is also required to endorse the same particulars upon a form supplied for that purpose, and to send the same to the Registrar General.

The laws of the Provinces differ but slightly as to provisions for registration. Nova Scotia requires that the return of particulars be made within ten days to the issuer of the license; Prince Edward Island, within six months, to the Island Surrogate; New Brunswick, at once, to the registrar of the division; Manitoba, to the municipal clerk; North-West Territories and Saskatchewan, within one month to the registrar of the division, and Alberta within one month to the registrar whose post-office is nearest.

(To be Continued.)

CANADIAN BAR ASSOCIATION.

The first annual meeting of this Association was held at Montreal, on the 19th and 20th days of last month. The attendance was large and representative, and the addresses were of a high order of merit. Sir James Aikins, K.C., President of the Association, and who has been re-elected to that position for the coming year, presided, and made an admirable chairman.

Even the legal profession does not yet realize the importance of this Association, and, of course, the average citizen cannot be expected to. The more one thinks about it, the more one is impressed with the far-reaching and beneficial effects that, if it is wisely guided and true to its mission, may flow from the deliberations of this Association, which gathers together the most representative and enterprising members of our profession from all parts of this wide Dominion.

The fact that such a good beginning has been made in the face of great difficulties (not the least of which is the geographical one) augurs well for its success and usefulness in the future. It

marks a great step forward in the history of the Dominion, so far as the welfare of the profession and the due administration of justice is concerned; and those who have worked so hard for it in its initial stages deserve both praise and encouragement.

Great care was taken in the selection of the Committees, and it is believed that practical developments of the objects of the Association will be shewn as the result of their work. It was decided to hold the next annual meeting in the city of Toronto, in June, 1916.

As soon as the report of the proceedings, which were of a very interesting character, is complete, further details will be given to our readers, together with as many of the addresses as can be found room for within the limits of our space.

Referring now to the various addresses, that of the President was illuminative as to what has been done and as to the proposed scope and work of the Association in the future, and was inspiring and full of hope and promise. The Minister of Justice, who was present, with other notables, gave an eloquent address. The address of the Hon. Arthur Meighen, K.C., bespoke the mind of a clear thinker, and shewed the Solicitor-General for Canada to be also an eloquent and cultured speaker. We listened with pleasure and satisfaction to what was said by Mr. E. F. B. Johnston, K.C., in his paper on "The Honour of the Profession." It was a well-considered effort, and clothed in forcible and appropriate language. It was once said by someone who had a responsibility as to the selection of Judges that the first requirement was that he should be a gentleman, in the proper sense of that term, and if he knew a little law, so much the better. We concur with him and with what Mr. Johnston said in that connection. The ethics of the profession is a subject which cannot be too strongly insisted upon, if we are to retain the confidence and goodwill of the public. It goes without saying that the address of Mr. Lafleur, on the "Uniformity of the Law," which is the subject most appropriate to the consideration of this Association, was in accordance with the high reputation of that learned counsel.

Our guests from the United States were Hon. James M. Beck and Mr. Estabrook, of New York. They were listened

to with the greatest interest and loudly applauded. The address of the latter, in which he eulogized the stand taken by England in connection with the present war and the duty laid upon neutral nations, especially referring to his own country, was an eloquent tribute to the mother of the Anglo-Saxon nations; the best of her sons could not have more happily expressed the loyalty and affection due to her.

It is gratifying to be able to record that this the first annual meeting of the Canadian Bar Association was a distinct and marked success.

THE CARRIE DAVIES TRIAL.

The trial and the verdict of acquittal in the case of Carrie Davies, charged with the murder of her employer, Charles A. Massey, reflect no credit upon the administration of criminal justice in the Province of Ontario.

The main facts of the case as regards the killing of Mr. Massey were simple, and may be shortly stated as follows: The wife of the deceased was away from the city for a week's holiday. Their son, aged fourteen, was living in the house, as was also the prisoner, being there as a domestic servant. The killing took place on a Monday evening. A newsboy came to the door about 6 o'clock and asked for money for the paper. The prisoner said that Mr. Massey was not in. The boy replied, "he is coming up the road," whereupon the prisoner looked out and presumably saw him. She immediately went upstairs and loaded a revolver belonging to the son of the house, and when the deceased came to the door she fired at him without result, but firing again the shot took effect and he fell dead on the sidewalk. The deceased had left the house in the morning after breakfast, and did not return until the time when he met his death.

The prisoner in her evidence stated that on the day previous he had kissed her twice and had also made improper suggestions to her and threw her on the bed, when she struggled and ran away. There was no evidence to corroborate this; and it may be said generally that the whole defence rested upon the girl's evidence

alone. This defence was that she committed the act in self-defence; in other words, that it was a case of justifiable homicide. Counsel for the prisoner made no allegation that the prisoner was temporarily insane, nor was the defence based on the theory of a "brain-storm," such as was the claim in the well-known Thaw case. It was a plain and straight excuse that the prisoner was, under the circumstances, justified in doing what she did.

The evidence was of a very meagre character, and there was apparently no attempt to throw light upon several points which would seem to be of interest, if not of importance. Possibly it might be claimed that the nature of the defence made an exhaustive inquiry of the attendant circumstances unnecessary. But the interests of justice seem to have required all possible light to be thrown upon this tragic event; and it must be remembered that it was these attendant circumstances which were said so to have operated on the girl's mind as to induce her to think that her only chance of safety from the alleged blandishments of her master was his death. And here it may be noted that the mind of the jury was undoubtedly largely swayed by such circumstances as were brought to their attention.

It was naturally asked why the girl remained in the house all day if she was afraid of ill-treatment when the deceased should return in the evening. The answer that the girl had promised her mistress to stay there until she returned appears to us to be entirely inadequate, in view of the girl's alleged fears, which bulked so large in her mind as to require the death of a man to quiet them. But however this may be, the alleged justification was utterly inconsistent with the rules of law as laid down in England and in this country as to "justifiable homicide," and we make this statement more strongly as we have as yet heard of no lawyer who is of a different opinion.

