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IS CHRISTIANITY PART OF THE LAW?

Some years ago some observations were offered in this journal under the above caption (see vol. 46, p. 81), and it seems, in view of a recent decision, an opportune time to recur to the subject. In the article above referred to, it was pointed out that of recent years there had been a gradual change in the attitude of the Courts to those who denied or impugned the Christian faith, and the conclusion then arrived at, was that, though the law would not actively assist in any way the impugning or denial of the Christian religion, it would no longer condemn persons as criminal who published books or spoke against Christianity, provided they observed a decent regard for morality and the feelings of others; and that, in consequence, though contracts for the purpose of spreading teaching inimical to the Christian religion would not be enforced by a Court of law, yet arguments against the Christian religion would no longer be punished as blasphemous so long as the language employed was not indecent or intemperate.

The policy of the law as then understood was in accord with those principles of toleration which have come to be generally accepted by English speaking people, but it was also conservative of that which was regarded as the animating principle which lies at the root of our institutions, viz., the Christian religion. We were professedly a Christian people, our civilization has its most salutary foundations in our recognition of Christian principles in all relations of life, political and domestic. At the same time those principles are to be enforced and promoted, not by persecution or prosecution of those who dissent from them, but by reason and persuasion. But, while those who seek to undermine those principles were to be tolerated, they could not, accord-

ing to the view then prevailing, call on the Courts of law to assist them in the spread of opinions which, rightly or wrongly, were generally regarded as inimical to the best interests of the commonwealth. But, according to the recent decision of the English Court of Appeal, this view has been further modified, and those who seek to undermine the Christian religion are now not only entitled to toleration, but also to the assistance of the Courts of law in carrying on their propaganda.

In the case of *Re Bowman, Secular Society* v. *Bowman*, noted in the English Law Times Jour., vol. 139, p. 315, a bequest to a society formed "to promote . . . the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action," was upheld as a valid legal bequest. This, it may be seen, is a society which simply ignores God; it is, to all intents and purposes, at least agnostic, if not distinctly atheistic, and its aims and objects are frankly materialistic.

We have a very practical lesson as to the meaning of such doctrines in the catastrophe which has overtaken Europe, and in which the British Empire is now involved. Whoever will care to read the diplomatic correspondence which preceded the declaration of war cannot fail to see that Sir Edward Grey did all that was humanly possible to avert war; that the course which he proposed was eminently Christian, just and reasonable, and that every effort he made in the direction of the maintenance of peace was thwarted by Germany, and that the British Empire was irresistibly drawn into the conflict and could only have refused to take up arms at the cost of sacrificing her honour. The progress of the war has revealed the reason of Germany's action. It has shewn that she was prepared for the struggle as no other nation in Europe. Her plan of campaign, as developed, has shewn that she intended to strike a swift and decisive blow, and, in order to do so, that she regarded a solemn treaty as of no more value than "a scrap of paper," and that it was only by the intervention of the British Empire that her plan failed. Now, all these enormous preparations for war, all this contempt

of treaties, the murder of non-combatants and the frightful outrages inflicted on a peaceful people of which Germans have been guilty, are due to the general acceptance in Germany of the doctrines of which the Secular Society is the exponent. Human conduct, according to the principles of that society, is to be based on natural knowledge—that is, the knowledge which man can acquire by his own unaided efforts, his knowledge of science in all its branches; and this he is to use solely to promote his welfare in this world: and his welfare in this world consists in the things of this world which he can possess and enjoy, and in the attainment of those things he is not to be guided by any principle other than the consideration how he can best attain his object. As interpreted by the Germans, if he can do it by lying, he is not to scruple to lie; if murder is necessary, he may commit murder—the only deterrent to murder is possible punishment; if a course of "frightfulness" is necessary, he is to have no scruple in being as "frightful" as possible. If the killing of non-combatants in cold blood is deemed advisable as a means to attain his material ends, he is not to scruple to kill.

In the present war we have the most striking illustration of this kind of teaching reduced to practice. Bernhardi's book may be regarded as a handbook of the religion of the Secular Society. By Christian people all such doctrines and practices are regarded as nothing more nor less than "the doctrines of devils," and to pretend that any society or nation is really and truly benefited by the spreading of such opinions is absurd, and, so far from it being of any benefit, it is plain that it would degrade any nation adopting such principles to the level of Germans, and the level they have reached in the scale of humanity is even below that of the "unspeakable Turk."

And yet the question might well be asked, Have not the same doctrines and the same principles found wide acceptance, not only in England, but in Canada itself? The luxury, the hedonism and practical heathenism which has of late years widely prevailed, largely due to worldly prosperity, are also legitimate fruits of the principles of the Secular Society. The things and the pleasures of this world have been supreme with too many,

indicating a very general forgetfulness of the supernatural, which, according to the Secular Society, is to have no place or part in the conduct of life. The conspicuous neglect of the Lord's Day by large masses of the people, both high and low, has indicated a weakened sense of religious needs, duty and responsibility. Not that church-going is of much use unless the right spirit accompanies it; still some who come to scoff may remain to pray, so that even a perfunctory attendance would seem better than a total forgetfulness of the Almighty from week's end to week's end. The sum of national sin is the aggregate of the individual sins of the people, and it might be well for us all seriously to consider what our individual contribution has been to the sum total, and how far we have been the victims and the exponents of the delusions of the Secular Society. The fearful scourge of war with which we are now being afflicted may and probably is due to our adhesion to and carrying out the principles of the Secular Society, and the sooner we learn that repentance and amendment are the Divine remedies, the better for us all.

It can hardly, therefore, be in accordance with any really sound policy, either public or private, that such principles should receive any support or sanction whatever from the law of a Christian state. If a bequest were made to a society formed for the purpose of promoting seditions and conspiracies against the King's Government, it would be null and void, and no Court of law would give any aid to making it effective. The Government of England is employed in spreading education among the people on Christian principles, and the society in question is formed to counteract and destroy the work of the State and spread certain noxious opinions, the fruition of which would be disastrous to the state, and the Courts of law have declared that a bequest to such a society is a valid and legal bequest. Mr. Justice Middleton, of the Ontario Bench, recently held that a testatrix's direction that her diamond ring should be buried with her was nugatory and the law would give no effect to it; and, in like manner, sound policy would seem to indicate that bequests to a society for the spread of anti-Christian doctrines should receive no support or aid from the Courts of law of a Christian state.

If persons to whom such bequests are made can get them paid without legal assistance, let them do so, but if they have to seek the intervention of the Courts of law, such bequests should be regarded as of no more legal validity than bequests to the man in the moon or directions to bury the money in the earth.

In giving judgment in the case referred to above, the Master of the Rolls is reported to have said: "There had been a great change on the subject within the last 100 years. It was really a question of policy, which varied from time to time. If *Cowan* v. *Melbourne*, L.R. 2 Ex. 231, was still good law, the legacy could not be claimed," but he did not consider it good law. Not, be it observed, because it had ever been authoritatively overruled, but simply because "public policy" is said to have changed. Lord Davey remarked, in *Janson* v. *Driefontein* (1902), A.C. 484: "Public policy is always an unsafe and treacherous ground for legal decision." It seems a no better rule than the length of the Chancellor's foot. You have to-day one set of Judges declaring that "public policy" is so and so, and a few years later another set of Judges declaring it to be exactly the reverse. "Public policy" as a ground of decision appears to be judicially utilized for reversing the law of the land without the assistance of the legislature.

No doubt the attitude of the State to religious belief has undergone a change of late years. A man's religion is no longer any test of eligibility for the Bench, and his unbelief in the Christian religion is no bar to his promotion, and in recent years we have had Jews and agnostics administering justice in English Courts, and as was, in effect, said by the late Lord Coleridge, when the State appoints such men to judicial positions, the Courts have necessarily a difficulty in holding that the publication of books advocating the religion or no religion which such persons profess is illegal, provided they are framed with some decent regard to the feelings of others who are Christians. Not only on the Judicial Bench, but for membership in the High Court of Parliament, Christianity has ceased to be a necessary qualification.

Perhaps the attitude of the modern judicial mind and of

Parliament towards religion is that of Pilate, who scoffingly asked, "What is Truth?" in the spirit of one who thinks that there is no such thing. It is to be hoped not; but, at all events, this much is clear, that "public policy," according to the English Court of Appeal, is now in favour of affording the assistance of the Courts to the spread of doctrines inimical to what probably the vast majority of English-speaking people still regard to be the Truth.

In view of the recent decision of the English Court of Appeal, what, it may be asked, ought now to be the answer to the question heading this article? It can hardly be said that the Court of Appeal has denied that Christianity is still part of the law of England, but, rather, that it has decided that it no longer enjoys any right to protection from assault, but may be attacked and societies formed in opposition to it, in just the same manner as any temporal law may be attacked and a society formed for its repeal. Whether this is really sound public policy, we venture respectfully to doubt.

