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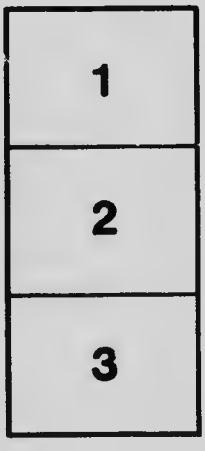

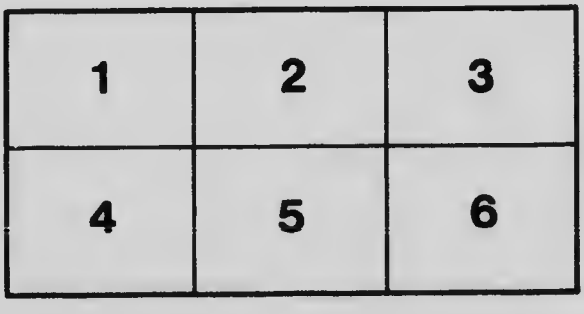

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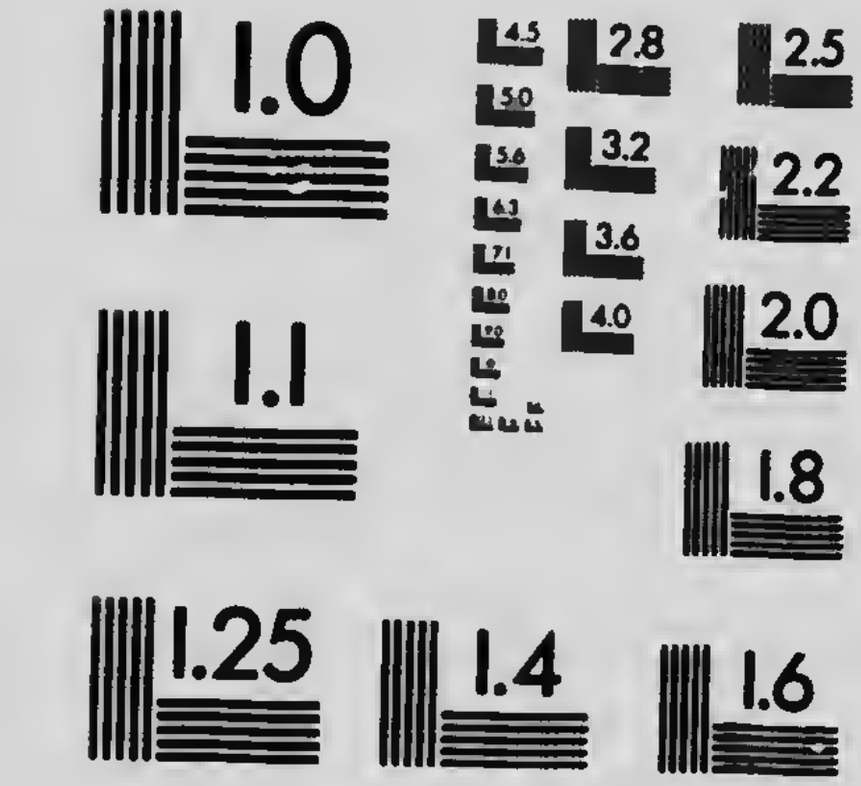

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The Canadian Law Times.

VOL. XXXVI. APRIL, 1916. No. 4.

BY THE WAY.

Mr. Punch informs us that an interned German was recently given a week's freedom in which to get married, and the interesting question has now been raised as to whether his children when they reach the age of twenty-one will be liable to the *Conscription Act* or will have to be interned as alien enemies.

The brilliant Article on Lord Mansfield, with which Mr. Silas Alward favours us this month, recalls to us the time when it was every Englishman's boast that—

Chatham's language was his mother tongue
And Wolfe's great heart compatriot with his own.

The attitude of the British Commonwealth the world over in the present crisis of our fate enables us to recall these words without any sense of national decadence or self-reproach: as also the still greater words—

O England! Model to thy inward greatness,
Like little body with a mighty soul.
What mightst thou do, that honour would thee do,
Were all thy children kind and natural.

As Mr. Sidney Low says, in his Article on *The War and The Problem of Empire* in the *Fortnightly Review* for March—

> 'It is unnecessary to insist upon the fact, which is seldom absent from our consciousness, which fills us all with joy and pride and gratitude, the fact that in this war we have obtained support more whole-hearted and enthusiastic than we could have dared to expect from all the peoples and races which constitute the British realm.'

The Empire-wide debate about the Empire, and whether some form of closer organic union cannot be devised, to be carried into effect after the war,—and, perhaps, in part inaugurated even before the peace to which we all look forward,—proceeds apace. Apropos of the recent attendances of Sir Robt. Borden, and of M Hughes, prime minister of the Australian Commonwealth, at Cabinet meetings in London, Mr. Sidney Low, whose *Governance of England* is so well and favourably known, say , in a letter to the *Times* of March 15th last.

'It is of immense importance for the development of the Empire constitution to have it recognized that a Cabinet Minister of one State is eligible for attendance at a Cabinet meeting in a. other State; and that his ministerial office and the obligations involved in his oath as a member of an Executive Council confers on him the requisite qualification.'

