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BLUE SKY LEGISLATION.

The meaning and intent of Blue Sky legislation has, until recently, been unfamiliar to the general public, and even the legal profession has been somewhat hazy respecting its nature and extent. Those who have financial dealings with the United States are somewhat better informed. The subject has been prominently brought before the public recently through the introduction by the Attorney-General in the Legislature of Ontario of a Bill intituled "An Act respecting the Sale of Securities."

Briefly speaking, the term Blue Sky legislation has been applied to any species of law which attempts to regulate or deal with the sale of fraudulent or worthless securities. The imposition on the public of these so-called "securities" has been a growing evil in every community since the time when corporate entities became recognized by law. The expression "Blue Sky legislation," which is not in any way indicatory of the subject, seems to have arisen from an expression used in a report made by the United States Post Office Department that some promoters would even sell lots in the blue sky. To give entry and seizin in such a case would not, however, be much more difficult than it would be in the case of the celebrated company "North Pole, Ltd.," where the promoter undertook to deliver ice-covered land to farmers in the Northern States.

As early as the year 1884 Germany had limited the sale of fraudulent securities, and in 1893 France followed suit. Great Britain has now a very strict Companies Act, which answers many of the purposes intended to be covered by Blue Sky legislation. In 1911 the State of Kansas enacted the first law on this continent, since when some 43 of the States have enacted laws which, in some form or other, regulate and control the issue and sale of stocks, bonds, debentures and other securities.

With the exception of three Provinces, Canada has been slow

to attempt the introduction of legislation of this kind. In 1919 a Bill was introduced in the Ontario Legislature, but it was killed, chiefly by the mining interests who believed that their ability to obtain capital was thereby threatened. Previous to this, in 1914, a Bill was introduced in the Nova Scotia Legislature. This also met with a violent death. The Province of Manitoba, in 1912, enacted a regulatory law. This was followed by Alberta in 1916 and Saskatchewan in 1920. Other than the above there is no such law in the Dominion.

At the present time there are two general types of this legislation. The first is commonly known as a Fraud Act, which is in force only in three States, viz., New York, New Jersey, and Maryland. The second type is a regulatory law which, with modifications, is in force in some forty States and the three Provinces of Canada above mentioned. The most comprehensive Act of this class is probably that of Illinois. The Commonwealth of Massachusetts has an Act which is a combination of the Fraud and Regulatory types.

Under a Fraud Act, if it appears to the Attorney-General that any person is employing any device to defraud, and he believes it to be in the public interest that an investigation be made, he may require such person to file with him a statement as to all the facts. Then he may either issue an order requiring the guilty party to desist from his fraudulent practice or may bring an action to enjoin him. The objection to this type is that complaints are seldom made to the Attorney General until the security has been sold and the purchaser has brown suspicious of his holding. It is usually then too late to take effective action, as the sale has been completed and the promoter has left the jurisdiction. To use the words of the Governor of Maryland—one of the States where a Fraud Act is in force—it is a case of "locking the stable after the horse has been stolen." The time to prevent the fraudulent promotion of companies and the sale of worthless securities is at the inception of the enterprise. Prevention is not effected by legislation which merely punishes the wrong-doer after he has pocketed his ill-gotten gains and departed for green fields and pastures new.

It will be said that the Criminal Code provides for cases of

fraudulent representation. That is quite true, and if those provisions of the Code were enforced some of the evils would be met. The fact, however, would still remain that the offence must be committed before the Code can be put in motion. There is also the further difficulty of obtaining evidence in cases of fraudulent misrepresentation; for example: the promoter employs an agent; the agent makes a certain representation and sells stock on the faith of it; the representation is untrue. Upon a prosecution, the agent denies making the representation and the promoter denies authorising him to make it; result, none. Nor must it be forgotten that dishonest promoters or salesmen seldom wait quietly for the service of a summons which may result in a heavy fine or imprisonment. Such legislation would seem to be not even a deterrent.

The more common form of Blue Sky legislation is the regulatory type, which is in force in the large majority of the States and in three of our own Provinces. Under it all securities must be passed upon by a Commissioner or Board before they may be sold, and a certificate is issued authorizing their sale. This certificate may be revoked upon evidence being shown of fraud. It is, however, largely used as a convincing argument to the would-be purchaser that the securities have not only the endorsement but have actually the guarantee of the State, and the certificate thereby becomes an agent of positive fraud.

Under the majority of regulatory Acts certain securities are exempt from the operation of the Act. These comprise such securities as, from their inherent nature, do not pre-suppose fraud. Some States have a very wide list of exemptions which they justify on the ground that legitimate business is thereby hampered as little as possible, while, at the same time, most of the crooked transactions are covered. Be that as it may, the principle of having exempted securities is undoubtedly growing in favour. An attempt is now being made in the United States Congress, with very great prospects of success, to have a list of exemptions which it is expected will be adopted by the various States. This would simplify the work of financial institutions and brokers in the same way as the work of insurance companies has been simplified by the Statutory Fire Conditions,

which are now almost uniform in the various Provinces, and which, within a year, will probably be uniform throughout Canada. Entire uniformity of laws will never be obtained, but every attempt in such direction should be strongly endorsed.

The Ontario Companies Act (ss. 99 to 110) requires that certain information be filed with the Provincial Secretary and that a prospectus must be issued. There is, however, no systematic supervision of the information filed and it need not be under oath. The obvious result is that much of the information is unreliable. While there have been some prosecutions for false information filed they have not been sufficiently frequent to deter the fraudulent promoter. The information required to be filed is taken almost verbatim from the Imperial Act, and much is now obsolete or inapplicable. Moreover the penalty provided by the Ontario Companies Act for its infraction is entirely inadequate. At present a promoter is able to file a prospectus containing false information, on the strength of which he may sell tens of thousands of dollars worth of stock and not be found out until he has unloaded his supply and left the jurisdiction. If he is unlucky enough to be caught, or if he is foolish enough to remain in the Province to be prosecuted, he may incur a penalty (mark it well!) "not exceeding $200." Even this penalty he may escape under certain circumstances.

The report on Blue Sky legislation recently laid before the Legislature, suggested that the prospectus provisions be taken out of the Companies Act, remodelled, made under oath, and enforced by means of suitable penalties which, in case of a fraudulent statement, would be properly severe. Any legislation that attempts in any way to regulate or control the issue and sale of securities should be directed towards fraudulent promotions, which should be drastically dealt with, while the honest promoter who makes an unintentional error should be treated leniently. The real object of such a law should be to keep out the fraudulent promoter without in any way hampering legitimate business.

The Bill introduced by the Attorney General differs from both the Fraud and Regulatory type. Under it any person issuing or selling securities must file certain specified information with

an officer known as the Commissioner of Securities. Although it is not necessary (as under a Regulatory Act) that all securities should be submitted to the Commissioner before being sold, the Commissioner has power at any time to investigate any security, and if he believes it to be fraudulent he may prohibit its sale. He may also prosecute for fraud in connection with the sale of any securities. The information above mentioned, which is filed with the Commissioner, is now called a "statement" instead of a "prospectus," which latter word is used in the Companies Act. The word "prospectus" is now confined to the document upon the faith of which the public subscribes for stock, and it must contain all material information that is in the statement. The prospectus must be given to every purchaser of securities in order to bind him.

A prospectus must bear the name and address of the broker. If the issuer is not domiciled in Ontario or has failed to issue a prospectus it must be issued by the broker who intends to offer the securities for sale.

Every broker and salesman (other than a salesman resident in Ontario and acting for the broker) must be registered. In this way those who sell securities are kept under a measure of supervision and control. The Commissioner examines into the reputation of the applicant for registration and may refuse registration for certain specified reasons. If the applicant is not resident in Ontario he may be required to furnish security in the sum of $10,000.

A graduated scale of penalties is provided for infractions of the Act. In case of fraud the maximum penalty is $25,000, which is none too much in view of the fact that a fraudulent promoter may have obtained much more than this amount from a too-confiding public.

Objections have been urged that such legislation is an invasion by the State of private business and an additional regulation by the State of individual enterprise; that it savors of paternalism; that the citizen has a right to spend his money as he chooses, and that investors should be allowed to exercise their own discretion as to the character of the enterprises into which they put their money. Those who urge the above views claim that when the

State undertakes to regulate by legislation the sale of fraudulent securities it is entering a new field, and that there is no obligation on the State to exercise any control over the sale of these securities. Those persons fail to realize that the corporation whose securities are being controlled has been created, and the issue of its securities authorized and sanctioned, by the State.

The right of the State to interfere by legislation is summarized in a report made in January, 1921, by a Special Commission appointed by the Governor of Massachussetts to investigate the sale of corporate securities. The report says:

"Since the State authorizes the issuance of fictitious or watered stock, it must follow that it is the duty of the State to prevent the sale of such securities until the State determines that they are not fraudulent. The State creates the securities and places them in the hands of the fraudulent promoter, who in turn distributes them to the public. Any additional legislation to check the sale of fraudulent securities is nothing more or less than an effort by the State to limit the use by fraudulent promoters of the false tokens which the State itself creates."