If we have correctly interpreted the decision of the Court of Appeal, then it may be said that Christianity is still part of the law of England, but it has no transcendent position. It is reduced now to the level of merely temporal laws; it is the law of the land only so far as the State and the Courts of law see fit to give effect to it, and is no freer from criticism than any other part of the law.

INTERNMENT OF ALIEN ENEMIES.

The legal position of civilians in this country who, while ceasing, in fact, to be German, have not acquired British nationality has again been raised, and in *Re Liebmann*, Times, 7th inst., an important judgment has been pronounced by a Divisional Court consisting of Bailhache and Low, JJ.

Liebmann was born at Mannheim in 1868, being by descent a subject of Germany. In 1889 he came to England on business, in 1890 obtained a formal discharge from German nationality, but did not take out letters of naturalization in England, and

in this country he has ever since resided and carried on business. In August, 1914, he registered as an alien enemy for reasons of abundant cautelâ, since he had lost his discharge, and feared that he would be unable to prove his renunciation of German citizenship. Later on he found the document and applied unsuccessfully for exemption from registration. Recently he applied, again without success, to the Home Office Advisory Committee for exemption from internment under the recent order of the Home Office. In August of this year he received from the superintendent of Vine Street Police Station the usual notice, sent by authority of the Secretary of State, informing him that he was about to be interned, and in due course there followed his arrest and internment. To contest the legality of these proceedings and to vindicate his liberty he applied for a writ of habeas corpus, and the matter came last week before a Divisional Court composed of Bailhache and Low, JJ.

Two possible courses were open to the Solicitor-General, who represented the Secretary of State at this hearing. He could either shew cause for the imprisonment of Liebmann, i.e., admit the fact of imprisonment and justify it on the ground of some common law or statutory right vested in the Crown; or he could take a preliminary objection to the applicant's locus standi altogether on the ground that the applicant was an alien enemy, and as such not entitled to appear in our courts. The Solicitor-General adopted this latter course and succeeded, so that no decision as to the rights of the Crown was given on the main issue; but, in fact, all points were argued more or less fully on the hearing of the preliminary objection, so that the difference of procedure was only nominal.

Now, as Mr. Justice Low put it in a singularly lucid judgment, the court had three points before it. The Crown contended (1) that the applicant was an alien enemy, (2) that by internment he had become a prisoner of war, and (3) that the Crown is entitled by virtue of its prerogative in time of war to imprison any person it pleases if it considers such course necessary for the defence of the realm, in which case no writ of habeas

corpus will run while war lasts. Success on any one of these points would be sufficient, but, in fact, it was the second point on which the Court based its decision. As regards the third, while refusing to decide it, the court very naturally intimated that it felt great repugnance to recognizing so wide a power.

As regards the first point, that Liebmann was an alien enemy, the court had simply to follow a recent decision of the Court of Appeal: *Ex part Weber*, ante, p. 692. In that case the applicant for a writ of habeas corpus was a German who, according to German law, had lost his nationality by long absence from his country, but under a recent German statute could take proceedings to regain it if he returned to Germany. The Court of Appeal held that, for purposes of English law, he must be regarded as German—the status of "no nationality" is unknown to our law. Liebmann was in the same boat as Weber, except that he had obtained twenty-five years ago a formal release from German nationality; but this release operates only in the municipal law of Germany, and not in that of England nor in International law, where, according to the better opinion, everyone must have a nationality. Hence Liebmann was an alien enemy. But at common law an alien enemy can neither sue nor obtain the remedy of habeas corpus unless he resides here sub domini regis protectione. Registration of an alien enemy under the Aliens Restriction Act, 1914, and Orders is equivalent to a licence to reside here, and confers this protection and all ancillary rights: *Princess Thurn and Taxis* v. *Moffitt*, ante, p. 26, (1915) 1 Ch. 58. But the licence, said Low, J., is revocable at any time by the Crown, and the order of internment in Liebmann's case must be regarded as an implied revocation of the licence to reside conferred by registration. Hence Liebmann reverted to his common status of an outlaw, and could not ask for the protection of the court, though, of course, the imprisonment of civilian enemies is a retrograde step, whether justified by present circumstances we need not here inquire.

Although, however, Mr. Justice Low intimated his determination of the first point in the way we have summarized, the

court preferred to base its decision on the second—which in our view is much more doubtful. It held Liebmann to be a prisoner of war; and, of course, there is abundant authority that a prisoner of war, whether enemy or neutral, cannot apply for a writ of habeas corpus: *Three Spanish Sailors' Case* (1779), 2 Wm. Bl. 1324. But how can a civilian (other than a spy) be regarded as a "prisoner of war." The idea seems a contradiction in terms. Both judges, however, found to the apparent difficulty an ingenious answer. They took judicial notice of the changes in modern warfare, especially as waged by Germany. They concluded from their survey of these changes that civilians residing in a hostile country are of great belligerent value to their national sovereign by sending information of enemy movements, by signalling, and by promoting strikes, disturbances, and unrest in the civilian population. These are military functions, and when the Executive Government chooses to arrest any alien enemy on the ground that he is performing these military functions, the court cannot inquire into the correctness or bona fides of its action. In other words, they applied to this case the well-known plea, "Act of State," upheld in *Salaman* v. *Indian Secretary* (1906) 1 K.B. 613, where the Court of Appeal held that it had no jurisdiction to question acts of the Indian Government confiscating the private property of a native ruler in a protected State, provided the Government represented such confiscation to be an arbitrary act of executive authority against that ruler in his capacity as a foreigner; and lucidly analyzed in *Hemchand Devchand* v. *Azam Sakarlal Chhotamlal* (1906) A.C. 217. The detention of an interned alien converts him into a prisoner of war, and is an "Act of State" into which no court has jurisdiction to inquire. But it may be suggested that, notwithstanding Germany's military excesses and barbarity, the judgments give a somewhat bold extension to the doctrine of judicial notice. What is the real evidence against Liebmann, and others like him, who have been practically English for many years?

On the third point argued for the Crown, the alleged right of the Executive Government to arrest and detain on grounds of

the public safety any person whatever by virtue of the prerogative as extended in times of war, the court was not in sympathy with the contention of the Solicitor-General, and the use of the prerogative would virtually overrule the Habeas Corpus Acts as against the Crown in times of war. It can only be defended by extending to unwarrantable lengths the much-criticized rule laid down by the Judicial Committee in *Ex parte Marais* (1902), A.C. 109, that while a country is the scene of war the civil courts, although sitting in the theatre of military operations, cannot question the acts of courts martial until the war has terminated. To justify such an extension would be to destroy the distinction between constitutional and despotic Government.—*Solicitors' Journal.*

THE NATIONAL REGISTER IN ENGLAND.

National registration is now more or less completed, if we may judge from the fact that members of the public are beginning to receive their registration certificates. This document is not unlike a passport; it contains a space for the signature of the holder, so that it may prove useful for purposes of identification. Indeed, just as at present, in a certain class of cases, the police ask persons whose movements they are investigating to produce their National Insurance cards, so probably these new certificates will gradually come to be relied on in law and business as a ready means of proving or disproving identity. In this, of course, they resemble a passport. It is also understood that they will be used to assist recruiting officers in their efforts to make a thorough canvass of all eligible persons in their districts. Whether or not they will be used in the immediate future as one instrument in an attempt to introduce compulsory service no one can say. But such introduction, we believe, is only possible by Act of Parliament, and to a limited degree by suspension of the Ballot Act. The common law prerogative right of levy *en masse*, even if it still exists, appears to arise only in the case of sudden invasion or dangerous rebellion (*Broadfoot's case*, 1743, Foster 154 *et seq.*). The right of the pressgang as a means of naval recruiting, of course, although doubtless still good law, applies only as against seamen, or, at most, as against the inhabitants of a seaport town. —*Solicitors' Journal.*

" AND LAW.

An old Cornish [illegible] cross-questioned after his initiation about Masonic secrets by a curious friend, summarized them as "the nearest thing to nothing." The lay student of International Law is tempted to describe it in similar phrase, and, for that matter, can quote in support of so flippant a definition Rousseau's contention that the laws of war, failing coercive sanction, are no more than chimeras; or the dictum of Clauseworth mentioning." To the legal mind such opinions are heresy unspeakable. International jurists have piled volume upon volume, and though an occasional uneasy suggestion peeps forth here and there in a preliminary chapter that, as the Report of the Royal Commission on Food Supply in Times of War confessed, "there is no absolute guarantee behind international law to insure that its rule will be enforced," natheless, the said Law has been coded and criticised, dissected and defended, iterated and reiterated, discussed and sanctioned at Conference and Convention, hedged about by paper forms and word ceremonies, until in the security of the legal library and council chamber it appeared that "there seems no prospect of any revolutionary change passing over it," for in this enlightened age the days must be past when a Grotius could have need to write, "I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reasons; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were henceforth authorised to commit all crimes without restraint."

