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THE FREEDOM OF THE SEAS.

Much has been said regarding this proposition of President Wilson concerning the freedom of the seas.

It has been feared by some that the principle the President seeks to establish is calculated to paralyze the action of Great Britain in time of war, and as it were tie up its principal arm of defence behind its back. Carried out in the terms laid down by the President it would undoubtedly have the effect of preventing Great Britain from being its own judge as to the course it should see fit to pursue in the event of its finding itself involved in war, and would compel it to seek from some international authority to be established the right to do that which she might conceive essential for her protection from her enemies. How, it may be asked, is that international authority to be obtained?

It is generally conceded that in times of peace the seas are free to all nations, and it is only in time of war that it becomes necessary for any nation to restrict this freedom. President Wilson's thesis is that this restriction shall be the result of international agreement and not the result of the mere arbitrary will of any belligerent. His proposition is this, "Absolute freedom of navigation upon the seas outside the territorial waters, alike in peace and in war. Except as the seas may be closed in whole or in part by international action for the enforcement of international covenants."

It is this exception that involves the crux of the whole matter. By "international covenants" it may possibly be assumed that he means "international obligations" wherein would be included the obligation of all nations to submit to the judgment of the international authority to be established for the settlement of all international disputes.

If a nation refused to submit itself to the international judgment and should resort to war, then if those whom it attacked should automatically by international authority have the right to close the seas in any way they should see fit, and be able to accomplish, in order to frustrate the efforts of the recalcitrant nation and to compel it to abide by its international obligation, there could not be much objection by any law-abiding nation.

If this be the meaning of the exception, it might not in any way interfere with any nation's right adequately to protect itself in time of war provided that in engaging in war it was not itself acting contrary to the judgment of the international authority.

But, if it should mean that when war has been entered upon by one nation, in disregard of the judgment of the international authority, the freedom of the seas may not be restricted by any belligerent without the concurrence of the international authority first specifically had and obtained, that might occasion a delay which might prove fatal to the just necessities of the law-abiding belligerent and be a source of comfort and assistance to his opponent; because in time of war it is absolutely necessary that measures of defence, as well as measures of attack, shall be taken with the utmost despatch.

Thus, in the case put, if the exception means what has been suggested, the nation wrongfully refusing to abide by the international judgment would be precluded from interfering with the freedom of the seas, whereas those whom it attacked would have a perfect right to do so, with the result that at the conclusion of the war any injury occasioned to other nations by the restriction of the freedom of the seas, whether by the recalcitrant nation, or by its opponent, would be the subject of a claim for compensation against the recalcitrant nation.

For the sake of avoiding all misunderstanding as to the meaning of the exception, it should be made clear that the international action therein referred to is to be an automatic action, and not the result of conferences and debates and negotiations after the emergency has distinctly arisen.

We can never forget that although Britannia has for many a century past "ruled the waves," she has never yet ruled them,

in times of peace, to the injury of the just rights of any other nation however politically insignificant. On the contrary, she has for the benefit of humanity at large effectually put down piracy and slave-trading. It is only in time of war that friction has ever arisen on the subject; and even then she has acted only when compelled by the law of self preservation to resort to measures which resulted in a restriction of the freedom of others. She has done so in the war which has just come to an end. Neutral nations have been restricted in the use of the seas for the purpose of carrying on trade with the enemies not of only Great Britain, but of humanity; and by these measures she has once again been enabled to deliver Europe and the world from what aimed to be a worldrwide tyranny. In doing what she did in this respect, Great Britain acted it is true on her own initiative; she had to. She determined for herself what was best to be done to meet the common danger, and she did it effectually, as the event has proved. All that remains for the contemplated league of nations to do is to give its personal sanction to Great Britain doing again, in a like emergency, the same thing. To seek to restrict her action otherwise would be to endanger not only her own existence, but that of the league of nations itself. When the wolf is at the door it is a bad time to argue who shall close it.

PUBLIC POLICY.

Decisions founded on what is called "public policy" are of all decisions the least satisfactory as expositions of the law, and the most unreliable. What the Courts to-day may be pleased to say is "public policy," the Courts a few years hence may declare has ceased to be "public policy," and that something else and wholly different has taken its place. It is about as bad as that kind of "equity," which was said to depend on the length of the Chancellor's foot. Public policy, after all is said, appears to be that particular view which the Judges for the time being come to the conclusion is best in the supposed interests of the public; and it is very easy to see how wide a difference of opinion the question what is to-day "public policy" naturally invites:—

In a recent case in the House of Lords, *Rodriguez* v. *Speyer*, 119 L.T. 409, Lord Haldane took occasion to make some observations on the subject of decisions resting on "public policy" which serve to shew how treacherous a ground it is—very like indeed what might be called a "legal quick-sand." He says, for instance, 'what the law recognizes as contrary to public policy turns out, to vary greatly from time to time". Further, he remarks: "I think there are many things of which the Judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and *the changes which take place in it*. The law itself may become modified by this obligation of the Judges." Furthermore, he quotes an observation of that very eminent lawyer, the late Lord Watson, when he said: "A series of decisions based on the grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal," and Lord Haldane remarks, "In England it is beyond the jurisdiction of her tribunals to mould and stereotype national policy"—by which it is presumed he means to include "public policy"—"their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."

We may remark it is not for a moment pretended that this "rule of policy" is to be sought in any law, statutory or otherwise, but it is apparently solely to be derived from the inner consciousness of the Judges themselves as to what, in their opinion, for the time being, is the "policy" most beneficial for the public interests, and most in accordance with the general contemporary notions of liberty and justice.

So it comes to pass that what was yesterday declared to be "law" is in a later day declared to be mere "rhetoric."

OUR BROTHERS WHO FELL.

There is a movement on foot in England to provide some suitable memorial for those members of the profession who fell during the late war in defence of their country. There should be, and doubtless will be, something of a similar character in this country. Those to whom this duty appertains in this regard will not forget the desire of the profession in this matter as soon as the time comes when action can satisfactorily be taken. In the meantime, suggestions would be in order as to the form this memorial should take; and we should be glad to hear from our readers on the subject. We venture to assert that the legal profession in Canada has, in proportion to its numbers, suffered greater losses in life and limb than any other class. It will take some time to gather all the information that is necessary for a suitable memorial; but we understand that in the various provinces this is being attended to. Whilst we mourn for those of our brothers who have so freely given their lives in such noble service, we welcome back to their homes those who are now returning.

INTERNED ALIENS.

We submit for the consideration of those in authority the very sane views of the Editor of *Law Notes* on this subject. They are thus expressed (in part) in a recent number of that excellent journal as follows:—

"It is related that during the Civil War some Federal soldiers on duty in a 'copperhead' district found a rattlesnake and were about to despatch him. At this juncture there came along an officer fuming inwardly over having been compelled to release some 'Knights of the Golden Circle' on their taking the oath of allegiance. 'Here,' he said, 'don't kill that snake. Swear him and let him go.' It is with similar feelings that the average American contemplates the possible release of the interned enemy aliens at the close of the war, . . Poetic justice is but rarely possible in a prosaic world, but in this instance nothing could be more just than that those who have preferred the land of their

birth to that of their adoption, who have sympathized with its unholy ambitions and gloried in its crimes, should be sent back to that land. They made their choice; let them abide by it. They have no part or parcel in the victorious peace which the blood of heroes has bought for us."

ALIENS IN CANADA.

That "great American," as the *Law Notes* describes Theodore Roosevelt, in his last known words in speaking of alien immigrants says they should be welcomed if they in good faith desire to become Americans, and to assimilate themselves in that regard. "But," he adds, "this is predicated upon the man's becoming in very fact an American and nothing but an American. If he tries to keep segregated with men of his own origin and separated from the rest of America, then he isn't doing his part as an American. There can be no divided allegiance here. Any man who says he is an American, but something else also, isn't an American at all. We have room for but one flag, the American flag, and this excludes the red flag, which symbolizes all wars against liberty and civilization, just as much as it excludes any foreign flag of a nation to which we are hostile. We have room for but one language here, and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality and not as dwellers in a polyglot boarding house; and we have room for but one soul loyalty, and that is loyalty to the American people."

The above sentiments are as applicable to Canada and the British Empire as they are to the United States, and we adopt them as expressing our views on the subject.

*DATES AND SIGNATURES.**

As an abstract proposition, a verbal agreement is as binding as any other; but, on account of the matter of proof thereof, some sort of writing, dated and signed by the parties, is generally substituted for the word-of-mouth understanding, thus providing a more permanent—and a supposedly more reliable—way of evidencing the agreement of the parties, as well as of identifying them and it. The importance of preserving such ready proof has led to numerous statutes requiring various transactions to be so evidenced in order to be effective.

Thus we are brought to an age when practically all agreements, etc., are reduced to writing; but the writer, years ago, in an article published in *The Lawyer and Banker*, San Francisco, warned against the dangers of relying too strongly on written—as distinquished from verbal—evidence; he said (*inter alia*), "With the now universal use of writings as a means of proof in litigation, there has come amongst us even a greater temptation to introduce false documents, than there was heretofore to swear falsely."

Indeed, it is not always that the Courts will even hold that a paper setting forth the terms of a transaction is a *written* document, and the matters of date and signature are still more uncertain.

What are "Written" Documents.—One would suppose, wherever the provisions of a transaction were set forth in *any* descriptive or symbolic form understood by the parties, upon a permanent receiving surface, that this would (for the purposes of the transaction) be considered as a writing thereof; that is, in fact, the generally accepted view, so that it would be immaterial how such presentation was actually made. Yet, where a statute required a holographic will to be *written* by the testator himself, one who himself *typewrote* the body of his own will and then signed it in the ordinary way, did not thereby comply with the same.

In Pennsylvania the Legislature has enacted that (except as to signatures) typewriting shall be considered as writing, yet even

*This article is copied from the *Central Law Journal*, St. Louis, U.S.A., vol. 87, p. 238. The authorities referred to by the writer will be fovnd by reference thereto.—Ed. C.L.J.

in that State typewritten corporate minutes not actually signed by the secretary, but only stamped with his name, are not, *per se* admissible in evidence as such. While the distinction between ink and pencil writing is gone in Pennsylvania, yet this does not apply to routine business of the Courts, whose records must be written in ink, or typewritten or printed, in order to be accepted as such. And where a statute requires the notes of testimony to be certified in *writing* by the court stenographer, a certificate in *shorthand* characters was held not to be "written" within the meaning of the Act.