And in a letter to the *Times* of March 18th, "R. D. Denman," who we take it is the Hon. R. D. Denman. M.P. for Carlisle in the Imperial parliament, after quoting Mr. Herbert Samuel's recent declaration that the Government is "very ready to admit the Dominions into a share in decisions of policy as soon as they desire such admission." says that—

'In no way can we be sure of pursuing a policy recognizably Imperial except by inviting each Dominion to be represented in the Cabinet.'

And adds:—

'Our present Cabinet, summarizing the chief political forces of the nation, differs *toto cœlo* from the party Cabinet under which we have grown up. And, having achieved so strange a thing as a summary of British forces, Mr. Asquith might well take the next logical step, and provide us with a microcosm of the Empire. Most people will agree that Canada, say, has as much right to a direct share in the decision of such problems as lie before us as the Labour Party. After the war, we can, if we choose, revert at leisure to the party Cabinet, and devise a brand new Imperial Constitution. But for the moment do let us, in our customary British way, put existing institutions to a use which, however novel, is manifestly appropriate to the present times.'

On the other hand, in the *Nineteenth Century* for March, Sir Francis Piggott, late Chief Justice of Hong

Kong, condemns as quite impracticable either the representation of the Dominions in the parliament at Westminster, or the permanent admission of Dominion members into the Imperial Cabinet. He thinks, however, that in the conduct both of foreign affairs and of the business of the Cabinet there is room for organic improvement, and that it might be possible so to reorganize them as to admit the Dominions to their share in the Imperial Government. His suggestion is that those members only should be called to meetings of the Cabinet whose Departments are concerned with, or who have some special knowledge of the business in hand, the selection being, of course, in the hands of the Prime Minister. He thinks this suggestion might be—

'So adapted as to allow the representatives of the Dominions to be called to discuss with the Secretaries of State in Council the 'great policies and questions which concern and govern the issues of peace and war.' The policy ultimately agreed on as to any question would become a pact between the Mother Country and the Daughter Nations; in the formation of it they would have had their share, and the Cabinet would assume responsibility to the Empire for carrying it out.'

Harvard, in electing Professor Roscoe Pound to be Dean of its Law School, has chosen a man "who is not only fit to continue the splendid tradition of Langdell and Ames, but, what is better still, one who is bound to create a new and vital tradition on his own account." This we read in a striking appreciation of Professor Roscoe Pound by Morris R. Cohen in *The New Republic* for March 11th:—

'Legal scholars have always tended to regard the main features of the traditional common law as fixed principles by which human affairs must eternally be governed. . . . . One of the achievements of Professor Pound is to have challenged this dogma of finality of the common law "as the beginning of wisdom and the eternal jural order." Law is a means not an end. The end is justice between living human beings here and now, and as social conditions change, the law must keep pace. . . . Langdell revolutionized the teaching of law and raised the standard of the legal profession by insisting on the simple principle that law is a science. Mr. Pound is sure to produce an equally important and beneficent revolution by insisting on the more obvious principle that law is a social science.'

OUR LONDON LETTER.

44 Bedford Row, W.C.
March 6th, 1916.

The Editor,
The Canadian Law Times,
Toronto.

Dear Sir,

Since my last letter few things of outstanding interest have occurred in legal circles.

The Under-Secretary for Foreign Affairs, Lord Robert Cecil, K.C., has been appointed "Minister of Blockade," his duties being to superintend and organize matters relating to Blockade. The Prime Minister has also given him a seat in the Cabinet. Lord Robert, who is the third son of the late Marquis of Salisbury, was called to the Bar in 1887 and had a extensive practice in Parliamentary matters before he took office in the Government. Lord Robert shares with his late illustrious father indifference to dress, and may frequently be seen with papers poking out of the pockets of his coat. Lord Robert has also the stooping shoulders associated in the mind with the late Lord Salisbury.

At the end of last month Sir Samuel Evans was well enough to resume his duties at the Law Courts, sitting in the Prize Court for the first time since his long and trying illness on the last day in February. The Attorney-General voiced the congratulations of the Bar on his lordship's recovery.

The Judicial Committee of the Privy Council is now hard at work sitting in two Divisions hearing appeals from the Prize Courts, but so far no decision of outstanding interest has been given.

Among the most interesting cases before the House of Lords recently was the appeal in the case of *The Continental Tyre etc. Co., Ltd.*, v. *Daimler Co.* It will be remembered that the Court of Appeal decided

(Buckley, L.J., dissenting) that a company if registered in England is an English company despite the fact that the overwhelming majority of the shareholders and all the directors are alien enemies resident in Germany. Their lordships reserved judgment. One of the most interesting features of this appeal was the fact that the President of the Court was the venerable Lord Halsbury who reached the age of 90 years last summer, who was already a barrister before the other Law Lords who composed the Court were born.

Sir John Simon, K.C., the late Home Secretary—has returned to practice at the Bar, and it is said that his Brief in the forthcoming action of *The Law Guarantee Trust and Accident Society* v. *The Law Accident Insurance Society* is marked with a fee of 7,000 guineas. It is also rumoured that Mr. Duke, K.C., the leading counsel opposed to Sir John in this case has a similar fee marked on his Brief.

In the course of their Report the Committee on Public Retrenchment once more recommended reforms in the administration of justice, all of which would, if carried out effect large economies. They advise that the recommendations of the Royal Commission on the Civil Service with regard to the Legal Departments to which I referred in a previous letter, should be carried out at the earliest possible date; and that it should be considered whether judges' secretaries, clerks and marshals need be paid out of the public funds. Among the other suggestions for economy is the oft-urged shortening of the Long Vacation from 10 weeks to 8; the re-organisation of the Circuit System and the extension of the County jurisdiction. In order to extend the jurisdiction of County Courts a statute would be required. This matter has within recent years been considered by the Law Society, and before the War they gave support to a Bill which proposed that all common law actions might if desired be commenced in the County Court, subject to a right on the part of the defendant to remove it to the High Court.