All legislation interferes more or less with the liberty of some subjects in order to protect others, even from their own folly. Although an investor should have the right to choose his investments it is not unreasonable that from such investments should be eliminated as far as possible all fraudulent elements. The late Theodore Roosevelt briefly summarized the idea by saying, "It is the business of the State to see that every man gets a square deal."

A report issued by the United States War Corporation, which had complete power to determine what securities should be issued and sold in the nited States during the late war, states officially that the people of the United States are being defrauded out of more that $500,000,000 a year by the sale of worthless and fraudulent securities. If Canada suffers equally in proportion, the necessity for some legislation would appear to be more than desirable. At the present time Canada, and especially the Province of Ontario, is a happy hunting ground for company promotions of every kind, very many of which are far from being honest. One reason for this condition is that

nine-tenths of the States of the United States have made dishonest promotion more difficult and less profitable than it used to be. The result is that the vendors of these wares find a ready market in those of our Provinces which have no such legislation. And this situation has been intensified as other Provinces and States have passed legislation. It may be noted that another Province and several additional States are preparing to introduce a measure of this kind.

Certain evils in connection with fraudulent promotion and stock selling cannot be met by any enactment within the authority of a Provincial Legislature. These are the use of the mails and advertisements in newspapers and periodicals. Only Dominion legislation can prevent letters or circulars from being sent through the mails from a Province where no such legislation is in force into a Province or State where there is legislation. Similarly, stock may be sold by means of advertisements in newspapers circulated in a Province which has such legislation although the newspapers are published outside the Province.

The situation seems to call for a remedy. Whether or not the Bill recently introduced will provide such remedy remains to be seen. It should at least be given a trial. If found wanting it can be repealed, but if it is found to be productive of good results, it can be strengthened, if necessary. It has never been supposed that legislation can cure all the evils aimed at, but if a large amount of money is saved to the public the legislation will have been worth while. The legal profession is the best qualified to criticise the proposed legislation, to point out the difficulties, and to suggest the remedies.

Whether or not the Bill now before the Legislature will become law rests with that body, but whatever the outcome may be, the signs of the times would seem to indicate that some form of this legislation must, sooner or later, be enacted.

A. H. O'Brien.

The above article was written by Mr. A. H. O'Brien, M.A., formerly Law Clerk of the House of Commons and Counsel to the Speaker. He was specially retained by the Ontario

Government to investigate the general subject of legislation for the protection of the public against spurious joint stock company flotations, with special reference to existing legislation in the Provinces of Canada and the States of the United States. Mr. O'Brien's report, which has recently been printed by order of the Legislature, gives a very complete summary of the subject and embodies the concensus of opinion of the various jurisdictions which have enacted this species of legislation. A perusal of this valuable and exhaustive report will be found exceedingly interesting to those who are in any way concerned with this subject and contains a mass of information no where else obtainable.

DOCTORS IN THE WITNESS BOX.

By Hon. Mr. Justice Riddell.

Every now and then appears an article, almost invariably in a medical journal, upon this subject; and quite invariably the article contains a complaint that lawyers have a privilege which doctors have not.

This kind of "grouching" does no good, and it may do harm. Perhaps there may be some advantage in clearing up a very common misunderstanding of the law. The latest article on the subject which I have seen—"The Hospital" for July 16, 1921, says: "The lawyer has from time immemorial enjoyed the privilege of refusing to disclose his client's secrets. . . . A doctor is surely entitled to no less protection"—and the lawyer is represented as "claiming for himself a privilege which he denies" to the doctor. A more serious misrepresentation of the fact could scarcely be made—the lawyer has not and never had any such privilege, and what is called improperly his "privilege" is in fact a burden which I have never known any lawyer to enjoy—I know I did not when at the Bar.

The truth is that the privilege is the privilege of the client and of the client alone—the client has in law the right to compel to keep silent certain matters, not only an attorney, solicitor or counsel, but also his solicitor's (I shall use the word "solicitor" to cover "attorney" and "counsel" as well) clerk, his own or his solicitor's interpreters or other agents of communication—and

even any person believed by him to be a solicitor and consulted by him as such.

But the solicitor is not at all bound to keep all his client's secrets.

The rule is this—where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, unless the client waives the protection. Every word of this rule must be borne in mind—there is nothing superfluous. In the first place it is to be observed that the client may at any time waive the privilege—the solicitor cannot then set it up—it is not at all for the solicitor's advantage or protection, but the client's.

There is no privilege where the advice is sought for the purpose of committing a crime or violating the law. If a client wanted advice as to how he could safely (say) suppress a will, raise money on a forged will or other forged document, or forge a document of any kind—or if he wished to evade his duty as a trustee or get around the succession or income tax—or if he wished to dispose of his property in fraud of creditors, there would be no privilege. "The privileged relation of attorney and client can exist only for lawful and honest purposes," and the solicitor "may be required to disclose whatever act was done in his presence towards the perpetration of the fraud" or crime.

What is to be kept secret is something that comes from the client either directly or through agents, interpreters, etc. Anything told to the solicitor by third parties, however much for the client's advantage, must be revealed—and anything which the solicitor finds out himself by enquiry of any kind in the same case; of course he will not be allowed without the client's consent to tell what he said to his client in the way of advice, etc.

The communication must be confidential and made for the purpose of legal advice—the mere relation of solicitor and client does not raise a presumption of confidentiality, and "the moment confidence ceases, privilege ceases." For example, the presence of third parties in no way interested may destroy the privilege,

a communication on the public street and in the presence of a third person may show by its circumstances that it was not confidential—statements to a third person are not privileged simply because they are made in the presence of solicitor and client. So, too, if the statement be irrelevant to the matter upon which advice is sought, it is not privileged, for the cleint is not then seeking legal advice on that.

It is not confidence placed in another alone which justifies privilege—there is no privilege in confidential communications to one's clerk no matter how confidential and trusted he may be, to a trustee, to a commercial agency, to a banker, to a journalist, to a telegraph operator, to the closest and most intimate friend.

Confessions to a priest are not on quite the same footing as those mentioned. British principles are now, and for many years have been in favour of perfect religious tolerance—it is recognised that the religion of the Roman Catholic and some others, compels them to confess sins to an ecclesiastic. While the law does not make such a confession absolutely privileged—as it might well do as being made under moral compulsion and in performance of a religious duty—judges are very loath to require disclosure by the father confessor. In my own experience, I have more than once said on the Bench that I would direct disclosure if it were pressed, but suggested that the confidence be respected; and in every case counsel has recognized the propriety of doing so.

The position of the priest and that of the lawyer are not the same, and it is misleading to suggest an analogy which does not exist.

The erroneous idea that the lawyer has any privilege is an instance of "fireside law" which, like so much other "fireside law," is a relic of the past. Two hundred years ago, the privilege was supposed to rest upon the honorable obligations of the attorney, and upon his oath on being admitted — it was his privilege; but nothing of the kind has been heard of for a century and a half. In those olden times, the courts recognized the rule of honour among gentlemen as being sufficient to entitle any one to decline to make public a confidential comm nication of any kind. Now neither the feeling of honourable obligation nor even

an oath will justify any witness in concealing communication made to him.

I am not concerned with the theories and principles underlying the privilege in question—I had nothing to do with making it, nor had any living judge—I never liked it when I was at the Bar, it is no advantage but rather a burden to the practising lawyer, and is maintained from grounds of public policy. No authority but the Legislature can abolish it, and I see no movement in that direction—the people who are the final court of appeal seem to be satisfied with it.

Apply now to medical men, the rule of privilege in attorney and client. The doctor would be not only entitled, but (in the absence of the patient's consent), compelled, to keep secret in the witness box communications made to him (1) by his patient, (2) seeking medical advice from him, (3) the communications being made in confidence, (4) and being relevant to the purpose. And the patient would have the same exemption, but not the same compulsion. The doctor would not be permitted to keep secret what he found out himself by physical or other examination or enquiry, what he was told by uninterested third parties, what was not relevant to the purpose, what was told in the presence of others not interested.

A medical man called upon to set a broken leg asks the patient how it happened—the patient says, "I fell off a wall", privileged, and adds "I was trying to break into a warehouse," not privileged. The doctor finds the bones in a certain condition, not privileged; the policeman says, "We found him lying on the sidewalk under Mr. Smith's warehouse"—the doctor must so state.

The now well known case of Dr. Elliott, of Chester, England, seems to have excited considerable comment. In a divorce suit, Dr. Elliott was compelled to state that one of the parties had had venereal disease. The doctor explained that he and other medical men formed a particular clinic on the distinct understanding that professional secrecy would be observed; he pointed out a regulation under the Public Health Act; he said that to give the evidence required he would have to violate one of the earliest and most sacred principls of the medical profession, one

which the profession held dear—all that did not avail against the right of the other party to the suit to have the truth told, and Mr. Justice Horridge directed him to answer.