Grotius made initial error in the assumption that the presumed Law of Nature—upon which his scheme of International Law was chiefly based—could not change because it had for foundation human nature itself. But elemental human nature, that alone knows not change, is barely removed from the level of the brute beast. His system, however, according to one authority, "rests secure upon the alternative foundation of general

consent." Vattel, more cautious, spoke of "the just regulations which ought to subsist between nations or sovereign states." And with that "ought" we come to the crux of the matter.

On paper it is acknowledged, by all those Powers that are ranked as "civilised," that certain usages and customs of war—decencies of the battle-field, in fact—certain standards of humane behaviour, are to be observed and maintained in the conduct of operations. On the other hand it is agreed—on paper—that there are actions so reprehensible that no civilised Power would permit its troops to be guilty of perpetration. These actions, known as War Crimes, in the British manual on the laws of land warfare are grouped under four headings: (i) Violation of the recognised rules of warefare; (ii) Illegitimate hostilities in arms; (iii) Espionage and war treason; (iv) Marauding. The first includes among its seventeen sub-headings the use of poisonous and prohibited munitions, the killing of wounded and prisoners, abuse of the Red Cross, illtreatment of inhabitants of occupied territories, and the bombardment of undefended localities. All of these acts stand condemned by the International Conventions at the Hague; they are, in the accepted phrase, illegal. But it is one thing to formulate a law and very other to ensure its observance. Hard words, as the proverb has it, break no bones. Condemnations break no offender. As restraint they are valueless if he wishes to offend, and deems himself strong enough to be able to do so without eventually incurring more material punishment. The vicious circle, in short, ever returns to physical force as the dominant factor in human intercourse; for a legal phrase that has behind it no superior potency carries little weight in the final arbitrament of war, which in its essence is an appeal to strength.

A sovereign head of the Holy Roman Empire, a Papal Pontiff with equal temporal and spiritual powers, could impose his fiat upon jarring nations and determine the forms and ceremonies of war, its licence and its limitations, just so long as he was able to back his decisions with more than wordy threat. Once any

supreme power has vanished, law and rule possess no other bond than the ephemeral tie of consent. No paper forms can secure immunity from disloyal conduct on the part of an opponent. A nation devoid of honour will repudiate them. International laws become, then, a matter of national honour dependent on the existing codes of national ethics. Though the jurists may dress them never so nicely in trappings of fine words and "ruffling garb" of sounding phrase, at bottom these fall into two opposing classes: on the one hand we get the "Golden Rule," or the nearest equivalent thereto compatible with a warfare of any sort, and on the other, baldly:—

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

It is a question how much of the whole matter might not be removed from the sphere of Law and acknowledged to be within the realm of Ethics. There is, in so much of the argument that has waged—and will wage—over International Law, a confusion of the ideas represented by the words *law* and *ethics*. An ethical standard is indicated. It is dubbed law. But that does not make it so. *Law* presupposes the possibility of coercion; failure to comply entails punishment; defiance invites definite reprisal. *Ethics*, on the other hand, suggests a standard, an ideal to be aimed at, right to be encouraged, wrong to be deprecated—but no coercive force. Yet here again we get nothing stable. It is a truism to remark that morals are a question of chronology and latitude. Nor will religion—in its widest sense—offer firmer foundation, for not all religions count human life as sacred, far less human suffering as an ill to be decried.

There is, then, no permanent basic ground for international ordinances to be gained from religion or ethics. But some such holdfast must of necessity be secured. Though Grotius erred in certain of his deductions and theories concerning the Law of Nature, in fact he touched on the one supreme authority that

can and does rule human fluctuations. Natural laws alone are binding, for Nature imposes her own punishments, and can coerce where man's potencies fail. Her processes are ruled by laws immutable. Chaos is inimical because it is the opposite to law, is prohibitory to progress. It can therefore never be permitted by Nature entirely to swamp humanity. So man makes his codes of law, builds up his standards of international ethics, till what time a stronger or more ruthless may come and let chaos, seemingly, loose again upon a tortured world.

The final test, therefore, is not so much what is or is not lawful, but what is or is not expedient. That Nature's action must needs be lawful was the excuse advanced by seventeenth-century theorists for the use of fire and smoke-balls. Nature wrought darkness; man might therefore copy her example and secure it, though by artificial means. "Balls which cast forth so great a smoak that they blind whomsoever they come near" were advocated by Simienowicz and by the author of "The Compleat Gunner" as "the most lawful way that one may follow, because it shews its original from natural things, and we may believe that this is alwayes sufficient justice, so that the wars where such things are practised be not unjustly enterprised." With blissful oblivion of this moral the latter writer proceeds next to discourse on "Stink Balls," which "are made to annoy the Enemy by their stinking vapours and fumes disagreeable to Nature." He further gives directions for the manufacture of poisoned bullets.

Whatever the anonymous writer of 1672 may have thought, the consensus of opinion has always been against such practices. Simienowicz, who wrote in 1649, though he considered *balles á fumée et à puanteur* were a means of *guerre loyal*, was not of the same way of thinking with regard to poisoned bullets and the fogs, storms, and thick mists made use of by Cossacks and Tartars in 1644 at Oehmatew. In 1675 we find *les Alliés conviennent, avec les Français, qu'il ne sera pas fait usage de balles empoisonnées.* Further arrangements were usual concerning the

type of bullet that might be used, tin being especially forbidden as material. In an Italian treaty of 1690 it is expressly noted that bullets are not to be made of any metal but lead, and this stipulation occurs again and again in subsequent treaties and cartels, with—as a rule—the additional prohibition of the use of "ramm'd bullets"—a literal, or rather phonetic, translation of *Palle ramate* or *Balles ramées*, in other words bar-shot—which the Dutch used in 1672 at the seige of Maestricht. The cartel or treaty between Leopold, Emperor of Rome, and Louis XIV., in 1692, expressly states nothing is to be employed which is forbidden among Christians as unlawful to be used against the life of man or beast. Ten years later Louis bought the secret of Poli's invention—*un feu dangereux*—in order to destroy it—*l'anéantir*—as contrary to the *droits des gens*. Putaneus, in his "Grundlehren der Artillerie," forbad the use of poisoned bullets. However, Flemming in "Le Soldat allemand" declared, in 1726, that their employment was *une question de politique*. Wolff argued poison was permissible, though the mass of authority from the days of the ancients agreed with the Roman dictum, *Armis bella, non venenis, geri debere*, and Vattel naïvely summed up the arguments with the confession that "Besides, if you poison your arms, the enemy will follow your example. And thus, without any advantage to yourself on the decision of the quarrel, you will render the war more cruel and horrible."

In his presidential address to the Folklore Society this year, Dr. Marett, speaking on savagery in war, put the pertinent question, does it pay? History at least has no hesitation in its reply. In the long run it does not. Ruthless barbarity makes for no durable success, else had the Assyrian wolf never been ousted from dominance in the fold of the nations. After every period of indiscriminate savagery come a set-back, a return to more moderate, to saner methods. In this connection another point emerges from the welter of world struggles: tyranny does not make power, but success may breed the tyrant; moreover,

tyranny and cruelty, like fear and cruelty, are never far apart. To give a national and an individual example: Rome, before her zenith was reached, when the Fecials were, as Vattel puts it, "the interpreters, the guardians, and in some sort the priests of the public faith," made war with a measure of restraint, with a regard for law and custom; but imperial Rome, drunk with the lust of power, drifted from her previous high standing, the international ideals she had herself once evolved: so, too, Henry V., fighting, whether professedly or no, to impose what he considered to be a superior civilisation—or, as Germany would say, *Kultur*—on a country that preferred its own, however inferior the standard, started with more humanitarian sentiments and projects than later he could find to be compatible with all his schemes of conquest. In August, 1415, before the seize of Harfleur, where "he plaied at tenys with his hard gonne stones," as a contemporary chronicler puts it, Henry issued a Proclamation the "Statutes and Ordenances . . . . made at trety and counseill of Maunt." These "Ordenances" very explicitly forbid desecration or robbery of "Holy Churche;" killing or making prisoners of women, unarmed priests, or children under fourteen; and include rules "For kepinge of the Countre . . . that no man be so hardey to robe or pille therein after that the peas is proclamyd;" "For Prysoners"—several regulations—; "For women that lie in Gesem;" and against waste of "Vitaill," or "Robinge of Marchantes comyng to the Market."