As is well known recent years have seen an enormous increase in the number of matters assigned to the County Courts. The fact that in ordinary actions there is jurisdiction up to £100, while equitable matters involving as much as £500 may be dealt with, added to the fact that the County Court is the appropriate tribunal for all cases under the *Workmen's Compensation Act* whatever the amount claimed, all tend to show the importance of these local courts which administer justice all over the county.

There is, however, always serious complaint on the part of solicitors concerning the time wasted in travelling to distant Courts and in waiting for a case which is perhaps not reached. This adds weight to the suggestion discussed at the last meeting of the Law Society that there should be a Central County Court established in London where the parties might (subject to the consent of the Registrar) agree to have the action decided. It is undoubtedly true that this would in many cases be a great convenience, but it is little likely to become an accomplished fact.

As is well known there is no Court in Ireland which has jurisdiction to dissolve a marriage. The result is that, as it was formerly in England, no one but wealthy persons can obtain a divorce, since a special Act of Parliament is required. During the last Session three such Acts received the Royal Assent.

A suggestion is made that a Royal Army Legal Corps should be formed for the purpose of giving legal aid to soldiers at the front.

The case to which I called attention last month has been before the Court of Appeal who have affirmed the decision of the Divisional Court that a British subject of hostile origin or associations can be interned: the Regulation authorising this made under the *Defence of the Realm Act, 1914,* is not *ultra vires.* In the opinion of the Court of Appeal the regulation was one which was in terms authorised by the express words of the statute as a regulation ' for securing the public

safety and the defence of the realm,' and in their opinion Parliament had expressed its intention with irresistible clearness and the power to issue the regulation was vested in the King in Council. Although the decision has been much criticised, yet as was said by Sir John Simon in the House of Commons when the subject was recently discussed,—"for persons who were not enemy subjects, they must have in a war such as this, some regulation, not of the technical kind requiring strict proof, but some proper regulation to secure the safety of the State."

In several cases which have been before the Courts, persons of enemy origin have sought to evade the disabilities of alien enemies by showing that although undoubtedly born in Germany they are not now German subjects because they have lost their German nationality. The claimants do not allege that they have acquired any other nationality but contend that they are persons of no nationality—in fact they are Stateless. So far no claimant has succeeded in making good his contention, and in the latest case on the subject (*Ex parte Weber*) the House of Lords dismissed the appeal of Weber on the ground that he had not discharged the burden of showing that he had so divested himself of German nationality that he could be treated here as though he were not a German citizen.

A recent decision (*Kech* v. *Faber,* 60 S. J. 253) appears to be the only reported case in which a vendor of land has recovered a substantial sum, no less than £19,818 as damages for the difference between the contract price and the value of the land on the purchaser failing to complete his purchase.

The new *Trading with the Enemy Amendment Act, 1916,* contains an extremely important provision in section 2. It will be remembered that the effect of war on contracts with an enemy is in some cases to avoid them, while in others the contracts are merely suspended during the continuance of the war. It must also be remembered that even where the contract is avoided

at common law, this will only occur where the other party is actually resident or carrying on business in enemy territory. Sect. 2 of the present Act provides that where it appears to the Board of Trade that a contract was entered into before or during the war with an enemy or enemy subject the Board of Trade may by order cancel such contract. This section enables the Board of Trade to determine a contract even where the other party is not domiciled in an enemy country but being a person of enemy nationality is resident or carries on business in a neutral country.

The prominent position taken by cases involving Prize Law and questions of Nationality has called for lawyers whose previous studies have fitted them to deal with the complex points raised, and there have not been wanting men competent to undertake the task. In addition to those lawyers who have been previously prominent only as writers on questions of International Law and of Nationality, many other eminent men who in addition to their ordinary practice have found time in their leisure hours to study these questions, have now found their knowledge put to practical use.

There is a rule—and a good rule it is—that Solicitors having cases set down for hearing in the King's Bench Division should give information at the Associates' Office of the probable length of the cases. This rule is obviously intended to prevent too many cases being put in the list for trial each day and so save time and expense to all parties. It is very curious that a rule so clearly advantageous to Solicitors themselves should not be observed, but recently Mr. Justice Shearman took the occasion to point out how frequently solicitors neglect to give the desired information. There is really no excuse, for it is the practice of the Associates' Office to write a note to each Solicitor who has a case in the week's list asking for information as to its probable length.

A new Society has been formed in London called the "Grotius Society" under the Presidency of Lord

Reay, intended to promote the study of International Law.[1] Unlike the International Law Association which has a large foreign membership, this Society confines its membership to British subjects although persons of foreign nationality may be admitted as associate members. All good wishes will be felt for any Society which tends to make for unity and harmony in International Law and to encourage the study of the many problems which are now vexing the mind of lawyers.

W. E. Wilkinson.

[1] See *New Books and New Editions*, *infra*, p. 345.

LORD CHIEF JUSTICE MANSFIELD.

