Canada Law Journal.

VOL. L. TORONTO, OCTOBER, 1914 Nos. 19 & 20

ENFORCEMENT OF THE LAWS.

An address was recently given at Chicago by Mr. Robert McMurdy, president of the Illinois State Bar Association, which contains some startling information, frankly given by him, though not to the credit of his country. He introduces his remarks by quoting a saying that "before we can make progress we must make admissions." He makes the admissions and we trust with him that progress will come in due course. We refer to this matter, not to throw stones at our neighbours, but because we have sins of our own which we should repent of, and the occasion is opportune to take stock of them.

The foundation admission which he makes is in the words following:—"We must admit at the outset that the inhabitants of our own United States are the most lawless of all civilized people." He quotes the words of a great educator and diplomat who says:—"In no civilized country on earth is the first of the three great rights named in the Declaration of Independence, that is to say, the right of life, so disregarded as in this. Homicide is the most rapidly growing of serious crimes in this country and it is increasing more alarmingly here than in any other land." A learned Senator is also quoted as saying, "There is no country of first importance where there is so little respect for the law, because it is the law, as here in our own republic." An ex-President of Harvard University declares that "the impunity with which crimes of violence are now permitted is a disgrace to the country."

These statements, sorrowfully made no doubt, are substantiated by carefully compiled statistics. We are told, for example, that the number of homicides in London, England, with its enormous population, were for 1912 only eighty-six, whilst during

the same year in Chicago they reached two hundred and thirty-one. If the population in these two cities corresponded the record would read: London eighty-six, Chicago, six hundred and ninety-three. This is partly accounted for by the presence of so many foreigners in the latter city, but only partly so, and it is admitted that the main reason is the lax and often corrupt administration of the laws, and their non-enforcement.

The address gives considerable attention to the subject of lynching, a species of brutal mob violence which has flourished more largely with our neighbours than in any other country. As this is now on the decrease and is not a feature in the administration of justice in this country it is not necessary to refer to it, except as an interesting item of information. It appears that in the last thirty-two years the number of persons lynched in the United States reached the astounding total of 3,998, an average of 124 a year, though during the last ten years this average has been reduced to 72, partly through change of conditions in the Southern States, and partly through public sentiment created by constant agitation of the subject, and in a small degree by legislation against mobs. Of the number referred to, 1,227 were persons of the white race, neither were the lynchers respecters of sex, for 76 of the victims were women. It used to be said that these atrocious acts were for those who committed the crime of rape, but that excuse has, we are told, long been buried, and not more than one-third of the victims were charged with that crime or even suspected of it. Some ghastly details are given of these brutalities, which are not nice reading. One of the strange things connected with these exhibitions of mob violence is that the perpetrators were largely of the better class of citizens, the inference obviously being that there has been such a manifest and discreditable laxity in the enforcement of the criminal law as to compel citizens to take the law into their own hands. And so lawlessness has been encouraged and flourished.

The lecturer refers to many other crimes, (among them the crime of perjury) which have not been punished or dealt with. We cannot claim to be better than our neighbours in reference to the perjury scandal. It has increased with civilization and is a cry-

ing evil here, and remarked upon by our Judges from time to time.

As already stated, we refer to this subject and the condition of things in the United States as a warning for ourselves, for, being close neighbours, there is a danger of the disease spreading northwards. The importance of pure, prompt, strict and stern administration of the criminal law and the enforcement of its penalties is very obvious; but the tendency of the age, here and elsewhere, is to be lax in this respect. There is too much silly sentiment and misplaced mercy abroad for the public good. Let us take these lessons to heart.

PARTNERSHIP WITH AN ALIEN ENEMY.

One of our exchanges calls attention to a phase of international law which may be of interest to some of our readers:—

The present war seems likely to give rise to many knotty questions of international law, and among doubtful matters is the position of a firm one of whose partners is an alien enemy. From the text-books it would appear that upon declaration of war such a partnership would be dissolved, the practical reason being that the partnership could not be worked during the continuance of the war, and that the war may be unduly prolonged. The case cited in support of this is *Griswold* v. *Waddington*, an American case decided in 1818 (15 Johnson, 56; 16 Johnson, 438), but there the partnership had been dissolved by agreement before the outbreak of war; moreover, the action was brought by a creditor against an alleged partner, and was not an action for dissolution between the partners themselves. In *Feldt* v. *Chamberlain*, a case which came recently before the Vacation Court, Mr. Justice Shearman seems to have expressed the view that such a partnership is only dissolved so far as the German partners are concerned; at least, that is the expression attributed to him in the brief report of the case contained in the daily paper. The business was that of feather merchants, and one of the partners was a German at present serving with the German forces; there were two Eng-

lish partners, one of whom, a lady, applied for the appointment of the other English partner as receiver, on the ground that the partnership was dissolved upon the outbreak of war. After expressing the opinion to which we have referred, his Lordship made the order for a receiver as asked; but he did so only upon the ground that the substratum of the business had in this case disappeared. It appears to us that the true view of the general situation is rather to be found in the solution suggested by Mr. E. J. Schuster in his pamphlet on the "Effect of War on Commercial Transactions" (p. 20), that such a partnership is not necessarily dissolved by the outbreak of war; the winding-up cannot in any case take place until the war is over, and, as the reason for dissolution is then at an end, there is no reason why the partnership should not again become operative.

THE ORIGIN OF LYNCHING.

How many people, should they be asked as to the origin of lynch law, would answer that such executions were first in favour somewhere west of the Pecos? These same persons would be greatly surprised, I dare say, if they knew that Lynch's Law (as it was then known) was the outgrowth of a peculiar state of affairs in no other a state than that of the ancient Commonwealth of Virginia. However, Lynch's Law did not necessarily call for capital punishment by hanging; in some instances it was flogging, in others imprisonment, and in few cases, death.

In the year 1724, there was a lad, Charles Lynch or Licht by name, aged 15 years, who became dissatisfied in his Irish home over ill-treatment from a stepmother and the harsh discipline from a schoolmaster. Young Lynch determined on leaving the Ould Sod as one day he chanced on a sea captain on the eve of sailing for America. The lad told his story and asked to be allowed to accompany his new acquaintance. Consent being given, Lynch started on his eventful journey, but a few miles off shore repented of his rashness, leaped from the deck and attempted to reach shore. He was rescued by the crew, the ship continuing her journey.

At length the perilous voyage came to an end; and the good ship, having weathered stress of weather, came to anchor at her berth in His Majesty King George's colony of Virginia. What disposition was to be made of the lad was a question with the captain. At length he happened upon the expedient of apprenticing his charge to one Christopher Clark, a Quaker and wealthy tobacco planter.

Lynch went to work with a heavy heart, but fate was kind to the friendless youth; for the Quaker's daughter, Sarah, being moved to sympathy for his friendless state, fell in love with him and they were married, such a union seeming to be with the consent of Christopher Clark, for the young couple moved on to one of the latter's plantations, "Chestnut Hill," in what is now Campbell county, about a mile from the present city of Lynchburg.

Here Charles Lynch secured large tracts on the rivers James and Staunton. These grants from His Majesty George II., through William Gooch, Lieutenant Governor of Virginia, were bestowed for a few pounds sterling on the promise of improving the land, which embraced thousands of valuable acres.

Six children were born of the marriage of Charles and Sarah Lynch—Charles, Penelope, Sarah, John, Christopher and Edward. Of these Charles figures most prominently. His mother was a member of the Society of Friends, and, in marrying Charles Lynch, was expelled from the society, her husband, it was said by the elders, not being religiously disposed; but the two young people were forgiven, at length becoming members of the South River Meeting House. To the eldest of their offspring little of Quakerism seems to have descended, Charles Lynch, the son, having rather more of worldly desires than his good brethren could wish, as witness the following from the records of South Meeting House, December 12, 1767:—

"*Whereas* Charles Lynch, having been a member of the Society of the People called Quakers, and having, contrary to our known principles, been guilty of taking solemn oaths, we do testify against all such practices, and the actor thereof from being any longer a member of our Society, till it may please God to convict him of his error and work repentance in him by a Godly

sorrow, which is the sincere desire of us. Signed on behalf of the meeting.

"WILLIAM FERRELL, *Clerk*.

"South Meeting House, 20th of the 12mo, 1767."

Charles Lynch was afterwards reinstated, but again turned out with one James Johnson for taking up arms in his country's defence.

In the year 1780-81, General Cornwallis sent Colonel Tarleton and his troopers into the Piedmont country of Virginia, where there were many Tories, who gave much trouble to the Revolutionary party. Frequent conspiracies were put on foot against the Commonwealth, thereby occasioning great loss and injury to the cause of the colonists. Seeing that the state could not afford necessary protection, Colonel Charles Lynch, Colonel William Preston, Colonel James Calloway and Captain Robert Adams enlisted as many men as could be got for pursuit and capture of the marauders. When taken, the prisoners were brought before Colonel Lynch—who had been made judge and jury by his neighbours— who inflicted summary punishment by flogging, imprisonment, and, in some cases, death, the law thus administered being called in honour of the judge "Lynch's Law." The respectable Tories of the country having been flogged, instituted suit for the infliction of such punishment, whereupon the General Assembly, in October, 1872, exonerated the judge of Lynch's Law by the passage of the following Act:—

"*Whereas* divers evil disposed persons in the year 1780 formed a conspiracy, and did actually attempt to levy war against the Commonwealth, and it is represented to the present General Assembly that William Preston, Robert Adams, Jr., James Calloway and Charles Lynch, and other faithful citizens, aided by detachments of volunteers from different parts of the state. did by timely and effectual measures suppress such conspiracy, and whereas the measures taken for that purpose may not be strictly warranted by law, although justifiable from the imminence of danger:

"*Be it therefore enacted* That said William Preston, Robert

Adams, Jr., James Calloway and Charles Lynch, and all other persons whatsoever concerned in suppressing said conspiracy or in advising, issuing or executing any orders or measures taken for that purpose, stand indemnified and exonerated of and from all pains, penalties, prosecutions, actions, suits or danger on account thereof; and that if any indictment, prosecution, action, or suit shall be laid or brought against them, or any of them, for any action or thing done therein, the defendant or defendants may plead in bar or the general issue, and give this Act in evidence."