As we have said, the case was a very simple one, and the only question for the jury (and this should have been insisted upon by the learned Judge) was whether or not the prisoner believed or had reason to believe that she was in danger of immediate violence threatening her life or chastity, and any provocation must have been both "recent and reasonable." Nor was it an act done in

the "heat of passion or anger suddenly aroused at the time by some immediate and unreasonable provocation." Another judicial statement is that "homicide in self-defence is not justifiable unless there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer, and unless, also, there is reasonable ground to apprehend that the danger is imminent." It is clear from the admitted facts that the act committed was neither excusable nor justifiable in law, and the only possible verdict was either murder or manslaughter. The case of *The King* v. *Lesbini* (see *post* p. 145) is directly in point and confirms the view that the verdict was contrary to the law and the evidence.

In the unusually full report which appeared in some of the daily papers the learned Judge is stated as having said, when the verdict was recorded: "A verdict in which I concur. The jury perhaps have taken a view of the case not absolutely in conformity with strict rules, but they have rendered substantial justice."

A number of circumstances which had nothing to do with the alleged crime—such as the fact that her father was a soldier, that her fiancé was at the front, that she desired to save her honour at all costs, etc.—may have affected the minds of those engaged in the trial. Nevertheless, it must appeal to thinking men, apart from any question of sentiment, that this trial and verdict create a very dangerous precedent, and tend to encourage a lawlessness and disregard of the sacredness of life which hitherto has happily not been rife in this country.

It has been suggested that the circumstances surrounding the case and the absence of available evidence as to other circumstances indicated that those engaged in the trial, and others who did not appear, were not averse to a result which was merciful and which cast a veil of oblivion over the miserable tragedy. We, however, have no views as to this, though it is not surprising that attention has been called to there being so little brought out in evidence as to a variety of circumstances barely touched upon, and certainly not probed. "The least said, the soonest mended," is an aphorism which has much wisdom in it, but is scarcely

applicable to a murder trial, when the blood of a dead man "cries from the ground" at least for a searching inquiry.

The Court and jury and others have in effect said, "she served him right," or less tersely, "his death was her only protection," but unfortunately the dead man can say nothing. And, in addition, others may be led to follow her pernicious example.

A more unsatisfactory criminal trial from a legal point of view could not well be conceived. The majesty of the law cannot safely be trifled with, if a country is to retain its law-abiding character, and there is a feeling that in this case it has not been as carefully guarded as we are always led to expect it would be in the administration of criminal law in England and Canada. Perhaps the awful slaughter of men, women and children that we are now hearing of day by day is making us careless of the sacredness of human life.

KEEPING FIREARMS IN HOUSES.

Two recent events forcibly brought to the attention of the public the danger arising from the presence of firearms being kept in houses. A girl of 18 was tried for the alleged murder of a well-known citizen of Toronto. The revolver used was one belonging to someone in the house and apparently easily obtainable. The other was a case of a young girl, who was playing in her own yard. Being annoyed by the jeering of a small boy on the top of the fence and who refused to leave her alone, she ran into the house and got a loaded rifle and put a bullet into his thigh. Whilst one cannot help feeling that the boy deserved what he got, it shews the danger of loaded weapons being permitted where irresponsible people can get them. There is a law forbidding the carrying of concealed weapons, but evidently something more is necessary to prevent such occurrences as have recently and are frequently taking place. *Law Notes* thus refers to the subject:—

We already have statutes forbidding the carrying of concealed weapons. These statutes, it hardly need be said, have not proved effectual to accomplish the end sought. Nor, it is believed, will there ever be an approximation to that end except through a

complete ban upon the use of the pistol for other than police purposes. The proposal has a certain timeliness in view of the recent operations of the gunmen that have been exploited in the public prints. It would have little claim to serious consideration, however, if the reason for it were to be found only in these episodic incidents, flagrant though they be. The daily recurring homicides, suicides, and tragic accidents, of which the pistol is the convenient instrument, speak more trumpet-tongued against the longer sufferance of that diabolic piece of mechanism in a civilized society. What beneficent social purpose does the pistol serve that atones for the havoc wrought by it? It is a false notion of security that keeps it in the home. The housebreaker does not fear it, but its presence there does multiply the number of domestic tragedies. Unfortunately there has been thrown about the pistol a certain glamour that has blinded us to its real and essential ugliness. It is romantically exploited in the theatre, where a certain amount of gun-play is thought to be necessary to stirring and effective melodrama. Similarly the fiction writer has found the revolver an unfailing resource in the construction of his thrilling climaxes. In these and other ways we have been made so familiar with the pistol that we have become indifferent to its deadly significance, and, to a degree, our sense of the sacredness of life has been blunted. The pistol spells death, and it is high time that we realized that fact and placed an effectual ban upon its distribution and use. We are continually devising new methods to restrict the distribution of poisons and narcotic drugs, but we permit the barter and sale of the more deadly revolver to go on unrestrained. In all shapes, sizes and patterns these death-dealing devices gleam temptingly in the showcases of the gunsmith, and every pawnbroker's window is filled with them. They tempt to crime; they make crime easy. As a police measure, therefore, the prohibitive hand of the law may well be placed upon them. We confess that we do not like the word prohibition. But pistol laws now on the statute books are flagrantly inadequate, and a drastic prohibitive law such as has been suggested seems to be the only thing that will meet the situation.

PEACE THEORIES.

The humorous side of the present stupendous conflict appears occasionally in the papers of the American Society for Judicial Settlement of International Disputes. We have had occasion to notice some of their productions, theoretically unobjectionable and often praiseworthy in their intention, but, of course, ludicrously futile. Recently a paper was published by an Oxford professor under the title "Does International Law still Exist?" The writer comes to the conclusion that it does, and he anticipates that at the end of the war it will stand on a more secure footing than before. The hope is also expressed "that the world will declare that the clear principles of law must never again be set aside as of no account." This is a very pleasing hope, but one that we do not anticipate will ever be realized. The question in this paper leads one's thoughts to the last paper of the Society above referred to. We are glad that it shews that even some people of the peace-at-any-price party have lucid intervals, and are beginning to see the humorous side of their work, for the ast paper makes a statement which must have cost him many pangs, *viz.*, "An International Force must support an International Tribunal." In other words, there is no use in establishing a code of criminal law without providing a sufficient police force to enforce its observance and punish offenders. Whilst this can be done in individual nations, the present war indicates that it can never be hoped for in the community of nations: and therefore the discussion of this self-evident proposition is a waste of time, and had better be postponed until the world has nothing else to do but theorize.

THE UNITED STATES OF EUROPE.

