Canada Law Journal

VOL. LVIII. TORONTO, JUNE, 1922. No. 6

THE CROWN AND ITS COURTS.

GOVERNMENT BY INJUNCTION.

A question has arisen in the Province of Ontario as to whether a court (or a judge having the power of a court) can lawfully refuse to enforce an enactment of a Legislature (which has the right to make such enactment) or to promulgate a judicial order which in any respect changes the wording or character, or lessens the force of such enactment, or seeks to prevent the makers of the law from enforcing it. In other words, can a court or a judge make an order which seeks to enforce its own view as to what it considers the law ought to be, but which it is not? And would not such an order be legally impertinent and practically impotent?

The facts leading up to this question are as follows:—

At the present session of the Legislature an Act was passed entitled The Corporations Tax Act, 1922, which provided among other things that every incorporated company, association or club conducting a race meeting and becoming the custodian or depository of money, bets or stakes, shall deduct and pay to the Treasurer of Ontario for the use of the Province five per centum of the amount bet or staked, and shall pay the amount so deducted to the Treasurer of Ontario. This Act received the Royal Assent shortly before the spring meeting held by the Ontario Jockey Club at Woodbine Park, Toronto.

On the day before the opening of this race meeting, the Ontario Jockey Club issued a writ against the Hon. Peter Smith, Treasurer of the Province of Ontario, and Major-General V. A. S. Williams, representing himself and all other members of the Provincial Police Force, asking for an injunction restraining the defendant Peter Smith, as Treasurer of Ontario, from giving instructions to the Provincial Police Force, or any of them, to stop all racing upon the plaintiff's race-track at Woodbine Park,

or to stop the holding of any further race meetings by the plaintiffs, and restraining the defendant Williams from acting on such instructions, and for a declaration that the Provincial Act is ultra vires. (The closing of the race-tracks was a statutory remedy to prevent evasion of payment of the tax.) The plaintiffs forthwith moved for an interim injunction before Middleton, J., who directed that they pay into court five per cent. of the amount wagered at their race-track, and restrained the defendants in the terms of the writ, as indicated above, until the trial, or other disposition of the action.

The argument of the plaintiffs was that the tax imposed by the Act is indirect taxation, and that the Act levying it is ultra vires. The effect of the injunction granted by Middleton, J., was that the money representing the tax was paid into court, and the Province was unable to secure it when collected. If the injunction had held, the payment of the tax would have been delayed at least for some time. Just how this injunction would have been enforced if the defendants had disobeyed is not apparent. Would Ministers of the Crown have been kept in a Provincial gaol by the officials whom they as such Ministers may appoint and discharge, for carrying out the policy of the Legislature duly enacted? Neither is it apparent how the money paid into Court is to be repaid to its true owners, the bettors, if the Act proves to be ultra vires. In any event any scheme for its repayment out of court would have been applicable for repayment by the Government had it collected the money.

The Provincial authorities did not attempt to move against the injunction in court, but passed through the House the Declaratory Act, 1922. This Act has a two-fold purpose. One is to dispose of the action commenced by the Ontario Jockey Club. The other is to answer the objection that the tax levied is indirect taxation. The latter purpose it seeks to attain by declaring that the true intent and meaning of the recited provision of the Corporations Tax Act, 1922, is that each holder of a winning ticket issued under the pari-mutuel system shall pay a tax of five per centum upon the amount which would be payable to him if no percentage were deducted by the company, association or club; that this tax be collected by the company, association or

club as the agent of the Treasurer of Ontario by deducting five per centum from the total amount bet on every race; and that this sum be paid over to the Treasurer of Ontario at the close of each day's racing.

The Act seeks to attain the first purpose by declaring that "the law is and always has been that no extraordinary remedy by way of injunction, mandamus or otherwise lies against the Crown or any Minister thereof or any officer acting upon the instructions of any Minister for anything done or omitted or proposed to be done or omitted in the exercise of his office, including the exercise of any authority conferred or purporting to be conferred upon him by any Act of this Legislature." The Act also says "any action heretofore commenced or any proceedings heretofore taken in respect of the Corporations Tax Act, 1922, and still pending, and any order by way of injunction heretofore made in any such action or proceedings against the Crown or against any Minister thereof or any officer authorised to act upon the instructions of any Minister, shall be and is hereby forever stayed, save for the purposes of an application or applications for the payment out of court of any moneys that may have been paid into court in any such action or proceedings, and the Crown or any such Minister or officer is hereby declared to be entitled to proceed as if no such action had been commenced or proceeding taken or order made, but such stay shall not deprive the parties to any such action, proceeding or order of any right they may have to proceed by way of Petition of Right."

The provisions staying the action are not without precedent. Sec. 8 of 9 Ed. VII. ch. 19. The Power Commission Amendment Act, 1909, enacts that "every action which has been heretofore brought and is now pending . . . . by whomsoever such action is brought shall be and the same is hereby forever stayed." This Act was held in *Smith* v. *City of London,* 20 O.L.R. 133, to be within the competence of the Legislature and not to be revised by the judicial body. See also *Beardmore* v. *City of Toronto,* 20 O.L.R. 165, 21 O.L.R. 505. The right to bring an action is a "civil right." However, when a motion was made to obtain payment out of court to the provincial authorities the plaintiffs opposed it. The motion was dismissed pro forma upon

an undertaking to facilitate an immediate appeal. No appeal, however, was taken, and so the matter rests.

In the discussion which has followed each step in these unusual proceedings some confusion has been caused by those supporting the provincial authorities in the press, and elsewhere, laying an undue emphasis on cases such as *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 18 O.L.R. 275, 43 O.L.R. 474. These cases emphatically expound the doctrine of the plenary nature of provincial powers in respect of matters within the jurisdiction of the Provincial Legislature. We venture to suggest that the true basis of the law may be found in the principle that no injunction lies against the Crown because such an injunction cannot be enforced, and because the Crown cannot be asked through its courts to restrain itself.

In *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 8 O.L.R. 441, the defendants moved before Anglin, J., for an interlocutory injunction restraining the plaintiff from recommending to the Lieutenant-Governor in Council that an order be passed cancelling their charter. The injunction was refused. Anglin, J., at page 444 says:—"That the court has not jurisdiction at the suit of a subject to command or to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign, is established by many authorities, of which, as one of the most recent, I may refer to *The Queen* v. *Secretary of State for War* (1891), 2 Q.B. 326-334, 338," and further "no precedent has been cited for the granting of such an injunction on the application of a subject defendant, though many suits affecting rights of the Crown have been maintained by Attorneys-General in England and her colonies. Such actions are in fact the suits of His Majesty, instituted by his law officer, the Attorney-General, and it is not therefore surprising that the research of the learned counsel for the defendants has unearthed no instance of any such anomalous order as that which he now asks, by which His Majesty, through the instrumentality of this Court, would restrain himself in the exercise of the functions of his Executive Government. Cockburn, C.J., says 'this court cannot claim even in appearance to have any power to command

the Crown, the thing is out of the question.' *The Queen* v. *Lords Commissioner of the Treasury* (1872), L.R. 7 Q.B. 387, 394."

In *Church* v. *Middlemiss* (1877), 21 L.C. Jurist 319, Taschereau, J., late Chief Justice of Canada, says at p. 322: "He forgets that the acts of the Lieutenant-Governor in Council are His Majesty's acts, that if he suffers grievances in consequence of these acts, he can, by petition of right, complain and ask redress of Her Majesty, and her alone. The members of the Executive Council can be dismissed by Her Majesty or her Lieutenant-Governor in her lieu and stead. The House of Representatives can express its disapproval of their stewardship and oust them from power. But they are not in law individually and personally responsible towards any one of Her Majesty's subjects in the Province for any of their acts as advisers of the Crown; they cannot be called to account before a court of justice for the advice given by them, and each of them to the Sovereign in Her Councils. Their acts are not their personal acts. The Crown acts by them, and their acts are those of the Crown."

See also *The Eastern Trust Company* v. *Mackenzie, Mann & Co.*, 22 D.L.R. 410, and *In re the Massey Mfg. Co.*, 13 A.R. 446, which latter case merely deals with enjoining a statutory persona designata.

The judgment of the Appellate Division in *Electric Development Co. of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario*, 34 D.L.R. 92, is very helpful for a proper understanding of the point at issue.

The Judical Committee of the Privy Council, 47 D.L.R. 10, set aside this judgment on the ground that the questions involved were of too great importance for the action to be dismissed before trial on a summary order, but the judgment nevertheless embodies the opnion of the Appellate Division as to the law at page 389, where it is said: "The argument is that this court is entitled and bound to make a declaration which shall tie the hands of the Executive of this Province and define exactly the limits within which it can act. The practical results of such an experiment would be rather perplexing. If the Executive chose to disregard the judgment of the court, how

would it be enforced? If the Lieutenant-Governor wished to conform and his Ministers refused, is he to dismiss them? If, on the other hand, the Executve obeyed the declaration of the court, if that were in the pl' iff's favour, it would run counter to a statute which recites th ublic necessity for its enactments, and empowers the governm .t. i.e., the Lieutenant-Governor in Council, to carry out its provisions. . . . It looks to us as if the appellants were desirous of inducing the court to give advice to the Lieutenant-Governor in Council without waiting to be asked for it, a course which would, we think, astonish most students of constitutional law, and would completely ignore the relation implied by the enactment of the Constitutional Questions Act, R.S.O. 1914, ch. 85.

The argument which we have suggested above as being available to the provincial authorities in these proceedings does not ignore the finding in *Dyson* v. *Attorney-General* (1911), 1 K.B. 410, which was th . the Attorney-General of England may be made a party defendant to an action for the purpose of obtaining a declaratory judgment without proceeding by Petition of Right. There is also a distinction between obtaining a declaration as to the rights of the Crown with respect to matters in dispute, and directing against it an injunction which cannot be enforced if disobeyed.

The possibility of a Legislature usurping its powers and collecting illegal revenue is of course a danger, but a much greater menace is the prospect of a judge granting an injunction which stays the operation of an Act of the Legislature or of Parliament on the mere allegation of its unconstitutionality and without even considering whether the allegation is well or ill founded. On the mere allegation that the Act taxing the winners' money in the possession of the Ontario Jockey Club (an apparently direct tax and therefore within the jurisdicton of the Ontario Legislature) was ultra vires, and without following the provisions of the Judicature Act, s. 33, an injunction was issued restraining the Provincial Treasurer from exercising the power given him by the Corporations Tax Act in collecting such tax and ordering the payment of the tax into court. No similar order has ever been made in England or in Canada, and it is sui generis.