It is perfectly certain that the privilege claimed by Dr. Elliott went far beyond anything claimed in the case of a lawyer for a century and a half.

He was asked to state not what his patient had told him, but the physical condition in which he found him—he wished to shelter himself behind some agreement, binding no doubt in honour, and, perhaps, medical ethics, neither of which could be allowed to prevail in the case of a lawyer.

The claim now set up, is to make doctors a privileged class of the community above bankers, financial agents and other confidential persons.

If the profession desires that this be brought about, there is no use girding at the courts who did not make and cannot change the law—no use in looking askance at lawyers as though they were claiming a privilege and keeping doctors under- no use lamenting in medical journals the unhappy conditions of the profession. Go to the people direct, state what it is you wish, convince them, or even a few of them, that such a change would be for the advantage of the people and the thing would be done. Nay, convince the Legislature, or even a reasonable number of the legislators, and the end would be achieved—it is not hopeless, New York has such a law—try it in Ontario if you really think that the people would be advantaged. Before you make the attempt be very sure that you really desire the change.

But it is quite hopeless to expect that any court or any legislature in these days will go back to the archaic theory or pay any attention to the gentleman's sense of honour or a voluntary promise or oath, Hippocratic or otherwise, as any excuse for depriving a citizen of his right to have the full truth under oath in a court of justice.

GOVERNMENTAL RESPONSIBILITY.

The Law Times (Eng.) again criticises adversely the continuance of the vicious practice of appointing judges to perform duties not connected with their judicial duties; Mr. Justice McCardie having been recently directed to conduct the Clones Enquiry, whatever that may be.

Our contemporary admits that "during the war every one had to give of their best to their country; and the Bench rendered invaluable services outside their strict legal duties." The war, however, is over for the present, and it is time judges were permitted to attend to the business properly assigned to them.

We wish we could say that this practice in this country had only begun in 1914. It had done plenty of harm before that. We do not propose, however, to refer to this now, being in hopes that the Government and the judges have had a change of heart in view of recent legislation.

As we live in the days of what is called Responsible Government, it would be well to remember an axiom that admits of no argument, viz., that persons elected by the people to govern should govern. It is convenient occasionally to evade responsibility, and there may sometimes be a good reason for appointing a commission, but in that case, to carry out the theory of responsibility, the finding or report of the commission must become the finding and voice of the Government and not be used for its protection or to throw on the commission the responsibility which belongs to the power which appointed it.

In reference to the pernicious practice of creeping for protection under judicial robes, may we make a suggestion, or rather repeat what we have already said. If men of legal training are wanted to conduct enquiries or sit as commissioners there are many men in the profession quite as competent for such a position as our judges and of equally high character for probity who would be suitable for such duties.

APPEALS TO THE PRIVY COUNCIL.

May we be pardoned for reproducing some further interesting literature on this subject taken from our most valued contemporary The Law Times of England (vol. 153, u. 204).

To begin with, it copies with approval from our pages the remarks of Hon. Louis A. Taschereau, Premier of Quebec, in

which he enlarges upon the advisability of retaining the right of appeal.

In the same journal appears a paper by Arthur Robinson, C.M.G., Attorney-General of Victoria, and President of the Law Institute there, discussing appeals in constitutional cases. At the conclusion of an exhaustive paper he refers to the eloquent remarks of Lord Shaw of Dunfermline when extolling the beneficial influence of the Judicial Committee of the Privy Council, who spoke as follows:—

"The other afternoon, with a sigh of relief, for it has been a laborious term, the sittings for the year of the Judicial Committee came to an end. The two last decisions just before we rose awoke curious reflections. Not unseasonable thoughts they were, even for Christmastide. One of these cases was a conflict between a native prince and a municipality in Oudh as to the right of the latter to drive a street through a *Gunj,* or market-square, on the ground of which, beneath the fierce rays of the Indian sun, you might see the natives exposing their grain in piled-up heaps. The other was a contest between a wealthy railway and a great corporation, and it was, if you please, about the clearing away of snow from the tracks of a street railway in the City of Toronto! At one bound, so to speak, from the sweltering heat of India, away to another continent, to the chill and rigour of Canadian winter! And all these contentions to be laid to rest in that little room in Whitehall which you know.

"Suddenly, as I felt that 'the time draws near the birth of Christ,' I realised that the quiet, far-reaching task in which the Privy Council is engaged may be—must be—a part of that process, in which, through instruments ever so imperfect, the perfect scheme of peace on earth may be lifted forward in the practice and affairs of men. Quiet, did I say? Yes: its business is the search for truth; and the stuff which it works in is justice. A grave task and austere, according so much with simplicity and quiet that there is no place there for even the paraphernalia of a Court. Far-reaching, did I say? Yes. From that little room in Whitehall is wielded a jurisdiction over one-quarter of the population of the globe. To that little

room come able, learned men, widely different in race and creed and colour, all to help in that task, fundamentally human, fundamentally divine, the search for truth, the doing of justice. . . .

"Over and over again there come before the Board questions, antagonisms, rivalries, jealousies, which in former times would have driven races, provinces, kingdoms, to rancorous and bloody wars. These problems are settled by the arbitrament of equity and by a justice so manifestly achieved without fear or favour that their solution is accepted with a loyalty at once respectful, real, and complete. So that one can feel that peace is being won and kept by justice—a peace more enduring than any that could be imposed even by the rod of Imperial power."

MORAL DAMAGE.

Those who remember the history of the Jameson raid of 1895 wil recollect that much mirth was occasioned by the inclusion in President Kruger's claim for damages of a large sum under the head of "moral damage." Indeed the expression is little used in this country and so it easily lent itself to jesting. *Dommage moral* is, however, a reality, meaning injury to honour, affection or other proper feeling and forms the basis of our law of libel, of Lord Campbell's Act, of the Slander of Women Act of 1891, of breach of promise actions, and of actions against bankers for wrongly dishonouring cheques, and in all cases without special damage being proved; while in the practice of the courts actual damage is often appreciated at an enhanced figure when the conduct of the defendant has been shockingly bad or the feelings of the plaintiff have been injured. In the former case the practice of juries, sometimes encouraged by judges, exhibits the common desire to punish a wrong-doer wanting in moderation. Thus, the plaintiff sells his honour for riches which he has done nothing to earn, the jury has gratified their vindictive righteousness, the defendant learns that gross improprieties can be weighed against gold and the functions of the criminal courts have been usurped. Here is judge-made law of the doubtful kind under which punishment is meted out in a civil court and

is measured by the feelings of indignation stirred in the breasts of twelve indignant men by the arts of eloquent counsel, assisted sometimes by the oratory of the judge. These damages are called "exemplary."

Now, most countries allow a claim for moral damages as supplementary to a claim for damage to person or property—but to what extent do they permit actions for moral damage only, *i.e.*, for damage to honour, affection or other moral feelings? There are countries which definitely make moral damage justiciable *per se*. Prominent among these is the Argentine Republic, but it generally confines the remedy to damage arising from an act, since art. 1108 of the Civil Code says that a person who has occasioned prejudice to another by omission shall only be liable when a prescription of the law imposes upon him the obligation to fulfil the omitted act. Apart from that general provision "every right may be the subject-matter of a wrong, whether it is a right over an exterior object, or is intimately connected with (*se confunda con*) the existence of a person" (art. 1109). "Every wrong causes an obligation to repair the prejudice resulting therefrom to another person" (art. 1111). "If the act is an offence against the criminal law, the obligation arising therefrom includes not only the indemnity for loss and profit, but also the moral injury which the offence has made the person to suffer, by molesting him in his personal security or in the enjoyment of his property, or by wounding his lawful affections" (art. 1112). "The obligation to repair the damage caused by a wrong exists, not only in respect of him whom the wrong has directly damnified, but with respect of every person who has suffered thereby, although it be in an indirect manner" (art. 1113). "Every reparation of damage, whether material or moral, which is caused by a wrong, must merge in a pecuniary indemnity to be fixed by the judge, saving the case in which the object which was the subject-matter of the wrong is restored" (art. 1117). But a person offended by calumny or insult can only recover damages when he proves actual damage or loss of profit and that only when the defence fails to prove the truth of the aspersion (art. 1123). Specific instances of wrongs are dealt with in the same connection, and among others the right to sue for damages by homicide is conferred on the widow and

children (art. 1118). Actions for wrongs may be brought against universal successors (art. 1132), but on the other hand universal successors can only recover damages for moral injury (this being the only head of the claim) when the action has been begun by the deceased (art. 1133). Title IX. treats of damage caused by illicit acts, and the reader must remember that "act" includes act of omission. The important article is 1143: "Every author of an act which by his *culpa* or negligence occasions damage to another is bound to repair the prejudice, &c."

There are, however, many systems of law in which the codes make no specific reference to moral damage, and prominent among them is the French Civil Code. The terms, however, in which wrongs are made justiciable in the civil courts are wide; the two material articles of the code being No. 1382: "Any act whereby a person causes damage to another binds the person by whose fault the damage occurred to repair such damage:" and No. 1149, "Damages and profits are due, as a rule, to the creditor for the loss which he has suffered and the gain of which he has been deprived" (in consequence of a breach of contract), &c.