The document may have been prepared by different instrumentalities, resulting in conflicting provisions; in such cases that which has been inserted by the *more personal* means, overcomes that made in the less personal manner, the former alone being held to be "written"—for the purposes of the case. Thus, handwritten provisions in a printed form and inconsistent therewith, will prevail over the printed words; so, also, if the printed form were filled up on a typewriter whereby an inconsistency appeared, the print would give way to the typewritten words; and where a printed form was consistently filled up on a typewriter, and then a provision at variance with the typewriting was added with pen and ink, the typewriting was considered the same as printing, and the handwriting prevailed.

Assuming then, that we hold that which will pass muster as being "written," we may need to rely upon it as evidence. If it *purports* to be more than 30 years old when offered in evidence, and if it appears to be an old document and free from alterations and other suspicious conditions, it is admissible as an ancient document without proof of execution. If not so admissible, then we must be prepared to prove the signatures, if any, thereto.

Signatures.—When it comes to *signatures*, the prevalent idea, that here at last, we have something definitely, fixedly, and personally, a part of the individuality of the purported signer, is legally wrong. True, we generally find such a condition, and sometimes it is required by statute; but wherever possible the Courts hold that such is not necessarily the case, and that whatever the form of symbol, and however, and by whomsoever, made, *if*

it be so intended by the party thereby represented, it will operate as the "signature" of such party. This rule may have originated in necessity, but even so, it now often inflicts serious hardships; unscrupulous individuals frequently procure othe persons to sign their names to papers or obligations not requiring to be witnessed; when settlement day arrives, they promptly repudiate the procured signatures and evade the liability, except in the few cases where the other party is able to shew the adoption of such signature by the obligor.

What is Sufficient as Signatures.—Ordinarily a signature purports to be the *name* of the party; but the mere circumstance that the name is that of a person of a certain sex, is not conclusive of that question.

Where, as in California and Virginia, a holographic will must be written and *signed* by the testator, it will suffice if testator only signs it with his initials. Affixing a colored seal, and writing testator's initials and the word "seal" thereon, if intended as a signature, will be enough. A "mark" signature is sufficient—the actual name being written by another; or the "mark" may be omitted, and the party merely touch the pen used by the other; it will be enough if he *consciously* participates to *any* extent in the act and adopts it. Even a finger print would no doubt be upheld as a signature if necessary.

Errors in Name.—Where the identity of the testatrix is not questioned, her will is sufficiently signed by her when the subscription appears as "Nancy Wilson her (X) mark *Whaley,*" even although her correct name was Nancy Wilson *Hendrix.* An error in the spelling of the party's name will not, of itself, prevent it from being sustained as a valid signature of such person. One who sometimes wrote her first name "Lizzie," and at other times "Elizabeth," denied a signature on a judgment note "Elizze," as being erroneous, and there was other evidence pro and con; the Court declined to open the judgment.

So also, where a signature is required by statute to be attested by a subscribing witness, the fact that such witness, in signing, inadvertently wrote a name other than his own, would not vitiate the attestation; and where a will was executed in duplicate, and

one of the copies shewed an error in the signature of a witness, a letter having been first omitted from her last name and then interlined above it, while in the other copy there was no such mistake, it was held that both were valid and both should be probated as the will of testatrix.

Placing of Signature.—The placing of a signature at a particular point with reference to the body of the paper only becomes absolutely essential when made so by statute. Thus, in Pennsylvania, where wills must be signed at the "end" thereof, this means at the end, with regard to the sense of the testamentary provisions of the document when read. In Mississippi, where wills must be signed, but the statute does not say where, the signature is not necessarily required to be at the end of the will. The same rule prevails in New Jersey; but in California, where a holographic will is required by statute to be entirely written and dated and signed by testator himself, and where testator wrote his name at the beginning (but not at the end) of the will, and concluded the document "whereunto I set my hand this (date)," it was held to be for the Court to determine, from an inspection, whether or not this was intended as an execution of the will, and the Court found it was not so intended, and that therefore the will was not "signed."

The common seal of a corporation (being its official "signature") need not be placed next to the signatures of any of the attesting corporate officers.

Names Written by Others.—A party need not necessarily have any physical part at all in the affixing of his signature to a document and yet be bound by it. One who stands by, and either expressly or impliedly consents to another signing his name to a note, and to the delivery of the note to an innocent party for value, is bound thereby.

Even where testator is required by statute to sign his will, there may be a valid will without such signature. Where honest witnesses, not actually acquainted with the testator, attest a signature to a paper purporting to be a will, which purported signature is actually made by someone impersonating the testator, the document will stand as a valid will of such testator, until and unless, the fraud be clearly established. And where a will bears a

properly executed attestation clause it has been held that, in the absence of proof of some reason for testator not signing the will, there is no presumption that no such reason exists, which will overcome the attestation clause, and such clause will shew that nevertheless testator must have *acknowledged, as his own signature*, one made either by himself or someone else.

So also, one who holds a proper power of attorney may execute a paper binding on his principal, by signing same only with the principal's name.

Manner of Signing.—In the absence of statutory requirements, signatures need not be done by actual handwriting, or with pen and ink. In Pennsylvania, the distinction between pen and ink and lead pencil writing, outside of Court records and the like, is gone; elsewhere it has been held that signatures may be made with a pencil. A finger print impression would no doubt do, and a rubber stamp signature to a check is valid; so is a similar endorsement, though the Negotiable Instruments Law speaks of "written" endorsements; yet, where typewritten corporate minutes are not actually signed by the secretary, but only rubber stamped with his name, they will not be admissible in evidence without proof of the authenticity of the use of such stamp.

Letters bearing typewritten signatures are admissible in evidence; but a magistrate's typewritten signature to a jurat of a constable's return to a summons, will not sustain a judgment against a defendant who did not appear, "because it cannot be identified and is too liable to be erased"! A sheriff may use a fac-simile stamp signature as his official signature, in making returns, and a city solicitor may use a printed name to municipal liens, if he intends it as a signature for the purpose; a printed signature is also sufficient evidence of a contract of sale, under the Statute of Frauds.

From the foregoing it would seem that the popular conception of the legal individuality of a signature is shot pretty full of holes, and that in very truth there is, legally, very little left in a mere name—except a strong probability of lawsuits in every event. It is indeed fortunate that, scientifically, the *characteristics of identity of mark* still are left, ready for use in sorting out the goats

from the sheep—in protecting the innocent from the wrongdoers so ready to avail themselves of the doors of broad judicial construction, left wide open for them to pass through.

Dating.—The other element of written documents that has largely degenerated from a condition to a mere theory, is the *dating* thereof.

The time of a transaction is of supreme importance, and for the sake of convenience, as well as to have a ready record thereof, the date is generally set forth in written documents of every kind. The stated date is of course supposed to represent the true date, but as it is quite often a merely arbitrary statement of the time, it is well to consider its real status.

There is—apart from statute—no necessity for any date to be named, as it can be proven *aliunde, if you have the evidence to do so;* and if it be actually set forth in the document, the parties are not bound thereby, but may shew by other evidence that it is, or is not, the correct date. Such evidence is not construed as tending to vary the terms of a written contract and hence is admissible, by way of explanation or ascertainment of the true date.

Of course the *primâ facie* presumption is that a paper is executed on the date it bears; but the presumption that a note was executed and delivered on its date exists only in the absence of evidence to the contrary. On the other hand, the mere dating on a note is no evidence of the maker's presence at such time and place nor is the mere dating of a forged instrument sufficient evidence of venue to give the Court of the district named jurisdiction of a charge of forgery of such document. Neither ante-dating, nor post-dating is, *per se* fatal to a paper, but (when shewn) may become potent evidence of fraud thereby sought to be carried out.

Sunday Dates.—The mere fact that an executory paper is made or dated on Sunday will put the taker on inquiry, but will not invalidate it, if it be delivered or executed on a secular day; where dated on a Sunday it is only presumed to have been also delivered then, in the absence of proof to the contrary. A document that is legally void by reason of its execution and delivery on a Sunday, of course, cannot be the subject of forgery.

Alteration, etc.—Where the date of a document has been changed, that will not, of itself, vitiate the paper, but it will be treated as of its original date, if that can be shewn. This is true, even where there is nothing in the present appearance of a note to indicate that there had been an alteration in the date, if such alteration be in fact established by evidence. And where different parts of a paper are written at different times, this will not constitute evidence of alteration, unless there be testimony to shew that some part was written after the signatures were appended by way of executing the document. Furthermore, where several persons join in making a note for the benefit of one of themselves to whom they intrust it with the date specified as "July —," and where such beneficiary does not use the note till Sept. 1st, to which date he then changes the original date, such change is not a technical alteration, he having implied authority to make it.

Mis-dating.—Where a note in suit was dated January 4, 1904, and plaintiff claimed it should have been 1905, instead of 1904, the mistake being made because the writer was not yet accustomed to writing the new year, and where defendant's pleadings did not raise any issue of intentional alteration, evidence of the mistake was admissible.

Where the statute required a written will to be dated, and the date was set forth in the instrument as the 1st day of June in the year "One thousand," while the evidence shewed the paper to have ben written in the year 1910, it was held invalid; yet, in the same State, where a will was *fully* dated 1859, and contained a gift to one who was not born till 1861, it was admitted to probate, no question being raised, or explanation given, as to the date discrepancy.

Where there was no question as to genuineness, and the alleged error in the date of a will only affected questions of *distribution* thereunder, and the will was dated with the year 1911, and so probated, neither the register of wills, nor the Orphans' Court on appeal from his probate, had power to inquire into its true date, or to receive evidence to shew that it was really executed in 1912; such question could only be gone into on distribution, by the tribunal making the distribution, if it were a matter of any consequence as affecting such distribution.

In another case, a mechanic's lien had been filed against the defendant, under a statute requiring proof of service of notice to be filed of record in Court within 30 days thereafter, failing which the lien would be of no validity. The lien was filed on *July 7th*, and the only entry on the Court records as to the filing of the required proof of notice, was a *rubber stamp* endorsement by the prothonotary on the back of the paper filed, stating that it was filed *Aug. 18th*. Thereafter a rule was taken to strike off the lien, as the record shewed the notice to have been filed too late. Upon an answer being filed, testimony was taken shewing the belief of the prothonotary that the paper was actually filed *July 18th*, the stamped date being a mistake; there was also evidence from a document expert shewing that the movable date on the rubber stamp had accidentally slipped, or been turned, from its correct position, so that the type faces of "July" had gotten just beyond the marking field, and "Aug." had just entered it, thus making the date read "Aug.," which was out of alignment with the rest of the stamped date. Defendant urged that the Court could not contradict its own records by such extraneous evidence, but the appellate Court held that the record should be corrected to shew the true date, and that the rule should be discharged. Of course, if the stamped date had been due to *other than accident or mistake,—e.g.*, if done intentionally and knowingly by the prothonotary—the plaintiff would have been bound thereby, and would have been relegated to an action against the official, as his only remedy.