This last phrase takes one back to prehistoric warfare, when market and trade route appear to have been at least partially exempt from the turmoil of intertribal strife, and recognised as necessarily common ground, a neutrality that conferred mutual benefit on all combatants. How and when questions of contraband arose it is difficult to decide, but they are no development of modern days. The actual word has been traced first to an Italian charter of 1445; in England it makes its initial appearance in the treaty of Southampton in 1625. The subject

is a complex one, and not without its sentimental confusion of issues to-day. It has never been held contrary to civilised practice for a General to prevent by every means in his power the conveyance of provisions to a beseiged city. Starvation is a recognised means of forcing a surrender. That non-combatants, women, children, sick and aged, in the invested locality will suffer with the combatant garrison is one of the tragic outcomes of war. It may be of definite value in securing capitulation. At the siege of Wesel, in 1671, when, as the Prince de Condé relates, the women of the town, terrified at the progress of the siege works, demanded leave to quit, they were told, "He could not think of depriving his triumph of its greatest ornament," a compliment the sufferers could hardly have been expected to appreciate. "His calculation," the record continues, "was just; those very women prevailed on the governor to surrender at the end of three days." Exactly a hundred years later, during the siege of Cracow, the commandant of the castle offered to give up one hundred civilian prisoners, and asked permission for the clergy and their attendants to leave. Count Suvorov refused, "in order to increase the distress of the garrison by so many useless mouths." The "Green Curve" has long had recognition in siege warfare. But when the same principle is applied on a larger scale there are sentiment-mongers to-day who will make outcry against sufferings wrought by a state of blockade, which is simply a comprehensive naval siege, and who will demand that food at least be permitted to reach the non-combatant inhabitants of the enemy country. Setting aside the difficulty of differentiation between combatant and non-combatant, and the impossibility of preventing such supplies, once admitted, reaching both alike, or even combatants to the exclusion of non-combatants in extreme cases, why should, as a matter of abstract justice, the exclusion be permitted in the first case and not in the second? From the days when Jews and Romans made treaty, in Maccabean times, provisions have been included with arms, ships, and money, as contraband of war.

Indeed, prohibitions in war, be they of methods, munitions, merchandise or manners, are no new thing; nor are they peculiar to the nations that arrogate to themselves the title of "civilised." Even barbarian warfare has its taboos, its ceremonies. Among the Malays the Battaks announce war by a cartel; the Ilongotes of North America send arrows or sprinkle the road with blood. In the lowest grades of humanity there are restrictions—things that, in popular phrase, no decent fellow would do. There have been, and there must always be, rules for the Great Game, else would confusion ensue. Discipline, after all, is but law in another form. But in the matter of rules mankind has "sought out many inventions." A possibly less self-deceiving age dubbed them "Articles of War:" chivalry and Christianity added to the etiquette, and brought further measure of humanity into the business; with Grotius we get a definite attempt to range them—customs, usages, etiquette, and the dictates of humanity—as recognised and recognisable law, not for one belligerent, as Henry's "Ordinances," but for all.

The etiquette of mediæval warfare was no mere empty ceremony. Heralds in the days of chivalry enquired and proclaimed the terms of combat. The last herald to announce war was sent to the Danes in 1657. Subsequently the method changed, and hostile powers prearranged by treaty or cartel those matters which heretofore had been the province of the herald—such as the ransom, treatment, or exchange of prisoners, and later the treatment of wounded. From these cartels much may be gleaned. For instance, the treaty between England and Spain in 1630 ruled that prisoners should not be sent to the galleys—proof enough of their previous hard fate. But legislation on behalf of these unfortunates of war is of earlier origin. Haroun al Raschid, hero of so many a tale that it is almost startling to find him a real historical personage, in the year 797 made treaty with the Empress Irene, and eight years after with the Emperor Nicephorus, for the exchange and ransom of prisoners. They cried quits, or sold the balance to the adversary instead of dis-

posing of the prisoners through the ordinary channels of the slave mart. Slavery was the portion of war captives for century after century. They were spoils of war. Gradually life and freedom became a definite matter of purchase; the captive was, actually, merchandise; he represented potential wealth to his captor. By slow degrees the system of ransom was established not as an occasional favour on the part of a good-natured or broad-minded conqueror, but as a custom of war. Even as late as the Thirty Years' War exchange was looked upon as "robbery;" and if a prisoner was of sufficiently high rank he might be purchased—as a speculation, or for purpose of reprisal, or other weighty matter of state—from the individual captor by the latter's superiors; for example, the Emperor paid £4,000 to Verdugo, "the party seizing . . . in order to get the young Prince of Anhalt into his own hands." But by the middle of the seventeenth century more liberal views were permeating the nations. By arrangements made at Dunkirk, in 1646, the prisoners on both sides were to be returned. Nor was this the only improvement. Henry V.'s exemption of women, priests, and children, grew to include the medical staff and other non-combatants. The cartel of 1673, between France and the Netherlands, specifically notes they shall be freed *sans rançon*. Two years later the same countries agreed that the prisoners were to receive certain moneys *outre le pain de munition;* and it was forbidden to deprive them of their clothes. The same year—at Strasburg—France and Germany settled that neither sick, wounded, nor medical staff were to be *dépouillés*. More detailed rules for the treatment of prisoners were laid down in the cartels of 1690 and 1702. This last, the "New Cartel Between the Imperialists, English, Dutch, etc., of the one part; and the Spaniards and French, on the Other part," not only gives the elaborate tables of exchange common to all cartels at the period—the prices varied from 50,000 *livres* for an English Commander-in-Chief to forty for *un gentilhomme du canon*, and nine for a soldier or *pontonnier*—but includes explicit directions as to who

are exempt from ranson, how difficulties about pay are to be settled, what money is required during imprisonment for subsistence, how officers are to be treated, parole, reciprocal payment of expenditures by all belligerents, accounts, record of prisoners taken and exchanged, return of prisoners, regulations concerning small parties taken in arms—to prevent desertion and guerilla tactics—the care of wounded and sick, the lodgment of prisoners, passports, notification of capture; and, further, forbids the enlistment of prisoners and the use of prohibited munitions. Forty-one years later, after Dettingen, definite arrangements were made "that the hospitals on both sides should be considered as sanctuaries."

An interesting point in connection with capitulations and the exchange of prisoners is to be found in accounts of the siege of Cracov. When Suvorov captured the castle, part of the garrison consisted of French soldiers. But, at the time, there was officially no war between the powers of France and Russia; therefore it was ruled "no exchange of prisoners can take place," and according to the articles of capitulation the Frenchmen had to "surrender themselves only as prisoners, but not as prisoners of war." Another thing to note is that in nearly every case of cartel or treaty it is agreed that prisoners should not be retained for more than a fortnight. At the end of the fourteen days they must be released, even if the total sum owing as ranson were not paid. The twentieth century has not entirely dismissed the notion of sale and purchase. "We prisoners are their assets, their gold reserve, their pawns and chips in the game," wailed the anonymous author of "As the Hague Ordains." "We are as good for exchange and quotations as bonds or gold. Oh! God! to think I—I myself—my own poor body has its daily market value in this stock-gamble of nations!" The personal gain has been transferred entirely from the individual victor to the State; for war, once an individual matter, became a State affair. The tendency of this at first was to rule out the non-combatants in operations of war more fully even than previously

had been the case; and to judge by the cleaner records of the eighteenth century this resulted in humaner warfare. Fighting was the concern only of those forces of the State—voluntary, hired, or impressed for service—which made war their own particular business—the professionals. On paper it was an excellent development; and the civilian immune from war's alarms, except vicariously, had the privilege of criticising in safety—tempered only by the one serious drawback of having eventually to foot the bill in gold that the soldier had paid in blood. But it cuts both ways. *La guerre n'est pas declarée par ceux qui la font.* To-day such immunity is threatened. We are learning what not only the discipline and mobilisation of an army, but also the discipline and mobilisation of a people mean. As von der Goltz foresaw, as Alphonse Seché in "Les Guerres d'Enfer" demonstrates, war is ceasing to be a matter of professional combat and promises to be more and more not only an engagement between two armies, but the exodus of two peoples.