On turning to Baudry-Lacantinerie, vol. 15, p. 559 we find that most jurists are of opinion that moral damage is the proper object of pecuniary reparation, and on the following pages cases in the courts are quoted which show that this view is supported by the majority of judgments. Thus, damages have been given for defamation, adultery (both wife and co-respondent being liable), and cases are cited of indemnities recovered for the moral prejudice caused by accidents to the near relatives of the injured; other cases are quoted, however, in which the sum of money allotted has been purely nominal and evidently intended solely to cause the defendant to bear the costs of the proceedings. This, of course, is an unsatisfactory result, but at any rate the principle is admitted, even though the calculation of the pecuniary equivalent of the suffering caused was beyond the appreciation of the courts. In an action for breach of contract actual damage must be proved, even in such an action as that against a banker for wrongly dishonouring a cheque (Baudry-Lacantinerie, vol. 12, s. 480). The influence of French

cases of construction is very considerable in those countries which have adopted relevant articles similar to those quoted from the Code Napoleon. Thus Senor Roberto Butron, writing in the Revista de Derecho (Santiago) concludes that the Chilean courts would, and do on the whole, follow the same construction (vol. 17). At p. 51 he quotes certain Italian decisions, and among these, one of the Brescia Tribunal of the 19th March, 1890, condemning an adulterous wife to compensate her husband for the damage which he had suffered through finding himself alone, without family and without power to reconstitute it.

It is interesting to refer to the Japanese Civil Code which contains specific prescriptions relating to our subject. Art 710: "Whether the case be one of injury to the person, liberty or honour of another, or of injury to his rights or property, a person who has, under the provisions of the preceding article, rendered himself liable for damages must also give compensation for injury other than to rights of property. 711. A person who has caused the death of another must give compensation for damage to the parents, to the husband or wife, and to the children, even in cases where no injury has been done to their rights of property. 723. In the case of a person who has injured another's honour, a court of law may, on the application of the injured party, either in lieu of compensation for damage, or in addition thereto, order suitable steps to be taken for the retrieval of the injured party's honour.

In the German law, as in many other systems, moral damage can only be claimed in addition to damage to person or estate. False imprisonment is an exception and certain sexual offences against females (B.G.B. 847, 1300) such as seduction under promise of marriage, by deceit or menace or abuse of power.

It is difficult not to feel some sympathy with the arguments that no damages should be given for moral injury (1) because the latter is inappreciable in money; and (2) because damages are a penalty, and as such more proper to a criminal law.

It may not be superfluous to point out that many wrongs which occasion moral injury are susceptible of punishment under the penal law and in some countries the criminal courts have jurisdiction to award damages in addition to punishment.—*Law Times.*

LAW OF DIVORCE IN CANADA

By C. S. McKee, Barrister.

(Continued from March issue)

In Canada, as in Great Britain, the procedure has always been for private bills to originate in the Upper House. Before 1847, no standing orders on the question of divorce bills appear to have been in existence; the practice was merely to follow British procedure. In 1847 standing orders were adopted; in all unprovided cases reference was to be had to the procedure of the House of Lords; however, the latter was not followed absolutely, the outstanding example being that in this country a wife could get a divorce from her husband on the sole ground of adultery. These Senate rules were amended in 1876, 1888, and again in 1906, and the subject of divorce is now dealt with by rules 133 to 152. These twenty rules are published under separate cover and are available upon application. The only amendment affecting jurisdiction was in 1888. Under the former practice, the Senator in charge of the bill moved immediately after the second reading the appointment of a Select Committee of nine, and also named its members. At the instance of Senator Gowan, who had been a Judge of the district of Simcoe from 1843 to 1883, rules were adopted in 1888 providing for the formation at the beginning of each session of a committee of nine to whom all questions of divorce are referred with a view to relieving the Senate itself of some of the duties which under the old rules had devolved upon it. At first, an attempt was made to select the committee on the basis of provincial representation, but on account of the objection to divorce of Roman Catholic Senators, it has not always been possible to adhere to this plan.

Applications for divorce come under the head of private bill legislation. The practice is now governed by the set of rules adopted in 1906; apart from these rules the general regulations regarding private bills apply if not in conflict with the rules. A committee of selection of nine is appointed at the first of each session to nominate the Senators to serve on the several standing committees—among others, the one on divorce, which consists of nine. Every standing or special committee meets, if practicable, on the day after its appointment, and chooses a chairman. A majority of the committee constitutes a quorum. Senators who are not members of the committee may attend and

may speak, but may not vote; in practice members of the House of Commons may also attend. Although R. 152 provides that in cases not covered by the rules the general principles upon which the Imperial Parliament proceeds in dissolving marriages shall be followed, the rule has in practice been regarded as permissive only and not imperative, and the Senate has never felt itself bound by the decisions of the House of Lords. Another similar defect is the fact that the Senate observes precedents only when it chooses to do so; unlike a court of law, it is not bound by them; and the result is that solicitors are left in the embarrassing position in advising clients, that what the Senate has done before is an indication merely and not a guarantee as to what it will do again. Although it probably is impracticable for Parliament to limit its almost omnipotant powers by adopting a rule that precedents are to be followed in the manner in which they are followed in courts of law, yet the practice of the latter in the matter might well be more closely adhered to than it is at present.

The House of Commons, not being particularly concerned with divorce bills, has adopted no special rules relating to them, but has left them to the practice relating to other private bills.

There is of course no appeal from the action of Parliament —except to have the bill introduced again at a subsequent session.

The same principles in regard to proving a legal marriage, the unimportance of the place of commitment of the offence, and domicile as were noticed above in connection with Provincial Divorce Courts apply to Parliamentary divorces.

4. Jurisdiction. Declarations of Nullity.

By those not connected with the legal profession, declarations of nullity are frequently confused with divorce. In their practical effects, they may be somewhat similar, but technically there is a vast difference; and cases do occur where this technical difference impresses itself in a far-reaching manner—e.g., as regards legitimacy of issue, and as regards re-marriage prior to the declaration. Divorce starts with the basis of a legal marriage; a declaration of nullity has as its basis the absence of a legal marriage—the absence of the status of husband and wife. In the Provinces where there are Courts with jurisdiction over divorce, it is not surprising that these Courts have jurisdiction to hear applications for declarations of nullity; in On-

tario and Quebec, the exact legal situation is not very clear; and in so far as it is settled, it is probably not just what might reasonably be expected—the decisions of lower Courts are conflicting; of Appeal Courts are lacking in detail.

The theory of annulment is that marriage although accompanied by religious observances is for judicial purposes a contract, and can like other contracts be questioned as to its validity. Anson gives as the elements of a valid contract: 1. Offer and acceptance. 2. Form and consideration; 3. Capacity. 4. Genuine consent. 5. Legality of object.

In connection with the contract of marriage these may be regrouped and enlarged as follows:

1. Genuine consent—error—as to person, as to ceremony; duress; undue influence.

2. Form—as laid down by provincial legislation in regard to solemnisation.

3. Capacity—infants; lunatics; intoxicated persons; impotent persons.

4. Legality of object—consanguinity; bigamy.

A sub-division into void and voidable has been attempted by some writers, but such a classification would, besides being confusing on account of different legislation in the various Provinces, appear to be unnecessary, since in practice whether void or voidable, the effect never comes into operation until the validity has been attacked and settled.

1. Consent. Error in regard to the person must be as to identity and not as to condition, either social or physical. Misrepresentation, even though fraudulent, unless it results in such an error is not a ground for a declaration of nullity. The Quebec Civil Code differs from the English Common Law on this subject in that the former provides that after 6 months cohabitation and after having acquired full liberty or become aware of the error, the person coerced or in error cannot have the marriage annulled. (arts. 148-9).

2. Form. Obviously parties are not married unless they comply with the provincial law in regard to solemnisation. This phase of the question has been of much more importance in Quebec than in the other Provinces. A Papal decree, known as the Ne Temere, in 1908, tried to make marriages of two Roman Catholics or of one Protestant and one Roman Catholic except by a priest invalid. It was held by a majority of the Judges of the Supreme Court of Canada to be a question of conscience

only and not binding on Quebec Courts. However, in *Re Marriage Law of Canada*, 7 D.L.R. 629, [1912] A.C. 880, the Privy Council held that the power of the Provinces to legislate in regard to solemnisation covered the right to say certain ministers only should be competent to perform the ceremony of marriage for certain persons, and that non-compliance would render the marriage null and void. The matter has recently been before the Privy Council again, (*Tremblay Marriage* case, 58 D.L.R. 29, [1921] 1 A.C. 702, 27 Rev. Leg. 209), and it has been held that the marriage of two Roman Catholics or of a Roman Catholic and a Protestant by a properly authorised person other than a Roman Catholic priest is not a ground for a declaration of nullity.