THE FOUNDER OF ENGLISH COMMERCIAL LAW.[1]

If asked to name in order the four greatest Chief Justices of England I would indicate them as follows: Coke, the Great Oracle of the Common law; Holt, the fearless and upright judge; Sir Matthew Hale, the just judge; and the great Lord Mansfield, the founder of the Commercial law of England. I have heretofore lectured on three of these eminent Chief Justices. I purpose now to lecture on Mansfield, by some regarded as the greatest of them all. My object, in delivering these lectures, outside the regular course of the curriculum, is to set before you lofty ideals worthy of imitation and by so doing to inspire you with a like determination to succeed in a noble profession as did they, by unwearied application and unpausing effort. They excelled by learning "to scorn delights and live laborious days." So only can you. Law is a jealous mistress and brooks no rival.

William Murray, future Chief Justice of England, was born at the castle of Scone, on the Tay, three miles from Perth, on March 2nd, 1705. He was the fourth son of the fifth Viscount Stormont, a poor Scotch peer of distinguished descent. The family had been constant and devoted adherents of the Stuarts. He received the rudiments of his education at the Grammar School in Perth, either trudging the three miles on foot or riding on a pony. On the advice of an elder brother he was sent to London at the early age of thirteen and was admitted a King's Scholar at Westminster. The trip was made on his pony, which was sold on his arrival to pay the expenses of his outfit there. He was consigned to a Scotch apothecary, who had been on the Stormont estate and was a friend of the family and who advanced him money to enter Westminster School.

[1] An address delivered on the opening of King's College Law School, ovember 8th, A.D. 1915, by Silas Alward, D.C.L., K.C., Dean of the Faculty of Law.

His strange, uncouth dialect excited much mirth among his school fellows; but his agreeable manners, bright disposition and solid acquirements soon won their friendship. According to Dr. Johnson,—"Much may be made of a Scotchman if he is caught young." This saying finds apt illustration in the case of young Murray. It is said, he resorted to every means possible to get rid of his Scotch accent. By guarding well his pronunciation he succeeded in a remarkable degree; but there were certain words, he never could pronounce properly to his dying day. Caught young and properly tamed, by great industry, aided by extraordinary mental power, he soon rose to be the most distinguished advocate in England. His political career was alike brilliant. If not the equal of Pitt, his contemporary, the greatest orator and parliamentarian of the age, he was a close second. Although he lived to the advanced age of eighty-eight years, he never revisited his native country, nor ever more saw his parents, for whom he professed to entertain the strongest affection, from the sad hour of leave taking, when they bestowed their parting blessing. Whether this arose from a want of "the natural touch" or from other cause, still remains an unsettled question.

It was intended by the family that he should take orders in the English Church; his inclination, however, was in the direction of the Bar. The straitened circumstances of the family forbade the expense of a legal education. This difficulty, however, was overcome through the generous aid of the father of one of his school fellows. After a course at Trinity College, Oxford, he was accordingly entered at Lincoln's Inn, in 1727. In 1731 he was called to the Bar. His progress at first was slow. His conduct in the management of some Scotch appeals brought him into notice. His English business, likewise, was small. A brilliant speech, however, in 1737, in a Crim. Con. case, placed him at the head of the Bar, and thenceforth he enjoyed a most lucrative practice. In 1742, after the death of Walpole, when 37 years of age, he received the appoint-

ment of Solicitor General, in Lord Wentworth's Government. Pitt was Secretary of State in the same Ministry. This position Murray held in different ministries for the unprecedented term of twelve years. He at once became a conspicuous figure in political life, taking high rank as a parliamentary debater. When Pitt went into opposition Murray was the principal defender of the measures of a weak Government and had to bear the brunt of the vehement and severe attacks of that great orator and parliamentarian. In 1754 he became Attorney General and for two years was the leader of the House under the administration of the Duke of Newcastle. Thus facing his relentless and bitter rival his task was anything but an enviable one. An unexpected vacancy having occurred in the Chief-Justiceship, Murray claimed the position. Newcastle urged all means at his command to retain him, seeing his departure would hasten the downfall of his Government. Murray would not yield. He was even offered the Premiership, but declined the offer. In November, 1756, he was sworn in Chief Justice of the King's Bench and created a peer by the title of Baron Mansfield, of Mansfield. On the day following the administration was dissolved.

Murray's record of twelve years of continuous Solicitor-Generalship was not only the longest, but the most brilliant which the annals of the nation afford. In the light of the pretensions on the part of belligerents as put forth by Germany in the present titanic struggle, on the question of neutrality, the reply of the English Cabinet to like pretensions, made by Prussia, in the reign of George II., written by Solicitor-General Murray, stands unchallenged as the noblest vindication of English naval rights ever penned. The King of Prussia sought the adoption of the following claims, which would have rendered, if accepted, naval superiority in times of war of little avail. They were fourfold:—First: That belligerents are not entitled to seize upon the ocean the goods of enemies, in neutral ships; Second: That contraband of war, the property of

neutrals, may be carried by them to enemies' ports; Third: That belligerents under any circumstances had no right to search the vessels of neutrals; Fourth: That the legality and validity of all the proceedings in the Courts of Admiralty of England, for the condemnation of neutral ships or goods by reason of an alleged violation of the duties of neutrality, were unjustifiable. Murray's masterly reply is thus commented upon by Lord Campbell,—"The distinctness, the precision, the soundness, the boldness, the caution, which characterize his propositions, are beyond all praise; and he fortifies them by unanswerable arguments and authorities. Preserving diplomatic, nay, even judicial calmness and dignity,—he does not leave a tatter of the new neutral code undemolished. Thus with unperishable granite he laid the foundation on which the eternal pillars of England's naval glory has been reared." It is said, Lord Stowell often referred to this able vindication of international law, extolling it, in terms of the highest commendation, saying "his own decisions were only an expansion of its principles." It has been called the great "repertory to which advocates and judges have had recourse when any part of these dangerous pretentions have been re-advanced."