Space forbids further inquiry as to even those war crimes already referred to, far less entry into discussion about others, or the examination of incidents during the campaigns of the last century as a method of comparison with those done during the past year and in the doing to-day. Of individual war crimes instances can be gathered from all wars; but to find a belligerent that, not of misadventure, not in the passionate on-rush of strife, but openly with organiser and deliberate intention, sets aside all the standards of "civilised" warfare, the pages of history must be turned for such dark periods as the wars of the Assyrians of old, the Thirty Years War, or the chaotic strifes that periodically have rent those portions of Europe and Asia we term the Near East. The words of Gustavus Adolphus, who "ever drew a line of partition between the man of service and the ruffian," are as grave an indictment of Teutonic methods, then and now, as could well be penned. He spoke of "the ravages, extortions, and cruelties lately committed . . . and that . . . persons of rank, birth, education, and competent incomes

have been guilty." In the same impassioned speech to the German officers in his army he declared, "this diabolical practice of ravaging and destroying lays a dead weight." On a previous occasion he had begged, "Let us not imitate our ancestors of confusion, the Goths and Vandals, who, by destroying everything that belonged to the fine arts, have delivered down to posterity their barbarity and want of taste, as a sort of proverb and bye-word of contempt."

Kultur!

"Do men gather grapes of thorns, or figs of thistles?" Germany is true to her record.

"Nothing," writes Colonel Edmonds, "is more demoralising to our troops or more subversive of discipline than plundering." But, as Bentwich points out, "the theoretical inviolability of private property on land is circumvented on the Continent by a liberal interpretation of the necessities of war, and the German staff-rules actually recognise and give legal validity to a number of harsh practices under the title of *Kriegsmanier*, which temper, or rather whittle away, the laws of nations (*Kriegsraison*) on the ground that military necessity brooks no restraint." The plea of military exigencies, military necessities, is no new one on the lips of German casuists. They have always had sophistries to controvert the restrictive tendencies of accepted mitigations of war. They have gone further and urged success as plausible excuse for outraging humane conventions. To what lengths the doctrine has been carried von Bethman-Hollweg displayed when he made his callous and cynical statement in the Reichstag on August 4 last year: "We are now in a state of necessity, and necessity knows no law." The justification of necessity once admitted, law does end—for who is to define "necessity"? By the standards of a Bethman-Hollweg the offender decides. Which is absurd.

What is to be the conclusion of the matter? Are we to admit the apostles of *Kultur* correct in upholding the doctrine of might as right? Is physical force not only dominant but the deter-

minant factor in human affairs? When nations seethe in the melting-pot of war the futility of paper contracts has received ghastly demonstration. But codes of law have their value for neutral nations in that they supply some standard whereby rights of trade and transit may be in a measure estimated, and the danger that threatens themselves, their goods, or their vessels —and it has proved such danger is increasing, not diminishing —may be adjudged, and a portion of the losses inevitable in a state of war may be avoided. One of the many suggestions that have been advanced is that an International Law Court might be established at the Hague as a central administrative Prize Court. In such a war as the one we are now engaged upon this would be of no greater use than individual Courts set up by the combatants. Belligerents as the parties interested, by juridical principle, could not sit on it. Neutrals would practically, if not theoretically, be in like case where decisions as to neutral rights were concerned. What remains? The Court might lay down a thousand laws as to contraband and neutral trading, but how would it enforce them? All the weightiest tomes and wordiest diatribes are of no avail when one is up against elemental passion and raw fact. War sweeps away the trappings of peace-made law, and only the shell and the bayonet can gainsay its verdicts. "The litigant," said Professor Cramb, "appeals to something higher than himself, while no free State sees anything higher than itself." It needs no 'lawyers' arguments to prove that "the entire world has, properly, a right to consider whether an alleged grievance is a justifiable and sufficient cause for making war. It has, further, a right to intervene when the alleged cause is unfounded." Legal splitting of hairs is a weird folly to the plain soldier. Who denies the right? And of what matter if they do? What value lies in moral sanction without the will for forceful suasion to compel the acceptance of a judgment? Once the will to intervene exists the act swiftly follows —but it usually takes more than an abstract theory of right or wrong to rush a nation into the adventure of war.

It would seem, then, that might is indisputably the dominant factor. But this does not make it the determinant factor. Superficially it may appear so, but there are deeper issues and influences to be considered; for, after all, physical force itself is controlled by the greater values of spiritual and idealistic forces —the supremacy of the mind. Here lies the ultimate triumph. So that Ethics in the final assize must tell for more than Law, because Law becomes the servant of Ethics. Conformity to the rules of warfare is a test of national ideals. The British record is a high one because the liberty-loving Briton is first of all a sportsman. His sense of fair play, and appreciation of any opponent who puts up a good clean fight, make him—from General to last-joined recruit—a gentleman on the battle-field. Of his own initiative he would, as a matter of course, avoid commiting the majority of war crimes, whether International Law condemned them or not. But he expects reciprocal treatment, and knows the value of reprisal if forced thereunto.

During the Civil War in America the Federal States professed to adopt Lieber's "International Law" as the basis of action. But surely the lawyers' apothesis was reached when Japan, newly admitted into the comity of nations, attached professors and diplomats—authorities on International Jurisprudence—to the Headquarters Staff in the Field, to advise the General Officer Commanding as to the legality of any action! Yet it was *Bushido,* not knowledge of forms and ceremonies, that secured the victory for the island empire. And that idealism which inspired her one-time enemy is alive in Russia's struggle to-day. So her devastated lands, and stricken Belgium, the trampled fields and ruined cities of northern France, our own slaughtered women and children at seaside resorts, in country villages, or on sunken vessels, our wounded, our mutilated dead and murdered prisoners, stand for no mere wastage on the middens of war, but make for that spiritual influence in the world's progress that on one far day will usher in—the Golden Age.—*United Empire Journal.*

COMMERCIAL IMPOSSIBILITY.

In *Associated Portland Cement Manufacturers* (1900) *Ltd.* v. *W. Cory & Son. Ltd.*, 14th May, 1915, Rowlett, J., held that a commercial contract, in spite of the *Coronation* cases, was not dissolved by its becoming commercially impossible on account of the war. His Lordship took the view that the rule in *Taylor* v. *Caldwell* still applies only where a specific thing, the foundation of the contract, has ceased to exist. The disturbance of the "return coal trade" from Scotland, on whose continuance the defendants relied when making their contract to carry cement to Rosyth, did not relieve them from it. The case puts a useful check on the dangerous uncertainty which the *Coronation* cases created. Nor, it was held, did the interference with traffic amount to a "restraint of princes," or to a Government interference under the Defence of the Realm Act (Second Amending Act), 1915, s. 1(2). Ridley, J., gave a somewhat different decision in *Berthond* v. *Schroeder & Co.*, 29th April, 1915.—*Law Magazine.*

KILLING PRISONERS.

The statement, if correct, in a communiqué received from the Russian headquarters, published in Petrograd on the 20th July, and published in the British Press with the permission of the Censor, that, according to information given by Austrian prisoners of war, the Germans shot 5,000 Russian prisoners at Rawa Russka, eclipses in its horror the atrocities of the French Revolution. When the Convention in 1794 had decreed that no quarter should be given to the English, Hanoverians, and Spaniards, the French soldiers nevertheless took prisoners from a sense of military honour, and excused it to the Government on the ground that the men were *deserters*. The infamous decree was soon revoked without even a threat of retaliation. The cases in which prisoners of war may be slain, however exceptionable the circumstances may be, are, in the words of Burke, "cases at which morality is perplexed and reason staggered." The savage

practice of killing enemies, to which Henry V. resorted after Agincourt, by putting to death the combatants in what he deemed self-defence, although he protected the peaceful population, was likewise the practice of the Chevalier Bayard, who otherwise conformed to the principles of humanity in warfare. While the killing of captives was an old Roman custom employed to inspire dread, it was not universal among the Greeks, whose later practice was to regard them as slaves. The sparing of the lives of prisoners had, as we have seen, become firmly established in civilized warfare at the time of the French Revolution, although, no doubt, Napoleon in 1799 shot three or four thousand Turks captured at Jaffa, who would not respect parole, because he could not feed or escort them. On the other hand, Charles XII. after Narva, released his captives under similar circumstances.—*Law Times.*

RIGHT OF THE CROWN TO REQUISITION LAND.

An aviation ground was taken by the Crown. Mr. Justice Avory held that he had come to the conclusion that the King, by virtue of his war prerogative, was entitled, in the circumstances, to take possession of the land. In addition to that, the regulations under the Defence of the Realm Act conferred on the competent naval and military authorities during the continuance of the war an absolute and unconditional power to take possession of land and buildings, and to do any other act for the public safety and the security of the realm, even though that act interfered with private rights to property. The suppliants had failed to establish any right in law to compensation. There must be judgment for the Crown. His Lordship thought, however, that the suppliants were entitled, under the Royal Commission of Inquiry of 31st March last, to apply for compensation for loss or damage suffered through interference with their property. —*Solicitors' Journal.*

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lord Dunedin, Lord Atkinson, Sir Geo. Farwell, and Mr. Ameer Ali.] [113 L.T. Rep. 55.