Thus we see that Lynch law was brought into being from patriotic motives alone and, for the time, was a valuable adjunct to the law when Virginia was being overrun by a pitiless enemy.—*Green Bag.*

A NATIONAL CRISIS AND HOW RECEIVED.

A distinguished journalist of the United States gives his impressions of the temper of the British people on the occasion of the national crisis which has recently arisen. His observations are well worth preserving:—

"War! Seven nations simultaneously battling for existence; Europe trembling under the tramp of 12,000,000 soldiers; war by Dreadnought and submarine; war by Zeppelin and aeroplane; the combined armies of Ghengis Khan, Timur, Xerxes, Hannibal, Caesar, Saladin, and Napoleon pygmytized by contrast with the hostile hosts; war at a cost of £12,000,000 per day; the proudest of centuries threatened by the most appalling ruin that ever scarred the memory of man; the delicately-adjusted and exquisitely-organized machinery of production vandalized for 3,000,000 square miles; the commerce of the universe in chaos; art and science, agriculture and industry, halted by the bayonet; civilization with a sword point at her heart; the Bank Act suspended; the Stock Exchanges of the world closed; the calculations of the five races dislocated; bewilderment from Canton, U.S.A., to Canton, China; and this, the biggest piece of news that ever broke

since the Deluge, is calmly tucked away in the heart of the London morning papers, while page one, as per wont, is devoted to the necessities of sundry anonymous ladies and gentlemen in quest of loans, lodgers, and lovers, the latest additions to Madame Tussaud's Exhibition, intelligence of steamships, and undertakers' advertisements—Magnificent!"

He goes on to say that one reads the temper of the people in the attitude of the Press, and asks what may humanity not expect from a land capable of such calm and poise in the most dread hour of its history. Let foemen beware of a nation whose women do not wail, and whose men do not cheer at the call to arms.

The Semitic, and therefore emotional Xerxes, failed to comprehend the significance of Sparta's deliberate primping at the approach of his swarms. The Lacedaemonian was never so formidable as when perfumed and anointed to face his gods in befitting elegance, and beneath all this seeming disregard of potentialities, which deceives more than one alien observer, I sense a Spartan resignation on the part of London. What may appeal to many as an underestimation of the struggle upon which Britain has entered is rather the sober and far-sighted intent of the community to support King and country, as and when needed, with a patriotism too deep for surface display.

"I stood in the throng before Buckingham Palace when the King's Proclamation was read to the people. I moved from point to point in the crowd, listened, watched. Only a witness of the scene could understand the British heart that night. There were mothers and wives, and daughters, and sisters in the press to whom the portentous words were sentences of desolation. Not a tear paled the cheek of a child or a greyhead. Instantly there were born a thousand new soldiers, who there received summons to the most desperate conflict upon which the Empire would ever embark. Their vision reft the veils of the horizon, and disclosed the ominous German millions, and there was at least one gun in those silent ranks for each of their hearts. And they must have remembered the women whom they were to marry, and their minds must have caressed the wives they would leave behind, and they must have thought of the protection. But what they spoke

to their souls only God heard. When their Majesties appeared all heads were uncovered. "God Save the King," sobbed through the night as though cathedral arches spread about us, and the notes were those of an anthem. In little groups the people dispersed. Save for an occasional low voice floating back to the empty square, the masses along the Mall were noiseless shadows in a dim picture. And when all were gone and the scarlet-tuniced sentries alone remained before the Palace, a strangely white moon seemed to sail straight to the centre of the vast space, and its light fell as if in augury upon the austere head of the old Queen sitting guard over her loyal capital.

As was London that night, so is London this morning. The aspect of the city is unaltered. Save for the Press bulletins, and the cries of the paper-sellers, one meets with no sign of perturbation or excitement. Regiments march through the streets attended by no greater crowds than one usually finds in the wake of parading soldiers. The unaltered price tickets in the shop windows proclaim the absence of business panic. The Strand maintains its accustomed appearance and seeks to lend assurance to the moment by calmly proceeding with its scheduled repairs. It seems to say to the passer-by: 'Steady, my friend. Why worry needlessly? Time alone controls affairs. All things are episodes to my vast experience. For a thousand years I have borne the tread of regiments, and always the to-morrows of London are greater than her yesterdays. Take example from me, and attend to your allotted tasks, as I now proceed with mine.'

I do not fear for Britain's future. A people possessed of such adamantine patience, or stubbornness—call it what you will—that they can afford to wait for their war news until the death notices and legal advertisements on the front pages have been carefully perused can hardly be expected to fail before any crisis."

We regret to notice the death of Captain Bertrand Shaw in a recent engagement with the Germans. Our readers will remember that he was confined in a prison in Germany for two years for alleged espionage, but was released on the occasion of the Kaiser's

visit to England. In an article in the *National Review* he severely criticised German administration of justice. We took occasion to refer to this in a previous number (ante p. 401). His prophecy of a speedy outbreak of war has been fulfilled. Captain Shaw also referred to the injustice and cruelty of German officials, which was entirely alien to the usages of civilized countries. We see in recent accounts from the front of the awful cruelty and barbarism which seem to be the heritage of the German people. Their hideous atrocities in Belgium and France are simply unspeakable. The tyranny of militarism by a certain class in Germany has been utilized by the Kaiser to feed his insane ambition, and this may account for much of this barbarism. It may be that the people themselves will put an end to this tyranny. Civilization demands a radical change. German methods are a blot on civilization and therefore those who practise them and who countenance fiendish acts towards women and children which would shame the worst barbarians, must be blotted out, or taught a lesson which they will never forget.

On a recent occasion, Lord Rosebery, in a public address, spoke as follows:—

"This is a war which must be fought out to the bitter end. It is a war for supremacy, the supremacy of liberty, of all we hold sacred, and is conducted by the Christian faith against a barbarous paganism. That being so, we cannot afford to lose. All we have in the world is at stake, the empire, country, honour, our place in history, and in the nations of the world. So placed as we are we can neither flinch nor come to any patched-up truce. This devilish thing we are fighting must come to an end forever."

The British army has fought for the establishment of our nation, and on all these occasions it is known that the discipline which exists in that army has not destroyed its spirit. It is, thank God, what it was, still; and they will meet again with the same spirit when called on on a future occasion, and I hope and trust, whether men mean it or not, no man will be able to render a British soldier other than he is, one of the most respectable.—Best, J., *King* v. *Burdett* (1820), 1 St. Tr. (N.S.) 55.

REVIEW OF CURRENT ENGLISH CASES.

PARTITION—JURISDICTION—NO JOINT TENANCY, OR TENANCY IN COMMON—OVERRIDING TERM.

Dodd v. *Cattell* (1914) 2 Ch. 1. This was an action for partition. The circumstances were somewhat peculiar. A testator, by his will, settled his real estate upon certain trusts under which, in the events which had happened, the plaintiff was entitled, subject to a term of 1,000 years, to the entire estate in fee simple, subject, however, as to one moiety thereof to have her estate therein divested by the attaining of a vested interest therein by other persons. The term was limited to trustees on trusts for management and application of the rents, under which, in the events which had happened, one moiety thereof was payable to the plaintiff together with a part of the other moiety. Warrington, J., before whom the action was tried, held that the plaintiff was not entitled to partition, because (1) there was no joint tenancy, or tenancy in common, and (2) the trusts for management required that the entirety of the property should remain in the trustees.

LETTERS OF ADMINISTRATION—SALE OF REALTY BY ADMINISTRATOR—SUBSEQUENT DISCOVERY OF WILL APPOINTING EXECUTORS—REVOCATION OF LETTERS OF ADMINISTRATION—GRANT OF PROBATE TO EXECUTORS—VALIDITY OF PURCHASER'S TITLE—LAND TRANSFER ACT 1897 (60-61 VICT., C. 65), SS. 1, 2, 11, 24—(R.S.O., C. 119, SS. 3, 5, 20)—CONVEYANCING AND LAW OF PROPERTY ACT (44-45 VICT., C. 41), S. 70—(R.S.O., C. 109, S. 56,

Hewson v. *Shelley* (1914) 2 Ch. 13. Was an action to set aside a sale made by the administrators of a deceased person's realty, a will appointing executors having been subsequently discovered and the letters of administration having been revoked and probate granted. Astbury, J., who tried the action, held that the sale was null and void (1913) 2 Ch. 384, (noted ante vol. 49, p. 659). This decision, if supported, would have made it exceedingly hazardous for anyone to buy real estate from an administrator. Happily, the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Phillimore, L.JJ.), have taken what appears to be a much sounder view of the situation, and have reversed his decision on

two grounds, viz., that the letters of administration did not, on their revocation, become void *ab initio*, but, on the contrary, were valid and effectual for all purposes until revoked, and *Graysbrook* v. *Fox*, 1 Plowd 275, and *Abram* v. *Cunningham*, 2 Lev. 182, and *Ellis* v. *Ellis* (1905), 1 Ch. 613, were declared to be no longer law —and secondly, because the grant of administration was an order of the Court and under s. 70 of the Conveyancing & Property Act (see R.S.O. c. 109, s. 56), a *bona fide* purchaser acquiring a title under it was protected.

NUISANCE—GASWORKS—DISCHARGE OF NOXIOUS FUMES—DAMAGE TO TREES ON ADJOINING PROPERTY—INJUNCTION—DAMAGES.

Wood v. *Conway* (1914) 2 Ch. 47. The plaintiff in this case was the owner of premises adjoining the defendants' gas works, the fumes and smoke from which were carried for a distance of 100 to 200 yards by prevailing winds across a plantation of trees on the plaintiffs' premises, and had destroyed some, and injuriously affected others. There was no house on the plaintiffs' property within the affected area. The plaintiff claimed an injunction to restrain the defendants from carrying on their works so as to cause a nuisance or injury to the plaintiff or his property. Joyce, J., who tried the action, granted the injunction as prayed, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Channell, J.) affirmed his judgment, holding that, as the injury was of a continuous nature, it was not possible to measure the damages occasioned thereby with any certainty, and therefore it was a case for an injunction and not for damages.