The mind of the American Association for International Conciliation is developing under the stress of a war which the Peace Party thought should have been prevented by arbitration. Their last paper has a new remedy for the war fever, and it is "The Federation of Nations." It is said to be a necessary step in the

evolution of mankind. The paper admits the weakness of the modern peace movement, and suggests a federation of the nations of Europe, after the plan of the organization of the United States and the German States, and avers that "this condition is destined to come." Another paper by the President of Columbia University, reprinted in the *New York Times*, is headed "The United States of Europe." In it the belief is expressed "that the organization of such a federation will be the outcome, soon or late, of a situation built up, through years of European failure to adjust government to the growth of civilization," and that thinking men of the contending nations are beginning to consider such a contingency.

We quite agree that such a federation as the United States of Europe will shortly be an existing fact; but that it will have the effect anticipated by these "thinking men" we deny. Our reason for thinking that such a federation is imminent is that an old Book, not cited by these writers, but looked upon as an authority by very many, stated thousands of years ago that such a federation would take place. We will even go further than these learned professors and prophesy that this federation will consist of ten kingdoms, and that the ruling spirit or the president of these United States of Europe will be a genius such as the world has not yet seen; much greater than Napoleon or Wilhem II., each of whom, in his mad ambition, thought he might become some sort of Universal Dictator. We commend the study of this old Book to the writers above referred to. They will find much of interest in it, and it will give them much food for thought and enable them to forecast events with greater accuracy and certainty.

ALIEN ENEMIES AS LITIGANTS.

Five important judgments on this subject have recently been given in the English Court of Appeal, the names of the cases being *Porter* v. *Freundenburg*, *Kreglinger* v. *Samuel and Rosenfeld*, *Re Merten's Patent*, *Continental Tyre and Rubber Company* v. *Daimler Company*, and *Continental Tyre and Rubber Company* v. *Thomas Tilling Limited*. The first three cases raised questions as to the capacity of alien enemies to sue in our Courts during the con-

tinuance of the war, their liability to be sued, their right to appeal to the appellate courts, and their rights generally to appear and be heard. The two latter cases discussed the position of limited companies registered in England where the majority of the shareholders are alien enemies pure and simple.

A writer in the English *Law Journal* thus speaks of the judgment in the three cases first referred to:—

The established law, as laid down by Lord Stowell in the great case of *The Hoop* (1799), being that one of the consequences of war is the absolute interdiction of all commercial intercourse with the inhabitants of the hostile country, everything else follows as a result. The rule provides and carries with it its own limitations. So the Court had no difficulty in deciding that, though "alien enemies" have generally no civil rights, and cannot take proceedings in our Courts, yet persons who are subjects of enemy States, but are resident here by tacit permission of the Crown, are entitled to sue, for they are *sub protectione domini regis*. As to the liability to be sued, it was sufficient to say that to decree immunity during hostilities would be to convert that which is a disability imposed upon the alien enemy because of his hostile character into a relief to him from the discharge of his liabilities to British subjects. It followed as a necessary consequence, in the view of the Court, that an alien enemy sued can appear and be heard in his defence and take all such steps as are necessary for the proper presentation of his defence. "To deny him that right," said the Lord Chief Justice, "would be to deny him justice, and would be quite contrary to the basic principles guiding the King's Courts." Applying the same principles to the question of appeals, the Court distinguished between cases where the "alien enemy" is suing or defending. In the first case, where he is the appellant, he is the "actor" throughout, he cannot invoke the assistance of the Courts; in the second, though he initiates the appeal, he is in fact on his defence, and is entitled to have his case decided according to law, none the less that there is a judgment against him in a Court of first instance.

The same writer, in speaking of the position of alien companies, says:—

Adopting the principle which is applied to individuals that "enemy character" is the criterion of suing capacity—not enemy origin or nationality—it is hard to see why there should have been any difference of opinion about the right of a duly constituted English company, trading and having its registered office in this country, merely because some or all of its constituent members were aliens. It is scarcely consistent with the unanimous judgment of the full Court to hold that a company domiciled here may not maintain an action, because of its constituents, though each of those constituents, if so domiciled, would have a right to sue notwithstanding his alien, but not "alien enemy" character. Five out of the six Judges who heard the appeals in the *Continental Tyre Company's* cases declined to draw the suggested distinction between natural and legal persons, and it is odd that the single dissentient was just the most technically-minded of them all. Lord Justice Buckley, regarding the important question at issue as one of relative friendliness or enmity, and holding as essential the capacity to pay allegiance to the King, "which could not be predicated of a mere legal entity," refused to recognize the company's rights because of its alien constituents. The view of the learned Lord Justice that such a company should not be allowed to recover the debts due to it (though no funds collected could be transmitted abroad) was obviously based on considerations of public policy, for he maintained that even if his judgment were wrong, as it presumably was, the matter was one which called for urgent legislation. "Public policy," it has been said, "is an unruly horse and dangerous to ride—when once you get astride it you never know where it will carry you"; and one of the more careful of the Judges, commenting on this text, roundly declared that "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." The majority of the Court were mindful of this dictum, observing that nothing could more easily tend to create uncertainty and confusion in the law than to allow considerations of public policy, as distinguished from law based upon public policy—a very acute and just distinction—to be a ground of judicial decision.

REVIEW OF CURRENT ENGLISH CASES.

EMPLOYER AND WORKMAN—NOTICE OF INJURY—OMISSION TO GIVE NOTICE—WORKMEN'S COMPENSATION ACT (4 GEO. V. c. 25), s. 20.

Potter v. *Welch* (1914) 3 K.B. 1020. In this case the point discussed is whether or not the omission to give notice of the accident for which compensation was sought was excusable. On January 7, 1913, the workman met with the accident by a door falling on his head causing him to bite his tongue. He immediately gave verbal notice of the accident to the foreman, and the accident was also reported to one of the employers at the time. On January 11 he was attended by his own doctor, who found him suffering from an open discharging wound in the tongue. The difficulty of taking food increased, but he continued to work until July 14. On July 22 he died of cancer of the tongue resulting from the injury. No written notice of the accident had been given. The Court of Appeal (Cozens-Hardy, M.R., and Eady and Pickford, L.JJ.), reversing Channel, J., held that no reasonable cause within the meaning of the Act of 1906 had been shewn for not giving the notice. From the opinions expressed by the Court of Appeal it would seem that the only two grounds on which notice can be excused are (1) that the injury was latent or (2) that it was of so trivial a character that it would be unreasonable to expect the workman to give notice of it.