BALMUKAND AND OTHERS *v.* THE KING-EMPEROR.

Judicial Committee of the Privy Council—Practice—Petition for leave to appeal against conviction—Sentence of death—Stay of execution of sentence—Matter for executive and not for committee.

Upon the hearing of a petition to the Judicial Committee for leave to appeal from a death sentence, and for the postponement of the execution of the sentence pending the hearing of the appeal:

Held, that, with regard to staying execution of sentence, the Board were unable to interfere, and, therefore, thought it not right to express any opinion as to whether, on the facts stated, leave to appeal should be granted.

The Board was not a Court of Criminal Appeal, and the question whether His Majesty should be advised to exercise his prerogative of pardon was a matter for the Executive Government and was outside the jurisdiction of the Board.

A. M. Dunne, for the Crown. *Sir R. Finlay* and *B. Dubè*, for petitioners.

Dominion of Canada.

SUPREME COURT.

B.C.] KOOP *v.* SMITH. [May 18.

Bill of sale—Transfer in fraud of creditors—Assignment between near relatives—Suspicious circumstances—Corroborative evidence—Bona fides—Practice.

Where a bill of sale made between near relatives is impeached as being in fraud of creditors and the circumstances attending

its execution are such as to arouse suspicion the Court should, as a rule of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction. Judgment appealed from, (7 West. W.R. 416,) reversed.

Appeal allowed with costs.

Lafleur, K.C., for appellant. *Orde*, K.C., for respondent.

Exch.] TURGEON *v.* THE KING. [June 24.

Government railway regulations—Operation of trains—Negligent signalling—Fault of fellow servant—Common fault—Boarding moving train—Disobedience of employee—Voluntary exposure to danger—Cause of injury.

By a regulation of the Intercolonial Railway, no person is allowed to get aboard cars while trains are in motion. Without ascertaining that all his train-crew were aboard, the conductor signalled the engineman to start his train from a station where it had stopped to discharge freight. One of the crew, who had been assisting in unloading, then attempted to board the moving train and, in doing so, he was injured.

Held, that the injury sustained by the employee resulted solely from his infraction of the regulation which he was obliged to obey and not from the fault of a fellow servant; that by disobedience to the regulation he had voluntarily exposed himself to danger from the moving train; that the negligence of the conductor in giving the signal to start the train was not an act for which the Government of Canada could be held responsible, and that its relation to the accident was too remote to be regarded as the cause of the injury.

Judgment appealed from, affirmed.

Appeal dismissed with costs.

Lane, K.C., for appellant. *P. J. Jolicoeur*, for respondent.

Exch.] [June 24.

THE QUEBEC, JACQUES-CARTIER ELECTRIC COMPANY *v.* THE KING. THE FRONTENAC GAS COMPANY *v.* THE KING.

Expropriation Act, R.S.C., 1906, *c.* 143, *ss.* 8, 23, 31—*Abandonment of proceedings—Compensation—Allowance of interest—Construction of statute—Practice—Taxation of costs—Solicitor and client—Reimbursement of expenses—Interpretation of formal judgment—Reference to opinion of judge.*

While the owners still continued in possession of lands in respect of which expropriation proceedings had been commenced

under the "Expropriation Act," R.S.C., 1906, chap. 143, and before the indemnity to be paid had been ascertained, the proceedings were abandoned, no special damages having been sustained.

Held, that in assessing the amount to be paid as compensation to the owners, under the provisions of the fourth sub-section of section 23 of the "Expropriation Act," there could be no allowance of interest either upon the estimated value of the lands or upon the amount tendered therefor by the Government.

The trial Judge, by his written opinion, held that the owners were entitled to be fully indemnified for their costs as between solicitor and client and for all legitimate and reasonable charges and disbursements made in consequence of the proceedings which had been taken. The formal judgment provided merely that costs should be taxed as between solicitor and client.

Per DAVIES, IDINGTON, ANGLIN and BRODEUR, JJ.:—In the taxation of costs, the registrar should follow the directions given in the Judge's opinion to interpret the formal judgment as framed. DUFF, J., *contra*.

Per DUFF, J.:—The registrar, in taxing costs, is required by law to follow the terms of the formal judgment and it is not open to him to correct it in order to make it accord with his interpretation of the opinion judgment.

Appeals dismissed with costs.

E. A. D. Morgan, for appellants. *Newcombe*, K.C., for respondent.

Que.] [June 24.

GUARDIAN ASSURANCE CO. *v.* TOWN OF CHICOUTIMI.

Fire insurance—General conflagration—Acts of municipal officials—Demolition of buildings—Statutory authority—R.S.Q., 1888, *art.* 4426—*Indemnity—Subrogation—Tort—Transfer of rights to municipality—Liability of insurer.*

Article 4426, R.S.Q., 1888, empowers town corporations, subject to indemnity to the owners, to cause the demolition of buildings in order to arrest the progress of fires, in the absence of a by-law to such effect power is given to the mayor to order the necessary demolition. In the Town of Chicoutimi, no such by-law having been enacted, the mayor gave orders for the demolition of a building for the purpose of arresting the progress of a general conflagration and, in carrying out his directions, an adjacent building was destroyed which was insured by respondents for $4,700. The municipality settled with the owner

by paying her $5,500 as full indemnity for all damages sustained, and obtained a transfer of her rights under her policy of insurance with the respondents. In an action on the policy so transferred:

Held, (Duff, J., dissenting,) that, as the destruction of the building insured was occasioned by an act justified by statutory authority and full indemnity had been paid, the municipality was entitled to subrogation in the rights of the owner and to maintain the action against the insurance company for reimbursement to the extent of the amount of the insurance upon the property.

Per DUFF, J., dissenting:—Although the destruction of the building insured was occasioned by an act justified at common law, the rights of the municipal corporation were determined by the principle laid down in *The City of Quebec* v. *Mahoney*, Q.R. 10, K.B. 378, and the claim for reimbursement to the extent of the amount for which the property was insured could not be maintained. *Quebec Fire Insurance Co.* v. *St. Louis*, 7 Moo. P.C. 286, applied.

Appeal dismissed with costs.

Atwater, K.C., for the appellants. *Belcourt*, K.C., for the respondent.

Ont.] COFFIN v. GILLIES. [June 24.

Contract—Construction—Sale of foxes—Mixed breeds.

By contract in writing G. agreed to sell to C., who agreed to buy, two black foxes "to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911."

Held, (Davies and Duff, JJ., dissenting,) that the proper construction of the contract was that the two foxes to be sold must have both Dalton and Oulton parentage, and G. could not be compelled to deliver a pair bred from the Dalton strain only.

Appeal dismissed with costs.

D. C. Ross, for the appellant. *W. M. Douglas*, K.C., and *J. E. Thompson*, for the respondent.

Ont.] HAMILTON STREET RAILWAY CO. v. WEIR. [June 24.

Negligence—Obstruction of highway—Street railway—Trolley poles between tracks—Statutory authority—Protection by light.

The Act incorporating the Hamilton Street Railway Co. authorized the city council to enter into an arrangement with the

company for the construction and location of the railway. A by-law passed by the council directed that the poles for holding wires should, on part of a certain street, be placed between the tracks, which was done under the supervision of the city engineer.

Held, reversing the judgment appealed against (32 Ont. L.R. 578), that the location of the poles was authorized by the Legislature, and did not constitute an obstruction of the highway amounting to a nuisance; the company was therefore not liable for injury resulting from an automobile, while driven at night, coming in contact with the pole.

Held, also, that as on the city council was cast the duty of regulating the operation of the railway in respect to traffic and travelling on the street and it had made no regulation as to lighting the pole, the company was under no obligation to do so.

Appeal allowed with costs.

D. L. McCarthy, K.C., and *A. H. Gibson*, for appellants. *Howitt*, for respondents.

Book Reviews.

Bullen & Leak's Precedents of Pleadings in Actions in the King's Bench Division of the High Court of Justice, with notes. Seventh edition. By W. BLAKE ODGERS, M.A., LL.D., K.C., and WALTER BLAKE ODGERS, M.A. London: Stevens & Sons, Limited, 119-121 Chancery Lane; Sweet & Maxwell, Limited, 3 Chancery Lane. Toronto: Canada Law Book Company. 1915.

The first edition of this standard work appeared in 1860. It immediately took the first place in works on pleadings, a subject which was much more intricate, and when pleadings were much more elaborate, than they are now. Let it not be supposed, however, that there is no need for books on pleadings. A number of new precedents have been added to the work since the 6th edition, which appeared in October, 1905, and which is now out of print.