By an order in Council of the British Government made, on March 11th last past, raw cotton was proclaimed contraband of war. The cause of the order was the abnormal quantity of this material which was reaching Germany indirectly, through neutral ports, carried by neutral ships from the United States. The British Government was largely influenced in issuing it in consequence of the answers given by eminent chemists. Such order, with regard to the law of contraband and the law of blockade, is based upon the principle of the right of the belligerent indefinitely to extend the list of contraband of war against the neutral trader. It has met with a most emphatic protest from the United States Government and the end is not yet. What is now the German view of International law may be gleaned from the writings of German authors

and professors, whose doctrines have been woven into the very texture of German thought as well as action.

One of their greatest authors and historians, Treitschke, in his lecture on International law, refers in the following terms to Belgium and Holland, those chief centres of the study of International law,—"Nowadays few people," says this distinguished author, "reflect how ridiculous it is that Belgium should pose as the home of International law. Just as it is true that that law rest on a basis of practical fact, so true is it that a State which is in an abnormal position will inevitably form an abnormal and perverted conception of it. Belgium is neutral. And yet men think that it can give birth to a healthy system of international law. I will ask you to remember this when you are confronted with the voluminous literature which Belgian scholars have produced on this subject. This perverted view arises, in such small countries as Belgium and Holland, from an ever present fear of attack from outside. Again, there is one country, England, which believes itself in a position to attack when it will, and which is therefore a home of barbarism in all matters of International law. Thanks to England, marine International law is still, in time of war, nothing better than a system of privileged piracy."

A vacancy having occurred in the professorship of Civil Law in the University of Oxford, the Duke of Newcastle, at the request of Murray, promised the appointment to Blackstone, a jurist in every respect eminently fitted for the position. The Duke, in disregard of his promise, and for reasons most discreditable, gave the place to one Jenner, a man said to have been utterly incompetent, alike ignorant of civil, ecclesiastical or common law, "to expound the Pandects, which he had never read, and could not construe." Murray, knowing the great abilities of Blackstone, advised him to settle at Oxford and deliver lectures, on the common law, to private students. This advice having been acted upon in 1753, the venture

proved most successful and finally resulted in the establishment of a professorship in the common law at this renowned University, by means of the munificent benefaction of Mr. Viner, who died in 1756. The Introductory lecture of Mr. Blackstone, under the Vinerian Professorship was delivered, on October 25th, 1758, two years after the appointment of Mr. Murray as Lord Chief Justice of England. Consequently, for the great Lord Chief Justice, it may be fairly claimed, the profession as well as the world are indebted for the "Immortal Commentaries of Blackstone."

The rebellion of 1745 must have been trying times for Murray. His emotions must have been most conflicting. His mother rendered aid to the rebels, as they marched through Perth. His brother had been in the service of the Pretender for a period of twenty years and had been created Earl of Dunbar, and, it was said, had the promise of the premiership under the expected new *regime*. He himself was a tory at heart. He knew the landed gentry, as well as the aristocracy and the established Church, were favourable to the return of the Stuarts. It was generally believed, he had in his callow days drunk, on his knees, to—"The King over the water." Yet, he strongly, as Solicitor-General, supported the Bill for suspending the *Habeas Corpus Act*, when the threatened invasion of Charles Edward was announced. And what must have been his feelings, when it became his official duty, after the rebellion, to take an active part in the prosecution of the rebel lords, some of whom were connected with his family by blood or alliance? Murray conducted the prosecution against his cousin, Lord Talbot. After the Solicitor-General had concluded the case against him, Lord Talbot, who stood near by, introduced himself and after complimenting him on his able speech, remarked,—"But I do not know what the good lady your mother will say to it, for she was very kind to my clan as we marched through Perth to join the Pretender."

So loud and persistent became the charge that Murray had been an adherent of the Pretender, and

that he drank his health on certain occasions, it was made the subject of investigation before the Privy Council and the House of Lords, in the year 1753. The evidence was conflicting. The address of the Solicitor-General was able and eloquent. He concluded by a solemn asseveration that he had never given any treasonable toasts and had never consciously been present when any such toasts were drunk. He was unanimously acquitted by the Council. Yet, according to Lord Campbell, "he was suspected." Although a favourite of the King, he was even suspected by his Majesty as being a Jacobite at heart.