WILL—CONSTRUCTION—WORDS OF FUTURITY—GIFT TO CHILDREN OF CHILD OF TESTATOR "WHO SHALL DIE IN MY LIFETIME"—CHILD DEAD AT DATE OF WILL LEAVING CHILDREN.

In re Williams Metcalf v. *Williams* (1914) 2 Ch. 61. This was an appeal from the judgment of Sargant, J., (1914) 1 Ch. 219, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Channell, J.) have affirmed his decision. The short point being whether the children of a child who was dead at the date of a will could take under a disposition in favour of the children of any child "who shall die" in the testator's lifetime. The result of the case is an affirmative answer.

BANKRUPTCY—DONEE OF GENERAL TESTAMENTARY POWER OF APPOINTMENT—EXERCISE OF POWER BY BANKRUPT—DEATH OF BANKRUPT—APPOINTED FUND—CREDITORS—STATUTE OF LIMITATIONS—(21 JAC. C. 16)—(R.S.O. C. 75, S. 49).

In re Benzon Bower v. *Chetwynd* (1914) 2 Ch. 68. This, although a bankruptcy case, is deserving of attention. One Benzon, who had a general testamentary power of appointment over a fund of £15,000, was adjudicated bankrupt in 1890 and again in 1892; and he was never discharged. He died July, 1911, having executed the power. The present action was by his executors for the administration of his estate which consisted almost entirely of the appointed fund. Certain creditors of the deceased who had proved their claims in the bankruptcy proceedings, claimed to be paid their debts out of the appointed fund. Warrington, J., held that under the Bankrupt Act they could only enforce their claims, if any, through the trustee in bankruptcy, and disallowed their claims. On the case being carried to appeal the respondents claimed that this construction of the Bankruptcy Act was erroneous, whereupon it became necessary for the plaintiff to rely on the Statute of Limitations (21 Jac. c. 16)—(R.S.O. c. 75, s. 49). It was argued that the Statute of Limitations could not be set up in Bankruptcy proceedings, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Channell, J.) conceded that it could not be set up "in the bankruptcy," but this action was not the bankruptcy, and the statute having begun to run before the bankruptcy proceedings, continued to run in favour of the debtor, and was therefore a bar to the creditors in this action. Taking this view, they did not decide whether or not Warrington, J., was right as to his construction of the Bankruptcy Act.

WILL—CONSTRUCTION—CHARITABLE TRUST—GIFT FOR HOLIDAY EXPENSES OF WORK PEOPLE—GIFT TO CLUB PURPOSES TO BE DETERMINED BY COMMITTEE.

In re Drummond, Ashworth v. *Drummond* (1914) 2 Ch. 90. By the will in question in this case the testator bequeathed certain shares in a limited company to trustees upon trust to pay the income thereof to the directors of a commercial company "for the purposes of contribution to the holiday expenses of the work people employed in the spinning department of the said company in such manner as the directors in their absolute discretion should think fit," the directors having power to "divide the same equally or unequally between such work people." This bequest Eve, J.,

held not a charitable bequest, as the work people, some of whom earned only 15s. a week, could not be said to be "poor people," within the Statute of Elizabeth (see R.S.O. c. 103, s. 2 (2) (*a*) (*d*)), and it was not a trust for general public purposes, but a trust for a fluctuating body of private individuals and was void as infringing the rule against perpetuities. By the same will the testator bequeathed his residence, real and personal estate to trustees upon trust for sale and conversion, and to hold the proceeds upon trust for the Old Bradfordians Club (being a club for old boys of Bradford Grammar School) to be utilized as the committee of the club should think best in the interests of the club or school. This bequest Eve, J., held to be valid, as not tending to perpetuity.

PARTNERSHIP—ACTION FOR ACCOUNT—BOOK-MAKING AND BETTING BUSINESS—CAPITAL NOT ABSORBED IN BETTING—PROFITS OF BETTING—GAMING ACT 1892 (55-56 VICT. c. 9), s. 1.

Keen v. *Price* (1914) 2 Ch. 98 was an action by a partner against his co-partner for an account. The business of the partnership was book-making and betting. On behalf of the defendant it was contended that no action would lie to recover money in respect of such a business under the Gaming Act 1892, and therefore no account ought to be ordered; but Sargant, J., who tried the action held that, although the defendant might not be under liability to pay over any profits gained by the employment of the partnership funds in betting, yet that the plaintiff was entitled to an account, leaving it open to the defendant to object to any particular items, and to repaying anything which might represent profits gained by betting.

TENANT FOR LIFE AND REMAINDERMAN—TRUST FOR SALE AND CONVERSION—DISCRETION TO POSTPONE CONVERSION—INCOME OF UNAUTHORIZED OR WASTING SECURITIES—PREMISES "CONSTITUTING OR REPRESENTING" RESIDUARY ESTATE.

In re Godfree, Godfree v. *Godfree* (1914) 2 Ch. 110. By the will of a testator who died in 1913, all his real and personal estate was vested in trustees on trust for sale and conversion, but with full power to trustees to postpone the sale of the whole or any part of it, proceeds to be invested, and by his will the testator declared that the trustees should divide the trust premises "constituting or representing" his residuary estate into as many shares as he left children, and should appropriate one of such shares to each of such children and pay the income to each child for life, with re-

mainder on trusts in favour of his or her children. The estate, at the testator's death, comprised leaseholds, and divers investments which were not authorized by the will, but which had not yet been sold or converted. The trustees applied to the Court to determine whether, as between the tenants for life and the remainderman, the former were entitled to the whole of the income in specie received prior to sale. On behalf of the remaindermen it was contended that the direction as to payment of the income, referred to the income of the shares when appropriated; and the trustees had no power to appropriate unauthorized investments and that therefore the direction to pay income did not cover income received in the meantime from unauthorized securities prior to conversion: but Warrington, J., decided that the words "constituting or representing" the residuary estate, indicated that the testator meant that the income of the estate, as it from time to time existed, was to be divided, and therefore that the tenants for life were entitled to the whole income in specie, so long as the estate remained unsold.

WILL—SPECIFIC BEQUEST—SECURITIES "STANDING IN MY NAME" —FOREIGN BONDS PAYABLE TO BEARER—CUSTODY OF TESTATRIX'S BANKERS.

In re Mayne, Stoneham v. *Woods* (1914) 2 Ch. 115. By the will in question in this case the testatrix bequeathed all the "stocks, shares, debenture stock and other securities which shall be standing in my name at my decease." At the time of her decease the testatrix had in the hands of her bankers two bonds of the Japanese Government, payable to bearer. The bonds were in an envelope marked outside with the testatrix's name, written by the bank manager and with the letters and figures "S.C.R. 122" which meant "Safe Custody Register folio 122;" and the entry in this register was headed with the testatrix's name; but this was merely the bank's book recording that the bonds were held by the bank for safe custody. Warrington, J., who heard the application, held that the bonds did not pass by the will.

WILL—SPECIFIC LEGACY GIVEN "AS A GENERAL AND NOT AS A SPECIFIC LEGACY"—LIABILITY OF LEGACY TO ABATE.

In re Compton, Vaughan v. *Smith* (1914) 2 Ch. 119. Sargent, J., determines that where a specific legacy is given by a will "as a general and not as a specific legacy" the latter words must be given due effect; and notwithstanding the legacy is in terms

specific, yet in the case of a deficiency of assets it must abate as if it were a general legacy.

PRACTICE—DISCOVERY—PATENT—INFRINGEMENT—NAMES OF MANUFACTURERS OF INFRINGING ARTICLES.

Osram Lamp Works v. *Gabriel Lamp Co.* (1914) 2 Ch. 129. This was an appeal from the decision of Eve, J., (1914) 1 Ch. 699. (Noted ante p. 391). The action was to restrain the infringement of a patent for an invention. The plaintiffs claimed to examine the defendants for discovery as to whether a particular set of 150 incandescent electric lamps were manufactured wholly, or in part, by a specified Paris firm, or by what other person or firms. The defendants admitted selling the lamps to an English firm, but stated that none of the lamps were manufactured by the defendants. They objected to answer whether they were manufactured by the Paris firm, or by whom otherwise. The avowed object of the plaintiffs in seeking the information was to enable them to ascertain the sources from which the lamps in question were obtained, and to enable them to identify and establish the process of manufacture employed in their production. Eve, J., held that the defendants were not bound to answer the questions objected to as not being relevant to the issue, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Channell, J.) have reversed his decision, holding that the leading case of *Marriott* v. *Chamberlain*, 17 Q.B.D. 154, was conclusive as to the plaintiffs' right to interrogate, not merely as to facts directly in issue, but also as to facts, the existence or non-existence of which is relevant to the facts directly in issue.

SETTLED ESTATE—PERSONS BENEFICIALLY ENTITLED TO INCOME OF SETTLED ESTATE—TENANT FOR LIFE—SETTLED LAND ACT 1882 (45-46 VICT. c. 38), s. 2(5); s. 58 (1 v. IX.)—(R.S.O. c. 74, s. 33 (1, *a*, *i*).)

In re Johnson, Johnson v. *Johnson* (1914) 2 Ch. 134. Under a settlement certain persons were entitled to the income arising from the real estate settled until the death of the last survivor of them; one of them was dead and her executor was entitled to her share. Warrington, J., held that these persons, with the executor, were together persons having the powers of a tenant for life, within the meaning of the Settled Land Act, 1882, s. 58, (1, IX)—See R.S.O. c. 74, s. 33 (1), (a), (i).

AGREEMENT NOT TO EXTEND "MAINS"—EXTENDING SERVICE PIPE—BREACH OF AGREEMENT—INJUNCTION.