The learned judge (Middleton, J.) in his judgment did not refer to any cases, and indeed he could have referred to none, although many cases besides those already referred to, both in England and here, could be cited against enjoining the Crown or its Ministers or servants. The injunction, in effect, orders Crown taxes to be paid into court and enjoins a Minister of the Crown from exercising powers given to him by Act of the Legislature, although no one has even suggested that the granting of such powers was beyond the capacity of the Legislature.

In the improbable supposition that some court will eventually determine that a tax upon winning bettors' money is indirect taxation, the bettors will receive no relief because the money is not collectable by suit from the Ontario Jockey Club or from anyone else, and the amounts claimed by each bettor are so small and the evidence in support of each claim so vague that no practical relief was afforded by the injunction. The learned judge in his judgment declined to determine the constitutional validity of the taxing statute, or his jurisdiction to enjoin a Minister or an officer of the Crown, nor did he apparently realize the practical futility of the injunction. He merely granted the order. On this theory the operation of any Act of Parliament or of a Legislature could be postponed indefinitely on the mere allegation that such Act is unconstitutional, e.g., the Judicature Act, on the ground that the Master of Chambers exercised the functions of a Superior Court Judge and therefore should be appointed by the Governor-General and not by the Lieutenant-Governor; the Surrogate Courts Act, on the ground that the Surrogate Judge should be appointed by the Governor-General and not by the Lieutenant-Governor; the Police Magistrates Act, on similar grounds; the Law Stamps Act, on the ground that it is indirect taxation; the Ontario Railway and Municipal Board Act, on the ground that the Board should be appointed by the Governor-General; the Municipal Act, on the ground that the provisions of many of its by-laws infringe the criminal law, and so on ad infinitum.

In the field of Dominion legislation the Criminal Code might be attacked on the ground that many of its provisions interfere with property and civil rights, which subjects are excluded

from Dominion jurisdiction; the Dominion Companies Act and the Dominion Trust Companies Act, on the ground that they infringe on Provincial jurisdiction; the Customs Act, on the ground that it imposes taxes upon the Provinces contrary to the British North America Act, 1867, and so on. Only a few of the Acts which might be "held up" are mentioned here, but every one of them could be attacked on the allegation that it is unconstitutional, and according to the doctrine expressed by Mr. Justice Middleton in granting his injunction order, the judge should not even consider whether such allegation is correct.

The injunction order was so extraordinary and has resulted in so much criticism of its action that one can scarcely regret that in this case the Ontario Legislature asserted the principle that irresponsible government by injunction did not meet with its approval.

ACCIDENT INSURANCE.

The case of *Sowards* v. *London Guarantee and Accident Co.*, 21 O.W.N. 456, has attracted the attention of the public, and has been commented on in the public press, because of its great interest to the owners of motor cars, and not the less in these days when accidents and collisions are of daily occurrence.

In this case no new principle of law is enunciated; and though all intelligent business men knew that one cannot insure against the consequences of one's own illegal act, they did not, perhaps, emphasize that thought when endeavouring to secure application for insurance. It has, therefore, been a surprise to many motor car drivers to learn that if they become involved in an accident, which is found to be the result of their own negligence, they may not recover upon their insurance policies.

In *Sowards* v. *London Guarantee and Accident Co.* the plaintiff brought his action upon a policy insuring him in respect of damage to his motor car. One of the defences set up was the illegal speed at which the car was running at the time the damage was sustained. Upon this defence, as upon another defence, also set up, the defendant company was successful. Riddell, J., held that the policy must be read as though it had expressly

provided that it was not to apply to accidents at illegal speed.

A defence of this nature by insurance companies was foreshadowed by *O'Hearn* v. *Yorkshire Insurance Co.*, 64 D.L.R. 437, and 67 D.L.R. In this latter case the plaintiff had struck and injured a pedestrian, who died of his injuries. The plaintiff was sued, and judgment was recovered against him. He was also convicted under section 285 of the Criminal Code. (Injuring persons by furious driving.) He was drunk and was driving at the rate of about forty miles an hour when the accident happened. He sued upon his policy of insurance. The company contested the claim on the ground that it was contrary to public policy that the plaintiff be indemnified against his own criminal act. The company was successful both at the trial and upon appeal.

In the O'Hearn case the plaintiff had been found guilty of an actually criminal act, and it was not surprising that the insurance company should contest the claim. After that decision the idea of an insurance company setting up a similar defence to claims arising from an ordinary accident occurred to the minds of several solicitors, but as a matter of practical business policy it was thought unlikely that anyone would take this decisive step. However, the Rubicon was crossed in *Sowards* v. *London Guarantee and Accident Co.* As a result the insuring public knows that payment of claims under the public liability and property damage clauses of automobile insurance policies is an uncertainty depending perhaps on the grace of the insurance company. When a motor car owner insures against "public liability" he insures against having to pay damages to a person whom he has personally injured. If he has injured such person without negligence on his own part, he is immune from judgment and needs no insurance. If he injures such person because of negligent driving, he is guilty of an illegal act, and may find it set up against him when he seeks to recover upon his policy.

Insurance men when confronted with the result of this case will be furnished with some food for thought, and may find it necessary, when endeavouring to secure business, to emphasize the argument that their companies are not desirous of taking advantage of this case.

CONSTITUTIONAL LAW—PREROGATIVES OF THE CROWN.

Questions arise occasionally on this subject which reveal things hard to be understood and misty and confusing in their character. The last one that we know of is to be found in the *Law Times* (*Re H. J. Webb* v. *The Smithfield London*, reported at p. 295 of vol. 153, and referred to on page 319). It is not to the fact and findings of that case that we desire to refer but rather to the comments of our contemporary on the condition of the law as to Crown prerogatives.

The Master of the Rolls in giving judgment held that the Crown had no claim to priority by virtue of its prerogative in that case, which, however, unconsciously revealed the constitutional position (we quote from our contemporary) "on which Professor Dicey laid stress. 'The whole province,' wrote Professor Dicey, 'of so-called constitutional law is a sort of maze in which the wanderer is perplexed by unreality (by what if I might venture to do so, I would call "shams") by antiquarianism and by conventionalism.' Professor Dicey insists that the true scope and character of constitutional law are concealed by the hopeless confusion both of language and of thought introduced into the whole subject from the habit of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror. The Master of the Rolls said that 'he thought that the expression debt due to the Crown was an unfortunate one, for it suggested the exercise of the prerogative in circumstances long passed away. It suggested the right of the Sovereign to be paid for his own use or for the public use as determined by him sums due to him to the exclusion of the rights of his subjects. At the present time, when the Departments included under the expression the Crown, or some of them, had become, especially during the war, great trading corporations, the prerogative had to be exercised in quite different circumstances and in respect of quite different subject-matter. Again, the payment in priority of a debt due to the Crown was not now a payment to the Sovereign for his own or

public purposes to the exclusion of his subjects, but a payment for the benefit of the general body of the taxpayers at the expense of those who were creditors of the insolvent company. The argument, therefore, proceeded in an artificial atmosphere, bearing little if any relation to the actual circumstances.' The prerogatives of the Crown have, in the words of Professor Dicey, become 'the privileges of the people.' They have been transferred in practice from the Sovereign to the Cabinet by whose advice the Sovereign exercises them in accordance with the wants and wishes of the people.''

LAW OF DIVORCE IN CANADA.

By C. S. McKee, of the Toronto Bar.

(*Continued from May issue*).

A few people are opposed, so far as their own use is concerned, to the principle of divorce on any grounds. The unreasonableness of their opposition to the availability of divorce to those sharing other views was well pointed out before the British Commission in 1912, by Rev. W. P. Paterson, Professor of Divinity at Edinburgh University, who said that while the ideal of divorce only for adultery, which Christ set up is binding upon members of His Kingdom, it ought not to be imposed by force upon a mixed society, including many who are non-Christian, or only nominally Christians, and that the duty of the State in relation to dissolution of marriage is not to make the Christian ideal compulsory, but to make provision for the relief of those who suffer injustice in marriage, and so far as this shall be compatible with the general interests of society. Others in Canada are willing to recognise divorce on the grounds already adopted; but, whenever new grounds are advocated, a storm of protest is raised, generally on the theory that to admit other grounds is going to make divorce too easy to obtain, and thereby ruin the morality of the country. The utter absurdity of such a doctrine should be apparent to any one who will but reflect that there are several grounds in addition to those already adopted which in fact put an end to married life—not merely to happy married life, but to any married life at all—while in law as distinct from fact, the married life is regarded as continuing. There are cases in which the state, having regard to the requirements and practical circumstances of life and

the nature of marriage as a contractual relationship, is obliged to grant the severance of a bond the moral foundations of which have been destroyed. Complex and changing conditions make recognition of new grounds imperative.

This was brought to the attention of the British public by the press in the summer of 1919. A well-known member of the British House of Commons and his wife found that for them to live together was impossible; the wife had committed no act of adultery, nor did either party wish their good name to be dragged through the mud; the husband registered at a well-known hotel with a woman of low character, and occupied the same room with her; this was used as evidence of adultery, and the desired divorce obtained. After the decree had been granted, the husband informed the public through the newspapers that as a matter of fact, although he had spent the night in the same room as the co-respondent, no adultery had been committed. In order that a highly desirable divorce might be obtained, it had been necessary for the man to appear in the roll of a moral delinquent.

The first reform throughout Canada should be to place women on the same footing as men; to make adultery alone on the part of the husband sufficient ground for a divorce by the wife. The inequality which at present exists in Provinces following the English Divorce Act has its origin in a past age when immorality on the part of men was looked upon as less serious than on the part of woman, this theory in turn being based on the belief that the man committing adultery would likely do so with a woman of loose character and under conditions which would be unlikely to produce children and thereby affect inheritance, etc., while in the case of the few wives who might err, the circumstances would in very many cases be just the opposite. As a matter of fact, there is in all probability in the vast majority of cases of adultery by either party leading to a divorce little likelihood of the production of children; while in very many cases of the offence by the husband, the possibilities of him contracting and communicating to his wife venereal disease are great. The reason more true to fact for admitting adultery as a ground for divorce to either party is that it strikes at the inmost privacy of married life, at the stability of the home, and at the happiness of the parties concerned—and to woman with her more sensitive nature and finer feelings, the idea would in most cases be far more loathsome than to man,

and her future happiness far more prejudiced. Before the Ecclesiastical Courts the sexes had been on an equality; the inequality had its origin in divorce by Private Acts—passed by a Parliament of men. The equality of the sexes on this question is recognised throughout the United States, and was strongly recommended by both the majority and the minority reports of the British Commission of 1912.