On the death of Pelham, Murray accepted the position of Attorney-General, under the premiership of the Duke of Newcastle. His two years of Attorney-Generalship, from 1754 to 1756, in defending a feeble and corrupt administration led by the Duke of Newcastle and assailed by an opponent of unrivalled powers of sarcasm, stimulated by bitter dislike, were the most unhappy of his life. The following account of two speeches delivered by Pitt, on certain occasions, was given by Henry Fox and reads as follows:—"In both speeches, every word was *Murray;* yet so managed that neither he nor anybody else did or could take notice of it, or in any degree reprehend him. I sat near Murray, who suffered for an hour." "On another occasion, Pitt made the use of an expression of savage triumph which was long in every mouth. Having for some time tortured his victim by general invective, he suddenly stopped, threw his eyes around, then, fixing their whole power on Murray, uttered these words in a low, solemn tone, which caused a breathless silence: 'I must now address a few words to Mr. Attorney; they shall be few but they shall be daggers.' Murray was agitated; the look was continued; the agitation was increased. 'Festus trembles,' exclaimed Pitt; 'he shall hear me some other day.' He sat down. Murray made no reply, and a languid debate proved the paralysis of the House." What he suffered, during the two years he defended the weak and vacillating Min-

istry of Newcastle finds illustration in an expression made by him, at the close of the session, in May, 1756. He said he regretted,—"That he had not adhered to the profession to which he was origina.. destined, so that he might have been vegetating unseen as the vicar of some remote parish, and that he desired to know nothing of politics, except from a weekly newspaper taken by the village club, and that he wished to have for his companions only the school master, the apothecary, and the exciseman." Mr. Welsby, in contrasting these rival orators, likens Murray to an accomplished fencer, invulnerable to the thrusts of a small sword, but not able to ward off the downright stroke of a bludgeon.

His politics it would be difficult to define. During the reign of George II. he acted with the Whigs, yet his intimate associates were members of the Tory party. Throughout his entire political career he was a supporter of prerogative and favoured arbitrary power. This made him a great favourite of George III. He also believed in the Divine Rights of Kings. Macaulay thus describes his political creed:—'He was the father of modern Toryism, of Toryism modified to suit an order of things in which the House of Commons is the most powerful body in the State.' Although he professed to be thoroughly disgusted with political life at the close of his career in the House of Commons, yet this disgust may have arisen from his dread of Pitt, under whose venomous attacks he suffered keenly.

On the fall of the Newcastle administration a most unhappy state of affairs obtained. Ministries rose and fell. Pitt was the only man that could save the nation. He was hated by the King, but the idol of the people. The nation was at war and for eleven weeks it was without a Government. The stubborn King was compelled to yield and a coalition was formed between Newcastle and Pitt, Newcastle furnishing the majority, and Pitt the capacity. This, Pitt's first Ministry, was

called "The Great Administration." Goldwin Smith, in referring to it said,—'For four years Pitt is dictator. The House of Commons bows, almost cringes, to his personal ascendancy sustained by the oratoric fire, of which only a few flakes remain. His will is done, and all the money which his vastly expensive policy demands is voted without a word. He boasted "that he alone could save the country." War was his panacea; he avowed himself a lover of honourable war. His grand aim was to humble France, strip her of her colonies, and destroy her commerce, thereby as he and the traders of that day believed, making British commerce flourish. He was the greatest of War Ministers. He had the eye to discern merit in the services, and to promote it over the head of seniority and in defiance in routine. He infused his own spirit into all. It was in Hawke, when on a stormy sea and on a dangerous coast he scattered the fleet of the enemy. It was in Wolfe when he scaled the heights of Quebec. It was with Clive in India when he won an empire. No one, it was said, ever entered Chatham's closet without coming out a braver man.'

What seems the most surprising act of Chief Justice Mansfield's career, was his acceptance of a seat in the Cabinet and in subsequent Cabinets for a period of fifteen years, after taking his seat in the House of Lords, and what is still more surprising, was his acceptance of a seat in Pitt's first Cabinet, his bitter and hated rival. By such an arrangement, he, as Chief Justice would be called upon to try offenders directed to be prosecuted for high treason by the Cabinet of which he was a member. This acting in a dual capacity subjected him to bitter political attacks and was the main cause of opening the vials of the wrath of Junius, under which he suffered scarcely less than under the lash of Pitt, when in the Commons. Certainly it was an anomalous position, lacking in propriety, to use no harsher term, to act both as prosecutor and judge. Still it was never charged he had, in any such case, wrested the law or treated the accused with a lack of

fairness. His judicial career, however, extending for a period of nearly one-third of a century from 1756 to 1788, was by all odds the most brilliant part of an eventful life and justly entitles him, in the words of Lord Campbell,—'To the designation by which he was afterwards known, and by which he will be called when, five hundred years hence, his tomb is shown in Westminister Abbey—that of "The Great Lord Mansfield.'

England entered, in the reign of the early Georges, upon a marvellous career of commercial prosperity and colonial expansion. She was fast becoming the greatest manufacturing country of the world, while her jurisprudence moulded in the rigid forms of an inert past was not adapted to meet the requirements of the altered conditions of the new age, so auspiciously opening before it. This archaic state of the laws Mansfield saw with the instinct of genius and was determined to work a remedy. The success, which crowned his efforts, justly entitles him to the proud distinction of "Great." The judgments of Mansfield are found reported in Burrow, Douglas, Cowper, Durnford and East, pronounced by Lord Campbell to be "the very best law reports that have ever appeared in England." In his judgments, the Great Chief Justice, while giving due regard to precedent, refused to be bound by precedent, when he found the doctrine not established upon the basis of moral rectitude and contrary to the principles of justice and humanity. He used to say of himself, "that he ought to be represented as placed between precedent and principle, like Garrick, between tragedy and comedy." In this connection the following extract taken from the admirable address delivered, on September 13th, 1913, at the meeting of the American Bar Association, at Montreal, by Lord Haldane, Lord High Chancellor of Great Britain, may be worthy of insertion,—"The moral of the whole story is the hopelessness of attempting to study Anglo-Saxon jurisprudence apart from the history of its growth and of the characters of the judges who created it. It is by no accident that among Anglo-Saxon lawyers the law does

not assume the form of codes, but is largely judge-made. We have statutory codes for portions of the field which we have to cover. But these statutory codes come, not at the beginning, but at the end. For the most part the law has already been made by those who practice it before the codes embody it. Such codes with us arrive only with the close of the day, after its heat and burden have been borne, and when the journey is already near its end."