3. Capacity. The English Common Law which says that a man under 14 and a woman under 12 cannot marry except to prevent illegitimacy is in force in Canada, except in Ontario, where the age limit is 14 for both. (R.S.O., 1914, ch. 148, sec. 16), and in Manitoba, where the age limit is 16 for both, (1906, (Man.) ch. 41, sec. 16). All Provinces have passed legislation to discourage marriage by very young people, but in most cases this legislation does not go so far as to affect legality once the contract has been entered into. In Quebec and Ontario the statutes go further. In the former, a marriage where the parties are under 21 years of age contracted without the consent of the parents can be attacked only by those whose consent was required, and then only within 6 months of the ceremony. In Ontario, by R.S.O., 1914, ch. 148, sec. 36, when a form of marriage has been gone through between persons either of whom is under 18 without the consent of the father if living or of the mother or other guardian if he is dead, the Supreme Court has jurisdiction in an action brought by either party who at the time of the marriage was under the age of 18 years to annul the marriage, provided that such persons have not after the ceremony cohabited together as man and wife and that the action is brought before the applicant is 19. These provisions came before the Courts in 1916 in *Peppiatt* v. *Peppiatt* (1916), 30 D. L.R. 1, 36 O.L.R. 427. It was the case of a marriage without consent on the part of her parents of a girl under 18, and came on for trial before Meredith C.J., C.P., 34 D.L.R. 121, who held that the section of the Ontario Marriage Act R.S.O. 1914, ch. 148, requiring consent was *ultra vires*, and who sent the case on to the Appellate Division, it being the first of such cases to

go there. The trial judge said at p. 123: "This is another of those cases which, though of infrequent occurrence in this Province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the mar ' ge and divorce laws of Canada whenever they do occur; unce.. in and unsatisfactory not only in the conflicting and indecisive character of the case-law upon the subjects, but equally so of the statute-law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character . . How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they are lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the questio . . . . The cases are very much opposed to one another; or rather, the expressions of judicial opinion in them are; and they are less helpful as none of them was ever carried to a court of appeal."

With the desirability of a clear decision so definitely set out by the trial Judge, it is to be regretted that the reasons for the decision of the Appellate Division are not more clearly set out than they are. The Appellate Division felt themselves bound by the decision of the Privy Council in *Re Marriage Law of Canada*, 7 D.L.R. 629, [1912] A. C. 880, which held that everything which is included in the solemnisation of marriage is excepted from the exclusive jurisdiction vested in the Parliament of Canada by sec. 91 (26) of the B.N.A. Act, and that this enables the Provincial Legislature to enact conditions as to solemnisation which may affect the validity of the contract. They then considered the question of whether the Marriage Act makes the consent required by its 15th section a condition precedent to a valid marriage. The action was dismissed, it being held that the consent required by the Marriage Act was not a condition precedent to the formation of a valid marriage but merely a direction to the issuer of marriage licenses. The question of the validity of sec. 36 was not decided. Jurisdiction was held to be conferred by sec. 16 (B) of the Judicature Act. This decision appears to have found jurisdiction elsewhere than was found in *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, and to have overruled *Reid* v. *Aull* (1914), 19 D.L.R. 309, 32 O.L.R. 68, where Middleton J. said, at p. 78: " . . The power to

make declaratory decrees conferred by the Legislature is not to be exercised in respect of matters over which the Court has no general jurisdiction."

Where there is insanity—not merely mental deficiency—or drunkenness, there can obviously be no consent to the contract —*A.* v. *B.* (1911), 23 O.L.R. 261, and *Roblin* v. *Roblin* (1881), 28 Gr. 439.

Another capacity essential to the marriage contract is the capacity for the consummation of the marriage, the lack of which is known as impotency and is ground for a declaration of the nullity. It must exist unknown at the time of the marriage; physical incapacity arising subsequently is no ground, as the parties have taken each other subject to all the vicissitudes of life which may arise, but on the belief that all is correct at the start. Moreover, in cases of subsequent impotency, the marriage would already have been consummated. The impotency must be incurable—i.e., the contract must be incapable of completion. Usually it will be apparent to medical authorities; but in some cases, it cannot be detected by them; the practice in such cases is to recognise the claim after the lapse of 3 years. In England the practice has been that the fit party must be the petitioner; but in some cases this rule has not been followed, as where the unfitness was not known to the deficient party. In Quebec, the marriage can be annulled for impotency, natural or accidental, existing at the time of the marriage, but only if it be apparent and manifest; the jurisdiction can be invoked only by the party who has contracted the marriage with the impotent person, and only before 3 years have elapsed. According to Bishop, there were in England between 1858 and 1872, 15 reported cases.

4. Legality. In England since Lord Lyndhurst's Act in 1835, (Imp.) ch. 54, marriages within the degrees prohibited by 1537 (Imp.) ch. 7, sec. 7, are void *ab initio* and not merely voidable. The Acts of 1835 however do not apply to many of the Provinces of Canada, and therefore in these Provinces such marriages are merely voidable. In *Cox* v. *Cox* (1918), 40 D.L.R. 195, 13 Alta. L.R. 285, to take only one case, the Court of Alberta made a declaration of nullity in connection with a bigamous marriage.

Very similar to a nullity suit is a jactitation suit. It is available to the man or to the woman. The former may complain that the latter has improperly boasted of being his wife

and may ask the Court to silence her. She may answer the charge by denying the boasting, by setting up a marriage, or by pleading his permission to assume the character of wife. It has rarely been resorted to in England in modern times, and never in Canada or the U.S.A.

So much for the grounds for declarations of nullity as they are generally recognised at present. Are these grounds too broad or too limited, and are they the only grounds which should be recognised? Should legislation be passed abolishing some of the existing grounds? At the basis of these questions there lies —and always in the past has lain—the desirability of releasing the person from an unhappy contract which was never contemplated or understood, of limiting the number of children of an undesirable physical type which are brought into the world, of limiting the number of children declared to be illegitimate, and of limiting the type of immorality which enters into marriage, thinking that when tired of it, it can easily be annulled. Cases discussed above under the heading of consent would appear to be ones which should be annulled only if action is brought before the marriage has been confirmed by the acts of the injured party which would be within a reasonable time after the error, or duress, etc., has ceased; but if brought within such time, then even though the marriage has been consummated before the error, duress, etc., ceased. The action should lie only at the instance of the injured party; the marriage should be voidable not void. Since ignorance of the law can never be a defence, since the question is also one of crime, and since the State is presumed to punish all crimes of which it has knowledge, the non-observance of the formalities provided by law for marriage should be ground for annullment only at the instance of the Crown, except when the ignorance is one of fact only and not law, in which case the party acting in such ignorance should be able to bring an action. It would appear to be advisable in most cases in the interests of legitimacy for the Crown to compel the parties to go through a properly binding marriage ceremony, and in fact it would be wise if as well either party could take action to compel the other to complete the contract in regard to form. The classes under the heading of capacity are slightly more complex as regards estimation, and can probably best be considered under headings.

(To be continued in May issue)

Review of Current English Cases

WILL—REVOCATION BY MARRIAGE—EXCEPTION IN CASE OF APPOINTMENT IN EXERCISE OF POWER—VESTING OF APPOINTED INTEREST AT AGE OF 25—WILLS ACT 1837 (1 VICT., C. 26), S. 18—(R.S.O. C. 120, S. 21 (1) (C))—PERPETUITY.

In re Paul; Public Trustee v. *Pearce* (1921), 2 Ch. 1. Two points of interest are determined in this case by Sargant, J.: (1) that a will made in exercise of a power of appointment is not revoked by a subsequent marriage where the property appointed would not, in default of appointment, pass to any of the persons specified in the bracketed part of s. 18 of the Wills Act 1837 (R.S.O., c. 12, s. 21 (1) (c)); (2) that the postponement of the period of vesting until the appointee was 25 did not offend against the law of perpetuities.

LANDLORD AND TENANT—PROVISION AGAINST ASSIGNMENT WITHOUT LICENCE—LICENCE NOT TO BE UNREASONABLY WITHHELD—REFUSAL BECAUSE LESSOR WANTED POSSESSION.

In re Winfrey and Chatterton (1921), 2 Ch. 7. In this case Sargant, J., holds that where a lessor has agreed not to unreasonably withhold his consent to an assignment by the lessee, he is violating the agreement if he refuse to consent to an assignment merely because he wishes to get possession of the demised, and that a refusal on that ground entitled the lessee to assign without licence.

WILL—EXECUTION OF WILL IN CHILEAN FORM—"CLOSED WILL"—SEALED ENVELOPE—SIGNATURE AND ATTESTATION ON COVER—SIGNED BUT UNATTESTED WILL INSIDE ENVELOPE—VALIDITY—REALTY IN ENGLAND—WILLS ACT 1837 (1 VICT. C. 26)—R.S.O. C. 126.