We may also observe that in this case it was also decided by Channel, J., with the concurrence of the Court of Appeal, that where a deceased workman could not himself recover at common law by reason of contributory negligence, no action would lie by his representatives under the Fatal Accidents Act.

CRIMINAL LAW—FALSE PRETENCES—EVIDENCE.

The King v. *Sagar* (1914) 3 K.B. 1112. This was a prosecution for obtaining goods on false pretences, the false pretence alleged being a pretence that the accused was carrying on a genuine and *bonâ fide* business as a manufacturer's agent and merchant. The accused offered evidence of receipts for payments of goods supplied to him by different firms, and his bank pass-books shewing payments for goods, which Ridley, J., refused to receive. The Court of Criminal Appeal (Lord Reading, C.J., and Coleridge and Avory, JJ.) held that it should have been received, and the conviction was quashed on that ground.

CRIMINAL LAW—MURDER—PROVOCATION NECESSARY TO CONSTITUTE MANSLAUGHTER—ACCUSED SANE BUT HOT TEMPERED AND SENSITIVE, WITH DEFECTIVE SELF CONTROL AND WANT OF MENTAL BALANCE.

The King v. *Lesbini* (1914) 3 K.B. 1115. In this case the prisoner was convicted of murder in the following circumstances. He went into a shooting gallery in charge of a girl, who made a jesting remark to him which he resented. She then invited him to take some shots, to which he agreed, and she then said, "It just shews what sort of temper he has, it is soon over," and she opened a case and took out a revolver which she loaded for the prisoner and laid it on the counter for him. The prisoner took it up and pointed it at the target, but turning round he went in front of the girl and said, "Now I've got you," and levelled it at her. She screamed out, "Oh, please don't, don't!" and ran away. The prisoner followed and discharged the revolver at her, inflicting a wound from which she died. It appeared that the prisoner had little self control and was wanting in mental balance. The prisoner was convicted of murder, and the question raised before the Court of Criminal Appeal (Lord Reading, C.J., and Avory and Lush, JJ.) was whether the evidence disclosed a sufficient case of provocation as to reduce the crime to manslaughter. The Court agreed with the judgment of Darling, J., in *Rex* v. *Alexander*, 9 Cr. App. R. 139, and with the principles enunciated in *Regina* v. *Welsh*, 11 Cox 338, where it is said "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man and so as to lead the jury to ascribe the act to the influence of that passion." The Court rejected the view that it ought to take into account the different degrees of mental ability of the prisoners who come before it, and if one man's mental ability is less than another's to find that the provocation may be sufficient in his case which would not be sufficient if he were a reasonable man. The conviction was therefore affirmed.

MARINE INSURANCE—CONCEALMENT OF MATERIAL FACT—INNOCENT MISTAKE AS TO MATERIALITY—"HELD COVERED" CLAUSE IN POLICY.

Hewitt v. *Wilson* (1914) 3 K.B. 1131. This was an action on a policy of marine insurance, which contained the clause: "In the event of deviation being made from the voyage hereby insured, or of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged."

The goods insured were printing machinery, and during the voyage some of it was broken. The assured had omitted to state that the machinery was second-hand, and there was evidence to shew that the difficulty and cost of replacing lost or injured parts of second-hand machines was greater than in the case of new ones. Bailhache, J., who tried the action, held that the fact that the goods were second-hand was material, and ought to have been disclosed; but he held that the case was within the above-mentioned provision, because, as he found, the concealment was not due to any intention to deceive, but merely to a misapprehension on the plaintiff's part as to its materiality.

MANDAMUS (PREROGATIVE)—REGISTRAR OF COMPANIES—REGISTRATION OF COMPANY—OBJECTION TO NAME, "UNITED DENTAL SERVICE"—COMPANY PROPOSING TO CARRY ON DENTISTRY BY UNREGISTERED PERSONS.

The King v. *Registrar of Companies* (1914) 3 K.B. 1161. This was an application for a prerogative mandamus to the registrar of companies to compel him to register a company styled "The United Dental Service Limited." One of the objects of the company was "to carry on the practice, profession or business of practitioners in dentistry in all its branches," and it was intended to do this by practitioners not registered under the Dentists Act, 1878. The registrar refused registration (1) because he considered that the use of the name for the purpose of carrying on business by unregistered practitioners was a violation of the Dentists Act, and (2) because it was a name calculated to deceive the public into believing that the business was carried on by registered practitioners. The Divisional Court (Lord Reading, C.J., and Bankes and Avory, JJ.), in view of the decision of the House of Lords in *Bellerby* v. *Heyworth* (1910) A.C. 377 (noted *ante* vol. 46, p. 619), and the case of *Minter* v. *Snow*, 74 J.P. 264, held that the first ground was untenable, and as regards the second they held that the discretion of the registrar did not extend to enable him to reject registration on that ground, as he had no power to hold a judicial inquiry on that point. The mandamus was therefore granted.

PARTNERSHIP—TRADING FIRM—IMPLIED AUTHORITY OF PARTNER OF TRADING FIRM TO BORROW MONEY.

Higgins v. *Beauchamp* (1914) 3 K.B. 1192. This was an action to recover money borrowed by one member of a firm on the ground that he had an implied authority to bind the other

partners. The business of the firm in question was that of a cinematograph theatre. The articles of partnership expressly provided that no partner should borrow money for the firm without the consent of the other partners. In violation of this article, one of the partners borrowed money from the plaintiff, and for which the plaintiff sought to make the other partners liable, on the ground of the borrower having an implied authority to contract the loan. The borrowed money was misappropriated by the borrower. The County Court Judge who tried the case gave judgment for the plaintiff, but the Divisional Court (Horridge and Lush, JJ.) held that the implied authority only existed for the purpose of trading businesses, and that a cinematograph theatre was not a trading concern. The judgment was therefore reversed.

ILLEGITIMATE CHILD—MAINTENANCE—PROOF OF PARENTAGE—CORROBORATIVE EVIDENCE—PREVIOUS CONVICTION OF PUTATIVE FATHER—(R.S.O. c. 154, s. 2 (2)).