Wilful desertion without the consent or against the will of the other party and without reasonable cause for two years and upwards is a ground for a sentence of judicial separation. Clearly such an offence in many cases breaks up a home more than, for example, a single act of adultery; and, in fact, if the subject could be investigated, it is only reasonable to suppose that adultery generally will be committed by the deserting party. In the case of the poorer classes, the circumstances following desertion are often particularly pitiful—a woman may be left with no means of support for herself and family, or a man may be left with no one to look after his home and his children. If divorce were allowed as suggested, re-marriage and possibly happiness would be a possibility. It was recommended by the British Commission that the period should be 3 years; but 2 years has been found to be a just period in cases of separation, and in view of modern means of rapid travel and communication, and of the possibility of distress already referred to, there would appear to be no satisfactory reason for not adopting the 2 year period. This is the period recommended by the American Report.

Cruelty is another of those grounds which in fact put an end to the married life, and should be recognised by law as doing so. "Cruelty is such conduct by one married person to the other party to the marriage as makes it unsafe having regard to risk of life and limb or health, bodily or mental, for the latter to continue to live with the former." (British Commission of 1912.) It should include the communication of venereal disease knowingly or negligently, and also cases where husbands compel their wives to become prostitutes for their husband's maintenance. This course in regard to venereal disease practically has been adopted by the Senate of Canada, as already noted in connection with proof of adultery.

Insanity pronounced as incurable by competent medical authority, should also be recognised as a ground for divorce. This disease differs from most others in that the person suffering

from it has to be put under confinement and is rendered unable to perform all duties connected with married life and domesticity. That a person should be kept linked for years to one who has the dreadful misfortune to be afflicted with this malady, and thereby never know or cease to know the happiness connected with a home and a family is unjust and unreasonable. When the insanity can be shown to have been brought about by the sexual perversions of the petitioner, the relief should not be granted. The theory of eugenics has not as yet behind it a sufficient volume of public opinion, nor is it sufficiently connected with the subject of this article to warrant examination here.

It might at first appear that the development of incurable impotency after the consummation of the marriage should be recognised as a ground for divorce. But it is apparent that there is a vast difference between a properly consummated and a non-consummated marriage, and between the situation in a home where impotency develops and one where desertion, cruelty or insanity takes place. This question is one which would appear to require further investigation by medical authorities before it can be discussed fully from its legal side. The wilful development of impotency can easily be regarded as refusal to have sexual intercourse.

Habitual drunkenness was said by the British Commission of 1912 to produce as much if not more misery for the sober partner and the children than any other cause in the list of grave offences. The report goes on to say: "Such inebriety carries with it loss of interest in surroundings, loss of self respect, neglect of duty and persona cleanliness, neglect of children, violence, delusions of suspicion, a tendency to indecent behavior, and a general state which makes companionship impossible. This applies to both sexes; but in the case of a drunken husband, the physical pain of brute force is often added to the mental and moral injury he inflicts upon his wife; moreover by neglect of business and wanton expenditure, he has power to reduce himself and those dependent on him to penury. In the case of a drunken wife, neglect of home duties and of the care of the children, waste of means, pawning and selling possessions, and many attendant evils produce a most deplorable state of things. Should anything further be necessary to convince all that under such circumstances married life cannot exist, and that to continue it in law is an injustice. With habitual drunk-

enness should be classed habitual use of drugs. Divorce in all such cases should be granted only on the proof of failure of all reasonable attempts at cure—for a period recommended in England as 3 years, in the U.S.A. as two years.

The remarks made above in regard to insanity apply almost wholly to imprisonment; with the difference that where the imprisonment is not for life, there is a possibility of the resumption of married life. A life sentence should be made a ground for divorce. This is as far as the British Commission were prepared to go; the U.S.A. report recommends the same in regard to a sentence of 2 years or more; other countries, as noted above, adopt various periods. Cases of poverty urge the adoption of a short period; but when it is remembered that the state has various provisions for assisting the poor, and that the imprisonment is not "incurable," the adoption of a longer period than 2 years would seem desirable—probably 10 years and over. Recurrent imprisonment amounting to this period also should be a ground.

Refusal without reasonable ground to permit of sexual intercourse where there has been no intercourse as already recommended should be made a ground for annulment; if there has been no sexual intercourse, the refusal should after the lapse of 2 years be treated as wilful desertion.

Although not strictly a question of divorce, the question of presumption of death is so closely akin that the matter may be noticed in passing. The law on the subject is found in R.S. C., ch. 146, sec. 307, sub-sec. 3 (b); if his wife or her husband has been continually absent for 7 years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those 7 years—under such circumstances going through a form of marriage does not amount to bigamy. Instead of leaving the law in the very unsatisfactory condition indicated by this section, it would seem much more reasonable—and particularly in view of modern means of communication—that after the lapse of the 7 year period, the other party was entitled to apply for an order of presumption of death and on obtaining such an order to re-marry. Such an order should also be obtainable within the 7 years on proof of definite circumstances leading to a reasonable presumption of death.

All the above reforms in regard to the grounds for divorce were recommended in England as long ago as 1912; they are

all either recognised or recommended in the United States. Lord Gorell, the chairman of the Commission of 1912, introduced a bill in the House of Lords in 1914 embodying many of the recommendations of the report, but the bill was not adopted. The argument that by increasing the grounds, the number of divorces will be automatically increased, and that knowledge of the possibility of divorce will cause an increase in the offences thereby completing a vicious circle, will not stand examination for one moment. In the United States in States with numerous grounds for divorce, the increase in proportion to the population has been slight or there has been even a decrease (Connecticut); while in other States, having few causes, there has been a considerable proportional increase. (British Report, p. 20). In no case has the granting of a divorce to the guilty party been suggested, and to say that there will be collusion to the extent of a man rendering himself a permanently incurable lunatic, drunkard, or convict is absurd. In cases of desertion and cruelty the absence of collusion in most cases far outweigh the possibility of collusion in a very few; as in cases of adultery, the inability of a Court to get to the bottom of the situation and discover the real facts should not be presumed. The grounds advocated put an end to married life in fact, and in every case are recognised as grounds for a judicial separation, that form of existence which as a permanent remedy for such evils is outrageous, being as it is an existence where one is neither married nor single, where one is married in law and not in fact, where in many cases adultery and illegitimacy are almost natural consequences; an existence of which the Honorable Henry B. Brown, a former Justice of the United States Supreme Court, said in an address before the Maryland State Bar Ass'n.: "A situation more provocative of temptation and scandal cannot be imagined. For the former relation is substituted a marriage which is not a marriage—a celibacy, an amphibious existence which places the strongest instincts of our nature under a ban and deprives both parties not only of the companionship of the other sex, but of the comforts of a home life. A legal separation is, in fact, a punishment rather than a remedy." (British Report, p. 92). In 1917 an effort was made in England to have a separation of 3 years convertible in to a divorce; the effort had the support of the Law Quarterly Review edited by Sir Frederick Pollock. After years and years of effort, such a provision has been adopted in France. Divorce in the cases re-

commended would not be a degradation of the sanctity of the marriage tie—that in each case has already occurred. The commission of a wrong cannot be prevented by denying redress to the injured party—divorce is not a disease, but a remedy for a disease.

6. Defences in Divorce Cases.

The defences to an application for divorce or the grounds for its rejection are practically the same throughout the British Empire and the United States. Those recognised at Ottawa are: 1. Denial of facts alleged. 2. Connivance. 3. Condonation. 4. Collusion. 5. Recrimination. 6. No or void marriage. 7. *Non compos mentis* at the time of commission of the act of adultery. 8. Delay. 9. Cruelty, desertion, or wilful separation without excuse before the alleged adultery, or wilful neglect or misconduct which has conduced to the adultery complained of.

Connivance is the consent or indifference of the applicant to the commission of the acts constituting the cause of divorce. It occurs before the misconduct.

Condonation is forgiveness, either express or implied, of a matrimonial offence constituting the cause of divorce. It occurs after the misconduct. The mere resumption of sexual intercourse is not absolutely conclusive as implied condonation by a wife. If the condonation is on the condition that no further offence occurs, and there is a repetition such repetition nullifies the condonation.

Collusion is an agreement between the parties that one of them shall commit or appear to have committed acts constituting a cause of divorce, or that facts shall be suppressed, or that no defence shall be entered, for the purpose of enabling the other to obtain a divorce. The practice in regard to this subject appears to be a little too strict. There would appear to be no injustice in the parties agreeing as to the conduct of the application if such an agreement is honestly and properly made, in a suit in which there is previously an adequate and good ground for divorce. The Senate has adopted the practice of admitting in evidence affidavits of the guilty party admitting the facts complained of provided the absence of collusion is amply proved by other evidence.

Recrimination is a showing by the defendant that the plaintiff has committed an act which is a cause of divorce. Adultery is the most frequent example at present. The practice is to re-

ject evidence of adultery by the petitioner if it occurred after the adultery complained of in the application. Generally the adultery of the petitioner although long passed and condoned is a bar to divorce. In Scotland, the petitioner's guilt was no bar, and it is doubtful if the guilt of both is not a greater reason for sundering the tie than the guilt of one. Lord Daysart in his evidence before the British Royal Commission stated that he often felt that in intervening as King's Proctor to have the applications refused on the ground of the petitioner's adultery, he was doing more harm than good. On the other side, that the applicant must come with clean hands is an old principal of British justice, and one which acts as a check on immorality. The only reform which suggests itself is to leave the check, but to give the Court discretion as to its use according to the circumstances of the case and the petitioner's conduct. The respondents' counterclaim of adultery on the part of the petitioner is useless:

(a) Where the adultery is committed in ignorance of the fact—as where the respondent is believed to be dead;

(b) Or in ignorance of law—as where a party bona-fide believed that a decree nisi dissolved the marriage. (Query this.)

(c) Where the adultery is committed in consequence of the violence and threats of the husband.

Delay pleaded on the part of the respondent may be answered by want of means on the part of the petitioner.

In addition to the above defences, in Provinces where the English Act is followed, under sec. 32, the Court has power to suspend a decree until some provision is made for a wife divorced.

7. Procedure.

As the purpose of this article is to discuss rather the general principles of divorce in Canada than the minute details in regard to practice before the various Provincial Courts, many of which details are those common to all litigation rather than peculiarly the divorce proceedings, only a few points in regard to such practice will be noted in passing.