Whittington Gas Co. v. *Chesterfield Gas Co.* (1914) 2 Ch. 146. This was an action to restrain an alleged breach of agreement by the defendants. By an agreement between the plaintiffs and defendants the latter agreed not to extend any existing "mains" of their gas works into certain specified parishes, without the plaintiff's consent. Without the plaintiff's consent the defendants had laid a service pipe of 88 yards length from one of their mains in one of the parishes mentioned, in order to supply gas to one consumer. Eve, J., held that this was no breach of the agreement and the Court of Appeal (Cozens-Hardy, M.R., Eady and Pickford, L.JJ.) have affirmed his decision, the Court holding that a service pipe is not a "main," nor, though connected with a main, can it be properly said to be an extension of the main.

WILL—RESIDUE TO BE AT THE DISCRETION OF THE EXECUTOR AND AT HIS OWN DISPOSAL—PRIOR LEGACY TO EXECUTOR—EXECUTOR WHETHER BENEFICIALLY ENTITLED—NEXT OF KIN.

In re Howell, Liggins v. *Buckingham* (1914) 2 Ch. 173. By the will in question herein, the testatrix appointed George Buckingham her executor and directed him to pay her debts, funeral and testamentary expenses. She bequeathed various pecuniary legacies, including one to Buckingham "my executor," and the will concluded "after the aforesaid legacies have been duly paid the remainder of my property, if any, shall be at the discretion of my executor and at his sole disposal." The question was whether Buckingham took the residue beneficially or as trustee for the next of kin. Warrington, J., was of the opinion that the question turned on whether the expression "my executor" in the concluding clause could be construed to mean Buckingham individually, or the person appointed to execute the will, whoever he might be. He came to the conclusion that it meant, not George Buckingham, individually, but the person who should administer the will, and therefore he did not take beneficially but in trust for the next of kin. This is supposed to be carrying out the intention of the testatrix, but it is to be feared that this testatrix, like many others, would probably be much surprised to find how difficult it is to make a Court of law understand what you really do mean.

WILL—GIFT OF INCOME TO CHILDREN DURING THEIR LIVES OR TO ISSUE OF ANY DYING BEFORE THE OTHERS—GIFT OVER AFTER DEATH OF ALL CHILDREN TO GRANDCHILDREN—IMPLIED CROSS REMAINDERS DURING LIFE OF SURVIVORS.

In re Tate, Williamson v. *Gilpin* (1914) 2 Ch. 182. By the will in question, in this case, real estate was devised on trust to pay the income thereof, to the testator's children in equal shares, or to their issue in case any of them should die before the others, and from and after the decease of all of his children, then to sell and divide the proceeds between his grandchildren in equal shares *per stirpes*. The testator left three children, one of whom, Frances, had died without issue. Another died leaving a child Emilie. The third child, Elijah, survived, and the question was, who was now entitled to the income of Frances' third? This was the problem Sargant, J., had to settle, and he decided that, according to the true construction of the will, there were implied cross remainders in favour of the children and their issue, and that Elijah and Emilie were entitled in equal shares to the deceased Frances' one-third share.

SHIPPING—REGISTERED SHIP—SALE OF SHIP—CONTRACT TO GIVE DELIVERY ORDER FOR SHIP—BILL OF SALE—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. c. 60), ss. 24, 530.

Manchester Ship Canal Co. v. *Horlock* (1914) 2 Ch. 199. The Court of Appeal (Cozens-Hardy, M.A., and Eady and Pickford, L.JJ.) have been unable to agree with the decision of Eve, J. (1914) 1 Ch. 453, noted ante p. 310, on the ground that the ship in question was "constructively lost" within the meaning of the Merchants Shipping Act 1894, and ceased to be a registered ship, and no bill of sale thereof was therefore necessary.

VENDOR AND PURCHASER—RESTRICTIVE COVENANT FOR BENEFIT OF ADJOINING LANDS—SALE OF ADJOINING LANDS PRIOR TO COVENANT.

Millbourn v. *Lyons* (1914) 2 Ch. 231. This was an appeal from the judgment of Neville, J. (1914) 1 Ch. 34, (noted ante p. 147). The action, it may be remembered, was for the specific performance of a contract for the sale of land which the defendant objected to perform, on the ground that the land was subject to a restrictive building covenant. The Court of Appeal (Cozens-Hardy, M.R., Eady and Pickford, L.JJ.) agreed with Neville, J., that as the covenantee had not at the date of the covenant

any adjoining property to which the benefit of the restrictive covenant could attach, the property in question was not bound by the covenant.

WILL—LEGACY TO "ST. MARY'S HOME FOR WOMEN AND CHILDREN, 15 WELLINGTON STREET, CHELSEA"—CHANGE OF CONTROLLING BODY AND CHANGE OF ADDRESS OF CHARITY IN TESTATRIX'S LIFETIME.

In re Wedgewood, Sweet v. *Cotton* (1914) 2 Ch. 245. In this case a will was in question whereby the testatrix bequeathed a legacy to Saint Mary's Home for Women and Children, of 15 Wellington Street, Chelsea. During the testatrix's lifetime St. Mary's Home had been carried on at 15 Wellington Square, Chelsea, but during her lifetime the controlling body of the home had been changed, and it had been removed to other quarters, and the work was now carried on by two organizations. Joyce, J., held that the bequest was a valid charitable bequest, but that neither of the present organizations could claim it unless the Attorney-General consented to their getting it on an undertaking to apply it to St. Mary's Home, otherwise a scheme must be settled.

COMPANY—INDEMNITY TO SERVANTS—SPECIAL ARTICLE—COMMON LAW RIGHT OF SERVANT TO INDEMNITY—MINING ENGINEER—SCOPE OF EMPLOYMENT—LIBEL AND SLANDER—COSTS OF SUCCESSFULLY DEFENDING ACTION.

Re Famatina Development Corp. (1914) 2 Ch. 271. This was a winding-up proceeding in which an employee of the company in liquidation claimed indemnity for certain costs he had been put to in defending an action of libel brought against him in reference to a report made by him as a servant of the company. The claimant was employed by the company as a consulting engineer, to visit and make inquiries and report as to the company's properties. As the result of his inquiries he reported that the managing director had made contracts for worthless properties, had made misleading reports, and had arranged to procure certain secret commissions. The director sued him for libel and failed, and the engineer was put to costs and the action was ultimately dismissed with costs, owing to the director being unable to give security for costs for a new trial. These costs he failed to recover from the plaintiff in the action, and claimed to prove them against the company. The claimant was a member of the company at

the date of his employment and one of its articles provided that every officer or servant of the company should be indemnified against loss and that it should be the duty of the directors to pay all costs, losses and expenses which he might incur by reason of any act done by him as an officer or servant. Sargant, J., held that, on the evidence the reports in question were made without malice and were privileged, but, though it was the duty of the claimant to make the reports, it did not fall within the direct terms of his employment so to do, and, therefore, that he was not entitled to the indemnity claimed, either under the article, or at common law, but the Court of Appeal (Cozens-Hardy, M.R., and Eady and Pickford, L.JJ.) reversed his decision, holding that all that the claimant had done was in pursuance of his duties as an agent of the company.

CONTRACT—CONSIDERATION—PUBLIC POLICY—BANKRUPTCY ACT —CONTRACT BY BANKRUPT TO PAY DEBT IN FULL—VALIDITY OF CONTRACT.

Wild v. *Tucker* (1914), 3 K.B. 36. This was an action to enfor a contract made by the defendant, a bankrupt, in consideration of a small loan, to pay in full a large debt due by him to the plaintiff, and which was recoverable in the bankruptcy proceedings. It was contended that the contract was contrary to the policy of the Bankruptcy Act, and therefore void. The plaintiff had not proved his claim in the bankruptcy, and no dividend had been, or was likely to be, declared therein, and the defendant had not been discharged. But Atkin, J., who tried the action, held that the contract was valid and gave judgment for the plaintiff.

SALE OF GOODS—DOCUMENT OF TITLE—DELIVERY ORDER MADE BY OWNER OF GOODS—DELIVERY ORDER NOT FOR SPECIFIC GOODS—TRANSFER OF DELIVERY ORDER FOR VALUE—FACTORS' ACT 1889 (52-53 VICT. c. 45), ss. 1, 2, 10—SALE OF GOODS ACT 1893 (56-57 VICT. c. 71), ss. 25, 47, 62—(R.S.O. c. 137, s. 3.)

Ant. Jurgens, etc., v. *Dreyfus* (1914), 3 K.B. 40. In this case the defendants who were the owners of 6400 bags of seed, gave a delivery order to one Finkler for 2640 of the bags for which Finkler gave them his cheque. This order Finkler transferred to the plaintiffs, who took it in good faith, and for valuable consideration. Finkler's cheque was subsequently dishonoured, and the

defendants refused to give delivery of the 2640 bags to the plaintiffs. Pickford, J., who tried the action, held that the delivery order was a document of title which had been transferred by the defendants to Finkler within the meaning of s. 10 of the Factors' Act, 1889 (see R.S.O. c. 137, s. 3), and s. 477, the Sale of Goods Act, 1893, and having been transferred by Finkler to the plaintiffs who took it in good faith and for value, the defendants' lien as unpaid vendors was defeated, notwithstanding the order did not relate to specific goods.

CHARTER PARTY—REFUSAL OF CHARTERERS TO PERFORM CONTRACT—RESTRAINT OF SERVICES—INABILITY OF SHIPOWNER TO CARRY CARGO TO ITS DESTINATION.

Embiricos v. *Reid* (1914), 3 K.B. 45. This was an action for breach of contract of charter party. The defendants chartered plaintiffs' vessel, a Greek ship, to proceed to the Sea of Azofi, there load a cargo of grain and carry it to a port in Great Britain. The charter party contained an exception of restraint of services. The ship arrived at the loading port on October 1, 1912, and commenced to load on the following day. After a small portion of the cargo had been loaded the defendants stopped further loading on learning that the Turkish authorities were then seizing and detaining Greek ships arriving at the Dardanelles. War between Greece and Turkey was declared on October 18, 1912, and was not concluded till September, 1913. The lay days under the charter party expired on October 22, 1912; and on October 21 the defendants cancelled the charter party on the ground that the war had brought the venture to an end; but the plaintiffs refused to accept the cancellation. Scrutton, J., who tried the action, held that the facts afforded a sufficient justification for the defendants' refusal to carry out the charter party, notwithstanding that they had begun to perform the contract. The action therefore failed.