In re Nichols; Hunter v. *Nichols* (1921), 2 Ch. 11. In this case the validity of a will in Chilean form to pass realty in England was in question. The testator was an Englishman domiciled in Chile and he executed a closed or secret will accord-

ing to the provisions of Chilean law, before a notary public and five witnesses. By that law "a closed will" was deemed to include the cover which contained it, and that cover was the only document on which the names of the testator, the notary and the five witnesses were signed together—the will itself being signed by the testator alone. The closed will and cover was proved in Chile and letters of administration with the will and cover annexed were granted in England. Eve, J., who heard the application, held, following the reasoning in *In re Alenomius* (1859), 20 L.J. (P.) 46, that the indorsement on the envelope and the document therein enclosed constituted one testamentary document and it was sufficient to pass real estate in England.

WILL—CONSTRUCTION—DEVISE OF REAL ESTATE AND BEQUEST OF PERSONALTY—TESTATOR POSSESSING LONG TERM LEASEHOLDS BUT NO REAL ESTATE STRICTLY SO CALLED—EFFECT OF DEVISE ON LEASEHOLDS—WILLS ACT 1837 (1 VICT. 26), s. 26—(R.S.O. c. 120, s. 29).

In re Holt; Holt v. *Holt* (1921), 2 Ch. 17. In this case a devise of real estate was held by Sargant, J., to pass leaseholds in the following circumstances. A testator who had no real estate strictly so called was possessed of two long term leaseholds, and, by his will, he gave all his "personal property" to some persons, and "all his real estate and property" to other persons, and the question therefore arose whether the gift of his real property would pass the leaseholds. The learned Judge, although holding that s. 26 of the Wills Act (R.S.O. c. 120, s. 29) did not apply, nevertheless held that, apart from the Act, the case was governed by *Rose* v. *Bartlett*, Cro. Car. 292, which he considered was still law, and that the leaseholds passed.

LANDLORD AND TENANT—PAROL LEASE WITH OPTION TO PURCHASE—POSSESSION TAKEN—OPTION EXERCISED IN WRITING—PART PERFORMANCE—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE.

Brough v. *Netleton* (1921), 2 Ch. 25. The plaintiff in this case made a verbal agreement with the defendant for the lease

of certain premises with an option to purchase the same. In pursuance of the agreement he entered into possession and subsequently in writing exercised the option. The defendant having refused to carry out the sale the action was brought for specific performance, and the defendant set up the Statute of Frauds as a defence. Lawrence, J., who tried the action, held that the taking possession of the property by the plaintiff amounted to a part performance of the contract which entitled him to prove all the terms of the parol agreement, and, this being done, he gave judgment for specific performance as prayed.

TRUSTEE—INTESTATE'S ESTATE CLEARED OF DEBTS AND ADMINISTRATION — POWER OF COURT TO APPOINT TRUSTEE TO ACT JOINTLY WITH ADMINISTRATRIX—TRUSTEE ACT 1893 (56-57 VICT. C. 53), S. 25 (1) (3)—R.S.O. c. 121, s. 4 (2) (4))

In re Ponder; Ponder v. *Ponder* (1921), 2 Ch. 59. In this case an application was made to Sargant, J., to appoint a trustee to act jointly with an administratrix who had cleared the estate of debt and administration expenses, and in whose hands a balance remained for distribution. The learned Judge held that the administratrix had now become in effect a trustee of the balance and that the Court had power to appoint a trustee to act with her on her own application, and he made the appointment as asked.

VENDOR AND PURCHASER—BUILDING SOCIETY—MORTGAGES OF MEMBERS—CONTRACT TO SELL MORTGAGES TO ANOTHER BUILDING SOCIETY—DIRECTORS ACTING HONESTLY—ULTRA VIRES—SPECIFIC PERFORMANCE.

Sun Permanent Benefit Building Society v. *Western Suburban H.R. Building Society* (1921), 2 Ch. 83. This was an action to enforce the specific performance of a contract whereby the defendant society agreed to buy certain mortgages of members of the plaintiff society. The directors of the defendant society had acted honestly in entering into the contract, but claimed that in the event of the transaction proving unprofitable they might be held to have acted *ultra vires*; and that the contract was made

under the erroneous impression that the mortgagors would become members of the defendant society and as such liable to pay fines in accordance with the rules in case of default. Lawrence, J., who tried the action, held that the contract was not *ultra vires* of the defendant society, and though conceding that the Court would not decree specific performance involving a breach of trust, yet he found that the contract had been fairly entered into even if there had been some breach of duty by the directors of which the plaintiffs had no notice, and though the defendant might not be able to impose fines on the mortgagors that was no ground for refusing specific performance.

NEGLIGENCE—NUISANCE—COAL MINE—COLLIERY SPOIL—TIPPING ON MOUNTAIN SIDE—LANDSLIDE OCCASIONED BY TIPPING—LICENCE TO CARRY ON TRADE.

Attorney-General v. *Cory, and Kennard* v. *Cory* (1921), 1 A.C. 521. This was an appeal by the plaintiffs in two separate actions against the same defendants. The defendants carried on a coal mine and by leave of the plaintiffs in the second action had tipped spoil from the colliery on their land which was a mountain side. The result was that a landslide took place and injured certain houses of the licensors and also a public road. The first action was brought by the Attorney-General on the relation of the municipality in which the road was vested, to restrain the nuisance and for damages done to the road. The other action was brought by the licensors claiming damages and an injuction on the ground that the defendants had tipped to an unreasonable extent and in an unreasonable manner. The House of Lords (Lords Haldane, Finlay, Atkinson, Shaw and Buckmaster) gave judgment (Lord Buckmaster dissenting) finding on the evidence that the landslide was due to the defendants having neglected to drain the tips, and that they were liable to both plaintiffs for the damage done both on the principle of *Rylands* v. *Fletcher* (1866), L.R. 1 Ex 265, and also on the ground of negligence, and the judgment of the Court of Appeal to the contrary was reversed. Lord Finlay was of the opinion that apart from negligence the defendants would not have been liable to the plaintiffs in the second action either on the principle of *Rylands* v. *Fletcher* or on the principle that a licence to carry

on a trade does not authorize the licensee to create a nuisance, unless that is the inevitable result of carrying on the trade.

SHIP—ADMIRALTY—COLLISION—SHIP NOT UNDER COMMAND—CROSSING COURSES—REGULATIONS FOR PREVENTING COLLISIONS AT SEA 1897, ARTS. 4, 19, 21—CONCURRENT FINDING OF FACT BY COURTS BELOW.

S.S. Mendip Range v. *Radcliffe* (1921), I A.C. 556. This was an action brought by the owners of the S.S. Mendip Range against the commander of the Drake, a British cruiser, to recover damages for collision owing to alleged negligent navigation and breach of the Regulations for Preventing Collisions at Sea 1897, arts. 4, 19, 21. The Judge at the trial and the Court of Appeal found in effect that the Drake, having been torpedoed, was "not under command," and that the defendant was justified in hoisting the "not under command" signal, and that he had not been guilty of negligence, and the House of Lords (Lords Haldane, Finlay, and Atkinson—Lords Wrenbury and Phillimore dissenting) held that there having been this concurrent finding of facts by the Courts below their decisions ought not to be disturbed, and the appeal consequently failed.

WILL — CONSTRUCTION — BEQUEST BY BARONET'S SON TO HIS BROTHERS FOR LIFE AND THEN TO THE HEIR TO THE BARONETCY —TIME FOR ASCERTAINING HEIR.

Lucas-Tooth v. *Lucas-Tooth* (1921), 1 A.C. 594. In this case the construction of a will was involved which resulted in some difference of judicial opinion. Sir Robert Lucas-Tooth, Bart., had three sons — Selwyn, Douglas and Archibald. The son Douglas made the will in question in 1914, whereby he bequeathed certain stocks to his brothers Selwyn and Archibald in equal shares for their lifetime only, and then to pass to the heir of the baronetcy—then held by his father—and failing an heir to the eldest daughter of Selwyn. The testator died in 1914. Selwyn also died subsequently in 1914 leaving a daughter but no son. Sir Robert, the father, died in 1915, and the

baronetcy then passed to Archibald, who died in 1918; and on his death the baronetcy became extinct for want of an heir. The question therefore rose whether the daughter of Selwyn was entitled to the capital of the fund, or whether it had become vested in Archibald as the heir of the baronetcy within the meaning of the will, and this depended on whether such heir was to be ascertained at the date of the death of Sir Robert or at the death of the survivor of the testator's two brothers. The Courts below had taken the former view, but the House of Lords (Lord Birkenhead, L.-C., and Lords Finlay, Dunedin, and Shaw —Lord Atkinson dissenting) reversed their decision and came to the conclusion that the heir of the baronetcy must be ascertained at the last of the last survivor of the two brothers of the testator, and that there being then no heir the gift over in favour of Selwyn's daughter took effect.

LUNACY—PAUPER—SUMMARY RECEPTION ORDER BY CHAIRMAN OF BOARD OF GUARDIANS—CERTIFICATE OF MEDICAL PRACTITIONER —ACTION FOR GIVING FALSE CERTIFICATE—NEGLIGENCE.