When Mansfield became Chief Justice he found the common law of England which he had been called upon to administer in a shape unfitted for the requirements of the altered conditions prevalent. The legislature had done nothing, in the meantime, to supply the deficiency. The precedents were few to guide the Court in cases that would necessarily arise in the future. Especially would this be so, among the colonies distributed over the whole world, some settled by voluntary emigration, others by conquest, others governed by Charter, and some others transferred by Treaty; and also questions respecting the affreightment of ships, respecting marine insurance, respecting the laws of evidence, and also respecting bills of exchange and promissory notes. No treatise had been published upon these or cognate subjects. No judge was better fitted for tthe task. Possessed of a keen, analytical mind, master of a finished and attractive style for the consideration of legal subjects, an ardent student of the Roman Civil law and possessing an intimate acquaintance of the juridical writers of the leading European nations, he entered upon the task with a zeal and determination that assured success.

Upon the subject of evidence, his decisions were many, especially those which turned upon its admission and rejection. Of the result of his work in this department it has been said,—"He found it of brick, and left it of marble."

The law of Insurance was mostly all his own production. The treatise on the subject of Insurance by Mr. Justice Park is composed largely of his decisions,

as well as dicta. In this connection the judgment of Mansfield, on a policy of Insurance, where verdict passed for Plaintiff, found in *Carter* v. *Boehm*,[2] should be carefully read. The defence set up was fraud by concealment, sufficient to vitiate the contract. The judgment is a most masterly disquisition, concise, logical and expressed in an attractive form.

The great case of *Campbell* v. *Hall*,[3] having been argued several times, the judgment of Mansfield, clearly and succinctly laid down the rules by which the English colonies have been governed for the past 140 years.

How little regard Mansfield had for the dicta of judges, however eminent, was clearly shown in the *Somersett case*.[4] A negro slave brought from Africa was taken to Jamaica, where by law slavery was permissible, and thence taken to England. He there claimed his freedom. Being brought into the Court, under a writ of *Habeas Corpus*, the Chief Justice in delivering judgment said:—"I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle. The dicta cited on behalf of the Crown were probably misunderstood; and, at all events, they are to be disregarded. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may have heretofore suffered and whatever may be the colour of his skin."

The many judgments of the great Chief Justice, during his eventful career, virtually became established precedents in the many commercial questions the Court afterwards was called upon to decide, and eventually came to be regarded almost as a code. Why add further cases?

For the student who wishes to become well grounded in the principles of the profession, no better practice could be adopted than a careful perusal of the

[2] (1766) 3 Burr. 1905.
[3] (1774) 1 Cowp. 204.
[4] 20 St. Tr. 1.

judgments of Mansfield as reported in the books heretofore referred to, such as, Burrow, Douglas, Cowper, Durnford and East. There you find abstruse legal questions treated with such literary grace and charm as renders their perusal not only instructive, but delightful as well.

Many of his judgments, admirable alike in substance as in composition, bear evidence of having been carefully revised, apparently by himself. Conciseness and clearness are the distinguishing characteristics. Of the numberless judgments delivered by him, that on an application to reverse the outlawry of Wilkes stands unequalled. Lord Brougham, in referring to it, said:—"Great eloquence of composition, force of diction, just and strong but natural expression of personal feelings, a commanding attitude of defiance to lawless threats, but so assumed and so tempered with the dignity which was natural to the man, and which here, as on all other occasions, he sustained throughout, all render this one of the most striking productions on record."

He toned down the rigidity of the common law, by introducing equitable principles. He seems to have been guided by the maxim of Mr. Justice Powell,—"What is not reason is not law." He presided for a period of thirty-two years, in Westminister Hall, in the Court of King's Bench, yet during all this period it is said, there were only two cases in which his opinion was not unanimously adopted by his brethren sitting on the Bench with him. Of the many thousands of judgments he pronounced, during these years, it is likewise said, only two were reversed. And there was never a Bill of exceptions tendered to his directions.

While full justice has been done to his extraordinary merits as a judge, yet he has been subjected to the bitterest and most unfair criticism ever dealt out to an English judge, either from prejudice or malice. Junius, in letter 41, makes the following fierce and malignant charge,—'I see through your whole life one uniform plea to enlarge the power of the Crown at the expense

of the liberty of the subject. To this object your thoughts, words, and actions have been constantly directed. In contempt or ignorance of the common law of England, you have made it your study to introduce into the Court where you preside maxims of jurisprudence unknown to Englishmen. The Norman code, the law of nations, and the opinion of foreign civilians are your perpetual theme; but who ever heard you mention Magna Charta or the Bill of Rights with approbation or respect? By such treacherous arts the noble simplicity and free spirit of our Saxon laws were first corrupted. The Norman conquest was not complete until Norman lawyers had introduced their laws, and reduced slavery to a system. This one leading principle directs your interpretation of the laws, and accounts for your treatment of juries. It is not in political questions only (for there the courtier might be forgiven) but let the cause be what it may, your understanding is equally on the rack, either to contract the power of the jury, or to mislead their judgment.'