Most of the litigated date questions arise from the *fraudulent* misdating of papers, and while the writer has had legions of such cases in his hands as an examiner of questioned documents, yet comparatively few of them get into the reports on these points, because there is seldom an appeal taken. Many of these unreported cases included notarial certificates to affidavits shewn to have been fraudulently dated and thereupon set aside; others included certificates of acknowledgments that were fraudulently dated, and therefore also put into the discard; still others included fraudulent accounts, and title evidences, in bankruptcy and insurance cases. The following reported cases are representative of the various forms of controversy arising however:

A paper was presented for probate as a will and bore date nearly a year previous to such presentation. The alleged signature of testator thereto was strongly attacked as being a forgery, and the contestant's evidence also shewed that the paper was written and signed long after its date, notwithstanding the subscribing witness testified it was written upon said date. The Orphans' Court, on appeal, directed an issue *dev. vel non.*

In another case, where a party got into financial difficulties, he sought to protect himself by a confession of judgment upon a note under seal in favor of a relative, purporting, by its date, and alleged by the parties thereto, to have been executed and delivered some years before there was any trouble in sight. An expert examination and test of the ink writing of the note disclosed that the assigned date was false, and that the note had been executed at about the time when judgment was entered upon it, and it was dated back in an unsuccessful attempt to defraud the maker's creditors. The note in question waived the benefit of the debtor's exemption, and though the note itself was found to be fraudulent, yet this waiver was held (by reason of the attempted fraud) binding on the maker in favor of the other and legitimate creditors of the defendant.

In an important series of cases there were a number of proceedings in equity to compel a corporation to issue shares of its capital stock to the several plaintiffs, who claimed by reason o- assignments by the holder of what purported to be genuine certifif cates of such stock theretofore issued by the corporation to such holder for large blocks of the stock. The claims were defended on the grounds that some of the certificates so assigned were entire forgeries, and others had been fraudulently raised from a small, to a large, number of shares, and that the alleged assignor of the stock—who was the wrongdoer—had fraudulently misdated the certificates and the corporate records, the better to suit his purposes. At the trials the entire *modus operandi* of the criminal was shewn by the evidence disclosed by an expert examination of the corporate records as kept by the criminal, who was an officer of the company. The plaintiffs, under a threat of judicial compulsion, allowed defendant's expert to test the authenticity of the writing on the

certificates, by microscopic metric and colorimetric examinations, but declined to permit such writing to be tested chemically to determine their ink constituents, their real ages, and the questions of alterations. Finally the Court compelled plaintiffs to submit the papers for the latter tests, which were then made. The results were that all the cases were decided in favour of the defendant corporation.

The true rule would therefore seem to be, that where the actual execution of the paper is not attacked, or in question, but only its effect, as dependent on the date, the date set forth in the paper will be presumed to be the true date, in the absence of evidence to the contrary, and the truth or falsity of such stated date can be shewn by any lawful evidence, *aliunde* or otherwise, and will not affect the primary fact of execution; if, however, the actual execution of the paper is *denied*, then the question will have to be determined by proof, like any other matter, and this proof can be met by such evidence as in any other case, and the result may be to disprove the execution of the paper by shewing the falsity of the alleged date.

In the latter alternative the paper itself will have no probative force, and the party relying upon it will necessarily be required to establish its execution, by the subscribing witnesses, or by proof of their handwriting, or of the handwriting of the alleged signer; if these witnesses testify that the alleged maker signed the paper on the date it specified, the party relying on the paper will be bound by his proof, even though his witnesses be mistaken, or lie about the date. Consequently, if the other party, by satisfactory evidence, shews that the alleged maker could not have executed the paper on the date claimed, that would set aside the document, even without evidence in denial of the actual execution—though any such evidence would of course strengthen his case.

Judgment was entered on a judgment note dated March 25, 1905, and defendant took a rule to open, on the ground (*inter alia*) of forgery. Plaintiff called one of the two subscribing witnesses, who testified that defendant executed the note on the date named, and at the place set forth as part of such date. This was met by evidence of an alibi for the defendant, covering such

time and place. On appeal the judgment was opened, the higher Court wisely observing that "as there is nothing to shew that the note was signed at any other time than on its date, and as the only evidence of the plaintiffs is that that was the date of its execution, it is difficult to see how one could conclude from the evidence that it was signed at some other time. Of course it was unfortunate for the plaintiff, if his witnesses were not truthful, but (as in every other case) he was bound to prove the execution, and if unable to do so by trustworthy evidence, the execution was not proven, and his case fell.

Such a rule would seem to apply with even more force where a will was in question, because statutes practically always require the execution of wills to be proven by *the evidence of two or more witnesses*, who must separately testify, either to the actual execution thereof by the testator, or to their properly founded belief in such execution; the party who is to pass on such proof—whether it be register, Judge, Court or jury—is without power to accept or to adopt other than such evidence as establishing other than such evidence as establishing the will; one or all may feel perfectly satisfied, from a personal examination of the writing, that the will was signed by the party in question, yet they are powerless to substitute their such belief for the statutory requirements as to proof.

Yet the Supreme Court of Pennsylvania, in a recent remarkable decision, laid the foundation for plenty of future trouble by ignoring the foregoing distinctions. A will purporting to be written and signed by the testator on a date named therein, and attested by two subscribing witnesses, was contested on the ground of forgery. Proponents' statutory proof consisted of the evidence of the subscribing witnesses, to the effect that the testator executed said will in their presence at or about the date, and at the place, mentioned therein; this was corroborated by the usual proof as to handwriting. Contestants met this testimony by conclusive evidence of an alibi for the testator as to both time and place claimed for the execution, and this was corroborated by evidence as to the handwriting not being that of the testator, but that of one of the subscribing witnesses. An issue being awarded, a jury trial

was had and resulted in a verdict in favor of the will. Upon a new trial being granted, a verdict was reached against the will. Proponents stuck to their dates and place of execution every time, and were always met by the alibi. On appeal the Supreme Court held that, even if the jury found that the subscribing witnesses to the alleged will lied, or were mistaken, as to time and place, yet that would not necessarily be fatal; if, notwithstanding, the jury was satisfied *from its own examination of the writing*, that the writing was genuine, the will would nevertheless be valid.

The Court, in this case, entirely overlooked the fact that, with the formal proof of execution negatived, proponents' *primâ facie* case was gone, and there would be no writing legally before the jury—much less any testimony as to such writing—for the jury to pass upon. How can such a decision be reconciled with the Pennsylvania statute that requires every will to be established by the independent *testimony of two living witnesses* who must give their evidence under oath before the proper tribunal? Nobody, and nothing, else—not even a jury and some writings—can take the place of such witnesses; and when such witnesses are absent, or absolutely discredited, that is logically and properly the end of the matter, just as was held in the other analogous Pennsylvania case before referred to, which states the correct rule.

Soon after the *Husband* case the Supreme Court of Pennsylvania made the broad remark, in the *Baum* case, before referred to, that "the date is not a matter affecting the validity of a will"—which was true, when limited to the facts of that case, because there it only concerned a question of *distribution*, and not one of *execution*, as to which latter point there was no controversy; but as a broad general statement, it was not true, and could only be considered as a dictum.

This *Baum* case, and the *Dubosky* case, represent one side of the line of cleavage in the rule, and were both decided in 1918; the earlier *Varzaly*, *Cassidy*, *Bierly* and *Somerset Telephone* cases are typical of the other side; the *Husband* case, decided in 1917, belonged with the latter class, but seems to have been lost in the shuffle—at any rate it can scarcely be depended upon (with safety) as an authority.

Conclusion.—In the words of the Arabic proverb, "Everything crooked-necked is not a camel;" so before either attacking, or relying upon, a written document, it would be well to remember that:

1. Any name or symbol, made in any manner with any instrument (and sometimes even where not made by the supposed maker at all) may constitute a valid signature.

2. If the execution of a writing be admitted, the falsity of its assigned date will not affect its validity; but if the execution be denied, the false dating will probably be fatal to it.

Express statutory provisions may of course modify these broad and very general rules, which may soon come to have a special significance, in view of the fact that, right after the first heavy loss of American lives in the pending war, a mysterious advertisement for "old portraits" appeared prominently in the daily press—something scarcely worth purchasing except to bolster up some fraudulent scheme.

THE PREVENTION OF WAR.

There is so much good sense in a short article on this subject in the February issue of the *Law Notes* (Northport, New York), that we publish it in full, taking exception, however, to the last sentence:—

"There are some optimists who seem to believe that with the passing of autocracy the danger of war is forever averted; that self-governing peoples will never enter on armed conflict. The idea that peoples are unwillingly hurled into war by autocratic monarchs is the veriest nonsense. Sometimes they enter into an aggressive war willingly, as did the people of Germany, who would doubtless in July, 1914, have voted with practical unanimity for war. Sometimes they are drawn into war by the irresistible logic of events. That was the case in 1861, when no responsible man, north or south, wanted war, and yet war became inevitable because there was an issue which had to be decided and no other method of decision was open. Both sides had the fullest measure of self-government, both sides wanted a peaceful solution, provided only

that it was solved in their way. The prevention of war is not therefore to be found in popular government; it is not to be found in any degree of goodwill which can just at the present time be expected. The 'balance of power' will not avert war for the simple reason that it will not remain in stable equilibrium. There is another theory that war can be averted only by substituting class consciousness for national consciousness. Since recent events in Russia, culminating in the arrest of Lenine by Trotzky, that idea has not made very much of an appeal to thinking persons. Every person not afflicted with Teutonism of the mind knows that the moment a 'class consciousness' is established a process of sub-classification will begin and strife will be renewed. The good conduct of nations, like the good conduct of individuals, is to be secured in just one way—by the operation of two elements, one of which is a necessary preliminary to the other, 'the law' and 'the gospel.' Just as the men of belligerent temper can be restrained from settling their differences by personal combat only by the existence of a tribunal to whose decision they are bound to submit, belligerently inclined nations can be kept from war only by an international court whose jurisdiction is not dependent on consent and whose decrees may be enforced. Whether that enforcement lies in a league of nations or in a coalition pledged to keep the peace of the world, the power to decide and the power to enforce the decision are essential if war is to cease. But it is only in a barbaric state that the power of the law is the only restraint against crime and violence. In civilized communities, most people would keep the peace were the Courts closed and the police force disbanded. So with nations, while laws and the power to enforce them must exist, the growth of mutual understanding and mutual good feeling will be the most potent security against war and will in time make other securities superfluous."