In the East, the proceedings are commenced by a petition which corresponds to the Writ of Summons in other actions. In Saskatchewan some of the earlier proceedings were commenced by petition and others by writ, but now they are all commenced by writ in the ordinary way. Other pleadings

in the form of defence and reply follow this, and have to be served and filed in the usual way. In all litigation it is very desirable to keep the pleadings as simple as possible as regards form, and there would appear to be no reason why a petition should be substituted for the ordinary writ of summons endorsed with a statement of the facts. A practice complained of in England before the Royal Commission of 1912 was that of making in the petition some specific charge of adultery, and then concluding with a general charge of adultery between the parties. The result was a continuous application for particulars which when given amounted to fresh charges of adultery. The Commission recommended (p. 134) that every charge should be specific with sufficient detail to give adequate notice to the other party. This recommendation seems most reasonable and one which might well be adopted in Canada. In the Provinces where English procedure is followed, an adulterer or adulteress must be made a co-respondent. In order that a person may have the chance to deny accusations on his or her good name —accusations which may be false—it would appear to be reasonable that where such co-respondents are known—as distinct, for example, from cases where the evidence is merely that the respondent visited a brothel—service on them should be effected, personal where possible, and in other cases substitutional, barring only substitutional service by advertisement.

As already noted, in most of the Provinces either party may apply for a jury to decide a question of facts. By some it has been suggested that trial of divorce cases by jury should be abolished; the right does not exist in Scotland, and exists in but very few of the United States of America; juries know little of any class of life except their own, and are apt to take an extravagant view of such things as cruelty. However unsavoury may be the nature of the evidence, it remains a fundamental principal of British justice that a man should have the right to be tried by his peers, especially so in divorce cases where the great mass of the work is the settlement of pure issues of fact—e.g., whether there has been adultery, desertion, etc.—and where difficult questions of law, as for instance those which depend on some branch of International Law or the extent of the Court's jurisdiction come up for decision very rarely; and it would seem but just that this right in regard to divorce cases should exist. That it would be in-

frequently used is suggested by the figures of the British Divorce Court of 1910 which one would presume may be taken as fairly representative:—Total number of cases heard 627, undefended 500, defended 127, tried by Judge alone 567, tried by Judge and jury 60.

The fact that the petitioner is not bound in most cases to answer questions which would admit adultery has been criticised. If the suggestions made in the last two chapters in regard to offences by the applicant are sound, this point ceases to be of importance.

The usual regulations in regard to the form of evidence and the compelling attendance of witnesses apply.

In regard to collusion and connivance, the practice appears to be for the applicant to satisfy the Court that these have not occurred by a mere declaration to that effect. It is most desirable that every possible check should be put on this phase of the matter, as otherwise the result would amount to divorces almost at will. The Courts should be given the very freest possible hand to adjourn the hearing until any suspicious circumstances can be fully investigated by the Crown authorities. One of the fundamental ideas in connection with divorce is that if one of the parties to a marriage commits any of the offences already referred to in the face of the opposition and dislike of the other party, a divorce should be the relief of the latter if so desired. Unless this happens the parties must make the best they can of life, so that the homes broken up may be kept to a minimum—so that divorce may not become a cause of separation and infidelity, but may continue to be a relief therefrom. If the offence is committed with the sanction of the other party merely for the purpose that a union regarded as undesirable for reasons less fundamental than those suggested as grounds for divorce, such for example as incompatibility of temper, not amounting to absolute cruelty, the parties should not be freed from such a union. Although it is a question not capable of positive proof, it would appear that where the offences are committed with collusion or connivance, in most cases, which are as a matter of fact those of adultery, the guilty party will be prepared to go to the same lengths (i.e., to commit adultery) without such collusion or connivance. In England the annual average of decrees nisi for the period 1906 to 1910, was 639; The King's Proctor interfered in 26 cases, and 23 decrees were reversed.

In Provinces following English procedure, the practice is to grant a decree nisi, not to be made absolute until after the expiration of 6 months, during which time the Crown may intervene to shew collusion, etc.

In the case of the 3 Maritime Provinces and British Columbia, there appears to be no right to appeal beyond the Supreme Court of the Province. In the Prairie Provinces appeals may be carried to the Privy Council. The latter arrangement—so long as the Privy Council continues to be the Court of last resort for Canada—would appear to be desirable, on the basis that questions of divorce are surely of as great an importance as questions involving merely comparatively large sums of money. As a matter of practice, the very nature of the cases will in almost every instance of a decree granted check the parties from going on with an appeal; as by the time their private affairs have been given the publicity of one Court, the parties will have become so estranged as to make them not desirous of continuing the marriage union.

Poor applicants and respondents may proceed in *forma pauperis*, the conditions for which should be twofold: 1st, a *prima facie* case; and secondly insufficiency of means. As the wife is very often dependent on her husband for means, and as he is bound to supply her with necessaries of life—of which divorce, as distinct from an action say for damages or on a contract, may be one—the rules in regard to him providing her with the necessary funds to prosecute or defend her case have been made similar to the rules in alimony actions. Whether innocent or guilty, she is nearly always allowed a certain amounts of costs, for which the husband is primarily liable, unless she is shewn to have separate estate. Where the wife succeeds, she gets her costs as a matter of course; where she fails, she gets such amount as the Court allows.

In view of the criticism which follows it is proposed to examine in some detail the procedure to secure a parliamentary divorce. This is governed by Senate Rules 133 to 152.

The first thing to do is to be sure that the grounds exist, that there is no sustainable defence, and that the case comes within the now usually recognised jurisdiction of Parliament, that there has been no connivance, condonation, or collusion, and that there is sufficient time as detailed hereafter. As already noticed, Parliament has jurisdiction to grant a divorce to a party domiciled in any part of Canada; but, with the

exception of a single case from each Province ot B.C., and P.E.I., the practice has been to apply to Parliament only in cases where the domicile is in a Province not having a Court of recognised jurisdiction.

Having established these matters, the next step is to start the necessary advertisement. A notice of application must be published once a week for 14 weeks in the Canada Gazette and in two newspapers published in the district (Quebec) or in the County (Ontario) wherein the applicant usually resided at the time of the separation of the parties. The flaw in this regulation is that parties residing in large cities can publish their notice in any paper in the county instead of being required to publish it in a city paper. As a result, in the case, *e.g.*, of Toronto, divorce applications instead of being published in the city papers at about 6 dollars an insertion, are published in country journals at about 10 dollars for the whole fourteen insertions, and the parties to whom the notice is intended to be given never know of its existence. Notices in the Province of Quebec must be published in one English and in one French paper; if two such papers are not published in the district, they have to be published in one newspaper in both languages. A copy of each issue of the newspaper is required before the committee at Ottawa, and should therefore be obtained while the advertising is in progress. The publication must be between the close of a session and the consideration of the petition; if it is not completed in time to allow the petition to be considered during the session for which notice is given, the Senate does not require any fresh publication; to comply with the regulations of the House of Commons governing private bills, the notice in such a case would have to be republished for two months. As it usually requires about 6 weeks to get a bill through both Houses, it is advisable to have the advertisement completed before the session commences. The form of notice is given in the pamphlet issued by the Senate, containing the rules on divorce.

After advertising has been commenced, the applicant should proceed to effect service on the respondent of: 1. A copy of the notice. 2. A copy of the petition to the Senate. 3. A statement of particulars.

The service must be made not less than 2 months before the consideration of the petition by the committee, and where possible, must be personal service. If all reasonable attempts

at personal service fail, and the applicant makes all reasonable attempts to bring such notice, petition, and particulars to the knowledge of the respondent, the committee will regard the service as sufficient. Copies should be mailed or delivered to the respondent's last known address, and to anyone likely to be in communication with the respondent, such as a relative, agent, or solicitor. The form is given in the above mentioned pamphlet.

Service, when made in Canada, is verified by a declaration of service as set out in the pamphlet.

When the service has been effected in a foreign country, the proof must be by affidavit instead of by declaration, the form complying with the law of the country where made. If made before a notary public and certified by his seal, it is generally sufficient. The committee before proceeding with a petition may order substitutional service in some manner different to what has been carried out.

After service has been effected, the following documents should be forwarded to the agents in Ottawa of the applicant's solicitor:

1. Declaration of service with exhibits.
2. Petition to House of Commons—"To the Honourable the House of Commons of Canada in Parliament assembled"—and then follows form of petition to the Senate.
3. Petition to the Governor General . . . "To . . . (put in full name and titles) . . ." . . and then follows form of petition to the Senate.
4. Copy of 1 for agent's file.

The Ottawa agent, when the session opens, will give the documents to a Senator and Member of the House of Commons for presentation.

The rules provide that petitions must be presented to the Senate during the first 60 days of the session, but the time for receiving them is often extended. They must be presented to the House of Commons within the first six weeks of the session. No notice of the sitting of the committee is given except by posting in the lobby, but this is done in ample time to enable the parties concerned to be present.

When the petition is presented, it should be accompanied by proof of the following: 1. Publication in the newspapers

and the Gazette for 14 consecutive weeks—by declaration. 2. Service—as above.

Duplicates of the following documents should be given to the Clerk of the Senate Committee: 1. Duplicate petition to the Senate. 2. Declaration of service. 3. Declaration of publication. 4. Copies of the newspapers containing the advertisements. 5. Every document to be used as evidence before the Committee—such as marriage certificates, etc. 6. Fees—$210. If the petitioner is too poor to pay this, a petition should be presented asking for leave to proceed in *forma pauperis*.

The applicant, the respondent, and any other person affected may be heard by counsel; the latter wear their gowns. Besides counsel, the services of a parliamentary solicitor are most essential to see the bill safely through the Committee and through each of its three readings before each House, and that it receives the Royal assent. Evidence is upon oath, and witnesses may if necessary be summoned under the hand and seal of the Speaker of the Senate—and on payment of proper expenses. Proof is required before the Committee of the following:—

1. A valid marriage including identity of the parties—usually by marriage register, copy of entry in register, certificate of Registrar-General in Ontario and of custodian of register of marriages, etc., in Quebec, or by personal proof of cohabitation.
2. Domicile.
3. Adultery, etc.—It is not necessary to prove the direct fact of adultery; in nearly every case the fact is inferred from the proof of circumstances which shew the opportunity for the act, and which led to the conclusion that it occurred—e.g., registering as man and wife and spending the night in the same room at a hotel, cohabitation, venereal disease, visit to a brothel, birth of an obviously illegitimate child. The evidence of a woman of loose character with whom the adulterer is said to have been committed will be very closely scrutinized, also the evidence of a husband or wife alone, unless corroborated by another witness or by strong circumstantial evidence.
4. Lack of condonation, collusion, and connivance—this in most cases is done by the applicant simply making the statement that there has been none, a system obviously

open to all the defects already referred to in connection with applications before Courts of law.