SHIP—CHARTER PARTY—DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND REASONABLE TIME—DAMAGES—POINT OF LAW—FACTS IN DISPUTE.

Western Steamship Co. v. *Amaral & Co.* (1914), 3 K.B. 55. In this case, which was an action for demurrage, an order had been made to set down the case to be heard on a point of law relating to the construction of the charter party raised by the pleadings. The point was accordingly argued and decided by Bray, J. (1913), 3 K.B. 366 (noted ante. vol. 49, p. 663) in favour of the defen-

dants, from which decision the present appeal was brought; but it appearing on the appeal that the case could not be satisfactorily disposed of on the question of law, as the plaintiffs raised an issue of fact that the vessel had been deliberately detained by the defendants for their own purposes, the Court of Appeal (Lord Reading, C.J., and Phillimore, L.J., and Lush, J.) without deciding whether or not the decision of Bray, J., was correct, set aside the order directing the argument of the point of law.

INSURANCE (MARINE)—COLLISION CLAUSE IN LLOYD'S POLICY—"COLLISION WITH SHIP OR VESSEL"—COLLISION WITH NETS OF FISHING VESSEL.

Bennett S.S. Co. v. *Hull Mutual S. P. Society* (1914), 3 K.B. 57. The Court of Appeal (Lord Reading, C.J., and Phillimore, L.J., and Lush, J.) have affirmed the decision of Pickford, J. (1913), 3 K.B. 372 (noted *ante* vol. 49, p. 745), to the effect that a collision of a ship with the nets of a fishing vessel is not "a collision with a ship or vessel," within the meaning of a Lloyd's policy.

MARRIED WOMAN—SEPARATE PROPERTY—RESTRAINT ON ANTICIPATION—"SEPARATE PROPERTY WHICH SHE IS AT THAT TIME OR THEREAFTER RESTRAINED FROM ANTICIPATING"—MARRIED WOMEN'S PROPERTY ACT, 1893 (56-57 VICT. c. 63), s. 1—(R.S.O. c. 149, s. 5(2)).

Wood v. *Lewis* (1914), 3 K.B. 73. This was an application to garnish a debt due to the defendant, a married woman. The debt in question was payable by a trustee for the defendant under a covenant in a deed for her separate use without power of anticipation. Subsequently to the making of the covenant the defendant incurred the debt to the plaintiff for which judgment had been recovered, December 29, 1913. On December 24, 1913, the covenantor had paid to the trustee the quarterly payment then due, which was the debt sought to be attached, but the Court of Appeal (Lord Sumner and Lawrence, J.) held on the authority of *Barnett* v. *Howard* (1900), 2 Q.B. 784, that at the time of the contract the money in question was subject to a restraint against anticipation, and was therefore not liable to satisfy the judgment, and the order of Channell, J., in favour of the defendant was affirmed.

PRACTICE—DISCOVERY—TRANSCRIPT OF SHORTHAND NOTES OF PROCEEDINGS IN PREVIOUS ACTION—NOTES TAKEN IN ANTICIPATION OF FUTURE LITIGATION—PRIVILEGE.

Lambert v. *Home* (1914), 3 K.B. 86. In this case the plaintiff claimed that the transcript of the shorthand notes taken of

proceedings in open Court in anticipation of future litigation, in the possession of the defendant, were liable to production for the purpose of discovery. The Master granted production, and Lawrence, J., affirmed his order, and his decision was affirmed by the majority of the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., Channell, J., dissenting), the majority holding that the reproduction in physical form of matter which is *publici juris* is not privileged from production. Channell, J., on the other hand, considered that, as the notes had been taken on behalf of the defendant with the object of instructing counsel in case of future litigation, they were privileged.

ACTION BASED ON FELONIOUS ACT—STAY OF PROCEEDINGS TILL DEFENDANT PROSECUTED.

Smith v. *Selwyn* (1914), 3 K.B. 98. The statement of claim in this action was by husband and wife, and claimed that the defendant had drugged the wife and then indecently assaulted her. The defendant applied to stay further proceedings or to dismiss the action on the ground that the statement of claim was based on an alleged felony for which the defendant had not been prosecuted. Lord Coleridge, J., affirmed the order of the Master dismissing the action, but the Court of Appeal (Kennedy, Eady, and Phillimore, L.JJ.) held that the proceedings must be stayed until after criminal proceedings had been taken against the defendant.

LANDLORD AND TENANT—IMPLIED CONTRACT BY LANDLORD WITH TENANT THAT DEMISED HOUSE IS FIT FOR HABITATION—ACCIDENT ARISING FROM DEFECT IN DEMISED PREMISES TO DAUGHTER OF TENANT.

Ryall v. *Kidwell* (1914), 3 K.B. 135. By virtue of a statute it was provided that a contract should be implied by the defendant with the plaintiff's father, that certain demised premises let by the defendant to the plaintiff's father were fit for human habitation. The premises were in fact defective, and by reason of the defect the plaintiff, who was an inmate of the house, was injured and claimed damages. The Divisional Court (Ridley, and Avory, JJ.) held, following *Cavalier* v. *Pope* (1905), 2 K.B. 757; (1906), A.C. 425, that the contract did not enure to the benefit of strangers to the contract, and that the plaintiff had, therefore, no right of action, and this decision was affirmed by the Court of Appeal (Lord Reading, C.J., and Phillimore, L.J., and Lush, J.).

FOREIGN JUDGMENT—APPEARANCE IN FOREIGN COURT—DEFAULT JUDGMENT SET ASIDE, AND SUBSEQUENTLY RESTORED ON APPEAL.

Guiard v. *De Clermont* (1914), 3 K.B. 145. This was an action recovered in a French Court. The defendants contended it was not enforceable against them in England. The defendants had a notification of the institution of the proceedings in the French Consul, which had been sent to the French Consul in London, who informed the defendants and requested them to take up the papers which they declined to do. Judgment was given against the defendants in the French Court for default, and intimation thereof was given to the defendants in the same way, but they took no notice thereof until an application was made to attach certain moneys of the defendants in a French bank, when they applied to the French Court to open the proceedings, which was done, but the plaintiff appealed and the original judgment was restored. In these circumstances Lawrence, J., held that the judgment was enforceable in England because the defendants had voluntarily appeared in the French proceedings, and the judgment took its whole force and effect from the decision of the Court of Appeal and not from the original default judgment.

SHIP—CHARTER PARTY—PROVISION FOR CESSATION OF PAYMENT OF HIRE—"LOSS OF TIME THROUGH DAMAGE PREVENTING EFFICIENT WORKING OF VESSEL FOR MORE THAN FORTY-EIGHT HOURS"—LOSS OF TIME EXCEEDING 48 HOURS—CESSATION OF PAYMENT FOR FIRST FORTY-EIGHT HOURS.

Meade-King v. *Jacobs* (1914), 3 K.B. 156. In this case the point decided is as to the proper construction of a clause in a charter party which provided that in case of "loss of time through damage preventing the efficient working of the vessel for more than 48 hours, the payment of hire was to cease." The vessel was, in fact, disabled so as to prevent its efficient working for more than 48 hours, and the simple question was, whether the provision relieved the charterers from payment of hire for the first 48 hours of the time, and Bailhache, J., held that it did.

PRACTICE—COSTS—TWO DEFENDANTS—COSTS OF SUCCESSFUL DEFENDANT, WHEN PAYABLE BY AN UNSUCCESSFUL DEFENDANT.

Besterman v. *British Motor Cab Co.* (1914), 3 K.B. 181. The plaintiff in this case had been injured in a collision between a

motor cab and an omnibus, and joined the owners of both vehicles as defendants in an action to recover damages thereby sustained. He recovered judgment against the cab company, and the action was dismissed as against the omnibus company. Coleridge, J., who tried the action, ordered the cab company to pay the plaintiff's costs and also the costs which the plaintiff was ordered to pay the omnibus company: and it was held by the Court of Appeal (Williams, Kennedy, and Eady, L.JJ.) that he had a discretion so to do, although the cab company had not before action intimated any intention to throw the responsibility for the action on the omnibus company. Their Lordships hold that there is no rule that such intimation must have been given to justify such an order as to costs, and that the only question in such cases is whether it was a reasonable and proper course for the plaintiff to join both defendants in the action.

Correspondence.

CORPORATION LAW.

To the Editor CANADA LAW JOURNAL:—

SIR,—In a note on page 34 of "The Law of Associations Corporate and Unincorporate," by Herbert A. Smith, Oxford University Press, we are told that in the case of a corporation making an agreement *ultra vires*, it would seem that the other party has no remedy at all. It is submitted that this is not a correct statement of the law having regard to:—

(*a*) The rules relating to "tracing judgments."

(*b*) The cases of *Re Phoenix Life Assurance Company* (1862), 2 J. & H. 441, and *Flood* v. *Irish Provident Assurance Company, Limited*, 46 Irish Law Times, p. 214, in each of which it was held that the amount of certain premiums which had been paid in respect of policies, the issue of which was *ultra vires*, could be recovered. Viscount Haldane, L.C., in his judgment in *Sinclair* v. *Brougham* (1914), 30 Times Law Reports 315, refers to these two cases, but does not discuss them fully.

As regards liability for torts and crimes, some reference should have been made to *Oram* v. *Hutt* (1914), 1 Ch. 98, in which Lord Parker of Waddington, said: "It may well be that a corporation cannot commit the common law offence of maintenance . . .

I cannot doubt, however, that an agreement which if entered into by an individual would be void as an agreement to commit an illegal act would if entered into by a corporation be similarly void, and if this is so, payments made pursuant to any such agreement would be *ultra vires* unless they could be justified on other grounds;" and Lord Sumner observed: "Whether an act is an act of maintenance or not depends on its own character, not on the character of the maintainer." In that case it was held that the payment of certain costs out of the funds of a trade union was, in the circumstances, obnoxious to the law of maintenance, and *ultra vires*.