Mash v. *Darley* (1914) 3 K.B. 1226. This was an appeal from the decision of the Divisional Court (1914) 1 K.B. 1 (noted *ante* vol. 50, p. 115), affirming an order for the maintenance of an illegitimate child, in which the Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.), though affirming the decision, do so on different grounds from those taken by the Divisional Court. The proof of the prior conviction of the defendant for carnally knowing the applicant, by oral testimony, their Lordships hold was insufficient proof of the conviction; but the oral testimony of what took place before the magistrates and at the trial of the defendant they hold was nevertheless admissible as, and was corroborative evidence, within the meaning of the Act (see R.S.O. c. 154, s. 2) of the applicant's evidence as to the paternity of the child.

ILLEGITIMATE CHILD—CHILD BORN ABROAD—AFFILIATION ORDER—(R.S.O. c. 154).

The King v. *Humphrys* (1914) 1237. This was a motion for a certiorari to bring up an order of justices adjudging the applicant to be the father of an illegitimate child. It was contended that the child having been born abroad, though now with its mother domiciled in England, was not properly the subject of such proceedings. The Divisional Court (Bankes and Lush, JJ., Avory, J., dissenting) overruled the objection.

COSTS—JOINT DEFENDANTS IN ACTION OF LIBEL—DEFENDANTS SEVERING IN PLEADING—JUDGMENT AGAINST BOTH DEFENDANTS WITH COSTS—LIABILITY OF ONE DEFENDANT FOR COSTS OCCASIONED BY CO-DEFENDANT.

Hobson v. *Leng* (1914) 3 K.B. 1245. This was a libel action against two defendants, one of whom admitted his liability and pleaded an apology, and the other pleaded justification. At the trial judgment was given against both defendants with costs, and the judgment was so entered. The Judge at the trial refused to give any special direction as to the costs. On the taxation the defendant who pleaded apology objected to being charged with the costs occasioned by his co-defendant's plea of justification. The taxing officer disallowed the objection. Rowlatt, J., on appeal, allowed it, and the Court of Appeal (Buckley, Kennedy, and Phillimore, L.JJ.) affirmed Rowlatt, J.'s decision. It appears from this case that in England there is a difference of practice on this point in the King's Bench and Chancery Division. In the latter division the taxing officer taxes according to the judgment, and exercises no discretion as to the apportionment of costs, unless expressly directed so to do, whereas in the King's Bench Division under a judgment for costs in general terms the taxing officer applies Ord. lxv., r. 1, and apportions costs having regard to the issues in the action.

DISCOVERY — PRODUCTION OF DOCUMENTS — PRIVILEGE FROM PRODUCTION—DOCUMENTS COMING INTO EXISTENCE IN CONTEMPLATION OF LITIGATION—DOCUMENTS OBTAINED FOR OBTAINING ADVICE FROM SOLICITOR.

Adam Steamship Co. v. *London Assurance Corporation* (1914) 3 K.B. 1256. This was an action on a policy of marine insurance for a constructive total loss. The defendants on the happening of the loss instructed the Salvage Association to look after their interests. The defendants claimed that the communications by cable and otherwise which passed between them and the Salvage Association after notice of abandonment as a total loss and before action were privileged as having been procured for obtaining their solicitors' advice and to enable the solicitors properly to conduct the case. The Court of Appeal (Buckley, Kennedy, and Phillimore, L.JJ.), overruling Bailhache, J., held that the documents were privileged as claimed.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Man.] HALPARIN *v.* BULLING. [Dec. 29, 1914.

Negligence—Master and servant—Use of motor car—Disobedience—Act in course of employment—Employer's liability.

B. was owner of an automobile and hired a chauffeur to run it, giving him positive instructions that the car was not to be used except for purposes of the owner and his family, and that, when not in use for such purposes, it was to be kept in a certain garage. On the evening of the accident in question, the chauffeur took his master's family to a theatre, in Winnipeg, and was directed by them to take the car to the garage and return for them after the close of the performance. The chauffeur took the car from the garage before the appointed time, and proceeded with it for the purpose of visiting a friend in a distant part of the city. While so using the car, contrary to instructions, he negligently ran down the plaintiff, causing injuries for which an action was brought to recover damages against B.

Held, affirming the judgment appealed from (24 Man. R. 235) that, at the time of the accident, the chauffeur was not engaged in the performance of any act appertaining to the course of his employment as the servant of the owner of the car, and, consequently, his master was not liable in damages. *Storey* v. *Ashton*, L.R. 4 Q.B. 476, followed.

Appeal dismissed with costs.

Nesbitt, K.C., and *H. Phillips*, for the appellant.

W. N. Tilley, for the respondent.

Que.] PRINGLE *v.* ANDERSON. [Dec. 29, 1914.

Construction of will—Legacy to church committee—Special fund—Ulterior disposition of bounty—Failure in object of bequest—Lapse of legacy—Art. 964 C.C.

At a time when the congregation of St. Matthews Presbyterian Church, in Montreal, was heavily encumbered with debt

incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. The committee were relieved of their duty and the fund ceased to exist several years later, and during the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death, balances of debt still due for expenses incurred for other building purposes. In an action to have the bequest declared to have lapsed on account of failure in its ulterior disposition:—

Held, affirming the judgment appealed from (Q.R. 46, S.C. 97), Duff and Anglin, JJ., dissenting, that, in the circumstances of the case, the bequest must be construed as a bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund, but to benefit the congregation in respect to its building liabilities generally, and that the legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied.

Per Duff and Anglin, JJ., dissenting:—It was of the essence of the gift that it should be capable, at the time of the death of the testatrix, of being applied in furtherance of the specific purpose for which the "building fund" had been instituted, and, in consequence of the failure of that ulterior disposition, it lapsed, under the provisions of art. 964 of the Civil Code.

Appeal dismissed with costs.

C. M. Holt, K.C., and *W. F. Chipman*, for the appellant.

J. E. Martin, K.C., for the respondents.

Alberta.] ROWLAND v. CITY OF EDMONTON. [Feb. 2.

Highway—Old trails of Rupert's Land—Survey—Width of highway—Construction of statute—60 & 61 Vict. ch. 28, sec. 19—North-west Territories Act, sec. 108—Transfer of highway—Plans—Registration—Dedication—Estoppel—Expenditure of public funds.