The growth of "mutual understanding and mutual good feeling" is most desirable, and we should all work for it; but that it will ever be a "potent security against war," or "will in time make other securities superfluous" we do not believe. The growth spoken of has always been nipped in the bud, and always will be; and for the simple reason that human nature is warped

and vicious; it always has been, and always will be so. It is described by the One who knows it better than anyone else, as "deceitful above all things and desperately wicked. Who can know it?" We all realize that this statement is absolutely true, and the history of the world proves it. It is insane folly to hope that human nature will ever change. The only hope is in a supernatural power to police the world. That will come, but only when the One appears who can and will "rule the nations with a rod of iron."

NOTES FROM THE ENGLISH INNS OF COURT.

Reconstruction in the Temple.

Members of the Bar who have been on active service are beginning to return to their former haunts. When the first scheme of demobilization was framed, the authorities were minded to release men from the army "by trades"—that is to say, the members of the most important trade were to be the first set free. A priority list was prepared. "Ratcatchers" stood at the head, and, strange as it may appear, "attorneys and barristers-at-law" were relegated to the bottom of the list! But that scheme has now been "scrapped," and members of the Bar are being rapidly released from military service.

But to what do these men return? Are clients waiting, with open arms, to receive them and give them lucrative employment? In this connection it is to be remembered that we, in England, are not like you in Canada. Here there is a great gulf fixed between the two branches of the profession. The solicitor who went on active service may have had a partner to keep his connection together; but the barrister had and could have none. He went forth leaving his name on a door in the Temple, and (in some cases) a clerk, who might tell would-be clients that Mr. —— "is at present out of town, and the date of his return is uncertain." Yes, the date of his return was uncertain; and as many of these gallant men may find, there is an uncertainty as to whether they

are returning to anything substantial in the way of a connection. However, those who remained behind have done their best for absent friends; and it may be that the Temple will before long assume that look of prosperity which it had before the war.

Damages for Nervous Shock.

The question whether a person can sustain an action for damages for nervous shock caused, not by actions, but by mere words, was considered in a recent case in the King's Bench (*Janvier* v. *Sweeney*). A Frenchwoman claimed damages from two private inquiry agents for nervous shock, which she said she had suffered because of their conduct. She had been visited by one of them who represented that he came from Scotland Yard, and "wanted" her because she had been writing to a German spy. The plaintiff was engaged to be married to a German who was interned in the Isle-of-Man. It was stated that the real object of the defendants was to obtain letters from a woman, who was staying in the same house as the plaintiff, for the purposes of a divorce suit. The jury found that the defendant Barker represented himself to be an inspector from Scotland Yard, and that in doing so he was acting within the scope of the defendant Sweeney's authority. They also found that the statement of Barker was made with the knowledge that it was calculated to cause physical injury to the plaintiff. They assessed the damages at £250.

Mr. Justice Avory gave judgment for the plaintiff. He found that the matter was covered by the case of *Wilkinson* v. *Downton* (1897) 2 Q.B. 57, but inclined to the opinion that apart from that case he would have held there was no cause of action. He said: "To hold that every person has a legal right not to be frightened by some false statement made to him by another might lead to an infinity of trumpery or groundless actions; and to say that every one has a legal right to have the truth always told to him and not to be frightened by some lie is undoubtedly a wide proposition." It is interesting to notice that one of the Judges who decided *Wilkinson* v. *Downton* said this: "It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of

action. There is, I am inclined to think, at least one limitation. The shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."

Private Property in Ceded Territory.

There is much speculation as to what is to happen to private property in the territories which must inevitably be ceded by Germany as a term of peace. For instance, the German mine-owner of Lorraine—will he still remain *dominus* of the mine and its mineral wealth? The general opinion seems to be that ownership of private property will be studiously respected by the Allies. In this they would follow Germany herself, who, after the Franco-German War, did not interfere with private rights in Alsace and Lorraine. This accords with international law.

A judgment of the United States Supreme Court in the case of *Coffee* v. *Groover* states this: "It is no doubt the received doctrine that in cases of ceded or conquered territory the rights of private property in lands are respected. Grants made by the former Government, being rightful when made, are not usually disturbed. . . . It is true that the property rights of the people in those cases were protected by stipulations in the treaties of cession, as is usual in such treaties; but the Court took a broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right of the public domain, and not upon the private property of individuals which had been segregated from the public domain before the cession."

There is nothing which more strikingly illustrates the extent of Greater Britain than an occasional glance at the proceedings of the Judicial Committee of the Privy Council. In a recent number of the *Law Times* reports, we notice cases going there for final adjudication from all quarters of the earth. From the Supreme Court of Canada comes an appeal as to the powers of expropriation of land for railway and other purposes. The next case is an appeal from His Majesty's Supreme Court in Shanghai, China, dealing with a question of practice and procedure in an

opium case. Another case is an appeal from the Supreme Court of New South Wales touching procedure and evidence in connection with questions between husband and wife. This is followed by yet another which is an appeal from the Supreme Court of Ceylon reversing a decree of the District Judge of Negomba as to the rights of hasband and wife under the Roman Dutch Law. All these come for final decision, before perhaps four or five quiet, thoughtful men sitting round a table in morning costume. The proceedings, which are devoid of all form of ceremony, are conducted in a comparatively small room in an office building on Downing Street, in the metropolis of our great Empire, in that "Tight little Island," which rests in peace, happy in the thought expressed in the old sea song:—

"The sea is merrie England's, and England's shall remain
While Britain's sons have hearts of oak her freedom to maintain."

The report of a Committee of the Bar Council of England, suggests the establishment of a Ministry of Justice. In this country we are especially interested in this as such an office has been in existence in this Dominion for so long that the surprise is that there has been no such office in England. And one is at a loss to know how the legal machine can do without it in the Mother Country. Some of the work which would naturally come to a Minister of Justice is doubtless being done now by the Lord Chancellor, but as nothing has been published as to the many details which would have to be arranged, we need not discuss it further at present.

The stress of war requirements in England has necessitated a departure from the wholesome rule advocated by such journals as the *Law Times*, which, before the war, was resolutely opposed to calling upon Judges to perform duties not connected with their position. In a recent reference to this subject, the above journal joins with the Master of the Rolls in hoping that the time is not far distant when a full and complete severance will be made between executive and judicial duties, and the old position reverted to with strictness.

REVIEW OF CURRENT ENGLISH CASES.

REVENUE—ENTERTAINMENTS DUTY—MUSICAL PERFORMANCE DURING SERVICE OF MEALS—PAYMENTS FOR ADMISSION.

Lyons v. *Fox* (1919) 1 K.B. 11. This was an appeal from a conviction for an alleged breach of a revenue Act which imposed a tax on all payments of admission to any entertainment. The defendants kept a restaurant, and during the service of meals concerts, vocal and instrumental, of a high-class character took place. No charge was made for admission, and the meals were charged for *à la carte* for which a bill was rendered to the customer before he left the restaurant. A person who had finished his meal was allowed to remain and listen to the music, and the dinner concert continued for an hour after the service of dinner had ceased. An unusually strong Divisional Court (Darling, Laurence and Bailhache, JJ., Shearman and Salter, JJ., dissenting) held that the payments made by customers were not "payments for admission" to an entertainment within the meaning of the Act, and quashed the conviction; Darling, J., quoting Dryden's "Alexander's Feast" in proof of the antiquity of the custom of having music at meals.

SHIP—CHARTERPARTY—OWNERS TO TAKE MARINE RISKS—CHARTERERS TO TAKE WAR RISKS—SALVAGE—APPORTIONMENT OF SALVAGE BETWEEN OWNERS AND CHARTERERS.

Pyman, S. S. Co. v. *Lords Commissioners of Admiralty* (1919) 1 K.B. 49. In this case the Admiralty had chartered a vessel on the terms that the owners were to assume marine risks and the charterers the war risks. The vessel broke her propeller shaft, and in consequence was in danger of drifting into a minefield. In these circumstances salvage services were rendered, and a total sum of £3,000 was awarded as salvage, and an arbitrator to whom the matter was referred apportioned the liability for the salvage between the owners and charterers as follows: £2,250 to the owners, and the balance against the charterers, and Bailhache, J., confirmed the reward. The charterers appealed, contending that the whole was a "marine risk" due to the breaking of the shaft of the propeller, but the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) affirmed the decision of Bailhache, J., being of opinion that part of the danger to which the vessel was exposed

and from which it was salved was a war risk, and the difficulty of salvage was increased by reason of the latter risk.

MASTER AND SERVANT—SCOPE OF SERVANT'S AUTHORITY—SERVANT ACTING CONTRARY TO ORDERS—TORTIOUS ACT OF SERVANT IN COURSE OF EMPLOYMENT—LIABILITY OF MASTER.

Rand v. *Craig* (1919) 1 Ch. 1. This was an action against a master for an injunction to restrain the tortious acts of his servants, in the following circumstances: The defendant, who was a contractor, employed carters by the day to take rubbish from certain works to his dump, and tip it there. Some of the carters, to suit their own convenience, took the rubbish to a piece of unfenced land of the plaintiffs and dumped it there, and it was held by the Court of Appeal (Eady, M.R., and Duke, L.J., and Eve, J.) that the defendant was not in the circumstances responsible for the tortious acts of his employees, which were done not in the course of their employment, but altogether outside its scope.

EASEMENT—ANCIENT LIGHTS—DOORWAY.

Levet v. *Gas Light & Coke Co.* (1919) 1 Ch. 24. In this case Peterson, J., decided that an easement for light cannot be acquired in respect of a doorway, which was primarily constructed for being closed and thus excluding light. The case might perhaps be otherwise where the doorway is constructed for the purpose of admitting light.

COMPANY—REDUCTION OF CAPITAL—RIGHT OF DEBENTURE-HOLDERS TO OBJECT.