The learned author has fallen into another error on page 103, where he says: "The statutes regulating friendly societies and other quasi corporations contain a number of criminal provisions, but these seem to be invariably enforced by penalties against the officers and members of such bodies, and not by fines to be paid out of the common funds." It is provided by sec. 89 of the Friendly Societies Act, 1896, that "a society or branch . . . guilty of an offence under this Act for which a fine is not expressly provided, shall be liable to a fine of not more than five pounds;" and sec. 92 (b) refers to "a prosecution against a registered society or branch." (Compare sec. 68 of the Industrial and Provident Societies Act, 1893 sec. 16 of the Trade Union Act, 1871, and sec. 15 of the Trade Union Act Amendment Act, 1876.)

On page 32 we read that the memorandum can only be altered in exceptional circumstances and by leave of the Court. (This statement is repeated in a note on page 140.) This is true as regards the objects of the company, but we must remember:—

(*a*) That some parts of the memorandum of association are unalterable, for sec. 7 of the Companies (Consolidation) Act, 1908, provides that a company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

(*b*) That other parts of the memorandum may be altered without the leave of the Court; for example, the name of the company (sec. 8; compare sec. 20 (4)); the situation of the registered office (sec. 62); the liability of directors, managers, and managing director (sec. 61); the share capital (secs. 41 and 56).

There seems to be a clerical error in "draftmanship" on page 33, and a similar error in the last line on page 83.

LEIRO.

REPORTS AND NOTES OF CASES.

Province of Ontario

SUPREME COURT.

BASSI *v.* SULLIVAN.

Alien enemy—Definition of—Right of action in time of war—Resident alien "in protection"—Effect of Royal Proclamation—Enquiry as to conduct and status of plaintiff—Stay of proceedings.

Held, 1. An alien enemy is one whose Sovereign is at enmity with the Crown of England. He cannot sue in a British Court during the war unless he is here "in protection," that is to say, if there are particular circumstances that, pro hac vice, discharge him from the character of an enemy, such as coming under a flag of truce, etc., or in such a way as to put him within the King's peace, or unless he has a safe conduct or license from the Crown.

2. The Royal Proclamation of August 15, 1914, probably refers only to police protection and not to civil rights.

3. It is not incumbent on courts to make, still less to act upon, any presumption in favor of natives of either of the two nations now at war with the British Crown; though every facility should be given for local enquiry as to their status or condition or whether they can claim under a license sufficient to entitle them to the right to sue.

[Toronto, Sept. 11—Hodgins, J.A.

Motion by the plaintiff to continue an interim injunction.

W. R. Smyth, K.C., for plaintiff. *R. McKay*, K.C., for defendants.

HODGINS, J.A.:—The plaintiff, who holds an unregistered chattel mortgage, dated the 18th May, 1914, on the stock in trade of Wiwcaruk & Bassi, in the town of Cobalt, brings this action to set aside the defendants' registered chattel mortgage upon the same goods, dated the 29th May, 1914. He has obtained from the Local Judge at Haileybury an injunction restraining their sale.

The present motion is to continue that injunction. The plaintiff claims to sue on behalf of himself and all other creditors of the firm already named, and grounds his action upon the fact that the seizure and sale will, in his belief, "create an unjust preference."

The plaintiff by so suing must be taken to have abandoned his rights as a secured creditor. Insolvency is not suggested except inferentially, and apparently will only arise after the defendants have realised upon their security.

I do not understand upon what principle a simple contract creditor, even suing in a class action, can restrain a chattel mortgagee from realising upon his security, unless he in the first place alleges more than this plaintiff does, and in the second place satisfies the Court that the circumstances under which the mortgage was given indicate some infraction of the statutes relating to preferences. This the plaintiff does not attempt to do.

So far as the amount due upon the mortgage is concerned, the Court will not, upon this application, take the account, nor, as I understand the practice, will it restrain realisation by a solvent creditor under his mortgage, except upon at all events prima facie proof of invalidity. I am, thereore, unable to continue the injunction.

The defendants, however, contended that the action is not maintainable and that I should dismiss it, because the plaintiff is an alien enemy, being an Austrian and not naturalised. The plaintiff does not deny that he is a native of Austria, and by his counsel admits that he is not naturalised. The writ was issued on the 27th August, 1914, which was after the date at which a state of war existed between his Britannic Majesty and the Emperor of Austro-Hungary, viz., the 12th August, 1914.

This raises a most important point, of which the Court is bound to take notice: per Lord Davey in *Janson* v. *Dreifontein Consolidated Mines Limited*, [1902] A.C. 484, at p. 499. The position of an alien enemy has not, except in a few isolated cases, been dealt with in the Courts since the Napoleonic and Crimean wars. The doctrines then established have not, in consequence, undergone much, if any, modification. But, if not altered in substance, the extreme rights arising thereout are rarely—according to Lord Loreburn in *De Jager* v. *Attorney-General for Natal*, [1907] A.C. 326—put into actual practice.

An alien enemy is one whose Sovereign is at enmity with the Crown of England, and one of his disabilities which has always been strongly insisted upon is that he cannot sue in a British

Court during war. But this rule is always stated with an exception. In Wells v. Williams, 1 Ld. Raym. 282, 1 Salk, 46, Sir George Treby, Chief Justice of the Common Pleas (temp. Wm. III.) said: "An alien enemy who is here in protection may sue his bond or contract." And in the oft-quoted case of The Hoop (1799), 1 C. Rob. 196, Sir William Scott laid it down that, even in British Courts, by the law of nations, "no man can sue therein who is a subject of the enemy unless under particular circumstances, that, pro hac vice, discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice. But otherwise he is totally exlex."

This exception is recognised in more modern time by Sir Alexander Cockburn, L.C.J., in his work on Nationality (1869), p. 150: "An alien enemy has no civil rights in this country, unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war, the Sovereign usually, in the proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends."

But to the enjoyment of this privilege important qualifications are annexed. One is that the alien enemy must shew himself possessed of what amounts to such a license: *Esposito* v. *Bowden* (1857), 7 E. & B. 762, 763. And, further, if the license be a general one, the alien enemy may be prevented from asserting it. In *Sparenburg* v. *Bannatyne* (1797), 1 B. & P. 163, at p. 170, Eyre, C.J., says: "I take the true ground upon which a plea of alien enemy has been allowed is that a man professing himself hostile to this country and in a state of war with it cannot be heard if he sue for the benefit and protection of our laws in the Courts of this country."

The Crown has, by Royal Proclamation dated on the 15th August, 1914, directed: "That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained, or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation."

In the present case the Court has no means of knowing whether this Proclamation, the terms of which are relied on as giving a right to maintain this action, covers this particular plaintiff. He may or may not be quietly pursuing his ordinary avocation, or he may be, for all that is before me, one of the class excluded by its subsequent provisions, or otherwise disentitled to take advantage of provisions intended for those who have resided here and engaged in business for some length of time. Nor am I at all sure that the Proclamation has the effect contended for. It appears to have been issued under sec. 6, sub-sec. (b), rather than under sub-secs. (e) and (f) of the War Measures Act, 1914, and may well refer only to police protection. It is not incumbent on the Court to make, still less to act upon, any presumption in favour of natives of either of the two nations now at war with the British Crown; and I think that every facility should be afforded for local inquiry, so that the Court should be fully informed as to whether or not the plaintiff is in fact entitled to set up the protection extended by the Crown under the wording of the Proclamation. Such an inquiry may properly be made at or before the trial, and may be called for at any time on motion; but, if pleadings had been delivered in this case, I should prefer to leave the questions both of fact and law to be determined when the case came up for trial, especially as recent English statutes and proclamations have not yet reached this country. But, as attention is pointedly called to it on this motion, and as the Crown has drawn a distinction between peaceable alien enemies and those who may be otherwise engaged, I think, at this early stage of the war, it will be proper to stay the action until the plaintiff satisfies the Court that it ought to allow him to proceed to trial, and there urge the contention that he is here under what amounts to a license sufficient to enable him to sue on such a cause of action as he is setting up.

Reference to recent discussions in the English law periodicals and to the report of an expert committee of the London Chamber of Commerce in August may be of use in finally determining the extent of the Proclamation and the scope of its provisions.

The injunction will be dissolved and the action stayed meantime, with leave to apply on notice to a Judge of the High Court Division to permit the action to proceed after time has been given to make the inquiries I have indicated. Two weeks will be sufficient. If the action proceeds, the costs of this motion will be to the defendants in the cause, unless the trial Judge otherwise orders. If no further proceedings are taken, the costs will be paid by the plaintiff to the defendant after taxation.

Province of Nova Scotia.

COUNTY COURT.

Wallace, Co. J.] REX *v.* ALLEN. [17 D.L.R. 719.

Husband and wife—Non-support of wife or children—Summary proceedings—Wife as a witness.

The amendment to the Criminal Code in 1913, by the addition of new sections 242A and 242B (3-4 Geo. V., ch. 13), will not affect the interpretation of the words "the three last preceding sections" used in sec. 244; the three sections intended are 241, 242 and 243, and these relate to indictable offences as to criminal omission of duty, while the added sections relate to summary convictions for neglect to provide for wife or children; the reference in the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, to offences against sec. 244 does not constitute the wife of the accused a competent witness against him on a summary hearing of a charge under the added section 242A.

Witnesses—Wife as witness against husband—Criminal law—Non-support triable under summary conviction procedure.

The evidence of the wife is not admissible against her husband on the hearing before a magistrate of a charge under Code sec. 242A (amendment of 1913) whereby it was made an offence punishable on summary conviction for a husband to neglect without lawful excuse to provide for his wife and children when destitute, as no corresponding amendment was made to the Canada Evidence Act when sec. 242A was added to the Code.

Statutes—Amending statutes—New section introduced with number and letter designation.

Section 242A of the Criminal Code which was inserted by the Code Amendment Act, 1913, is not to be considered a sub-section of sec. 242, but as an entirely independent section.