The plaintiff's lands, held under Crown grant of 1887, were bounded on the south by the middle line of Rat Creek (now in the

city of Edmonton), and were traversed by one of the "old trails" of Rupert's Land, known as the "Edmonton and Fort Saskatchewan Trail." Upon instructions, under sec. 108 of the North-west Territories Act, as enacted by 60 & 61 Vict. ch. 28, sec. 19, that portion of the trail was surveyed and laid out on the ground by a Dominion land surveyor, shewing its southern boundary approximately as Rat Creek, and thus giving it a width upon the plaintiff's lands in excess of the sixty-six feet limited by this section. The plan of this survey was not shewn to have been approved by the Surveyor-General, nor was it filed in the Land Titles office as required by the statutes in force at the time.

Held, reversing the judgment appealed from (28 West. L.R. 920), that the statute gave the surveyor no power to increase the width of the highway authorized to be laid out by him; that the approval of the Surveyor-General and the filing of the plan in the Land Titles office were necessary conditions to the transfer of the trail as a public highway, and, consequently, the land comprised in the augmentation of the highway remained vested in the plaintiff.

Plaintiff sold part of his lands, described as bounded by the northerly limit of the surveyed trail, and, subsequently, the purchasers, and other persons holding other lands south of Rat Creek, filed plans of subdivision shewing the surveyed trail as of the full width given by the surveyor. The city also claimed to have expended moneys in improving the roadway at the locality in question.

Held, that the registration of the plans of subdivision, made without privity on the part of the plaintiff, was not binding upon him, and that there was not such evidence of expenditure of public money or conduct by the plaintiff—by recognizing the plans as filed—as could preclude him from claiming the lands encroached upon or compensation therefor.

Appeal allowed with costs.

Ewart, K.C., and *G. B. O'Connor*, for appellant.

Bown, K.C., and *O. M. Biggar*, K.C., for respondents.

Correspondence

MARRIAGE—PROHIBITED DEGREES IN CANADA.

To the Editor CANADA LAW JOURNAL:

SIR:—Permit me to point out that Mr. Raney, K.C., is mistaken when he says (p. 85 *supra*) that it was under 28 Hen. VIII. ch. 7 that Henry VIII. was divorced from Queen Catherine. A brief reference to dates will shew this. The so-called divorce (it was really a declaration of nullity of marriage) was pronounced 23rd May, 1533. The statute 27 Hen. VIII. ch. 7 was passed in the year 1536. It is clear that Henry could not have been "divorced" under a statute which was not passed until three years after the so-called "divorce" had taken place.

A perusal of 32 Hen. VIII. ch. 38 will shew to any unprejudiced mind that Henry's Parliament had the most excellent reasons for its legislation concerning prohibited degrees, altogether apart from any wish to favour the King's amatory desires. They took the subject out of the hands of ecclesiastics, who had dealt with it, as Mr. Raney states, in order to raise money, and they gave a legal sanction only to the prohibitions stated explicitly or implicitly in the Bible, which were what they called "God's law." For it must always be remembered that the prohibitions set forth in 28 Hen. VIII. ch. 7 are not of the Parliament's own devising, but merely those set forth in the Bible (Lev., c. 18), which in those days was generally considered by Christian people, and by most Christian people is still considered, to be "God's law" on the subject. This is really on what our prohibited degrees in Canada are based, and not the "matrimonial vagaries" of Henry VIII., as Mr. Raney states.

GEO. S. HOLMESTED.

[It seemed best to hand the above letter to Mr. Raney to answer. The discussion is especially interesting as the two learned gentlemen engaged in it are specially versed in the subject. Mr. Raney's answer is as follows:—

"Mr. Holmested is quite right in saying that the dissolution of the marriage tie between Henry and Catherine was really by a declaration of nullity. But a declaration of nullity is, both by the dictionaries and colloquially, also a divorce, and the historians, Green, for instance, sometimes speak of the decree of separation of Henry and Catherine as a declaration of nullity, but more often as a divorce.

I have to thank Mr. Holmested for calling attention to the error in citation. The statute which I intended to cite was the

"Act Concerning Succession," 25 Hen. VIII. ch. 22 (1533). This Act declared and adjudged the marriage of Henry to Catherine to have been "against the laws of Almighty God," and to be "utterly void and anihiled." But Mr. Holmested is in error in attributing validity, as he apparently does, to the decree pronounced by Archbishop Cranmer on the 23rd of May, 1533. Archbishop Cranmer had no jurisdiction to deal with the case except the authority conferred upon him in virtue of his office by the Bishop of Rome, and, on appeal by Catherine from the judgment of Cranmer, the Pope reversed the judgment of the Archbishop, and declared the marriage of Henry and Catherine to have been perfectly legal according to the ecclesiastical law. Obviously, then, the Cranmer divorce cannot be invoked. But Parliament had undoubted jurisdiction and undoubtedly exercised it in the Act of 1533, which, in point of time, was subsequent to the Archbishop's decree, and,—and this is the point I was endeavouring to make,—it was by this same statute that the prohibited degrees of marriage were first established as a part of the statute law of England.

Then, as to the relation of the prohibited degrees to "God's law," which, I take it, is the real point of Mr. Holmested's letter,—I did not, of course, overlook the 18th chapter of Leviticus. But when doctors, both of the supremest authority, differ, who am I that I should attempt to decide between them? It is said that Leviticus says that the prohibited degrees are "God's law." At all events the Parliament of Henry said so. But the Parliament of Edw. VII., the example being followed by the Parliament of Canada, unquestionably said something quite otherwise when it made it lawful for a man to marry his deceased wife's sister, and I felt myself obsessed with the difficulty which confronted the court in *The King* v. *Dibdin* (1910), p. 57, where one of the learned Judges was led to remark that:—

It is to my mind so repulsive as to be inconceivable that the King, by and with the advice of the Lords Spiritual and Temporal and the Commons, should have continued the declaration that such marriages are contrary to God's law as incestuous, and yet should have legalized them as regards the clergy and laity alike, and authorized their solemnization in church to the desecration of the house of God.

With all Henry's bestiality, he had a profound respect for the forms of the law, and it is, I think, a safe argument that, but for the desire to give colour of respectability and legal sanction to his infatuation for Anne Boleyn, Leviticus 18 would not have been incorporated by his Parliament into an English statute."

ED. C. L. J.

Book Reviews.