In re Meux Brewery Co. (1919) 1 Ch. 28. This was an application by a limited company for the sanction of the Court to a reduction of its capital in the following circumstances: The company was incorporated with a fully paid-up capital of £1,000,000, in addition to which it had issued perpetual debenture stock for £1,000,000 secured by trust deeds forming a floating charge on all its assets. In 1904 the company lost £800,000, and since that year no dividend had been declared, the profits in each year being applied in reduction of the deficiency which now amounted to £640,000 or more. In 1917, by a special resolution, the company resolved to reduce its capital by writing off the lost capital. The reduction did not involve the release of any liability for unpaid capital, or the return to any shareholder of any

paid-up capital. The application was opposed by certain holders of the debenture stock on the ground that the proposed reduction would be prejudicial to their security inasmuch as it would enable the company to pay dividends on the reduced capital instead of applying the profits to making good the lost capital. The assets, according to the latest balance-sheet, exceeded the debenture stock by about £500,000. In these circumstances, Astbury, J., held that the debenture-holders were not entitled to object to the proposed reduction, which he therefore sanctioned.

COSTS—PRIORITY OF CLAIM OF TRUSTEES FOR COSTS, AS AGAINST MORTGAGEE OF BENEFICIARY.

In re Pain, Gustavson v. *Haviland* (1919) 1 Ch. 38. In this case a beneficiary under a will, who had mortgaged her interest, brought an action against the trustees of the will for an account. The mortgagees were made parties to the action, and an account was ordered, the mortgagees not objecting. The result of the account established that nothing was due from the trustees, and the plaintiff was ordered to pay their costs, which were also declared a charge on her beneficial interest in priority to the mortgage so far as they were incurred subsequent to the order for taking the account.

Correspondence.

BAIL ON HABEAS CORPUS IN EXECUTION.

THE EDITOR OF THE CANADA LAW JOURNAL:

SIR:—The judgment in the case of *Dr. Henry O. Simpson* on his application for discharge on a writ of *habeas corpus* in the Supreme Court of Nova Scotia in November of last year, on a commitment for a violation of the Nova Scotia Temperance Act, is reported in Volume 44, Dominion Law Reports, No. 1, page 137.

It is to be regretted that the conditions on which the Court admitted the applicant to *interim* bail, pending the decision of the Court on the application, are not more fully reported in the statement of the case. There was a condition imposed by the Court when admitting him to bail in $400, that he pay the penalty in the

conviction, which amounted to $100, into Court, and which he did in addition to giving his recognizance, and the money was repaid out to him when it gave a decision discharging him on November 30th, 1918. This circumstance, coupled with that, that the Court expressly refrained from deciding the question as to whether or not a prisoner *in execution* could be bailed on *habeas corpus*, would rather indicate that "*ex parte Simpson* is" *not* "authority for the proposition that pending the decision on a writ of *habeas corpus* . . . the prisoner may be bailed even in execution," to negative the proposition in the language used by the learned annotator to the case.

His interpretation of Archbold's C.O.P. (1844), pages 330, etc., is hardly candid as a reference to the work will shew. Archbold first discusses on that page the subject of bail *in execution* without any reference to the statute of Charles, which he refers to in turn on pages 336-337, and that enactment expressly negatives the right of a prisoner *in execution* to be bailed under that Act, which thus assimilates the statute to the common law. The list of authorities cited in the annotation are, with the exception of the Alberta case, threadworn, and the changes on them have been rung without avail on similiar applications in almost every Court of Canada. The Supreme Court of Nova Scotia, with respect, like Idington, J., in *R.* v. *Whiteside*, 40 C.L.J. 713-714, seems to have left this question undecided.

If in its wisdom the Court or the Legislature deems it advisable to make this disputed right (of bail on *habeas corpus* while in execution) undoubted law, a Crown Rule or statute will put the matter beyond question, as it now is in the Supreme Court of Canada, when that tribunal administering the law of *habeas corpus*, R.S.C. ch. 139, sec. 64; *Ex p. Smitheman*, 9 Can. Cr. Cas. 15-16.

Yours, etc.,

JOHN J. POWER.

[It may be noted that the grant of bail in *Ex p. Smitheman* was upon consent of the Crown.—Ed. C.L.J.]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Full Court.] [44 D.L.R. 170.

PRATTE v. VOISARD.

Evidence—Handwriting—Proof of—Testimony of experts—Comparison.

Under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is admissible.

Alex. Taschereau, K.C. and *E. F. Surveyer*, K.C., for appellants.

Belcourt, K.C. and *S. Laurent*, K.C., for respondents.

ANNOTATION ON ABOVE CASE FROM 44 D.L.R.

Proof of Handwriting and Documents.

By ALBERT S. OSBORN, New York.

The following annotation is a reflection of the latest and most progressive American view on the subject of handwriting evidence.

The constant but slow tendency of the new precedents in the law in relation to the proof of handwriting and documents is unmistakably in the direction of that procedure that gives aid in promoting justice. Progress is especially shown by the removal of certain ancient restrictions which made it difficult if not actually impossible to prove the facts. The most important step in this direction, in what might be called modern times, was the admitting of standards of comparison, beginning especially with the English statute of 1854. There had been some progress, however, before that time because originally no comparison of any kind was allowed even if there was genuine handwriting in the case.

The statute in the federal courts of the United States, allowing standards of comparison, was not enacted until fifty-nine years after the enactment of the English statute, a measure of progress in this country not to be proud of. Following the enactment of the federal statute a number of the belated States passed a similar statute allowing standards of comparison, but in some States the strange law is still in force that no genuine writing can be admitted for comparison either to prove genuineness or forgery. The U.S. federal statute was approved and became a law, February 26, 1913. The same year North Carolina and Indiana passed substantially the same statute, and in 1915 Alabama, Michigan and Illinois adopted the new practice. Most American

States, the large majority of which had followed the English restrictive practice, continued to follow the old practice long after 1854. The change was not made in New York till 1880 and Pennsylvania courts continued the old practice till 1895.

A few American States, to their credit let it be said, never followed the old English practice at any time but adopted the sensible rule that recollection of a thing was not more reliable than the direct, sustained examination and comparison of a thing. A judge in an early Connecticut case, *Lyon* v. *Lyman*, (1831) 9 Conn. 54, 55, where it was sought to exclude standards, says of witnesses who had testified, "A fair paraphrase of their testimony is, that they *believed* (italics by judge) it to be his handwriting from having seen him write. This, according to the second position would render the testimony admissible. But they *knew* it to be his, by comparing it with his other writings. . . . But I forbear. It has always appeared to be a very feeble objection; and I rejoice to see it overruled."

The early violent prejudice against "the comparison of hands" in large measure grew out of the *Sidney* case in England in 1683 (9 State Tr. 817, 896) and the subject became in some degree a political question and for a long time this case had an unfortunate effect on handwriting testimony, which in some degree continues even to this day. For many years no comparison of any kind was permitted and then finally when it was permitted no standards for the purpose of comparison were admitted. Then for a long time many other restrictions prevailed, reasons could not be given and only a bare opinion could be expressed.

During much of the period of this gradual change there also was a continuous controversy over the question as to whether even a magnifying glass could be used, and the same controversy arose over enlarged photographs, illustrations on a chart, or anything in connection with such evidence by which it was made more effective and in which it differed from the old practice. Naturally the old decisions are full of criticisms of the weak and inconclusive evidence which naturally grew out of these various restrictions and exclusions. Many of these old opinions, defending and justifying the old practice, contained inaccurate and unscientific ideas which have trickled down through the decisions for more than a hundred years and mudded the stream of justice.

In justifying the exclusion of standards of comparison, Coleridge, J., in an old opinion advanced the view that standards of comparison were not necessary because the most reliable means of identifying handwriting was from a recollection, or memory, or impression of the "general character" of the writing, undoubtedly meaning its general appearance. This idea tended to make the evidence of the opinion witness who had simply seen the person write, or casually observed the writing, more valuable than any opinion that could be obtained from study or comparison *even by the same witness*. This ancient idea, although utterly unscientific and refuted numberless times, has continued down to the present day. It has been appealed to time and time again for the purpose of discrediting scientific handwriting evidence. It has been necessary in many modern decisions to refute the old idea. In the case of *Green* v. *Terwilliger*, 56 U.S. Fed. 384, as late as 1892 the writer of the opinion felt obliged to say, in combating the old error,

"In many cases it is more satisfactory to allow a witness to compare the writing in issue with other writings of unquestioned authority as to genuineness, than to compare it with the standard which he may have formed or retained in his mind from a knowledge of the party's handwriting."

Another erroneous old idea formulated long ago in one of these old opinions has for years been quoted as a defense of forgery. The contention was solemnly presented in the old language, that "similitude had more significance as indicating genuineness than dissimilitude had in indicating forgery." The argument thus was that genuine writings for various reasons necessarily differed somewhat from each other, therefore difference in a questioned writing as compared with a standard had little significance. No consideration whatever was given to the opposite reasonable contention that an imitation of a writing would, according to the skill exercised, necessarily be like the original in certain particulars, and especially in general appearance, and therefore mere resemblance alone ought not to be conclusive as indicating genuineness. It would thus be just as accurate to state the opposite of the old formula for it is not simply "similitude" or "dissimilitude" but their character and extent that is significant.

It can easily be understood how if an investigation was taken up with the idea that any resemblance would indicate genuineness and no kind or amount of difference would indicate forgery, that there would be no question as to what the final conclusion would be. This ridiculous contention about the force of similitude naturally permitted the forger to succeed. In an introduction to a book treating of forgery, Professor John H. Wigmore expresses the thought in a sententious way, "Amidst these new conditions, the falsifier again outstrips society for a while. A Chatterton and a Junius can baffle a community. Well down into the 1800's the most daring impositions remained possible, but society at last seems to have overtaken the falsifier once more. Science and art, in the mass, are more than a match for the isolated individual."

Soon after the invention of photography, when perhaps the science was in a somewhat experimental stage, some legal opinions outlined the dangers surrounding the use of photographs, and these old opinions are still quoted at length even though photography has been carried to a very high point of accuracy. A few decisions have said that enlarged photographs have "greatly assisted" the court, but the restrictive opinions seem to have a longer lease of life and are more frequently quoted. There are numerous States where the question actually is still undecided whether enlarged, illustrative, helpful photographs are actually admissible and in some courts they are still excluded.

The new precedents, however, have gradually tended toward that condition surrounding a disputed document trial which makes it a legally supervised, scientific investigation, in which all of the old unscientific discussions are swept aside and the question is attacked in a modern way with instruments and illustrations and everything that will throw light upon the inquiry, including the opportunity of giving detailed reasons for the opinion expressed.

Those arrayed against the facts are greatly aided in many kinds of cases by certain of these old outgrown decisions, carefully combed out of the

books by diligent advocates, and cited without dates. It would be in the interest of justice if the custom was universal of including the date with every legal reference, for, next to the indestructibility of matter, seems to stand a legal precedent after it is once distinctly stated in an opinion.