Copies of the evidence are distributed to the Senators, Members of the House of Commons, the parties, and their counsel.

The Committee may drop the application, recommend against it, or recommend in favour of it, or adjourn for further evidence to be produced. If recommended favourably, the report of the Committee to the Senate is accompanied by a draft bill.

The cost of a parliamentary divorce may be summarised as follows: 1. Advertising in two papers—$16 to $175. 2. Advertising in Gazette—$20 to $40. 3. Senate fees—$210. 4. Solicitor's fees and disbursements. 5. Agent's fees and disbursements. 6. Witnesses' fees and disbursements. 7. Counsel's fees and disbursements.

8. Parliamentary or Judicial Divorce? . .

Now that both jurisdiction and procedure have been examined, it seems meet to consider the advisability of abolishing parliamentary divorce, and of substituting therefor throughout the Dominion, a uniform system of divorce jurisdiction.

Attempts have been made in 1858, 1859, 1860, 1870, 1875, 1888, 1919 and 1920, at least, to abolish parliamentary divorce; but in each case the effort has met with failure, due largely to the opposition of Roman Catholics, partly to the opposition of many non-Catholics, and partly to the general bad luck which may attach itself to any bill in its varied course, through a Parliament run on strictly party lines and where time is limited.

The advantages of divorce by the judgment of a Court of law over divorce by an Act of Parliament are numerous. Although not a positive proof of advantage, it may be noted in passing that in every country in the world where divorce is recognised except Ontario, Quebec and Ireland, the jurisdiction lies in the Courts of the land. The prevalence of Roman Catholics in Quebec and Ireland accounts for the situation there, as it does also in Italy and Spain where no divorce is recognized, separation only being allowed; these are granted by Courts of law and not by a Parliament.

Expense to the public in regard to justice should never be a fundamental consideration; but where other things are equal, it may well be considered. Under the Parliamentary system divorces are tried by nine Senators each drawing $4000 a session,

and practically all of whose time is taken up with the work of the Committee. Divorces could be tried by a single Judge, assisted in some cases by a jury. In Ontario a Supreme Court Judge receives $9000 a year. Moreover, these Senators are sent to Ottawa presumably to deal with matters affecting the country as a whole—not the troubles of individuals. Their business should be affairs of state. The above figures do not take into account the cost of having the bill before each House 3 times, with the Members of Parliament each drawing $4000 a session and always pressed for time.

In the next place there is from the decision of Parliament no appeal. True another petition supported by fresh evidence may be presented at a subsequent session; but on a finding on a question of law or fact, there is no appeal. The advantages of a system of appeal in judicial matters is too widely recognised in practice to warrant further discussion here.

The chairman of the Senate Committee on Divorce is always a lawyer; usually 3 or 4 of the other members are lawyers; another 3 or 4 are doctors; and the remainder are anything. Could a body less suited for the trial of such actions be imagined, especially as the capability and certainly the training of the chairman to act in the advisory capacity of a Judge may often be questioned? The body can not be likened to a jury, nor will it be so regarded by many applicants or respondents; the Senators are not the peers of many of the parties who come before them. The poor man who goes before a Court and asks for a jury feels that he will have the opinion of men much in his own station of life; if he does not ask for a jury, he relies on the legal training of the Judge. On the occasion of the second reading of the bill introduced by Mr. Nickle (Kingston) in 1920, providing for the establishment of Divorce Courts, Mr. Steel, the Chairman of the Private Bills Committee said: ".....The greatest evil is that under the present system divorces can be obtained and are being obtained on evidence which....would not be accepted divorces granted during the present year which no Judge or lawyer entrusted with the examination of witnesses would have been disposed to grant for one moment." The Divorce Committee apparently recognises the necessity of making their proceedings resemble those before a Court of law—e.g., their examination of witnesses and insistence on proof of points of law—then surely the matters should be disposed of by a competent Court of law, instead of by a mere make-believe Court.

A great disadvantage of parliamentary divorce is the length of time it takes, due to the infrequency of the sittings and the necessity of advertising for 14 weeks. Some try to argue that this will prevent rash action; that it will provide time to repent and to reconsider. To this, the answer is that the possibility of reconciliation in divorce cases must from their very nature and from the publicity afforded to them by the necessary advertising be almost negligible. There is also the further and even more practical answer that in many cases this delay is an absolute hardship—the temperamental hardship of being tied to an undesirable union, and in the case of the poor of being unable to marry a desirable helpmate as soon as might otherwise be possible.

Probably the greatest disadvantage of the parliamentary system is the absolute disadvantage, amounting in many cases to prohibition, at which the poor are placed. It means the taking of counsel and witnesses long distances, their maintenance while attending in Ottawa, and the expenditure of $210 alone on parliamentary, and practically useless, printing. As stated by the British Commission in another connection, it is obviously unsatisfactory that, while Courts have been established in which the poor can sue and be sued in respect of small debts and torts and compensation for injuries, they should have no means of redress in these graver matters. The matters which are recognised as grounds for divorce are recognised as intolerable, and yet the remedy is placed beyond the reach of those who need to use it. The latter if too poor to invoke the assistance of Parliament must either take the law into their own hands and live immoral lives, or submit to hardships which the same Parliament has itself recognised as intolerable. It is argued that the poor can never be placed before the law in the same position as the rich! true poor people have to be content with less expensive litigation, generally in the way of counsel; but none the less the State should provide tribunals suitable to their means. This is done in respect of all litigation except divorce. Also the need of the poor for divorce is greater even than the rich. The latter have far more power than the former of mitigating the hardships and miseries consequent on the destruction of the home. The Registrar of the Supreme Court at Victoria gives as his estimate of the total costs in an undefended action before that Court $240; for Nova Scotia a similar estimate is made at $150; for New Brunswick, the estimate covers only Court costs, and is $30.

The criticisms offered of Divorce Courts are neither numerous nor sound. Senator Gowan in 1888 argued that Courts were bound strictly by precedent while Parliament was not. Parliament as a matter of fact recognises in a general way precedent, but the very fact that it is not bound to do so strictly is not an advantage but an absolute disadvantage—what the Committee has done one session is no positive assurance that if your case conforms it will be treated the same way the next session. Surely divorce is of equal importance with other matters of litigation. Or do the opponents of Divorce Courts wish to abolish from all Courts the recognition of the binding effect of precedents, and leave us to the whim of individuals?

The chief criticism of Courts has always lain hidden in the quite general feeling that divorce should be made or kept as difficult as possible—or since the question now under discussion does not involve the grounds for divorce but rather the accessibility of the jurisdiction once the grounds exist, it might be more accurate to say instead of as difficult as possible, accessible to as few as possible. It is said that it would militate against morality if the facilities for trying divorces were extended—that an increase in the number of divorces, even though the grounds are recognized as existing, would mean an increase in immorality. The findings after very careful consideration of the British Commission in 1912 (pp. 38 & 42) were quite to the contrary. Mr. Bishop in his authoritative work, Marriage, Divorce and Separation, says at pp. 21, 22, with reference to the period before 1857 in England: "....Indeed it is well known that in England, where divorces — — — have until lately been obtainable only on applicaton to Parliament, in rare instances and at an enormous expense, rendering them a luxury quite beyond the reach of the mass of the people, second marriages without divorce, and adulteries, and the birth of illegitimate children, are of every-day occurrence; while polygamy is in these circumstances winked at, though a felony on the statute book..... That wrongs whence come divorces are evils no one denies. If the refusal of divorce would prevent them all would pray for it. But the experience of every state and country withholding this redress is practically, however man may theorize, that no form of matrimonial delinquency is less prevalent there than elsewhere. And to the extent to which separations actually occur, the community is remitted back to the condition it would be in if marriage itself was abolished....." The example of the

United States is always pointed to in this connection as a dreadful warning as to the certain increase of immorality if facilities for the trial of divorces are adopted. The British Commission investigated this phase of the question most thoroughly, and had the great advantage of accessibility to evidence not available to the individual; and they found that in the case of the United States the high percentage of immorality of a type which is a ground for divorce was not due to the facilities for the latter, but to such things as the ease with which marriage can be entered into, immigration of people with different moral standards, facilities for travel, increase of luxury, a growing spirit of independence, and a resentment of restraint. To these the late E. F. B. Johnston, K.C., added the development of dense commercial centres, a restless and changing spirit, the substitution of business rush for home ideals, the desire to make money quickly, and the mode of living in hotels and rooms. It is even suggested that the increase is attributable in many cases to an appreciation of a higher moral standard. The opponents of Divorce Courts also appear to overlook the fact that right here in Canada there is the wonderful example of a Province (P.E.I.) with a Divorce Court, which owing to the high moral standard of the community has been in disuse for over 50 years. The existence of this Court has certainly not produced immorality. In Australia, New Zealand, and South Africa, Divorce Courts exist, and yet the people of these countries are not regarded generally as moral delinquents.

In a recent personal letter, a Regina barrister says: "We are somewhat deluged with divorce cases now, but I think that in very few of them the cause of action has arisen since the jurisdiction was established. In other words, all the old grievances are being dug up, and people who years ago would have obtained a Senatorial divorce but for the expense are now taking advantage of procedure in the Courts. When the arrears of divorce work are caught up, I do not think the number of divorce cases here will be startling at all. This is chiefly due to the attitude by the Judge of any Court in the land. I have seen several of our Judges, who are determined Saskatchewan will not be as notorious as Reno. Divorces here have by most of our Judges been granted with great care and only on grounds being most clearly established. Unless the Courts become more lax in granting divorces, I do not think it is going to be detrimental to social conditions here." If divorce is denied, the chances are all in

favour of immorality increasing, of, for example, an unfaithful wife living in adultery and bearing illegitimate children, and the husband living with another woman of his choice; reconciliation is generally out of the question. In fact the argument that if Divorce Courts were created the number of divorces would increase is really one of the strongest arguments for these Courts. As the Hon. W. S. Fielding said in the House of Commons: "If thousands of honest men and women in this country are entitled to divorce, not on new grounds but on the well-established grounds recognised by the Courts and by this Parliament, the fact that these men and women are entitled to divorce and are unable to get it because of the present machinery is the strongest argument why that machinery should be discarded . . . " When the Roman Catholics oppose the extension of grounds for divorce or even the recognition of any grounds, they are, if mistaken in their judgment and in their appreciation of an actual situation as distinct from an antiquated religious teaching, at least sincere to their faith. When their wishes are over-ridden by a majority and divorce on certain grounds is actually recognised and they exert themselves to make application of the adopted principles as difficult as possible, they are playing the part of an undignified and unjust opposition. If they would confine their activities to endeavors to convince Canada that grounds for divorce should be abolished and to teach adherents of their own church that no matter what the facilities for divorce may be they should not take advantage of them, they would more nearly be conforming to the principles for which they profess to stand and would probably sooner see the error of their views and amend the same to meet current conditions. To argue that because in any country there are few divorces the morality of that country is high is a fallacy. Let it be shown that in spite of ample facilities for divorce there are few, and then it may be argued that high morals exist.