Commentaries on the Law of Master and Servant. Including the modern laws on Workmen's Compensation, Arbitration, Employer's Liability, etc. By C. B. LABATT, B.A. (Cantab), M.A., Toronto, of the Bar of San Francisco. In eight volumes. The Lawyers' Co-Operative Publishing Co. 1913. 2nd edition. Agents for Canada, Carswell Co., Toronto.

The title, "Commentaries on the Law of Master and Servant" scarcely indicates the extent and immensity of the author's production, for these volumes contain an exhaustive treatise on the law of master and servant, including workmen's compensation, employer's liability, interference with service, labour unions, use of union labels, strikes, boycotts, arbitration, statutes, the constitutionality of statutes, and every other variety of subject incidental to the relation of master and servant which has come up for adjudication or would be likely to arise. One can therefore readily understand that eight large volumes were required to deal with such a collection of subjects.

The entire mass of information in connection with the relationship of master and servant and its ramifications has been so conveniently and clearly arranged, tabulated and indexed that one seeking information finds available what might not unreasonably be described as an exhaustive code of law on each and every branch. The work also deals exhaustively with the history, principles, doctrines and judicial and statutory authorities from which it has been deduced, together with the rights and remedies incidental thereto.

The text is based on the decisions of the Courts of Great Britain, United States, Canada, Australia and New Zealand, and indeed of all countries where the law of England is the basis of jurisprudence. The differences in the law of these various jurisprudences are ably contrasted, so that the work is equally useful wherever the law of England prevails, even though varied by custom or practice according to locality.

Such is the comprehensiveness and thoroughness of this great law book that none other on the subject of master and servant need be consulted; and its utility is apparent over any work which contains the law as decided in one country only, as the seeker for information has had collected for him cases which have been decided on the great variety of questions that would necessarily arise throughout the large extent of territory over which the range and authority of English law extends. And

in this connection it may be stated that all the decisions of the Courts of the United States are cited. This, of course, is peculiarly useful to us, as the customs of these two countries are so similar.

In the text is given the result of the decisions; the doctrines deducible therefrom are explained, and the reasons for the decisions made plain. To all this the author adds his own valuable comments and criticisms, elucidating the principles, and thus enabling the practitioner to rapidly and easily ascertain the law and apply it to any new facts or to any undecided question. The footnotes are admirable in matter and in method. In them you find not only a complete digest of the law on the subject, but references to leading cases, with quotations from the judgments of such leading cases as are the foundation of the laws.

It would, of course, be impossible to refer at any length to those portions of this work which might be cited as characteristic of the author's style, his lucidity of expression, logical reasoning and grasp of legal propositions. We can only refer our readers to such passages as the following:—

Sections 102 to 105, discussing English and American doctrines as to the validity of contracts made by infants.

Sections 156-163, as to English and American doctrines relating to the duration of a contract without specific mention of time.

Section 158, a criticism of the Ontario doctrine on this subject.

Section 1394-1398, a general discussion of the doctrine of common employment.

Section 2475, notes 4, 6, 7, criticizing some Canadian cases.

Section 2514-2517, relating to torts of persons employed by subordinate servants to assist them.

The whole of Vol. 6, especially the part relating to the liability of a master for the torts of his servant.

One can safely say that everything required in connection with the law of master and servant is in these eight volumes. There is, in addition, a very good and full index. An analysis of the subjects within the scope of each chapter is given in the beginning of each chapter, which is divided into paragraphs in logical arrangement. Each paragraph is headed with black type, indexing its contents. In fact, everything has been done to aid the reader in readily finding what he may be seeking. Even pages of a darker colour are inserted in certain places to shew where indices and tables of cases may be found.

A study of the work demonstrates that all the law on the subject has been collected and discussed, and that every artifice of arrangement, analysis and index has been added to enable the

various phases of the subject to be readily found; thus evidencing the time, industry, research and experience required to produce this monumental work, which must be regarded as the leading authority upon the subject.

This treatise is largely cited and most highly spoken of in the United States Courts. One Judge says, in a letter to the author, "I have frequent occasion to use and be helped by your really great book on Master and Servant." He further says, in referring to a case before his Court, "you will find in this case partial acknowledgment of the great value of your work to one who is not wrapped up in case law." And a learned Judge of an Appellate Court says, "Personally I regard it as the best text book that the present generation has produced."

We notice that several American periodicals make most complimentary references to this treatise. In the *Harvard Law Review* we find the following remarks: "Almost everywhere the discussion is enlightened and enlightening. This would be no surprise to readers of the preliminary edition: the two stout volumes which appeared in 1904, and which may be found in a revised form in the 4th and 5th volume of the present still larger work. The most interesting part of the present edition is probably the 6th volume. It is here that the careful and original, though not improperly original, analysis which is an attractive feature of the greater part of the work is found at its best."

Another writer, in speaking of modern law books and encyclopædias, considers that the profession constantly require a higher standard of excellence in text books, and states his belief that the author of this work has "correctly interpreted the requirements of the profession."

We conclude by concurring with another writer that "the Bench and Bar are indebted to Mr. Labatt and to the Lawyers' Co-operative Publishing Company for giving the profession such a valuable contribution to the legal literature of the period."

A. McLEAN MACDONELL.

Bench and Bar.

LAW SOCIETY OF ALBERTA.

The Fourth General Meeting of this Society was held at Edmonton, on January 4 and 5, 1915.

Reports were presented from the committees which had charge of the following matters:—

Proposed amendments to the Legal Profession Act: On tariff

of costs, to the effect that the changes recommended had been incorporated in the new rules of practise in force since Sept. 1, 1914: Education and legal committee of the Benchers. The Dominion Bar Association, etc.

Various matters of general interest to the profession were then taken up and discussed. A resolution was passed urging upon the Attorney-General to have the statute law of the Province revised and that a competent committee be appointed for such purpose. The committee named was O. M. Biggar, K.C., C. F. Newell, K.C., and E. H. MacKinnon.

Resolutions were passed to make more convenient registration and searches as to chattel mortgages; and to make further provisions for procedure in the Land Titles Offices.

A special committee was appointed to enquire into and report on the present territorial jurisdiciton in the District Courts and to make suggestions in reference thereto. The codification of the law as to vendor and purchaser was discussed and a special committee was appointed to consider and report upon the matter.

The following members of the Society were nominated to represent the Alberta Law Association on the Council of the Canadian Bar Association: C. F. P. Conybeare, K.C., A. H. Clarke, K.C., O. M. Biggar, K.C., and R. B. Bennett, K.C.