H. C. Morse, for the appellant, the defendant. *John J. Power*, K.C., for the respondent, the prosecutrix.

ANNOTATION ON ABOVE CASE IN DOMINION LAW REPORTS.

The case of *Rex* v. *Allen*, above reported, raises an interesting question which there appears to have been no occasion to consider in England since the Criminal Evidence Act, 1898 (Imp.) or heretofore in Canada since the Canada Evidence Act. That is whether, assuming as is done in the *Allen*

case that sec. 242A is to be viewed as an entirely separate section of the Code apart from sec. 242, and notwithstanding the non-inclusion of sec. 242A in the list of sections referred to in sec. 4 of the Canada Evidence Act, the wife is not a competent witness against her husband on a summary charge for failure to provide for her, whereby she falls into destitute or necessitous circumstances.

It seems clear that on the creation of a new offence without restriction as to the class of evidence or the competency of the witnesses, the analogy of the common law would apply, together with such general statutory enactments as were referable to the offence or to witnesses or evidence. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 2, makes sec. 4 applicable to "all criminal proceedings"; and while sec. 4 specifies particular offences as to which the wife of the accused shall be a "competent and compellable witness for the prosecution" without the consent of the person charged, it further provides, in the fourth sub-section, that "nothing in this section shall affect a case where the wife or husband of a person charged with an offence may *at common law* be called as a witness without the consent of that person."

Before it can be concluded that the evidence of the wife is not admissible, it is necessary not only to find if the offence is specially designated in sub-section 2 of sec. 4 of the Canada Evidence Act, but to ascertain if the case comes within the class of common law exceptions under which the wife's testimony was admissible. The common law rule as to the evidence of husband and wife either for or against each other is thus stated in Pritchard on Quarter Sessions (1875), p. 278:—

"In criminal, as in civil cases, there is only one relationship which disqualifies, viz., that of husband and wife. In no case, *except* those where either husband or wife complains of an injury directly inflicted by the one on the other, can either party in this connection give evidence for or against the other. Even where the husband consented to the wife being examined *against* him, the evidence was rejected, 1 Hale, Pleas of the Crown, 47. In case of personal violence or wrong, the wife is from necessity a competent witness against the husband, and the husband against the wife. It is said that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person. *Per* Hullock B. in *R.* v. *Wakefield*, 2 Lewin, C.C. 1, 279, 2 R.C. & M. 605. So on an indictment against the husband for an assault upon his wife, *R.* v. *Azire*, 1 Str. 633, Buller, N.P. 7th ed. 287. And upon an indictment under the statute of Henry VII, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*, and being competent against him she was consequently competent as a witness for him; *R.* v. *Perry*, Ry. & Mov. N.P.C. 353; though it has been doubted whether if the woman afterwards assented to the marriage and lived with the man for any considerable time, she would be capable of being a witness either for or against him. Roscoe Cr. Evid., 13th ed., 106. In *R.* v. *Wakefield*, 2 Lewin C.C. 288, 2 R.C. & M. 607, Hullock, B., was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution on the

ground of necessity, although there was no evidence to support that part of the indictment which charged force, and also on the ground that the defendant, to whom she had been married after having been illegally taken from her father's custody contrary to the statute then in force as to heiresses, could not by his own criminal act found a claim to exclude such evidence against himself.

It would seem that it is not necessary that there should be force employed in the offence in order to make the husband or wife competent. *R.* v. *Wakefield*, 2 Lewin C.C. 279; R. v. *Perry* (1794), cited in *Rex* v. *Serjeant*, R. & M.N.P.C. 354; 3 Russell on Crimes, 5th ed. 626 (*n*).

A wife is always permitted to swear the peace against her husband Taylor on Evid., 10th ed., vol. 2, p. 973; Roscoe's Crim. Evid., 12th ed. 109, 13th ed. 106. Upon the trial before justices under the Vagrancy Act, 5 Geo. IV (Imp.), ch. 83, for neglect to support wife and children whereby they became chargeable to the parish as paupers, it was held that the wife's evidence was not admissible against her husband, for the neglect was considered merely as an offence against the parish. *Reeve* v. *Wood* (1864), 10 Cox C.C. 58, 5 B. & S. 364, 34 L.J.M.C. 15. In that case the court of King's Bench (Crompton, Blackburn and Mellor, JJ.) all concurred in the view that the punishment provided by the statute was in respect to the chargeability to the union or workhouse funds and *not* for an alleged wrong to the wife and therefore that the evidence of the wife could not be received against her husband. Crompton, J., said it did not fall within the rule of necessity, for there are many other persons by whom the case may be made out without her evidence. Blackburn, J., thought it was not within the principle of *Lord Audley's* case, 1 St. Tr. 393, which made to the general rule an exception admitting the wife's evidence where she may be the only person who is cognizant of the offence concerning her person. Mellor, J., said there had been no personal wrong done to the wife in the sense of any of the decided cases. *Reeve* v. *Wood*, 10 Cox C.C. 58; and see *Sweeney* v. *Spooner*, 3 B. & S. 330.

But the Criminal Evidence Act (Imp.), 1898, made the wife not only a competent but a compellable witness in prosecutions under the Vagrancy Act, 1824, for neglect to maintain, such as was before the court in *Reeve* v. *Wood*, 10 Cox C.C. 58, 34, L.J.M.C. 15, *R.* v. *Acaster* and *R.* v. *Leach* [1912], 1 K.B. 488 at 493.

In *R.* v. *Jagger*, Russell on Crimes, 5th ed., vol. 3, p. 625, the prisoner was indicted for attempting to poison his wife by giving her a cake which contained arsenic, and the wife was admitted to prove the fact that her husband had given her the cake. The ruling by which the evidence was admitted was affirmed by all of the judges *en banc*. The ground for the admission could only be founded upon the exception *ex necessitate* to the general common law rule of incapacity between consorts to give evidence one against the other.

In the Ontario case, *Reg.* v. *Bissell*, 1 Ont. R., 514, decided by the Ontario Queen's Bench Division in 1882 before the passing of the Canada Evidence Act, it was held that the evidence of the wife was inadmissible on the prosecution of her husband by indictment under the Canada statute 32-33

Vict., ch. 20, sec. 25. That statute made it a misdemeanor in any person who was legally liable as husband, guardian, etc., to provide for any person as wife, child, apprentice, etc., necessary food, clothing or lodging, wilfully and without lawful excuse to refuse or neglect so to provide. The majority of the Court in *R.* v. *Bissell*, 1 O.R. 514, (Hagarty, C.J., with whom Cameron, J., concurred) thought the prosecution had failed to shew that the case falls within the exceptions allowed to the general rule. As said by Hagarty, C.J., at p. 519:—

"Force or injuries to her person or liberty, forcible or fraudulent abduction, or inveigling into a marriage procured by friends have been held to be admitted exceptions. I have not met with any case where the charge was wholly of non-feasance, decided to be an exception to the rule. It is said, not very directly, that there is also an exception from necessity where the offence cannot be proved except by the wife. Conceding for the argument that it is so, the case presented to us does not shew any such necessity. The charge against defendant is stated to have been proved by other witnesses. The wife was called to prove the non-supply of money from a named date, with a refusal so to do. In cases like these it may be that the charge can be fully made out without the wife's evidence."

Armour, J., afterwards of the Supreme Court of Canada, dissented from the opnion so expressed by Hagarty, C.J., and thought the wife was a competent witness. He based his reasoning on two grounds, first from the necessity of the case, and secondly, because it is a crime committed by her husband against her. He added:—

"The second ground really springs from the first, for the reason of the wife being admitted as a witness against her husband where a crime has been committed against her by her husband is "from the necessity of the case," for were she not admitted, the crime might go unpunished and in all the authorities that I have been able to examine upon the subject, I find necessity to be the foundation for the admission of a wife to testify against her husband; and if on a prosecution such as the one I am now considering a failure of justice must take place unless the wife is admitted to testify. I think she is competent to testify."

See also reference to the Bissell decision in *Mulligan* v. *Thompson*, 23 O.R. 54.

The decision in the *Bissell* case cannot well be said to have passed into settled law for the subsequent statute, the Canada Evidence Act, 1893, made the wife a competent and compellable witness in such a case. See now secs. 242 and 244 of the Criminal Code, 1906, and the revised Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

The importance of the *Bissell* decision is now revived because of the legislation creating the new offence stated by the added sec. 242A, inserted in the Code by the Code Amendment Act of 1913 (1913 Can. Statutes, ch. 13). The legislation is of a similar character to that under consideration in the *Bissell* case, and it furthermore bears indications that it was to be available as a remedy for the wife against her husband. The offence is made punishable "on summary conviction"; a new duty in so far as the criminal law is concerned is created with a criminal penalty for infraction,

and one of the elements of the new offence is in case of the wife, that she is in "destitute *or* necessitous circumstances." The destitution or necessity of the wife may frequently be provable *ex necessitate* only by the wife's evidence. The statute was passed for the wife's further protection by summary process and seems to imply that she may be the informant and chief witness. Section 242B as to inference of marriage and parentage appears to forecast the calling of the wife as a witness, and to be intended to aid her in proving her status as a wife, although she may not be able to prove that the marriage ceremony was in accordance with the laws of the country in which it took place. These considerations seem to favour the admission of the wife's testimony under the common law exception *ex necessitate* above referred to, and to be opposed to the ruling of Judge Wallace in *Rex* v. *Allen*, above reported (head note 2). As regards the force of the decision of *R.* v. *Bissell*, 1 Ont. R. 514, above referred to, there is much to be said in favour of the dissenting opinion of Armour, J.

Book Reviews.

Modern Business. A series of eighteen treatises, published in twelve volumes by the Alexander Hamilton Institute of New York. Canadian edition: Canadian Pacific Railway Building, Toronto, 1914.

These treatises are well known and highly thought of in the United States, their birthplace.