The editor in presenting these precedents to the profession reminds those who may use them that it is no longer possible for a pleader merely to copy all forms applicable to actions of the class to which his case belongs, as was often sufficient under the old system of pleading. There may be also some of the younger members of our profession who need to be reminded that under the present system all material facts have to be stated instead of

as formerly the legal result of those facts; and all necessary details must be set out in the body of the pleading. It is therefore necessary in using these forms to adapt or alter them to suit the facts of each particular case.

This standard work now consists of 1044 pages, concluding with a full analytical and topical index.

War Notes.

Lawyers and Their Duty.

We fear that there may be some of us who need to get back to the spirit that animated the ranks of our profession in the days when England fought for her existence, more than a hundred years ago, as recorded in Lord Cockburn's "Memorials of his own time," already referred to in these colums (ante page 119). We in this country can well follow the example of such men as Lord Cockburn, Lord Brougham, the Lord Justice Clerk (Charles Hope), Walter Scott, Francis Horner, Dr. Gregory, Jeffrey and others known to fame in Scotland, as well as many more in England and Ireland who devotedly spent hours every day in drilling and preparation for active service.

Such names as those of our own great and good Chief Justice Sir John Beverly Robinson, of U.E. Loyalist stock, and that grand old Scotsman Archibald MacLean, Chief Justice of the old Court of Common Pleas, and others of that time who fought under the gallant Brock in the days of Canada's extremity, will never be forgotten.

Already even in this war we can claim that something has been done by Canadian lawyers. We are glad to know that prominent positions in the Overseas Contingents and in our volunteer regiments are filled by members of the profession. Amongst these the most prominent is the name of Brigadier-General M. S. Mercer, of Toronto, who is looked upon as one of the best general officers at present on active service, whether from England or elsewhere. Other members of the profession in the same rank may be mentioned, such as Brigadiers-General W. E. Hodgins and Henry Smith. Col. W. A. Logie, of Hamilton, commands the Second Division and is one of the most prominent and useful men connected with Canada's army; Lieut.-Col. S. C. Mewburn, Assistant-Adjutant General, must also be named. There are others of the profession throughout the Dominion

who are also hard at work in connection with military service of various kinds; we cannot refer to all, but we may mention that the three crack Toronto regiments, the Queen's Own, the 48th Highlanders and the 10th Royal Grenadiers, have lawyers as commanding officers. The writer would add that on a recent occasion whilst visiting the camp at Niagara, where some 13,000 men were under canvas, he was a guest at the officers' mess of one of the Overseas Battalions, and was pleased to see that more than a fourth of those present were of the same profession as himself: a retired Law Clerk of the House of Commons, the son of a deceased Chief Justice of Ontario, two sons of a Justice of its Appellate Court, the son of an ex-Minister of Justice, two sons of a Provincial Premier (also a lawyer), a member of a large legal firm, the son of one of the leaders of our Bar, and two law students.

But, whilst this is so, there has not been amongst the student class the enthusiasm that one might have expected. Some knowledge of the law is naturally a necessity for a law student, but, at present, a familiarity with military matters and a knowledge of drill are very much more important. Men are being judged now, and will be for many years to come, by the stand they take in this time of our Empire's need. Now that the legal mill is grinding again and students have returned to their studies we may surely expect to see a large number of them offering for that which will redound more to their credit even than a high standing in their classes. Their future patrons and clients will remember the former rather than the latter.

Letters from the front in these strenuous days vividly reveal the character and motives of men. May we quote a sentence from one of these, not written for publication. It is from a lawyer of ample means who left a luxurious home and a charming home circle to serve his country. He says: "Of course, I am not (speaking, of course, comparatively) happy here, but I would be perfectly miserable if I were not here." This breathes the true British spirit of Nelson's message, "England expects that every man this day will do his duty"; the spirit that makes our Empire unconquered and unconquerable.

Alfred Noyes in his great poem "Drake" sings thus:—

"Mother and sweetheart, England! . . .
. . . . . If my poor song
Now spread too wide a sail, forgive thy son
And lover, for thy love was ever wont

To lift men up in pride above themselves
To do great deeds which of themselves alone
They could not; thou hast led the unfaltering feet
Of even thy meanest heroes down to death,
Lifted poor knights to many a great empire,
Taught them high thoughts, and though they kept their souls
Lowly as little children, bidden them lift
Eyes unappalled by all the myriads stars
That wheel around the great white throne of God."

And let us also remember the words this same poet (who ought to be our Poet Laureate in these days), puts in the mouth of England's great Captain:—

"Not unto us,"
Cried Drake, not unto us—but unto Him
Who made the sea belongs our England now.
Pray God that heart and mind and soul we prove
Worthy among the nations of this hour."

The Way to Victory.

In these days of intense nervous strain—increasingly so as the war clouds grow darker and the recent news from the Balkans and the East reveal fresh perils and perplexities confronting our armies in the East, overshadowing those in the Western area—and as we realise the need of increased supplies of men, money and material; of sacrifices of home comforts to supply the pressing wants of our men at the front and of rigid economy in view of reduced incomes and increased burdens; and of the sadness forced upon us by the news coming from day to day of loved ones "killed, wounded and missing," and all that these dread words imply, we are irresistibly led to the thought of some power greater than ourselves or the valour of our soldiers to shew us the way to victory and so put an end to the strife. This result of the war is becoming so apparent and so wide spread as to demand recognition even in a journal devoted specially to the interests and information of one class of the community.

The subject is incidentally touched upon in our article: "Is Christianity a part of the law? (ante p. 385). But instead of giving any views of our own we prefer to quote from such a man as the Bishop of London, and from the most representative of all British newspapers, the London *Times*. The former, in his great address at St. Paul's Cathedral in August last, alluded to

the celebrated cartoon in Punch where a dark figure (the Kaiser) sneeringly says to the King of the Belgians: "So you have lost everything," to which the King answered back: "But not my soul." The Bishop after referring to the soul of each of the allied nations said:—

"The Church has come out to-day to give a message to the soul of our nation. Have we got a soul? Who that knows the history of the English people can doubt it? It is a soul which gets overlaid, like the soul of other nations, with love of material comfort, with arrogance, and with wordliness; but the children would not be springing from all over the world to the mother's side if the mother had no soul, if there had been no love for freedom, no belief in honour, no care for the weak, no contempt for the merely strong; then there would have been no glad loyalty from thousands and tens of thousands who have rallied round her flag. . . . But, if we are to rise to our vocation, the first essential thing is that as a nation, not as a few groups of pious individuals, but as a nation, we should turn to God. The only power which can save Europe to-day is a nation which, while it fights and works and serves and saves without stint, is also a nation on its knees. . . . But to pray with effect we must pray with a good conscience, and that is the real significance of the Church's call to repentance. Repentance is not a weak whining on our knees to God because we are in a difficulty; it is a noble laying aside of all that makes us unworthy of working with the Great Friend."

In its leading article the next day the *Times* says:—

"The Church of England, it is commonly and not unjustly said, has been slow to rise to the great opportunities presented by the war. But we believe that it succeeded yesterday in expressing the mind of the nation in the intercession services that were held in London, and especially in the chief of them that was held on the steps of St. Paul's. And the mind of the nation, as it was then so justly and movingly expressed, asked that we might be made worthy of victory, so that victory, if it is given to us, may be good both for the world and for ourselves. We knew before the war that we had national faults, but we made no national effort to mend them; and when the war began we thought that the goodness of our cause would mend them, and that we should press on to a righteous victory in one happy and united onset. That has not happened, as it could not happen. . . . It is conviction of sin, not conviction of danger, that must

change us if we are to be changed. Conviction of danger alone will only make us upbraid each other; conviction of sin will set us asking plain questions of ourselves. . . . That was the spirit expressed in the prayers and in the words of the Bishop of London, and it was, we cannot doubt, the spirit of all troops ranged before him and of the silent crowd stretching far down Ludgate-hill."

This awful war obtrudes into all the activities of life, theological and religious as well as others. A Church Synod the other day debated whether or not the second verse of "God Save the King" was or was not to be canonical. To the surprise of most people it was ordered to be expunged. Those in favour of the motion probably thought that the word "confound" in "Confound their politics" was a "swear word," not knowing that it was simply an old fashioned way of expressing a prayer to bring confusion to the unrighteous counsels of a nation inspired by satanic hatred of a peace loving people. Fortunately the House of Bishops saved the situation and the verse was very properly retained. Again, a well known and highly esteemed theological institution ignorant of the wiles of the same evil spirit conferred its highest degree upon a pro-German, but has ever since been seeking a precedent to revoke the honour bestowed upon such an unworthy recipient. Perhaps the simplest plan would be to revoke it without a precedent. The loyal incumbent of the Church where this unsavoury divine was to lecture promptly shut the door in his face, and he retired, a sadder and a wiser man, to the German colony in Chicago he came from, and where, doubtless, this contemptible specimen of humanity has full liberty to insult and vilify the country that honoured him to his heart's content.