Everett v. *Griffiths* (1921), 1 A.C. 631. This was an appeal to the House of Lords (Lords Haldane, Cave, Finlay, Atkinson, and Moulton) from the decision of the Court of Appeal (1920), 3 K.B. 163 (noted ante vol. 57, p. 107), and is noteworthy as an instance of the careful and thorough way their Lordships deal with cases involving questions of personal liberty. The action was instituted by a pauper against the chairman of a board of guardians and a medical practitioner to recover damages for (as alleged) wrongfully committing him to a lunatic asylum, the certificate of the medical man being claimed to have been false, and the chairman being alleged to have been negligent in acting upon it. The Lord Chief Justice, who tried the action, directed judgment to be entered in favour of both defendants on the ground that the chairman was acting judicially and therefore was not liable to an action; and as against the medical man because the plaintiff's detention was not caused by the certificate, but by the order signed by the chairman. On a motion for a new trial this judgment was affirmed by the Court of Appeal (Atkin, L.J., dissenting), but on different grounds. After an elaborate discussion of the matter in judgments covering over

50 pages of the reports, their Lordships unanimously dismissed the appeal, as against the chairman on the ground that he was honestly satisfied that the plaintiff was insane, and that no action for negligence lay against him; and as against the medical man on the ground that there was no evidence fit to be left to a jury of any want of care on his part.

PRACTICE—SERVICE OUT OF JURISDICTION—CONTRACT TO BE PERFORMED WITHIN THE JURISDICTION—SALE OF SHIPS TO BE DELIVERED WITHIN JURISDICTION — REFUSAL TO TAKE DELIVERY—(ONT. RULE 25 (1) (e)).

Hemelryck v. *William Lyall Shipbuilding Co.* (1921), 1 A.C. 698. This was an appeal from the Supreme Court of British Columbia affirming an order of Hunter, C.J., allowing service of a writ of summons out of the jurisdiction in the following circumstances. The defendant had entered into a contract to buy six ships to be delivered in British Columbia but to be paid for in New York. The defendants refused to accept delivery. The Judicial Committee of the Privy Council (Lords Buckmaster, Dunedin and Shaw) dismissed the appeal, being of the opinion that for the purpose of satisfying the Rule of Court it is sufficient if there is one term to be performed within the jurisdiction, but that principle could not be invoked by setting up an artificial cause of action in order to provide jurisdiction as was attempted in *Johnston* v. *Taylor* (1920), A.C. 144, noted ante vol. 56, p. 153.

CANADA—QUEBEC—MARRIAGE—IMPEDIMENT TO MARRIAGE—PROHIBITED DEGREES—RULE OF ROMAN CATHOLIC CHURCH AS TO PROHIBITED DEGREES—IMPEDIMENT NOT SPECIFIED IN CIVIL CODE—CIVIL CODE OF QUEBEC, ART. 127—32 HEN. VIII., C. 38.

Despatie v. *Tremblay* (1921), 1 A.C. 702. This was an appeal from the Superior Court of Quebec which had affirmed a judgment annulling a marriage between two Roman Catholics duly solemnized according to the rites of the Roman Catholic Church, on the ground that the parties were cousins of the fourth degree according to the mode of reckoning of the R.C. Church. The

parties were married in 1904, and lived together thereafter as man and wife until the year 1910, when the husband made application to the Roman Catholic bishop of the Diocese to have the marriage declared null and void on the ground of his relationship to his wife as a cousin of the fourth degree, of which fact neither he, nor his wife, had any knowledge at the time of the marriage, but which it was claimed was an impediment to the marriage unless a dispensation should be first obtained, which of course, in the circumstances, could not even be thought of—as neither party knew of the existence of the impediment. The bishop granted the application, and pronounced the marriage null and void and, as far as he could do so, annulled it. The husband then applied to a civil Court for judgment of nullity, and that Court, conceiving itself bound by the judgment of the bishop as to the invalidity of the marriage, gave judgment of nullity as prayed, and this judgment was affirmed by the Superior Court (Archibald, J., dissenting); and it was from that judgment the present appeal was brought. The case practically turned on the proper construction of Art. 127 of the Civil Code of Quebec. The Provincial Courts came to the conclusion that it had the effect of making all the prohibited degrees of the R.C. Church part of the civil law of Quebec. The Judicial Committee of the Privy Council (Lord Birkenhead, L.-C., and Lords Haldane, Cave, Dunedin, and Moulton) in a very convincing judgment, delivered by the late Lord Moulton, makes is quite clear that art. 127 had no such effect, and that the only legal prohibitions to marriage in Quebec are the Levitical degrees referred to in 32 Hen. VIII., c. 38, and that the only effect of art. 127 is to afford the ministers of any religious organization having according to its rules prohibited marriage within degrees other than the Levitical degrees, a justification for refusing to solemnize any marriage offending against such special rules, and also a justification to the religious organization whose rules are violated by its members for disciplining such offenders. We also observe from what is said in this judgment that the notion, which apparently gained some credence in Quebec, that a marriage of a Roman Catholic could not be validly solemnized except in accordance with the rules laid down by the Council of Trent has, as a matter of law, no legal foundation, although no doubt Roman Catholics whose marriage are solemnized otherwise than in accordance with those rules may subject themselves to be disciplined by the church of which they are members.

Bench and Bar

Lord Chief Justice of England.

When Lord Reading went as Viceroy to India his place was filled by Mr. Justice A. T. Lawrence. The latter, subsequently created Lord Trevithin, has now resigned, and is succeeded by Sir Gordon Hewart, Attorney-General, whose rise is said to be meteoric but well deserved. He is succeeded in the office of Attorney-General by Sir Ernest Pollock, Solicitor-General.

Meetings of Bar Associations.

We are informed that Lord Shaw of Dunfermline, so well and favourably known to the profession in England and Scotland, will this year be the guest of the two great Bar Associations of this continent, Canada and United States, both of which meet in August next. His presence will greatly add to the interest of these meetings. We are much indebted to the thoughtful care and happy discrimination of Sir James Aikins and Mr. C. A. Severance in giving their respective Associations this treat. It is an education to have with us from time to time leaders in thought and expression from the mother land.

Ontario Bar Association—Annual Meeting.

The sixteenth annual meeting of the Association, held at Osgoode Hall on the 15th and 16th March, 1922, was one of unusual interest. The subject of Legal Education was the predominating theme. As the subjects discussed were of much wider interest than the limits of the Province of Ontario, we give a fuller report than usual.

The honorary president, Hon. Mr. Justice Riddell, lent his very active support to the success of the occasion and presided at most of the sessions. After a word of welcome to the guests of the Association and its members, he spoke substantially as follows:—

"TThere never has been a time for generations in which there was not interest for the lawyer; but to-day we are living in an era which ought to be, and is, more interesting to the lawyer than any of the many glorious centuries which have preceded it. . . . I do not mean the lawyer who looks upon law as his bread and butter, the lawyer who sees nothing in law except money; I mean the lawyer who recognises that law is the voice of

eternal justice, and that law is the foundation upon which all civilization must necessarily be built. . . . The time has long gone by when the ruling principle was,

'The good old rule, the simple plan,
That they should take who have the power,
And they should keep who can.'

. . . It may be that the profesion of law at large is losing its interest in public affairs of this country and devoting its attention rather more closely to business. That is to be deplored. . . . The lawyer ought to be a business man and make as much money as he honestly can, but I venture to think it is not right for prominent leading lawyers to disregard the public affairs of the country, to omit to take the great part in the affairs of the country which was taken by the great lawyers of the past."

This was followed by the annual address of the president, Mr. R. J. Maclennan, K.C. As the ful text of this able address will ultimately reach every member of the Association, we only refer to it briefly. He pointed out that the subject of Legal Education is now undergoing lively discussion on both sides of the Atlantic. In England no general address to lawyers seems complete without some reference to Legal Education. Both English and American lawyers agree that a considerable amount of knowledge should be acquired *before* a student enters the law school. The present standard in Manitoba is two years of University work and the American Bar Association at the present time is seeking to set up a similar standard. Dr Josef Redlich of the faculty of law and political science in the University of Vienna was brought to the United States before the war to examine methods of study in law schools. His report, entitled "The Common Law and the Case Method," was issued in 1914. The next bulletin, of about 300 pages, called "Justice and the Poor," prepared by Reginald Heber Smith of the Boston Bar, was published in July, 1919; and perhaps the most valuable, entitled "Training for the Public Profession of the Law," a book of over 500 pages, the work of Mr. Alfred Z. Reed, was published in June, 1921. Reference was also made to the conference on Legal Education held at Washington on February 23, 24, 1922, at which more than one hundred and fifty law Associations were represented, including delegates from Bar Assocations in Canada. After much discussion and difference

of opinion the recommendations of the American Bar Association received the almost unanimous approval of the meeting. These recommendations included the following: 1. That a law student should, before admission, have two years of study in a college. 2. That the law course should be at least three years of a student's whole time. 3. That there should be an adequte school library and most of the teachers should give their entire time to the school to ensure personal acquaintance and influence with the student body. 4. That the student's fitness to practice should be passed upon by some public authority, and that a list of all Law Schools in the United States should be prepared and divided into those which give a standard equal to the above and those which do not, so that intending students might know what school to choose.