Let us suppose that somewhere in seventeen hundred, or eighteen hundred and something, some unscientific man compelled to discuss a scientific subject, hurried perhaps, and, because of possible unfortunate individual experience, it may be somewhat prejudiced, also over-burdened with work or possibly with a liver somewhat out of order, writes out in an opinion some unjustified positive statement, comment, or inference, not necessarily on a strictly law question but on some phase of legal proof. In spite of the progress of science, or the progress of anything, that statement seems to stand fixed for use forevermore; it is on with tables of stone and tablets of brass.

If the statement in this old opinion is actually erroneous, unwarranted or even exaggerated, its immortality is all the more positively assured, as it becomes a beacon of hope, a floating spar, for the zealous advocate who is struggling in deep water. By its aid he cannot perhaps shew that black is white, but that it is at least streaked with gray. The statement will be quoted against other opinions, against technical experience, against scientific investigations, against logical testimony, against reasonable argument, until perhaps some great calamity, some Alexandrian catastrophe, has destroyed all of the libraries. There come trickling down through opinion law these erroneous ideas that have been used over and over again in the effort to befog, to delay and to defeat justice, and in some way they should be properly characterized and discredited in later opinions until they are effectively disposed of or rendered harmless.

The law books contain discussions of phases of a great variety of subjects connected with litigation; there is in fact no limit to the number. When the lawyer sets about preparing a brief on one of these subjects, incidental to the law, the usual practice is not to make an intensive study of the question itself, but rather simply to find in the books what has been said about it. This is not the method of science.

When scientific subjects are investigated and discussed in the law the discussion and investigation should be conducted in accordance with scientific principles and methods. The method of the law, if directed primarily to finding what has been said by someone, and strictly followed, makes no new contributions and corrects no errors. The method of science is directed to finding the fact and incidentally to determining whether what has been said on the subject is true. The law assumes that the question has been investigated, discussed and settled, while science begins with no assumption except, perhaps, that ancient pronouncements are probably wrong.

The treatment of the question of the desirability of admitting genuine writing as a standard of comparison illustrates the unfortunate method of the law. It was contended that this admission of standards would introduce interminable and confusing collateral issues and also it was argued that unfair standards might be selected. England, as we have seen, settled the question in 1854, while Connecticut and a few other American States always followed the enlightened practice now almost universal. When, however, the question was under discussion in other States, as it was for years, the

question was never investigated as to how the practice worked in England and Connecticut. As late as in 1911 one of the U.S. State courts refused to adopt the new practice and cited an old English opinion before 1854, instead of discovering how successful the new rule was across the border in the State of Ohio, a few miles away, where it had been followed for more than forty years.

In law the question may arise as to whether enlarged photographs should be used. A scientific investigation would endeavor to answer the following questions: What are their purpose and what is the argument for their use? Will they aid in shewing the facts? How will they aid? May they mislead or deceive and are they objectionable in any way? Finally, have they been used before and what has been the result of the experience in other cases?

There is no good reason why scientific methods cannot be applied in greater measure at least, in connection with these general subjects. The vital question in law as in science is to discover and prove what is true. The investigation ought to be unhampered and free, in which everything is considered that may throw light on the question and what has before been said should be used for what it is worth and only for what it is worth, and should be tested as all else is tested. There is no doubt that this too rigid dependence upon precedent has tended to retard progress by making legal discussions unscientific and perhaps making legal investigators lazy. There is, however, an awakening on the question, stimulated in large measure by able legal authors who have the courage to put into the law the methods of science, and who argue and prove that the science of the law is alive and growing.

Under the ancient restrictions regarding the introduction of evidence, cases relating to handwriting and documents were surrounded by a violent prejudice that weakened all technical evidence on the subject involved. Then the decisions rendered in these cases under the restrictions that made the evidence weak if not valueless perpetuated and intensified the criticisms and prejudice that actually grew out of the procedure imposed. Numerous of the old text books, reflecting the past, also contained violent and undiscriminating criticisms of technical evidence of this class.

This retention of these ancient ideas is discussed in an illuminating manner by Professor Roscoe Pound, Story Professor of Law and Dean of Harvard University Law School, in a book review in *Harvard Law Review*, March, 1911, in these words:—

"The dogmatism of many really competent experts, the obvious limitations of the crude empiricism of bank tellers, the extravagances of graphologists, and the unhappy operation of over-technical rules of evidence in many jurisdictions, which preclude the use of sufficient data on which to base a sound conclusion, have given rise to a distrust of expert evidence as to writings which to-day is not justified. Mr. Harris's account of the expert in handwriting, written, it is fair to say, over thirty years ago, but unaltered in the current edition of 'Hints on Advocacy,' has no application to the fair, temperate and reasoned statements of what may and what may not be discovered and determined with respect to the authorship and authenticity of documents which is given us in this book. Modern experimental psychology has furnished a sure foundation, confirmed in its application to handwriting

by abundant experimentation and experience, and the ingenuity of the optician has provided standard instruments, giving results that speak for themselves to the layman as well as to the expert."

The striking contrast of the new legal precedents with some of the ancient practice in the proof of documents is conclusively shewn in numerous recent American opinions. Two notable opinions in the courts of the State of New York shew this change in a striking manner. In *Venuto* v. *Lizzo* (1911), 130 N.Y. Supp. 1066, the opinion says:—

"While the testimony of expert witnesses is carefully weighed and accepted with caution, the law allows such evidence. The conclusion of a handwriting expert as to the genuineness of a signature, standing alone, would be of little or no value, but supported by sufficiently cogent reasons, his testimony might amount almost to a demonstration. While the court in this case did not directly refuse to allow the experts to state their reasons, as was done in the case of *Johnson Service Co.* v. *MacLernon*, 142 App. Div. 677; 127 N.Y. Supp. 431, the effect of allowing constant trivial objections and of the erroneous rulings was virtually equivalent to such a denial . . . We might not reverse this judgment for a particular ruling, standing alone; but the cumulative effect of all the rulings and of the constant interruptions of counsel on trivial grounds is such as to induce the belief that the defendant has not had a fair trial, and that, in the interests of justice, she should be permitted another opportunity to present her defence. The order should be reversed and a new trial granted, with costs to appellant to abide the event. All concur."

In the opinion referred to in the foregoing opinion, *Johnson Service Co.* v. *MacLernon*, the court says:—

"The witness was then asked to state the reasons for his opinion. An objection to this question was sustained, and the plaintiff duly excepted. This was error. It is a rule of general acceptance that an expert may always, if called upon, give the reasons for his opinion."

" 'Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.' Chase's Stephen's Digest (2nd ed.), 156.

" 'On direct examination, the witness may, and, if required, must point out his grounds for belief in the identity of the handwriting on the principle already considered. Without such a reinforcement of testimony, the opinion of experts would usually involve little more than a counting of the numbers on either side.' 3 Wigmore on Ev. 2014.

"In this State the practice of permitting handwriting experts to give the reasons for his opinion, and even to illustrate upon a blackboard, has been distinctly approved; *McKay* v. *Lasher*, (1890) 121 N.Y. 477, 483; 24 N. E. 711. The reasons for the expert's opinion, if he had been permitted to give them might, and probably would, have added great force to his testimony; for the mere expression of opinion, standing alone, has little probative force. For these errors, the judgment and order appealed from must be reversed and a new trial granted with costs to appellant to abide the event. All concur. *Johnson Service Co.* v. *MacLernon* (1911), 127 N.Y. Supp. 431."

The words ". . . even to illustrate upon a blackboard" in the foregoing opinion is an unqualified expression of the fact that evidence of this class

may now be presented in the most effective and convincing manner. It is, of course, understood that the making of such illustrations would accompany a detailed exposition of the reasons for the opinion expressed. This is certainly a long way from mere opinion evidence of the old days.

On the general question of allowing experts to give reasons for the opinion expressed the Court of Appeals of New York has said very clearly in *People* v. *Faber* (1910), 199 N.Y. 256 at 268:—

"As has already been expressed by others, from which expressions we have quoted, it is competent for a person offering an expert as a witness for the purpose of shewing the strength of the opinion which he is about to express to specify in detail the observations upon which the opinion is based."

When these new revolutionary precedents, established, as it will be seen by unanimous courts, are compared with the old rulings on these subjects it can be understood what progress has been made, and the result of this progress is shewn by numerous surprising verdicts in cases of this class. Two recent New York cases will serve as conspicuous examples. In the first, six witnesses testified that they saw a certain contract signed, and a jury decided that the document was a forgery, and, in the second, a jury convicted a distinguished member of the bar of a forgery of two words in typewriting that by comparison were connected with his own typewriter.

With the use of the microscope and enlarged photographs (*Frank* v. *Chemical National Bank* (1874), 5 J. & S. 26, 34; affirmed 84 N.Y. 209); the assistance of the chart or blackboard (*McKay* v. *Lasher*, 121 N.Y. 477; and with the help of these new precedents, quoted above, an intelligent counsel and a competent witness are able, in most cases, to prove the facts, and the truth will often prevail against what may at first seem to be great odds.

Numerous lawyers and judges know that important cases of this class have been discontinued and hastily taken from court calendars before trial, but not till after the documents had been photographed and the physical evidence had been arranged in a formidable and conclusive manner for presentation in court. A few years ago many of these cases would have been won against the facts and in favour of fraudulent claimants.

As in all classes of cases, there of course continue to be decisions against the facts, and there are still cases in which it is impossible to prove with sufficient force, against sympathy and prejudice, what is undoubtedly true, but in very many cases involving disputed documents the old despair has passed away. With the new precedents and the practices a practically new profession has arisen, devoted to the investigation of documents and the photographic illustration and scientific proof of such cases in court.

Another definite forward step taken by the courts is in connection with the proof of disputed typewriting. The New York Court of Appeals in a recent case has definitely settled the question as to the admissibility of other typewriting merely for comparison. The court says:—

"I think it may well be doubted whether typewriting can be deemed handwriting within the meaning of the existing statute. Nevertheless, I think the law sanctions the reception of the evidence in question, substantially on the theory adopted by the trial judge. If the impression of a seal were in controversy, it would surely be competent to shew by other

impressions from the same sealing instrument that the impression was invariably characterized by a particular mark or defect . . ."

"These several cases base the rulings which have been mentioned upon the assumption or proof that a typewriting machine may possess an individuality which differentiates it from other typewriters and which is recognizable through the character of the work which it produces. Inasmuch as its work affords the readiest means of identification, no valid reason is perceived why admitted or established samples of that work should not be received in evidence for purposes of comparison with other typewritten matter alleged to have been produced upon the same machine." *People* v. *Storrs*, N.Y. (1911), 100 N. E. 731, 732.