The Canadian edition of this work has the following articles having special reference to this country:—Applied Economics, by Professor Mavor of the Toronto University; Canadian Banking Practice, by E. L. Stewart Patterson of the Canadian Bank of Commerce; Commercial Law of Canada, by W. S. Johnson of the Montreal bar; Traffic, by S. J. McLean, member of the Board of Railway Commissioners for Canada. The following subjects are treated by well-known experts in the United States:—Organization and Management; Selling; Credits; Advertising; Correspondence; Accounting Practice; Corporation Finance, Money and Banking; Foreign Exchange; Investment and Speculation; Insurance; Real Estate; Auditing; and Cost Accounts.

We have not, in this country, as a class, the corporation lawyer so well known in the United States, to whom these books would most appeal, for he is as much a business man as a professional man. These volumes are also text books in various Business Colleges in that country. A study of these subjects would be of

great benefit to law students in this country and help to fit them for their avocation. For their use it would be well if law libraries were to have this series on their shelves. It claims to be a complete and logical digest of the principles and practice of present-day business. The treatise on Commercial Law is an intelligent summary of the subject, useful as well to the professional man as to those engaged in business. The volumes are well printed, handy, and very attractive.

There is given with these 12 volumes, supplementary literature consisting of 120 pamphlets issued every two weeks for two years, explanatory of the treatises and very helpful in the study of the subjects.

The typographical execution of these books is excellent and they are well bound and attractive in appearance. The price including the supplements, is $96.

Proceedings of the New York State Bar Association at their 37th Annual meeting in Albany. The Argus Company, 1914.

This is an interesting volume containing much legal literature of interest in this country as well as in the States, though naturally more so there than here. A number of reports were given and some addresses delivered which were listened to with great interest. One of these was by our Mr. Justice Riddell, on the Jury System of this country—an interesting summary of trial by jury and its history and place in Canada.

A somewhat remarkable one was read by the Hon. Edgar M. Cullen, formerly Chief Judge of the Court of Appeals of the State of New York, on the Decline of Personal Liberty in America. There is one characteristic of the best men of the United States and that is, that they are not afraid to speak plainly of defects or supposed defects in their constitution or their judicial system, or the administration of justice.

The paper of Judge Cullen certainly handles the subject he takes up without gloves. We quote at some length from his address as his remarks and observations are especially interesting at the present time. He deals at length with the subject of military power as follows:—

Under these decisions the life and liberty of every man within the State would seem to be at the mercy of the Governor. He may declare a state of war whether the facts justify such a

declaration or not, and that declaration is conclusive upon the Courts. If he declares only a portion of the State to be in a state of war, under the decision in the second case a person in any other part of the State, however distant, may be arrested and delivered to the military authorities in the martial zone, and his fate, whether liberty or life, depend on the action of a military commission, for I know of no principle which authorizes a military commission to impose the punishment of imprisonment that would not equally authorize the imposition of the punishment of death. Under that doctrine, should armed resistance to the Federal authority justifying a suspension of the writ of habeas corpus occur in Arizona, a citizen could, on a charge of aiding the insurrection, be dragged from his home in Maine and delivered to the military authorities in Arizona for trial and punishment. The remedy suggested by the learned Court, of impeachment by the Legislature, would hardly seem of much efficacy. By impeachment the Governor could only be removed from office. He could not be further punished, however flagrant his oppression may have been, except by a perversion of the criminal law, for if the doctrine of the Courts is correct he would not have exceeded his legal power. The Governor might imprison or execute the members of the Legislature, or even the learned Judges of the Supreme Court themselves. Frankly, I do not regard such a danger as likely, for I have great confidence in the common sense of the American people, and I imagine that if such a course were attempted not even the devotion of those learned Judges to the principles of law they had declared would induce them to voluntarily surrender life or liberty and that in their resistance they would be supported by the mass of the people. Still, it is an unfortunate condition of the law that redress from wrong can only be achieved by violation of the law.

These decisions exalt the military power beyond any height hitherto known in this country. They assert the power of the military at the uncontrolled discretion of a single man to dispose of the life and liberty of any person within the State, not by way of detention till the termination of an insurrection nor where life is taken in the actual clash of arms, but purely as a punishment for acts which may not be offences at all by the law, or, if offences, subject to slight penalties. The case of Moyer v. Peabody, in the Supreme Court of the United States (212 U.S., 78), gives no support to such a proposition. It justifies

only "temporary detention to prevent apprehended harm." Yet, I am by no means sure that a majority of the people, indignant at the many outrages and crimes committed by strikers, do not approve the decisions which I have criticized, forgetful of the precedent they establish. How different was the action of the Supreme Court of the United States at the time when, by reason of the enormous loss of life and expenditures of money, caused by the Civil War, just then concluded, the Nation laboured, not unnaturally under great excitement and, possibly, some animosity, against its late opponents. In the Milligan case (4 Wall., 2), the Court discharged a citizen of Indiana, who had been convicted by a military commission, sitting in that State, of aiding the enemy, and sentenced to death. That great Court decided that the Constitution of the United States was a charter for the government of the country in times of war as well as in peace, and that except where actual clash of arms took place or the civil Courts were closed the constitutional safeguards always protected the citizen from loss of life or liberty except by the verdict of a jury. Answering the plea of necessity, the Court said: "If this were true it could be well said that a country preserved with the sacrifice of the cardinal principles of liberty is not worth the cost of preserving." Every true patriot, every lover of civil liberty and constitutional government should rejoice that at the time of the greatest popular excitement one branch of the government was found strong enough and courageous enough to interpose the Constitution as a shield to protect the life of an humble citizen, even though, perhaps, a guilty one.

The lust for military intervention in civil affairs grows on what it feeds upon. It is becoming the common practice, in the case of any great disaster, such as fire or flood, to call out the military. Three years ago the State Capitol was partially destroyed by fire. As soon as the fire had been extinguished the building was guarded by soldiers in uniform and armed, while scrubwomen and cleaners the only persons whose immediate services were requisite, did not appear till a day later. Finally, in this very month, in the State of Oregon, a young lady, acting as secretary to the Governor, placed the Town of Copperfield under martial law and the control of the military because the civil authorities had failed to close the saloons as required by law. Thus, one violation of liberty and law leads to another till the practice becomes common, and I

imagine that a majority, of the prohibitionists at least, will be found to approve of the practice, as long as it is exerted to accomplish ends which they desire. If it be true that in this country order cannot be maintained and the law enforced by the civil authorities, but we must constantly resort to military force, our boast of freedom is but idle and, at least, we should refrain from the expressions of indignation in which we have recently been indulging at the invasion of the rights of civilians by the army in Germany. The law in England is the reverse of that declared in West Virginia. Professor Dicey says: "This kind of martial law is in England utterly unknown to the Constitution. Soldiers may suppress a riot as they may an invasion. They may fight rebels as they may fight foreign armies, but they have no right to inflict punishment for riot or rebellion."

Bench and Bar

Osgoode Hall Rifle Association.

We are not of those who think Canada has done for the motherland and for the Empire all that she might have done or should have done in its defence; rather the contrary. We are, however, beginning to realize that we owe some debt for the protection and safe-guarding we have received, without cost to ourselves, all these years past.

In this connection we are glad that the profession in the City of Toronto has taken a lead in the formation of a Rifle Association, which is already actively at work.

Organizations of this sort are simple and elastic, requiring only the enrolment of at least 30 members and the taking of the oath of allegiance (R.S.C. c. 41, s. 62). The objects of the Osgoode Hall Rifle Association are declared to be:—

(a) A determination and desire to take some useful part in military preparedness for all possible eventualities.

(b) To stimulate a patriotic spirit in the community which shall ensure an immediate response of sufficient recruits of the best calibre to re-establish all volunteer regiments at full strength, and likewise secure all necessary volunteers for service abroad.

(c) The promotion of military art and military science and literature.

(d) To assist in recruiting the existing volunteer regiments from the ranks of the profession, or assisting in the formation of some new student and professional regiment.

(e) To place the members of this association at the service of the country, qualified as far as possible for action in the hour of need.

The officers' committee is composed of the following members: Captain, B. Holford Ardagh; Secretary, C. B. Nasmith; Treasurer, R. S. Cassels; Lt.-Col. Bruce, C. A. Moss, Thos. Gibson, T. A. Reid, R. H. Greer, W. D. McPherson, N. F. Davidson.

An advisory committee was also appointed, in which we are glad to notice the name of the Hon. Featherston Osler, K.C., formerly a judge of the Court of Appeal, who attended the first meeting and by his presence much encouraged others to join.

Among the members are a number of those who saw some military service in old days, for example, Hon. Mr. Osler and the editor of this journal drilled together as volunteers in the old Barrie Rifle Company, more than half a century ago. The latter is a Military School man and wears the Fenian Raid medal. Mr. C. W. Thompson was a member of the old Legal Company, formed just prior to the organization of the Queen's Own and incorporated in that regiment. The captain of the present Osgoode Hall Rifle Association was for several years adjutant of the Simcoe Foresters, (35th Regt.), which was formerly commanded by another member of the profession, Lt. Col. W. E. O'Brien. Captain Ardagh also served as Brigade Major of the 4th Brigade.

The Association also includes a number of officers, active and retired, such as:—Lt. Col. John Bruce, Lt. Col. Robertson, Major Levisconte, and others of lesser rank, R. S. Cassels, A. A Millar, J. H. Moss, F. B. Fetherstonhaugh, F. M. Gray, T. P. Galt, R. H. Holmes, D. W. Jamieson, F. I. LeBrun, W. S. Morden, H. W. Mickle, F. J. Roche, W. B. Raymond, S. Casey Wood, J. P. White and others.

The formation of this association and the example set by the seniors has been an inspiration to others to form similar clubs.

Lord Roberts and Lord Kitchener have on various occasions indicated the necessity of this form of assistance in the defence of the Empire. A nation of sharp-shooters can always give a good account of itself, and these bodies are a means to that end by teaching men to handle a rifle and to acquire a certain amount of simple and rudimentary drill and discipline.

The present war is not to be the end of the duties of the sons of the Empire with respect to its defences. It is our manifest duty to be prepared for any emergency, and therefore every man should make himself competent to take his place as a soldier. It was so when England depended upon her bowmen, and should be so when the bow is replaced by the rifle.