At this point the question naturally arises of where the authority lies to make the necessary change in jurisdiction. Sub-section 26 of sec. 91 of the B.N.A. Act gives the Dominion authority to legislate on matters of "Marriage and Divorce", while sub-sec. 14 of sec. 92 gives to the Provinces "The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including the procedure in civil matters in these Courts". From the above, it is obvious that it

is within the powers of the Dominion Government to enact that all jurisdiction as at present exercised over the question of divorce shall cease, that in the future such jurisdiction shall be exercised by such authority as the Dominion sees fit to enact, and that the grounds for divorce and annulment and the consequences of a decree shall be as enacted by the Dominion. Questions of procedure must be left to the Provincial Governments or to the rules made by the Judges under the authority of Provincial Acts.

What Courts should exercise this jurisdiction? Mr. Holmested, in Marriage Laws of Canada (1912), recommends a Dominion Court which would sit once a year in each Province, with an appeal to the Supreme Court of Canada. The objections to this are the delay, the probability that it would sit at but one place in the Province, the necessity of filing papers at the Court's headquarters in Ottawa, and the great variation from the present situation in Province with Courts with jurisdiction. The principle advantage would be the continuity in the interpretation of the law, an advantage which rather reflects on the ability of the Judges in the Provinces to give a just and correct interpretation of the law. Mr. Nickle's recent bill proposed to give jurisdiction to the existing and special Provincial Courts and to the Exchequer Court of Canada, the latter provision being suggested because many of the Judges in Quebec are Roman Catholics and are therefore supposed to object to divorce on any grounds, a suggestion which points to one of the obvious weaknesses in the position taken by the Roman Catholic Church—namely that its teachings on the subject are not observed by many of its own adherents. It would seem to be a matter which might easily be left to arrangements on the part of the Judges themselves—i.e., that only Protestants should try divorce cases. Also, it might be observed that Judges are on the bench not to administer such law as meets with their personal approval, but all law. In the United States, the divorce jurisdiction in some States is exercised by the Supreme Court of the State and in others by the District Courts. In England all cases have to be tried before the Divorce Court sitting at London; but the Commission of 1912 recommended that the jurisdiction be transferred to County Courts. The question of divorce is one which goes right to the root of society and one which therefore warrants the attention of the best Judges in each Province. It is also desirable to introduce as little complication as possible into all legal matters and to vary from that to which the people have

been accustomed as little as possible, provided justice and efficiency is guaranteed. With the system of the Supreme Court of each Province holding frequent sittings at various points throughout the Province, all these fundamentals would most certainly appear to be adequately secured by giving jurisdiction in matters of nullity and divorce to the existing Supreme Court of each Province, with the right of appeal in the usual way to either the Supreme Court of Canada or the Privy Council.

9. THE DECREE.

By Parliament, the actual divorce is granted by an Act, passed by both Houses and assented to by the Governor General. If the Committee report in favor of granting the relief, the law clerk prepares the necessary bill, which takes about one page in the ordinary statute volume and is composed of the preamble, which recited the facts, and two enacting clauses, one declaring that the marriage in question is dissolved, the effect of which is to restore the parties to the status which they held before the solemnisation of the marriage, and the second declaring that the petitioner may re-marry. Parliament has never definitely stated that the respondent is free to re-marry, but this seems to be covered by the first of the enacting clauses. After the bill has been passed by the Senate, it is "railroaded" through the House of Commons. It finally becomes an Act by receiving the Royal assent.

In the Provinces where the English procedure is followed, the practice is to grant a *decree nisi* which may become a positive decree on motion after 6 months. This procedure seems to be very apt as the question may be appealed, and if so to have the parties living in the meantime under a decree positive seems to be most undesirable. Also, until after the hearing, it may be very difficult if not impossible for the Crown authorities (known in England as the King's Proctor), to prove collusion. The practice of a *decree nisi* to be later confirmed has been adopted in many, but not all, of the States of America.

As one of the very fundamental matters in the arguments both of these in favor and those opposed to divorce is the question of the children and their home life, the effect of the decree on them should be considered. Parliament has occasionally granted the petitioner the custody of the children.....e.g., the *Pitblade* case of 1905——, but the general view is that the custody of the children is one of civil rights, and therefore

properly within the jurisdiction of Provincial Legislatures and Provincial Courts. However, cases where there are special circumstances may receive special relief. The English Act s. 28) definitely provides that the Court shall have power to dispose of the custody of the children as it shall think fit. The practice is practically the same in both England and the U. S.A. The primary question is the interest of the child, and this is followed by the interest of the innocent party; if the child is very young it may be left temporarily in the custody of the mother, even though she is an adulteress; if neither party is fit, the custody of the children will usually be given to any proper person intervening, or the children will be placed in a suitable institution, with the right of access given to both parents; if nothing to the contrary is said in the decree, the father will be liable financially for the children; if application for divorce is dismissed, it is not the practice to make any order in regard to the custody of the children; in annulment cases, the decree may be withheld until provision is made for the children.

Parliament's attitude to re-marriage has been noted above. In Nova Scotia either party may re-marry after the expiration of the period limited for appealing or after the decision in appeal, but no minister shall be liable to any penalty for refusing to marry any person who has been divorced. A similar section is in the British Act. The question was gone into most thoroughly by the British Commission of 1912, who say: (Par. 42): "The prohibition would probably be a strong deterrent to yielding to temptation placed before women of any social position . .., but it seems doubtful whether it would have any real effect as a deterrent on those of poorer degree; but it might thus result in the end, in the large majority of cases, in continued immorality, which could not be cured by re-marriage." It was also pointed out that in the present state of foreign laws, where such a re-marriage is not prohibited, it would give rise to all sorts of trouble, and finally the Commission reported against any restriction of the right to re-marry. As regards the United States, re-marriage is permissible unless expressly forbidden by the statute, as it is in some of the States. Where there is a prohibition against re-marriage, it has been held that it cannot be enforced, except in the State where it exists, nor can that State enforce it in connection with parties divorced in another State—

Houston v *Moore*, (1820) 5 Wh. 1 at p 69, Marriage, Divorce and Separation, vol. 2, sec. 1619, p. 616.

The next important question in connection with the decree is that of alimony. The following figures for the United States for the year 1916 are of interest: (U.S. Report, p 22).

Per cent. of divorces granted in 1916.

To Husband		To Wife	
Alimony Asked	Granted	Asked	Granted
6	5	27	20

In the United States, England and Canada, the law is almost the same, and may be stated quite briefly. The final decree may be withheld pending the settlement of alimony and arrangements therefor.

Two types of alimony are known to the law:

1. Alimony *pendente lite*—based on the right of a wife to support; during the proceedings from their very nature she can not co-habit with her husband; therefore he must support her elsewhere. It is usually calculated by adding the wife's income to that of her husband, taking one-fifth of the total, and deducting from that the wife's income, the result being the alimony if any which is to be paid. If this sum is unreasonably large it may be reduced.

2. Permanent alimony—usually calculated on the basis of dower of one-third of the husband's income, but the wife's need and the husband's faculties are considered.

The wife being by common law under no circumstances to be required to maintain her husband nor contribute to his support can never be compelled to pay alimony; some of the States have provided statutory exceptions to this rule. Alimony, unlike the general subject of divorce, is a matter in which the public can have little or no special interest, and therefore any just bargainings of the parties concerning it will not be regarded as collusion, but will be upheld. Besides alimony, the wife may be allowed a sum for costs in bringing or defending an action. Alimony in amount is subject to variations from time to time as circumstances, needs, and pecuniary conditions of the parties change. In some instances alimony has even been allowed to a guilty wife. Parliament's attitude to alimony is similar to its view of the custody of children.

In regard to property generally, the parties to a divorce after a decree has been granted can convey free from dower

and curtesy. In some exceptional cases, even Parliament has gone so far as to debar the husband from any interest in the wife's estate (*Holliwell* case 1878,) but usually this is not done as the effect of the divorce unless the bill provides otherwise is to restore the parties with respect to their property to the position which they would have occupied had the marriage never been solemnised. In England probably more than in the U.S.A., there is a tendency to alter marriage settlements. Unless this is definitely done by the Court, the settlements remain unchanged, and even the guilty party forfeits no rights accruing under such settlements; the Court may, however, retransfer all property brought into settlement, the principle being to leave the children and the innocent party in as good a position as before the home was broken up, even though it means giving them income from property brought into the marriage settlement by the guilty party.

When a marriage has been annulled, the former wife resumes her maiden name. If the marriage has been dissolved by way of divorce, the wife retains her husband's name, although in some of the States, statutes give her the right to revert to her maiden name. The more reasonable course would appear to be that the parties having been put in all other respects in the position as though the marriage had never occurred should be so treated in regard to their names, and this especially so in view of the confusion which might occur where a divorced husband re-marries, and there are then two women using the same name. On the other hand, an objection arises where there are children, as their unfortunate position would probably be unduly borne in on them if their mother was to revert to the prefix Miss.

The English practice which is followed in Canada, provides that the husband may in a suit for divorce on the ground of adultery, sue for damages from the co-respondent, which may be granted even in certain cases when the divorce itself is refused, as where the offence has been condoned or the respondent has yielded under the influence of force. The amount of damages is assessed by a jury, and must represent only simple damages; punitive or exemplary damages are not allowable. Among grounds for reduction of damages may be urged the fact that husband and wife were not living together; the fact that the co-respondent did not know that the respondent was a married woman; or the fact that the woman

was openly living in prostitution. The damages awarded do not *ipso facto* go to the husband, but the Court determines their application, usually giving part to the husband, to the children, and even in some cases to the guilty wife as a measure of prevention to her prostitution.

NOTE.—Since writing the foregoing article our attention has been drawn by Harvey, C.J., of Alberta, to the omission of two recent cases, one in Saskatchewan and one in Alberta, dealing with the subject of jurisdiction in relation to domicile. The cases are *Kalenczuk* v. *Kalenczuk* (1920), 52 D.L.R. 406; 13 S.L.R. 262; and *McCormick* v. *McCormick* (1920), 55 D.L.R. 386, 15 Alta. L.R. 490.