There are courts, however, that are still strangers to all these modern methods of presenting disputed document cases, but there is progress all along the line, and it is now coming to be recognized, as is said in the American and English Encyclopedia of Law, that "This kind of evidence, like all other probable evidence, admits of every degree of certainty, from the lowest presumption, to the highest moral certainty," or, as one of the opinions quoted above says, ". . . might amount almost to a demonstration." All the honest claimant, the reputable lawyer, asks is that the evidence be taken for what it is worth and without prejudice. More than one "demonstration" during these latter years has dazed old practitioners who in the past have won cases, not by evidence but by tactics and by objections. In more than one recent case, those against the facts, when confronted with the evidence and especially the illustrative photographs, have actually surrendered before or during trial, paid all expenses, and discontinued the case.

The variation of degree of force in evidence as to handwriting and documents has long been recognized in a general way, but it too long has been impossible for those in the right to prove their case, especially in those jurisdictions where they still continue actually to listen to long arguments as to whether reasons can be given, or illustrations can be made, or even a magnifying glass can be used in court, or enlarged photographs, or a microscope, or any of the modern approved scientific aids to investigation that are welcomed everywhere except in a court of law. The old "objector," when sustained, either excluded or made harmless the evidence necessary to prove the case, but his day is ended in most courts. One would be inclined to think, however, in going into a few courts, even in these days, happily growing less each year, that the date was sixteen hundred and something, instead of the twentieth century, and that a witchcraft case might actually be on trial.

There are still abuses to be corrected, and unfortunately, there continue to be frauds and charlatans among the specialists who testify on these technical subjects, who, let it be plainly said, ought to be in jail with the lawyers who exploit them and keep them in business, but there need no longer be despair about cases of this class. With the enlightened procedure now almost universal, adequate preparation by the counsel on the right side, and the use of the information on the subject now available, the errors of the ignorant witness and the vicious pretensions of the corrupt witness can usually be exposed. This cannot be done, however, when it is assumed, as was usual a few years ago, that any "conflict" of such testimony of any kind discredits the good as well as the bad.

When this prejudice was more common it is easy to understand how a "conflict" would usually be brought about by the lawyer against the facts in order that he might argue that none of the testimony on the subject ought to be considered. "Conflicts" of this kind are still secured, and may accomplish their evil purpose, if prejudice prevails and it is erroneously assumed that all testimony of the kind is of equal force and value. This is just what those against the facts want court and public and press to assume. Too often a portion of the press snatches at and magnifies the news value of such incidents, and thus unintentionally may help promote injustice.

Those who are not informed may say, "Of what use is such evidence when witnesses always disagree," not knowing that the "conflict" is actually brought about, not to prove the point at issue but solely for the purpose of appealing in argument to this erroneous notion on the subject. The legal precedents as quoted and the general press in many cases and numerous technical articles on the subject, shew a decidedly changing point of view and a correct understanding of the facts.

The modern court conducted under enlightened rules asks that the evidence be carefully weighed and that all prejudice be eliminated and promptly accepts every proper help that will throw light on the inquiry. Objections to accepted scientific aids are promptly overruled and argument on the subject is hardly tolerated. Not now once in fifty times are photographs, microscopes and charts excluded and in some jurisdictions such exclusion, like the exclusion of reasons for the opinion given, is actual reversible error.

Blackstone said many years ago that the law is the most progressive of all the sciences because it goes out and enlists the services of all the other professions, but in certain fields it has done this with such caution that there are many who would resort almost to revolution in order to bring about what should be accomplished in an orderly way.

In the law, as elsewhere, those interested in true progress must see to it that the best of the past is preserved and must always adopt with caution the new thing. As with every department of human affairs there are two parties in the law, those who on principle hark back to the past and are opposed to changes of any kind. Opposed to them there is another party interested in progress who all the time are looking forward to better things as time goes by. Hasty and unwise adherence to one of these opposed policies leads to danger, disorder and revolution, while strict adherence to the other is stagnation and death.

Handwriting Evidence by Lay Witnesses.

About the weakest and most inconclusive evidence ever presented in a court of law is the opinion evidence of lay witnesses regarding the genuineness of handwriting. It is an unwarranted assumption of the law, established by long practice and recorded in many opinions, that a knowledge of handwriting can be gained by the most superficial observation of the act of writing. The legal precedents even go to the ridiculous extent of assuming that an observer actually may be qualified to give an opinion under oath as to a disputed signature in a controversy of great importance who has seen the alleged writer sign his name only once more than twenty years before. It is difficult to imagine anything more unscientific than this.

The law thus takes it for granted that a mere casual glance at the act of writing many years before gives, or may give, to an observer, in some mysterious, unknown way, what the law calls "a knowledge of a handwriting." From a scientific standpoint, and also from a common sense standpoint, the assumption is utterly ridiculous and would be so considered had it not been dignified by long use. Knowledge that rises to the point that qualifies a witness to give formal evidence in a court of law on such a question is not gained in any such manner.

It is said in some opinions, seemingly in an apologetic way, that objection "goes to the weight of the evidence rather than to its competency" and the court does not undertake to say how much observation is necessary in order to qualify a witness to testify. The court should undertake to say this very thing, and it is utterly unscientific not to say it. Any reasonable man ought to be able to say that no such cursory observation, without any specific attention, or interest in the question, qualifies a witness to give formal testimony under oath in a court of law, any more than walking through a law library would qualify a man to give an opinion on a legal subject.

It is possible to become familiar with a handwriting by seeing it often and seeing it written many times, but such a knowledge is usually very superficial and unreliable and in any event is not gained when no particular attention is given to the act and that act is performed only a few times many years before.

A witness called upon to testify on the question of disputed handwriting should always be examined in advance by counsel and by the court and if he is asked whether he would risk his own property, to the extent perhaps of thousands of dollars, upon his own knowledge of the particular handwriting in dispute, the honest witness will be likely to say that he would not dignify his opinion on the question in any such important manner.

The identification of handwriting many times beomes a difficult scientific problem and in any important matter should not be undertaken by the uninformed and the untrained. One of the common fallacies in connection with the subject is the assumption that handwriting can be positively recognized by anyone as a face is recognized, by a sort of intuition. Some of the discussions even go to the point of contending that evidence based on this kind of recognition is particularly reliable. The exact opposite is the fact.

One of the most uncertain and unreliable kinds of evidence that ever appears in a court of law is evidence upon the recognition of a person, seen infrequently, or long before, or perhaps only once, from his features and general appearance alone. Thousands of errors have thus been committed and the liability of error is so great that such evidence has very little weight, and should have even less than is given to it.

The same danger of error arises when it is assumed that the recognition of a handwriting is a very simple and easy task. There are certain great classes or schools of handwriting in which there are certain general similarities, like the similarities in race or complexion, or general appearance in persons, and error is liable to follow in depending upon recognition from mere general appearance in identifying a handwriting as in identifying a person.

If a handwriting is clumsily imitated only in a general way, including only its conspicuous features, it at once takes on, in some degree, the general

appearance of the writing imitated and is immediately identified as the writing of a suspected party, or as genuine writing, by one who depends only upon this general appearance. The whole subject of handwriting identification is pervaded by a certain intangible notion that there is a sort of occult ability developed even by an unskilled, unscientific observer, which can be depended upon in this recognition of a handwriting.

This practice of calling on the unskilled has no doubt grown out of necessity, but it has been given a dignity and importance which it does not deserve. Stupid, half blind, unskilled persons are asked to give evidence on this subject of handwriting identification who are no more qualified than they would be to make a chemical analysis, or determine whether a law is unconstitutional, or whether a patent specification covers a principle already incorporated in another patent.

In proving uncontested documents witnesses are called to prove the signatures who are assumed by the law to "know the handwriting." This proof, as a rule, is of the most perfunctory character and is not assumed to have much really technical evidential value. The same character of proof has however been carried over into most important cases in which handwriting is seriously disputed, and may be skilfully forged. This character of handwriting evidence, that may answer the purpose of the law and not imperil the interests of justice in cases where no dispute has arisen, may be very dangerous unless the evidence is presented in a way that makes it possible to estimate its true value.

It also should be plainly said that the real purpose of this evidence by lay witnesses often is not what it purports to be. It is supposed to give help in solving a technical scientific question, but in most cases is in fact an opinion by the witness as to his judgment on the case as a whole. Especially in a community where all the various citizens are known in a general way to each other, at least by reputation, such evidence may be of considerable force in a disputed handwriting case. A prominent citizen who consents to testify really gives his opinion on the merits of the whole controversy rather than primarily on the technical subject presented to him. This certainly is the fact in many cases of this kind. Untrained witnesses who have not studied the subject of disputed handwriting will err in either direction in such a case by inferring that the slightest resemblance indicates genuineness, or, on the contrary, that the most trivial variation indicates forgery.

Witnesses of this character can sometimes be cross-examined very effectively if proper preparation for cross-examination is made. If such witnesses merely give opinions without any reasons whatever, the evidence may be unassailable from a technical standpoint and its only real value is that it indicates the opinion of the witness regarding the general merits of the case. It is often possible to secure a number of such witnesses, often perfectly reputable and honourable men, but totally unqualified technically, who will readily testify that the most glaring forgery is genuine if their friendship or their prejudice incline that way, or will testify that an undoubtedly genuine signature is a forgery if it contains the slightest variation from ordinary genuine signatures and they think the case should be so decided. They are not in fact qualified to give any opinion but are skillfully led to see the problem

as is suggested to them. They are not dishonest but technically uninformed, and often, if not usually, consciously or unconsciously, prejudiced.

As has been well pointed out in numerous modern decisions and many discussions of handwriting expert evidence by scientific law writers, the value of document expert evidence, unlike most expert evidence, arises, not from the mere opinion itself but from the reasons for the opinion. This sensible test in a disputed handwriting case greatly minimizes, if it does not actually destroy, the value of the testimony of untrained witnesses who presume to give only mere opinions on the subject.

The careful trial lawyer cannot, of course, wholly ignore such evidence which may be marshalled on either side against the interests of justice, but will endeavour to use it to support and confirm correct technical testimony given with reasons and illustrations. Some witnesses of this class are conceited and have been led to think they have a peculiar ability and they will undertake to go into details and, without technical qualifications, will attempt to give definite reasons for their opinions. Detailed evidence by such a witness is almost certain to be full of errors and, as a rule, such a witness can be successfully attacked by a qualified counsel.