Speaking of recommendation number 4, the President proceeded, "It is a matter of great regret that the Legislature from yeai to year opens the door and sends into the profession, and against the judgment of the Benchers, men who seek to escape the full rigor of the curriculum. We must never forget the truth of the maxim 'there is no royal road to learning' and that it applies to legal education."

The three principal addresses on the subject of Legal Education, in addition to the President's, were delivered by Dean Harlan F. Stone, of Columbia Law School; Dean MacRae, of Dalhousie Law School, and Dean McKay, of McGill University. All these gentlemen supported in the main the ideals of the American Bar Association, as to the standard requirements for entrance to the law school, and, in addition to this, favored what is called the "Case Method" of study as distinct from the lecture, or, as many of the speakers put it, "the case method as meaning directing the student to the sources." These addresses, it is hoped, will be published in full at a not too distant date for the benefit of all who are interested in the Association. An attempt to give their bare substance here would be futile. They were all of a first class order and it was a matter of regret, as it always has been, that so few of the members of the profession interested themselves sufficiently to go and hear them. The profession in the Province numbers two thousand or upwards and at some of the meetings, at which the most important addresses were being delivered, the attendance numbered not more than fifty to one hundred persons, notwithstanding the wide

publicity given to the same in advance. If any member of the Association or profession could suggest an effective method of rousing the members of the legal flock in the Province to a sense of their opportunity, his suggestion would be welcomed as a very valuable one by those who seek to promote the highest aims of the profession, for it is only by association and some approach to unity that these things can be accomplished.

Mr. Roger Sherman, of the Illinois State Bar, delivered an instructive address on a subject not by any means unrelated to the same subject, namely, on "Business Systems in Law Offices." He would abolish the old time roll top desk and all the accumulation which seems to belong to it, and to introduce such ideas of efficiency he would carry into the administration of the lawyer's practice the adoption of modern filing systems and of methods of discipline most conducive to the efficient management of the office, which, he said, should be managed as a business; and that these ideals, far from being in conflict with the highest ethics of the bar are, on the contrary, in accordance with them and are a challenge to the lawyer who would teach and lead and give the maximum service with the maximum satisfaction to himself and his clients. Mr. Sherman's address contained many useful and practical ideas which were greatly appreciated by his audience, and on motion he was unanimously elected as an honorary member of the Association.

The reports of the various committees which were presented contained valuable recommendations which were referred to Council for action, and as to which more anon.

A very pleasant feature of the meeting was the fact that it also commemorated the centenary of the incorporation of the Law Society of Upper Canada, and the afternoon session was devoted exclusively to this feature. It was in charge of the Benchers of the Law Society, Mr. E. Douglas Armour, K.C., being chairman in the absence of the Treasurer, Hon. Featherston Osler, K.C., through illness. On the platform were seated also Chief Justice Sir William Meredith, Hon. Mr. Justice Anglin, Hon. Mr. Justice Riddell, Hon. Mr. Justice Masten, and others.

A brief address was delivered by Hon. Chief Justice Sir William Meredith, who received a very hearty welcome. The learned Chief Justice and the chairman, Mr. Armour, held and advocated different views on the much mooted question of the

affiliation of the Law School with the Toronto University. The Chief Justice sponsored the idea as a very desirable and practical one, while the Chairman was equally strong in his expression of the opinion that for the Benchers to become party to such an arrangement would be tantamount to giving up a trust that had been reposed in them for more than one hundred years. No vote was taken.

Mr. Justice Anglin gave a very instructive address, in which, by way of reminiscence, he singled out the late Mr. Christopher Robinson, K.C., as perhaps the most outstanding man at the Bar of Canada during his lifetime.

At this meeting the Hon. Mr. Justice Riddell delivered an address on the history of the Law Society of Upper Canada prior to its incorporation in 1822. He traced the growth of the Society from the year 1797 until the incorporation of the present Law Society of Upper Canada in 1822. Again space forbids our doing justice to this most instructive and painstaking address, a veritable mine of information. This, too, it is hoped, may be published in full hereafter.

The annual banquet was held at Hart House, Toronto University, Hon. Mr. Justice Riddell presiding. Many pleasing and entertaining speeches were made by some of the guests, including the Lieutenant-Govrnor of Ontario, Dean MacRae, Dean McKay, Hon. Mr. Justice Anglin of the Supreme Court, Mr. MacDougall, C.R. of Montreal, President Falconer of Toronto University, and Mr. Buck of the Buffalo Bar. Mr. E. Douglas Armour, K.C., was called upon to recite "The Student's Dream," which he did in his own inimitable fashion to the delight of those present. Dean MacRae and Mr. Justice Anglin furnished an improptu drama in the somewhat divergent notes they struck on the subject of appeals to the Privy Council. The former thought the time was not ripe for this country to take the step of abolishing such appeals, whilst the latter was of the opinion that, if the judiciary of Canada was not of sufficient strength to constitute a Court of final resort it ought to be, and that the remedy lay, not in continuing appeals to the Privy Council, but in looking forward to the time when the Judges of our final appellate court would take rank with those of the Judicial Committee of the Privy Council.

The officers and members of Council for the ensuing year are as follows:—Hon. Mr. Justice Hodgins, honorary president;

Francis Ping, K.C., Kingston, president; Francis Kerr, K.C., Peterboro, vice-president; A. J. Russell Snow, K.C., Toronto, vice-president; Nicol Jeffrey, K.C., Guelph, vice-president; A. A. Macdonald, Toronto, recording secretary; W. H. Murphy, Toronto, corresponding secretary; H. F. Parkinson, Toronto, treasurer; W. S. Herrington, K.C., Napanee, historian and archivist.

Toronto members—J. H. Spence, K.C.; Daniel Urquhart, K.C.; H. S. White, K.C.; T. A. Rowan, W. D. Gregory, Daniel O'Connell, K.C.; J. M. Clark, K.C.; E. Percival Brown, K.C.; W.J. Elliott, K.C.; T. H. Barton, Judge Denton.

Other members—W. S. Ormiston, Uxbridge; K. F. Kerr, K.C., Cobourg; O. L. Lewis, K.C., Chatham; W. N. Ponton, K.C., Belleville; J. S. Davis, Smithville; W. T. Henderson, K.C., Brantford; V. A. Sinclair, K.C., Tilsonburg; W. S. MacBrayne, K.C., Hamilton; J. B. McKillop, K.C., London; Harold Fisher, K.C., Ottawa.

Appointments.

Severin Letourneau, of the City of Montreal, K.C., to be a Puisne Judge of the Court of King's Bench for the Province of Quebec. (Jan. 25)

Duncan Campbell Ross, of the Town of Strathroy, Ont., Barrister, to be Judge of the County Court of the County of Elgin, Ont. (Jan. 25)

J. St. George Stubbs, of Birtle. Manitoba, to be Judge of the County Court for the Northern Division of the Eastern Judicial District of that Province. (March 23)

Daniel O'Connell, of the City of Toronto, K.C., to be a Junior Judge of the County Court of the County of York. (April 1)

George W. Ballard, of the City of Hamilton, Ont., to be Crown Attorney and Clerk of the Peace for the County of Wentworth, Ont.

Donald W. MacLean, of the City of Ottawa, to be Registrar of Deeds for the County of Carleton, Ont. (March 18)

William S. Hall, of Van-Klesk Hill, Barrister-at-law, to be CountiesCrown Attorney and Clerk of the Peace for the United

Counties of Prescott and Russell in the Province of Ontario. (April 8)

OBITUARY.

We regret to record the death on April 2, at the comparatively early age of 52, of the Hon. Mr. Justice T. L. Metcalfe, of the Court of King's Bench, Manitoba. He was an able, painstaking and learned Judge, highly respected by all. It is said that his health was impaired by his arduous duties in connection with the strikes at Winnipeg in 1920.

Flotsam and Jetsam

We have on the list of our exchanges one that hails from south of the lakes. We enjoy it and wish it success in these days of difficulty and drought for legal journals. But we are concerned for its future in that it has lapsed from the language of its forefathers, and we are filled with dismay as to what we may expect as to its future.

The heading of a contribution to our namesake is: "Are the lawyers properly functioning as officers?"

Memory here brings before us visions of "Beef Eaters" in glorious apparel, "Beadles" in blue coats and brass buttons, "Cops" in helmets, "Tipstaves" and such like. But it sounds ponderous and incongruous, not to say comical, in a country where our professional brethren always appear in Court in every-day costume; sometimes even, as we have seen in "the Wild and Wooly West," in the dog days, in their shirt sleeves (we forgive them)!

We venture to thin that perhaps lawyers could more "properly function as officers" if they were to return to the practice of wearing white ties and horse hair wigs.