The following Proclamation has been issued by the Lieutenant-Governor of the Province of Ontario calling for contributions for the relief of our wounded soldiers and sailors at the various seats of the war. Doubtless it will be liberally responded to:—

WHEREAS the Most Honourable, the Marquis of Lansdowne, the President of the British Red Cross Society, has, on behalf of that organization and the Order of St. John, made an urgent appeal throughout the Empire for individual contributions for funds, to be collected on Thursday, the 21st day of October (Trafalgar Day), such money to be devoted entirely to relieving the sufferings of our wounded soldiers and sailors from home

and overseas at the various seats of war, from all parts of Our Dominions: AND WHEREAS Our Province of Ontario is one of the richest provinces in the Overseas Dominions of the Empire and its people are determined to do their share in the great struggle in which Our Empire is engaged:

WE, THEREFORE, APPEAL CONFIDENTLY to Our people of this Province to make such a contribution as will be worthy of the place you occupy in Our Empire, worthy of this Province and worthy of the great cause for which the appeal is made; AND, furthermore, we do hereby request that the Mayor of every town and city, and the Reeve of every municipality will confer immediately with the Patriotic and Red Cross Organizations in his community and with such other organizations and societies as he may see fit, and call a public meeting in each and every locality for the purpose of organizing a campaign for the collection of funds on the twenty-first day of this month with the object above mentioned;

WE, furthermore, urge upon all clergymen in the Province to bring this matter before their congregations at the first opportunity, and to impress upon them the necessity of prompt and liberal action; and We also appeal to Members of Parliament, Members of the Legislative Assembly, school teachers and the public generally to co-operate in this movement and assist in bringing the matter to the attention of every citizen.

The American Association for International Conciliation continues its foolish but harmless crusade in favour of peace at any price. One of its recent publications is "An Appeal to the Citizens of the Belligerent States." Of course, no one pays the slightest attention to these publications; but the conclusion of the one above referred to has such a comical side to it that we cannot refrain from referring to it. The writer states his belief that if "you make an appeal to the better side of man, then it will rise to meet you. Only fear can subdue a savage animal, but man, at least the cultured specimen of our day, requires something more—the establishment of justice. Give him that, and you will have made him in very deed harmless for good and all." One can scarcely imagine a more bitter dose of sympathy or advice to a tortured Belgian.

We suppose our Allies must for the present submit to the following activities of the Germans in Belgium in passing various legislative ordinances for the occupied territories; *e.g.*, the wearing or otherwise displaying of Belgian insignia in a provocative

manner, or the displaying of the insignia of other countries at war with Germany or her Allies, whether done in a provocative manner or not, is made an offence. Teachers and superintendents of schools are required to prohibit all anti-German demonstrations in the schools under their charge. Persons between the ages of 16 and 40 are prohibited from leaving Belgium, if they intend to enter the service of an enemy state or to take employment in a business manufacturing warlike stores for enemy countries.

We record with great regret the death, killed in action at the front, of Francis Mallock Gibson, student-at-law, son of Sir John Gibson, K.C., formerly Lieutenant-Governor of Ontario. Another son, Colin Gibson, has been wounded. We trust he may have a speedy and successful recovery. The family have our sincere sympathy.

It is very difficult to obtain information as to those of our number whose names appear in the casualty lists, we should therefore take it as a favour if our readers would inform us of any such that may come to their notice.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

The amenity of privacy.—*Law Times*, June 5.
Guilty but insane.—*Ib.*
Parol variation of contracts within the Statute of Frauds.—*Ib.*, June 12.
Articles of Association—How far binding on the company.—*Ib.*, June 19.
Prisoner's statements.—*Ib.*
Permission to deviate from trusts.—*Ib.*, June 26.
Rights of minorities of shareholders in Companies.—*Ib.*, July 17.
Murder or manslaughter.—*Ib.*
Executors and compromisors.—*Ib.*, July 24.
Investment of infants' legacies.—*Ib.*
British land and aliens.—*Ib.*, August 21.
Detention of ship in enemy port.—*Ib.*
Variation in the methods of blockade.—*Ib.*
The public and the foreshore.—*Ib.*, September 4.
Novation of written contracts.—*Solicitors' Journal*, June 19.
Nonage and some of its incidents.—*Ib.*, June 26.
Remuneration of the law officers in England.—*Ib.*, July 24.

Appropriation of land for military purposes.—*Ib.*, July 31.
The inviolability in neutral waters.—*Ib.*, August 28.
The limits of a trade union's privilege.—*Ib.*
The effect of war on instalment deliveries.—*Law Magazine*, August.
International law and the law of the land.—*Ib.*
Submarine piracy.—*Ib.*
Legislative strictures on Christian Science.—*Law Notes*, N.Y., June.
The photograph as evidence.—*Ib.*
A check on Judicial supremacy.—*Ib.*, July.
Confiscation of property in warfare.—*Ib.*, August.
Defending a prisoner believed to be guilty.—*Ib.*, September.
Blind trusts in conveyances.—*Central Law Journal*, July 16.
Progress of Uniform State Laws.—*Ib.*, July 30.
Requiring a street railway company to furnish seats for every passenger.—*Ib.*, Aug 13.
The education of the lawyer in relation to public service.—*Ib.*, September 24.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Austin Levi Fraser, of Souris, Province of Prince Edward Island, Barrister-at-law, to be Judge of the County Court of Kings County, in the Province of Prince Edward Island, vice Stanislaus Blanchard, deceased. (September 25.)

Jean Baptiste Gustave Lamothe, of the City of Montreal, Province of Quebec, K.C., to be a Puisne Judge of the Superior Court in Province of Quebec, vice Mr. Justice Beaudin, deceased. (September 25.)

Hon. Arthur Meighen, B.A., K.C., Solicitor-General of Canada; to be a Member of the King's Privy Council for Canada. (Sept. 30.)

Hon. Louis Codierre, of the City of Montreal, Province of Quebec, a Member of the King's Privy Council for Canada, K.C., to be a Puisne Judge of the Superior Court in and for the Province of Quebec vice Hon. Mr. Justice Pelletier, a Member of the King's Privy Council for Canada, who has been appointed a Justice of the Court of King's Bench. (Oct. 6.)

Louis Theophile Marechal, of the City of Montreal, Province of Quebec, K.C., to be a Puisne Judge of the Superior Court for the Province of Quebec, vice Hon. Mr. Justice Tellier who has resigned the said office. (Oct. 6.)

Flotsam and Jetsam.

The devotion of a large part of the long vacation by the Lord Chancellor of Ireland to the visiting of lunatic asylums, to which reference has been made in these columns, may recall a good story told by Mr. Daniel O'Connell when speaking at a public meeting in 1843 in condemnation of the conduct of Sir Edward Sugden (Lord St. Leonards) as Lord Chancellor in the dismissal from the Commission of the Peace of magistrates, amongst whom was Mr. O'Connell himself, for attending meetings convened to petition for the repeal of the Union. "The Lord Chancellor," said Mr. O'Connell, "had made an arrangement with Sir Philip Crampton, the Surgeon-General, to visit without any previous intimation Dr. Duncan's lunatic asylum at Finglas, near Dublin. Some wag (supposed to be Mr. O'Connell himself) wrote word to the asylum that a patient would be sent them in a carriage that day, a smart little man, who thought himself one of the judges or some great person of that sort, and he was to be detained by them. The doctor was out when the Lord Chancellor arrived. He was very talkative, but the keepers humoured him and answered all his questions. He inquired if the Surgeon-General had come. The keeper replied, 'No, but he is expected immediately.' 'Then I shall inspect some of the rooms till he arrives.' 'Oh, sir,' said the man, 'we could not permit that at all.' 'Well, then, I will walk for a while in the garden,' said his Lordship. 'We cannot let you go there either,' said the keeper. 'What!' said he, 'don't you know I am the Lord Chancellor?' 'We have four more Chancellors here already,' was the reply. He got enraged, and they were thinking of a strait-waistcoat for him when luckily Sir Philip Crampton arrived. 'Has the Lord Chancellor come yet?' said he. The man burst out laughing and said: 'Yes, sir, we have him safe; but he is by far the most violent patient in the House.' I really believe the Lord Chancellor caught the fury of superseding magistrates while he was in Dr. Duncan's asylum, and it would be fortunate if all the rest of the Ministry were there with him": Fitzpatrick's Correspondence of Daniel O'Connell, ii., pp. 306-307.