(*Concluded*).

EVIDENCE BY DECLARATION.

We are indebted to the courtesy of Hon. Mr. Justice Riddell for a copy of a paper on the above subject which will be found of special use to coroners, magistrates, and medical men in the many cases which require "first aid" from a legal stand point where crime is suspected. He thus states the origin of the Paper:—

"A few weeks ago, by reason of a misunderstanding between the Crown Officers of Toronto and the authorities of the Toronto General Hospital, I was requested by the Attorney General to preside over an informal but representative Committee to consider the proper practice in cases of apparent crime. *Inter alia* it was agreed that it would be of advantage that a simple and practical statement as to "Dying Declarations," "Ante Mortem Statements" or "Evidentiary Declarations" should be prepared for the guidance of medical men generally and those in hospitals particularly. I have prepared the following after conference with experienced Crown officers and medical men: I am, however, wholly responsible for the document."

The learned Judge then deals with the subject as follows:—

The general rule of our law is that only what is said under the sanction of an oath (or of its legal equivalent) can be received as evidence. But for about two hundred years, the English law, which our law follows, has made an exception in what have been called "Dying Declarations," or "Ante Mortem Statements"—sometimes "Evidentiary Declarations."

When a judicial investigation is being made into the death of any person by homicide, statements made by that person respecting the circumstances resulting in his death, are admitted in evidence, if such statements are made by him when under the influence of a conviction that his death is impending.

Sometimes such evidence is of the very greatest importance, since frequently no third person was present. It is, of course, the duty of every good citizen to disclose crime and to preserve evidence of it. A medical man, therefore, attending a patient likely to die under circumstances indicating a crime by act of omission or commission which directly or indirectly caused his death, should endeavour to obtain such evidence from him as is available; and this sometimes is as useful to protect the innocent accused of crime as it (more frequently) is to convict the guilty.

This is not (as it is sometimes offensively put) to act the part of a detective, but to act the part of a good citizen and it is called for only in cases of apparent homicide where there is reason to suspect that the condition of the patient is due directly or indirectly to crime, foul play or criminal negligence.

Speaking generally, it is always wise for the doctor as soon as he thinks that a case is hopeless, to inform the patient of the fact—he may have affairs to settle, a will to make, directions to give, etc.

Difficulties may sometimes arise as to which it is impossible to lay down any fixed rule—for example the patient may be of such a temperament that a statement of this kind would probably cause death sooner than it otherwise would occur, etc. Medical men are always conscious that (speaking generally) their first duty is to the patient, and that consequently nothing which can be reasonably and properly avoided should be done which is likely to harm the patient; and yet, exceptional cases may occur in which the private must give way to the public good. The medical man must face the situation if and when it arises and determine as his conscience and sense of public duty dictate. Cases of this kind are exceptional; and in no case should fanciful or captious objections be raised; in all cases of real difficulty, the Crown Attorney should be at once consulted.

To make a Declaration evidence, there must be in the mind of the patient an impression of impending death—if he believe that his case is hopeless, but that there will be a prolonged continuance of life, a Declaration is not admissible. There must be expectation, a hopeless expectation, of death near approaching. It is of no importance that the physician or any other than the patient, thinks he may or will recover—the import-

ant thing is the expectation of the patient. Nor is it of any importance how this expectation is indiced, whether from the patient's own observation, statements of medical men or otherwise—the essential matter is its existence, however induced.

This expectation, impression and conviction that death is impending, may be manifested by the patient in any of several ways—he may say so in so many words or he may indicate his conviction of impending death by changing countenance and appearing distressed or terrified when he is informed of it, etc. He may do this without any words of apprehension; and still make his conviction clear.

It is of great importance for the ends of justice that the attending physician should not only make the state of the patient unmistakably clear to him, but also that he should, if possible, obtain unmistakable evidence that the patient was convinced and without hope.

Where there is ample time, the Police and Crown authorities may be communicated with to take the Declaration; but no chances should be taken whereby the evidence may be lost.

The doctor should satisfy himself that the patient understand what is said to and by him. The Declaration may be elicited by questions put to the patient. Everything said by him in respect of the circumstances causing death should be noted, even if it may seem to be immaterial.

It is very desirable that the Declaration be reduced to writing; where circumstances permit, it should be read over to the patient; and if he is able, he should be got to sign it; witnesses present should also sign as witnesses. Magistrates sometimes examine a patient on oath and the examination is signed by both—this is permissible.

It is, however, not absolutely necessary that the Declaration be reduced to writing at all. If circumstances do not permit of a written Declaration, an oral Declaration should be obtained. In that case, all present should take full notes of what is said, so that the memory may be refreshed (if necessary) when evidence is to be given of the Declaration. (Such notes are, however, not evidence in themselves.)

If the Declaration be reduced to writing and circumstances prevent its being signed by the patient, the witnesses should sign it after making certain that it is accurate—the absence of the signature of witnesses is not fatal to the Declaration but such signature is always advisable.

The Paper concludes with the following practical rules which are thus tersely stated:—

1. A Declaration is admissible in evidence only concerning the circumstances resulting directly or indirectly in the death of the patient himself.

2. It must be made under the influence of a conviction in the mind of the patient that his death is impending.

3. It may be made to anyone.

4. The doctor should not imperil the obtaining of such Declarations by waiting for the Police or Crown authorities.

5. Where there is ample time it is well to communicate with Police and Crown authorities.

6. A Declaration may be obtained by questions; and when the statements of the patients are not full, it is often well to supplement them by information obtained in answer to questions.

7. Where possible the Declaration should be reduced to writing, read over to and signed by the patient—if it is also signed by witnesses, this is the ideal Declaration.

8. But a written Declaration without signature is admissible.

9. And so is an oral Declaration.

10. In case of any difficulty at any stage, the Crown officers should be at once consulted.

11. In all cases of doubt, the Declaration should be taken, leaving it to the Court to determine its admissibility and value.

12. Crown and Police authorities generally prefer to take the Declaration by stenographers--these rules are however, not intended for the guidance of such authorities—but for medical men or laymen who can seldom obtain stenographic assistance.

BLUE SKY LEGISLATION.

The Bill respecting the Sale of Securities introduced in the Ontario Legislature during the Session just closed, and to which we referred *ante* page 121, has been held over until next Session, owing, no doubt, to the desire of the Government to give the fullest opportunity for a careful consideration of the important questions involved and also by reason of the large amount of necessary legislation already before the House. The Bill has been referred to a special committee composed of thirteen members of the Legislature. The committee will sit early in the Fall, and will hear any interests which desire to make known their views upon the subject.

Review of Current English Cases.

By CECIL CARRICK, Barrister-at-Law.

Solicitor—Lien for costs—Partnership Action.

Dessau v. *Peters;* Rushton & Co., 1922, 1 Ch. 1. (Sargant J.)

When after an order has been made for dissolution of a partnership, and a receiver appointed of the partnership assets, the plaintiff in the action changes his solicitors, the former solicitors cannot assert their lien for costs of the action by retaining papers that have come into their hands in the course of the action, but must deliver them up upon receiving the usual undertaking by the new solicitors for preserving their lien. A partnership action is one in which not only the plaintiff but other parties are interested in not having the determination deferred of the questions to be dealt with, and a solicitor has only such qualified lien on his client's documents as is recognised in other cases where the client is not the only person interested.

Will—Condition contrary to public policy.

In re Boulter, Capital and Counties Bank v. *Boulter*, 1922, 1 Ch. 75, (Sargant J.)

A gift was made to grand-children upon the express condition that they should not, during their respective minorities, reside abroad except for periods not exceeding six weeks in each year, with a provision for forfeiture on non-compliance. It was held that this condition was a condition subsequent, and that as it tended to the possible separation of the children, from their parents it was void as being contrary to public policy.

Sale of business—Delay in completion.

Golden Bread Co. v. *Hemmings*, 1922, 1 Ch. 162. Where premises are sold together with the goodwill of the business being carried on therein, and the contract is not completed on the day fixed for completion, by reason of the default of the purchaser, the vendor is entitled to carry on the business at the purchaser's risk; and to be indemnified by him for losses so incurred, provided that he informs the purchaser promptly of what he is doing, and that the business is being carried on at a loss.

Sale of goods—Merchantable quality.

Sumner Permain & Co. v. *Webb & Co.*, 1922, 1 K.B. 55, (Court of Appeal). "An implied condition that goods shall be of merchantable quality" does not include the quality of being

legally saleable in the market for which they are intended. See Sale of Goods Act, 1920 (Ont.), Sec. 16, (b).

Mandamus—Contempt of court—Municipal council.

The King v. *Council of Metropolitan Borough of Poplar, Ex parte London County Council, Ex parte Managers of Metropolitan Asylum District,* 1922, 1 K.B. 95, (Court of Appeal). A corporation which is a notional body, cannot be attached for disobedience to a writ of mandamus issued against it. If it is sought to attach individual members of the corporation for disobedience to the writ of mandamus, their names should be inserted in the rule nisi, and it should be served on each of the members so named personally, together with a copy of an affidavit specifying the nature of the contempt with which he is charged.

Sale of goods—Engine affixed to freehold.

Underwood Limited v. *Burgh Castle Brick and Cement Syndicate,* 1922, 1 K. B. 123, (Rowlatt J.). An engine affixed to a vendor's premises is not in a deliverable state. It is not even a chattel, until the vendor has exercised his right to sever. Consequently the property in it does not pass at the time a contract for sale is made. See Sale of Goods Act, 1920 (Ont.) Sec. 20, (a) and (b).

Carrier—Exemptions from liability—Diversion from prescribed route.

Neilson v. *London & North Western Railway Company,* 1922, 1 K.B. 192 (Court of Appeal). Where a carrier has exempted himself from his common law liability in a contract which has reference to conveyance by a prescribed route alone, and the goods have been diverted by him from the prescribed route, they cease to be covered by the contract, and by the exceptions which it contains.

Landlord and tenant—Covenant against sub-letting.

Commissioners of Works v. *Hull,* 1922, 1 K.B. 205. (Appeal from Greenwich County Court.) A tenant in breach of a covenant not to sub-let or assign without the landlord's permission, assigned his tenancy and subsequently disappeared. An action against the assignee of the tenancy to eject him as a trespasser is a sufficient indication by the landlord of his intention to exercise his option to forfeit the tenancy for breach of the covenants, and the tenancy of the original lessee and of the assignee is thereby determined.