Interesting addresses were delivered by A. H. Clarke, K.C., M.P., on "Aliens and Naturalisation" and by Sir James Aikins, K.C., M.P., on "Some Purposes of the Canadian Bar Association and the Noblesse Oblige of the Legal Profession."

The Judges of the Supreme and District Courts, Visiting Guests and Benchers and other members of the profession were entertained at a banquet by the Edmonton Bar Association.

Mr. C. C. McCaul, K.C., was elected Chairman and Mr. Charles F. Adams, Secretary.

COUNTY OF YORK LAW ASSOCIATION.

The twenty-ninth annual meeting of the County of York Law Association was held at the City Hall on the twenty-fifth day of January, 1915.

After the annual report of the Trustees of the Association was read and adopted, Mr. A. MacMurchy, K.C., presented the report of the Special Committee on the New Registry Office, Mr. George C. Campbell read the report of the Special Committee on Consolidation of Registry Systems, and Mr. R. J. Maclennan read the report of the Committee on Legislation. These reports were discussed and adopted

The Association testified their appreciation for the interest and efficiency shewn by Miss Read, the Librarian, during the past year.

The Librarian's report shewed that the Library now contains 6,338 volumes, of which 168 were added during the year 1914. A resolution was passed deprecating the practice of handing out information concerning wills by Surrogate Court clerks to non-interested parties.

The Special Committees on the New Registry Office, on Consolidation of Registry Systems, and on Legislation, appointed last year, were continued.

The election of officers for the year 1915 resulted as follows:—*President*, M. H. Ludwig, K.C.; *Vice-President*, Angus MacMurchy, K.C.; *Treasurer*, George C. Campbell; *Secretary*, W. J. McCallum; *Curator*, J. D. Falconbridge; *Historian*, Beverley Jones; *Trustees*, D. T. Symons, K.C., Shirley Denison, K.C., H. W. Mickle, G. L. Smith, E. J. Hearn, K.C., J. E. Day, D. Urquhart, Edward Bayly, K.C., and R. J. Maclennan.

War Notes.

Speaking of our neighbour's neutrality it is said that a German war vessel entered a port of the United States with a lot of passengers, some of whom were taken from an American ship which had been piratically sunk by this warship. A statute of the United States provides that what was thus done was an act of piracy punishable by death. So far, it would seem that the United States Government is content to accept an apology from the German Government and payment of damages. One also constantly heard a few years ago the slogan, "Remember the Maine." Why so much fuss over the blowing up of that vessel, which was never proved to have been the act of a Spaniard, and no fuss at all over the admitted crime of a German?

The press has probably been unnecessarily harsh in its criticisms of Lord Haldane in connection with his supposed pro-German proclivities. This may partly have arisen from his speech at a dinner of diplomats shortly before the war, in which he lauded the Kaiser as "a man and a great man gifted by the gods with the highest gift they could give," and other laudatory remarks; also because he is a lover of German literature and admires the devotion of the Germans to learning and science. The *Spectator* comes to his rescue in a recent number, and protests

against the charge that he has been wanting in patriotism. The writer says: "In our opinion these attacks are most unfair. We have plenty of criticisms to make on the want of preparation for which the Government is responsible, and we must, when the proper time comes, press them home. It is, however, unjust to single out Lord Haldane for attack." The same writer says that the great difficulty, and one which the whole Government was responsible for and not Lord Haldane alone, was that there was not kept in store a million rifles beyond those required for visible needs. It is also to be remembered that Lord Haldane on the whole immensely increased the efficiency of the British Army in connection with his creation of the territorial force.

It has been suggested that the proper way to deal with German barbarism, piracy and murder, is for the Government to announce at once that they will hold the individuals who have authorized these crimes personally responsible for all clearly ascertained breaches of the rules of civilized warfare; and that they will, when conditions of peace are imposed, make it a primary condition that all such persons, not excluding the Emperor himself, shall be handed over to pay the just penalty of their crimes, and be dealt with as ordinary criminals.

Flotsam and Jetsam.

Apropos of the recent appointment of the Acting Chief Justice of a certain province of Canada, whose decisions have not always been received by the Bar with the favour they ought, a story is told that, on one occasion, counsel in the Court of Appeal said: "This is an appeal from the judgment of the Hon. Mr. Justice ———, but there are *other* reasons why the judgment should be reversed."

An item in a daily newspaper says, "Philadelphia lawyers and Judges are to decide whether coffee is a food or a beverage." This reminds us of the orderly officer, making his daily rounds, inquiring if there were "any complaints," and receiving from a newly-joined recruit the reply, "Yis sorr, plaze sorr, they chates me out of the thick of the coffee, sorr." It is clear that the question had been decided in Ireland long before it came before Philadelphia lawyers.

Someone is always taking the joy out of life. When, now, under the influence of the seductive tango, one-step, and hesitation, many of our grey-beards are undergoing a process of rejuvenation, along comes a court decision that puts an age limit upon dancing. At thirty-five, say two learned Judges of the Court of Special Sessions, at Jamaica, L.I., a man should cease to dance. This empirical pronouncement was made on the hearing of a charge against a man of thirty-five, lodged by his wife, that he neglected her at home, while he sought the delights of the dance halls. The chief justice of the court, however, who is over thirty-five, disagrees with his associates, handing down a dissenting opinion to the effect that a man should cease to dance only when his joints lose their flexibility, and when dancing fails to add to the pleasure of his life and to the gayety of nations. This is sound doctrine, and will be gratefully received by the white-haired devotees of the terpsichorean art. That age should not, of itself, exclude one from the dancing floor is a proposition that finds strong support in ancient as well as modern times. Socrates, for example, learned to dance when he was past sixty. And no facetious reference is here intended to the merry dance that the shrewish Xanthippe was wont to lead him. A modern instance shewing that age does not always wither is the case of the aged couple at South Norwalk, Conn., who in celebrating their golden wedding participated enthusiastically in dancing the fox trot. *Verbum sap.* Judges should hesitate before laying down a rule of limitation in this matter that is bound to be upset in the court of public opinion.—*Law Notes.*

A London solicitor, who has joined the 1st Sportsman's Battalion, Royal Fusiliers, has received the following congratulatory telegram from an old client:—

"Accept my congratulations on your gallantry in joining the Sportsman's Battalion. Anyway, you know how to *charge*."