Proof of handwriting by lay witnesses would be less dangerous if given in response to a question something like this, "From what knowledge of this handwriting you have and from the circumstances of the case and the conditions surrounding the production of the writing, is it your opinion that this handwriting is genuine or not?" Whether the question is propounded in this way or not, this is exactly the way in which it is usually answered. On the pretense of giving technical evidence a witness is in fact allowed to give his opinion on the general merits of the case as affected perhaps by his prejudice or his actual interest.

In disputed will cases one collection of relatives, more or less distant, and friends more or less friendly, on one side give evidence that a signature is genuine, and a similar group, wholly untrained, without scientific knowledge, and perhaps unconsciously acting under suggestion, give exactly opposing evidence. It may be practically impossible to dispense with such evidence entirely but it should be received with caution and should not be dignified in legal opinions or in legal literature more than it deserves and it certainly does not deserve much.

Province of Manitoba.

COURT OF APPEAL.

Perdue, C.J.M., Cameron and Fullerton, JJ.A.] [44 D.L.R. 185.

ROBB v. MERCHANTS CASUALTY CO.

Insurance—Accident policy—Construction.

A clause in an accident insurance policy, insuring against loss sustained while "riding as a passenger within the enclosed part of

any public passenger conveyance provided for the exclusive use of passengers and propelled by steam, compressed air, gasoline, cable or electricity, or while riding as a passenger on board a steam or gasoline vessel licensed for the regular transportation of passengers, and such injuries shall be due directly to or in consequence of the wrecking of such car or vessel," does not include an accident while attempting to leave a passenger elevator in a privately owned building. It is from the words and the context not from the punctuation that the sense must be collected.

ANNOTATION ON ABOVE CASE FROM 44 D.L.R.

Insurance—Polices Protecting While "Passengers in or on Public and Private Conveyances."

By F. J. LAVERTY, K.C., Montreal. Author of "*Insurance Law of Canada.*"

The liability of insurers under policies protecting insured while "passengers in or on public or private conveyances" has been the subject of frequent judicial consideration.

Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers; private conveyance suggests a vehicle belonging to a private individual: *Ripley* v. *Hartford Passenger Assurance Co.*, (1872), 16 Wall (U.S.) 336, 479.

In *Oswego* v. *Collins*, (1885), 38 Hun (N.Y.) 171, an omnibus was declared not to be a public conveyance.

In *Ripley* v. *Railway Passenger Assurance Co.*, 20 Federal Cases, No. 11854, it was held that "travelling by private conveyance" includes self-locomotion; it would have been different if the clause had read "travelling in"; see 9 Cyc. p. 863, Vo. Conveyance.

The paymaster of a railroad company travelling from station to station, and stopping between them to pay the employees, is not while doing so a passenger in a conveyance: *Travellers Assurance Co.* v. *Austin*, (1902), 94 Am. St. Rep. 125.

One injured while attempting to alight from a moving electric street car is to be regarded as having been injured "while riding as a passenger" in the car: *King* v. *Travellers' Assurance Co.*, (1897), 65 Am. St. Rep. 288.

Where the terms of the policy read "riding as a passenger in a passenger conveyance" an injury received while riding on the platform of a car is not within the condition: *Ætna Life* v. *Vandecar*, (1898), 86 Fed. 282; *Van Bokkelen* v. *Travellers Assurance Co.*, (1901), 167 N.Y. 590.

Where a passenger on invitation of the railroad superintendent left a coach to ride on the engine, and while so riding was killed, he did not thereby lose the character of a passenger, and the engine was part of the conveyance: *Berliner* v. *Travellers Assurance Co.*, (1898), 66 Am. St. Rep. 49.

Where the clause read that the insured was protected while riding as a passenger "in or on a public conveyance" and the insured was killed by being thrown from the platform of the car, the company was condemned: *Preferred Accident Insurance Co.* v. *Muir*, (1904), 126 Fed. 926.

A passenger elevator is one used for passengers, although also used for freight: *Wilmarth* v. *Pacific Mutual*, 168 Cal. 536 (1914). It was here held that the words "passenger elevator" are to be construed in their ordinary and popular sense, hence the evidence that among manufacturers of elevators, the term had a definite meaning and that an elevator used for the carriage of both passengers and freight was not a "passenger elevator" was properly excluded.

Where the body of the insured when injured was not wholly within the elevator, and the policy covered injuries "while riding in an elevator," it was still held to apply: *Ætna Life Assurance Co.* v. *Davis*, (1911), 191 Fed. 343.

A similar decision was rendered in *Depve* v. *Travellers Assurance Co.*, (1909), 166 Fed. 183, where the policy covered loss of life as a result of "bodily injuries effected while in a passenger elevator"; no one saw the accident; the body of the insured was found hanging head downward in the elevator, having been caught between the roof of the elevator and the floor of the building.

Where a policy insured against death or injuries resulting "while riding as a passenger in a place regularly provided for the transportation of passengers within a public conveyance," and the insured was injured while attempting to board a moving street car, but before he had entered the same, the company was released from liability: *Mitchell* v. *German Commercial Accident Co.* (1913), 161 South Western Reporter 362.

A transfer company renting picnic waggons was held not to be a common carrier; a common carrier being one who undertakes for a consideration to carry indiscriminately passengers as long as there is room in the conveyance, nor is a livery man a common carrier within the meaning of a clause in a policy covering insured while riding "as a passenger in a public conveyance, provided by a common carrier for passenger service:" *Georgia Life Insurance Co.* v. *Easter*, 66 Southern Reporter 514 (1915).

A similar decision was rendered in a case where the policy covered the insured "while a passenger in or on a public conveyance" and he was pushed by persons getting off an express train and fell between the platform and the train: *Rosenfeld* v. *Travellers Assurance Co.*, 161 N.Y. Supplement 12 (1916).

Where the clause read "while riding as a passenger in a railway passenger car" it was held that this provision was broad enough to cover death by being thrown from the platform of a passenger train, while passing from one car to another, the word "in" being interchangeable with "on": *Schmohl* v. *Travellers Assurance Co.*, 189 South Western Reporter 597 (1916).

Where a policy read that no benefit would be paid for injuries received "while the insured was on a locomotive, freight car or caboose used for passenger service," and it was proved that the caboose, in which he was riding at the time of his death was used solely for railway employees and drovers in charge of live stock shipments, it was held that it was not "used for passenger service," in the common and ordinary meaning of the term: *Standard Accident Assurance Co.* v. *Hite*, 132 Pacific Reporter 333 (1913).

A taxicab has been held to be a public conveyance: *Primrose* v. *Casualty Co. of America*, 81 Atlantic Reporter 212 (1911).

Under this last case an annotation will be found in 37 L.R.A. (n.s.) 618, dealing with the scope and construction of a provision for indemnity in case

of injury while riding in or on a public conveyance; also in 55 L.R.A. (1915C) 456, under the report of the decision in *Georgia Life Assurance Co.* v. *Easter*, *supra*.

Some policies make an exception of the risk involved in standing, riding or being on the platform of a railway car or entering or attempting to enter, leaving or attempting to leave any public conveyance while the same is in motion. Provided the car was in actual motion at the time the insured has his hand on it, at the moment of attempting to enter, no excuse will defeat the company's right to set up this exception in defence: *Huston* v. *Travellers Assurance Co.* (1902), 66 Ohio St. 246.

In Canada, we find a decision of *Powis* v. *Ontario Accident Assurance Co.*, (1900), 1 O.L.R. 54, holding that a person was "riding as a passenger on a public conveyance" when he had his foot on the step before the vehicle had begun to move. This judgment was based on an English case, *Theobold* v. *Railway Passengers Assurance Co.* (1854), 23 L.J. Ex. 249: also *Northup* v. *Railway Passengers Assurance Co.* (1869), 2 Lans. 168, and a very similar case of *Champlin* v. *Railway Passengers Assurance Co.*, (1872), 6 Lans. 71.

In another Ontario case, the plaintiff had stepped off a tramcar into the path of an approaching motor car; he stepped back on the tramcar, which at that moment caught and injured him; it was held, reversing Meredith C.J.C.P., that he was not at the time of the accident a passenger in the tramcar; see *Wallace* v. *Employers Liability Assurance Co.* (1912), 2 D.L.R. 854.

A person riding a bicycle "is not travelling as an ordinary passenger" in a vehicle: *McMillan* v. *Sun Life Assurance Co.*, (1896), 4 S.L.T. 66 (Scotland).

A number of pertinent decisions will be found in MacGillivray's Insurance Law (1912), page 925 *et seq.*

Bench and Bar

Appointments to Office.

Arthur Cyril Boyce, of the City of Sault Ste. Marie, Esquire, K.C., to be a Member of the Board of Railway Commissioners for Canada. (Oct. 4, 1918.)

John Gunion Rutherford, of the City of Calgary, C.M.G., and Simon James McLean, of the City of Ottawa, to be Members of the Board of Railway Commissioners for Canada. (Nov. 8.)

Professional Etiquette.

We fear that those of us who smoke are somewhat selfish creatures and apt to have too little regard for those who object to smoke.

Osgoode Hall, our headquarters in Ontario, has hitherto been considered a place where smoking is taboo, except in the places

provided for the purpose. But lately a learned King's Counsel might have been seen in his robes puffing away at a pipe in his mouth while he paraded the upper quadrangle. The combination of robes and pipe seems a little incongruous to say the least. But if a King's Counsel may smoke freely about the Hall, why not everyone else? Why not smoke in the Courts while waiting for a case? Smokers are often careless, and have occasioned many fires. A fire at Osgoode Hall might have very disastrous and irreparable results, and we think the profession should be careful how they encourage a practice calculated to jeopardise that building. Moreover, having regard to the fitness of things, we think the practice of smoking elsewhere than in the provided places at Osgoode Hall should be discouraged both by the precept and example of the leading members of the profession, and it might well be a standing instruction to all students not to smoke either in the passages or any of the offices of the Courts at Osgoode Hall There is a smoking room provided. That ought to be sufficient.

Flotsam and Jetsam.

There is much solemn discussion in some of the American legal journals as to whether the President of the United States may leave his own country. It does not strike those whose rulers can go where they like without restraint as of much consequence whether he ought or ought not so to do. He has done it, and he cannot be turned out of office for taking the jaunt. Whether his going out of the United States has been beneficial to the Allies some have doubted, but however that may be, we shall all be glad if England's toil of centuries to protect the freedom of the seas may ensure his safe journey. It is to be hoped that the precedent set by Mr. Wilson in going abroad will be followed by his successors, as there is nothing like travelling in foreign countries to cure insularity and enlarge the vision.