Will—Construction—Gift in trust for such son (living at his death) of testator's son as first or alone attains twenty-one — Contingent or vested interest — Intermediate rents and profits.

In re Astor, Astor v. *Astor* 1922, 1 K.B. 364, (Court of Appeal). This was an appeal from the judgment of Russell J. By his will the late Viscount Astor devised certain lands "upon trust in fee simple or absolutely for such son (living upon my death) of my son W. A. as first or alone attains the age of twenty-one years, or, failing any such son, then upon trust as part of my residuary estate." He gave his residue in trust for both or either of his sons W. A. and J. J. A. who should survive him, and if both, in equal shares. When the testator died he left surviving four sons of W. A. the eldest of them being then thirteen years of age. One of the questions which Russell, J. was asked to answer, on an originating summons, was whether the plaintiffs W. A. and J. J. A. had until one of the four grandsons of the testator should have attained the age of twenty-one years the powers of a tenant for life. It was held by Russell, J. following *In re Francis*, 1905, 2 Ch. 295, that a devise of real estate to a devisee, when he shall attain a certain age, or if he shall attain a certain age, without any further context to assist, is contingent, and the attainment of the prescribed age is a condition precedent to the estate vesting in him. He declared further that such further context might be found, for example, in a gift over in the event of the devisee not attaining the required age. In this case there was a gift over, but was there any person in whom the estate could be said to be vested? If the gift had been "for the eldest son (living at my death) of my son W. A. when he attains 21, and if he dies under 21 then for the next eldest son" (and so on with a gift over on the death of all such sons of W. A. under 21 years, there would be no difficulty in holding that the eldest son took a vested estate in fee simple, liable to be divested if he died under the age of 21 years). (See *Phipps* v. *Achers* (1842), 9 Cl. & F. 583). In this case, however, the gift is to such member of a class as first attains a specified age. There is no gift to anyone who does not answer the whole of the description. The devisee cannot be ascertained until one of the grandsons of the testator attains the age of twenty-one years. The persons entitled to the intermediary rents and profits for the period until one of the grandsons atttains twenty-one years are the residuary

legatees. On appeal the judgment of Russell, J. was upheld. Estates must remain contingent until there be a person having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in his will.

Principal and agent—Sale—Surreptitious dealing by agent of one principal with other principal — Avoidance of contract—Recovery of deposit.

Alexander v. *Webler*, 1922, 1 K.B. 642. Bray J. The original plaintiff in this action agreed to buy from the defendants a motor car for £2250., subject to an examination by his chauffeur. He paid a deposit of £250. Later he wrongfully repudiated the contract, and would have failed in his action to recover the deposit. During the pendency of the action he died. His executors, who were substituted as plaintiffs, discovered that the defendants had promised the chauffeur a share of the profit if his employer bought the car. It was held that even although the original plaintiff had repudiated the contract before the fraud was discovered, yet the principle laid down by James, L. J. in *Panama and South Pacific Telegraph Co.* v. *India Rubber* L.R. 10 Ch. 515, 526, applied, viz. "that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principle, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him." The plaintiff recovered his deposit.

Arbitration—Right of each party to be present at hearing of other party.

W. Ramsden and Company Limited v. *Jacobs*, 1922, 1 K.B. 640. Bray J. In an arbitration held under an arbitration clause in a contract respecting the sale of goods the arbitrators obtained written statements from the parties, then asked them separately to state their cases, each in the absence of the others. On a motion to set aside the award, it was held that this procedure was absolutely wrong, and that even although no objection was made at the time, the award must be set aside.

Insurance (unemployment)—Charwoman engaged in cleaning solicitor's office—Employed in any trade or business.

In *re Wilkinson*, 1922, 1 K.B. 584. Roche J. This was a reference under the Unemployment Insurance Act 1920. While there is no corresponding Act in Canada, this case is of some interest to the legal profession, in that Roche, J. stated that in his view a solicitor's practice, at any rate in London, is a pursuit upon lines sufficiently commercial to bring it within the term "business," as distinguished from an occupation such as that of a school master which is not organized and conducted upon commercial lines. He further held that a charwoman who cleans a solicitor's office is not employed in his business. Counsel agreed that the laundress who performs the like service for a member of the Bar was not employed in the carrying on of the profession of a barrister.

Apprentice — Dismissal of apprentice by master — Misconduct of apprentice—Repudiation of agreement.

Waterman v. *Fryer*, 1922, 1 K.B. 499. This was an appeal from the Portsmouth County Court. The plaintiff was an infant who put himself apprentice to the defendant for five years. The defendant undertook to instruct him in the trade of motor and cycle engineer, and he undertook to faithfully serve the defendant. In the action the plaintiff claimed damages for breach of the agreement to teach, and for wrongful dismissal. The County Court Judge had held that the plaintiff so misconducted himself that his misconduct amounted to a repudiation of the agreement. The Divisional Court which heard the appeal after applying the rule that an infant cannot assent to a revocation of a contract unless such revocation is for his own benefit referred the case back to the trial Judge for a finding as to whether repudiation of the contract by the infant would or would not be for his benefit.

Bench and Bar.

Lady Barristers.

The Inns of Court in England have at length opened their doors to women barristers. The first case was that of Miss Ivy Williams who was called to the Bar by the Inner Temple on May 10th; the first of her sex to obtain that distinction in the most conservative body in conservative old England. She had gained a remission of terms owing to certificate of honour. Other women students we are told will shortly qualify for call.

Privacy of Jury Deliberations.

The English Court of Appeal has taken the opportunity of passing severe censure upon the publication of an interview with the foreman of a jury in a recent criminal trial concerning the opinions expressed and the deliberations in the jury room. All discussions between the jurors should be treated as private and confidential, both on the ground of public policy and to secure finality. Every one will agree with Lord Justice Bankes when he said: "Speaking for myself, and, I am sure, for a large number of other persons, I saw the other day with astonishment and disgust the publication, in what are generally accepted as respectable newspapers, of a statement by the foreman of the jury in a criminal case, which attracted much public attention, as to what took place in the jury room after they had retired. I feel confident that anybody who read that statement will realise the importance of maintaining the rule, as it has been generally accepted, and I say nothing as to whether a person who invites such a statement and publishes it does or does not commit contempt of court." Lord Justice Warrington concurred, and laid stress upon the extreme impropriety of publication by any means of what took place during the deliberations of a jury after they had retired to consider their verdict, while Lord Justice Atkin also expressed complete agreement with the other Lords Justices.

Coercion.

Mr. Justice Avory is to preside over another Committee appointed by Lord Birkenhead to consider the doctrines of the criminal law with reference to the wife's responsibility for

crimes committed by her in the presence of or under the coercion of her husband, and to report what changes are desirable. The terms of reference are sufficiently wide to enable the Committee to propose amendments of the law which will preclude the defence of coercion where, in fact, it does not exist, and at the same time to protect the woman in those cases where the marital influence is strong enough to negative criminal intent.—Law Times (Eng.)

Correspondence.

The Editor,
Canada Law Journal,

Dear Sir:— Re Rule 248—Notice of Trial.

Rule 248, clause "a," requires that ten days' notice of trial shall be given before entering an action for trial, except in Toronto cases. I find differences of opinon as to the meaning of this rule. My own interpretation is that it means that, before entering an action for trial, a full ten days' notice of trial must have elapsed. I have always acted upon this in practice, but I find that, in the counties of Bruce and Grey, a different practice prevails and a different interpretation is placed on the rule by the Court officers. The marginal note in Holmested upholds my own view, as well as the notes on page 711, in which it is stated that the action may be entered "after the lapse of ten days from the giving of notice of trial." Practice should be uniform, and apparently the matter has never been the subject of a decision. A note in the Canada Law Journal would be interesting to a number of practitioners.

Yours truly,
C. J. Mickle.

Clause (b) of R. 248 does not appear to us to require that 10 days must have elapsed after service of notice of trial before an action can be entered for trial. The 10 days in clause (a) and the six days in clause (c) of the Rule we think may run concurrently. See *Mayfair Investments* v. *Somers*, 150 W.N. 95.—Ed. C.L.J.

Flotsam and Jetsam.

CANADA AT THE FRONT.

The following eloquent tribute to our soldiers of 1915 was written by an appreciative journalist across the border, and appeared in the Cleveland News of April 22nd, 1922:—

North, over the border, to-day in every community leal-hearted citizens of the Dominion are holding commemorative services for the sons of the maple, lying in Flanders fields, who held the line for liberty from April 22 to April 24 seven years ago. In proud and loving memory mothers and fathers of these heroes recall the battle of battles of the World War, in which the picked conscripts of continental Europe hurled themselves for three consecutive days on the flower of the youth of Canada and in the end retired baffled, leaving on the field thrice 10,000 dead.

The true story of the world's salvation from militarism by that little band of stalwart souls, known as the First Canadian Division, history will tell. The battle of St. Julien was the start of a series of displays of Canadian heroism and efficiency that marked the Flanders and Picardy campaigns of the great war wherever emergency occurred, and which has added to the glory of patriotic achievement the events chronicled by the names of Festubert, Givenchy, Vimy, Cambrai and a score more.

Untested men from farm and factory, numbering less than 10,000, had been placed between two French armies to block the enemy's determination to achieve the French channel ports. To Von Falkenhayn's command to his German troops to pulp the Canadians and break through, no matter the cost, an answer was given which ranks St. Julien with Thermopylae and The Alamo, with the difference that St. Julien had her messengers of victory, albeit they numbered but 400, all that was left of Canada's vanguard in the fight for civilization.

Deserted by the Algerian corps on its left; its right bared by the retreat of the extreme eastern French wing, this pigmy army stood. Defying the repeated charges of the magnificent Prussian guard, 10 service battalions of which dissolved themselves against that unbreakable human wall; scornful alike of gas and bomb these Canadians fought for 72 hours to achieve

the result their commander curtly ordered in the words: "The line across St. Julien Wood must be held. The Canadians will hold it."

And when, after the three-day agony, the third British army came to the relief and the battered men of the western continent marched out, no more inspiring sight was ever witnessed than the little army passing through in-facing serried ranks of seasoned British warriors, each rigidly standing at "the present." The salute of St. Julien is Canada's forever!"

We are requested to announce that the University of Toronto Press has in hand for the Historical Association of Annapolis Royal and will issue shortly a *Book of Remembrance* containing a record of the activities of the Association during part of 1921, as well as verbatim reports of speeches made and papers read on the occasion of the Triple Celebration of Historic events in old Fort Anne on the thirty-first of August that year. The issue will be limited to three hundred numbered copies—full cloth bound, with gilt title and illustrated.