Lord Mansfield did not find that the Common Law of England was adapted to the wants of a commercial nation. He did consider the Roman Civil law a splendid monument of human wisdom. He is fully vindicated in the following reply to Junius from the pen of a remarkably able jurist in the following terms,—'But in no instance did he ever attempt to substitute the rules and maxims of the Roman Civil Law for those of the common law of England when they are at variance. He made ample use of the compilation of Justinian, and of the commentators upon it, but only for a supply of principles to guide him upon questions unsettled by prior decisions in England. He derived similar asistance from the law of nations, and from the modern continental codes. But while he grafted new shoots of great value on the barren branches of the Saxon juridical tree, he never injured its roots, and he allowed this vigorous stock to bear the native and racy fruits for which it had been justly renowned.'

To the further charge,—"That he introduced too much Equity into his Court," it may be replied,—"The rules and precedents of Equity and Common Law have ever since been gradually moving in a common direction, having at length attained by greater simplicity of procedure and by the commingling of principles such beneficent results, as were undreamed of one hundred and fifty years ago."

We cannot close this sketch in more fitting terms than by inserting the following tribute to his memory, from the pen of an eminent American jurist, Judge Story,—'England and America and the civilized world lie under the deepest obligation to him. Wherever commerce shall extend its social influences; wherever justice shall be administered by enlightened and liberal rules; wherever contracts shall be expounded upon the eternal principles of right and wrong; wherever moral delicacy and judicial refinement shall be infused into the municipal code, at once to persuade men to be honest, and to keep them so; wherever the intercourse of mankind shall aim at something more elevated than that grovelling spirit of barter in which meanness and avarice and fraud strive for the mastery over ignorance, credulity and folly,—the name of Lord Mansfield will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge.'

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THE VIRTUE OF THE SEAL.

Although the necessity for the use of a seal by corporations in their corporate transactions has been reduced to a minimum since the days when under the old common law rule a corporation could act only by its seal, without which it could not enter into the most trivial commercial transactions or whisper its existence, nevertheless the virtue of the wafer remains conspicuously manifest in the daily business transactions of modern life. So much is this the case that it cannot be presumed to state within the compass of an article the uses to which it is still applied, the law enabling its being dispensed with, as well as its effect on different instruments.

There is a far cry indeed from the statement of the law by Blackstone that 'a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse; it therefore acts and speaks only by its common seal."[1] The change has been effected by the exigencies of the trading and business of modern life which have impelled the Courts to relax as much as is possible to them the rigidity of the common law, and which have caused legislation to be enacted to meet the demands of such exigencies. In England a corporation may by the express terms of its constitution contract without seal: *Scott* v. *Clifton School Board;*[2] *Reg.* v. *Chamberlain Justices;*[3] *Tilson* v. *Warwick Gas Light Co.*[4] Accordingly a company incorporated under the *Companies Consolidation Act,* 8 Edw. 7, c. 69, s. 76, is not bound to use its seal except as regards such contracts as are in the case of an individual required to be under seal. And any corporation which has power to bind itself by the contract contained in a bill of exchange, cheque or promissory note need not now use a seal under the *Bills of Exchange Act,* c. 59, S[illegible]

[1] 1 Comm. 475.
[2] (1884) 14 Q. B. D. 500.
[3] (1848) 17 L. J. (Q. B.) 102.
[4] (1825) 4 B. & C. 962.

91. Both in England and in America the law now appears to be that unless the charter or governing statute requires it the act of the corporation need not be evidenced by its corporate seal, except where a seal would be required in the case of individuals. Sec. 37 of the *Companies Act* (*Eng.*) *1867* enables a company as a general rule to contract without seal; it need contract under seal only in such instances as would be necessary for a private person to contract under seal, as in the case of a covenant or a bond. In Palmer's Company precedents,[5] it is stated that the said sec. 37 of the *Companies Act 1867* does not extend to 'conveyances, demises, surrenders, certificates, &c.' and that as regards such, the ordinary rule prevails, namely that where in the case of an individual a seal is requisite, it is requisite in the case of a company. 'Thus to convey a freehold property, and to assign or surrender household property, or to give a power of attorney, a seal is requisite. And a seal is requisite for some instruments in order to obtain certain statutory advantages *e.g.,* in the case of a certificate of title to shares (sec. 31 of the Act of 1862); in the case of a share warrant (sec. 27 of the Act of 1867); and see the Conveyancing Acts of 1881 and 1882 for various cases in which statutory incidents are annexed to deeds.'

In addition to its common seal a company may, under the *Foreign Seals Act,* c. 19, (1864), obtain power to have an official seal for its use abroad; and under Sec. 55 of C. 89, (1862), it can authorize any person, as the Attorney of the Company, to execute, under his seal, deeds outside the United Kingdom. Lord Denman, C.J. in *Church* v. *Imperial Gas Co.,*[6] referring to the relaxation of the rule under common law requiring the contracts of a corporation to be under seal said:—

"Convenience amounting almost to necessity may excuse the absence of the seal. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has

[5] 8th Ed. at p. 72.
[6] (1838) 6 A. & E. at p. 861.

prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions."

So also where the acts are such that "an over ruling necessity requires them to be done at once:" Per Alderson, B. in *Diggle* v. *London and Blackwall Rw. Co.*[7] The "accepting bills of exchange and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon," are also excepted: per Lord Denman in *Church* v. *Imperial Gas Co., supra.* For contracts made in the ordinary course of a trading company's business the seal is no longer required: *South of Ireland Colliery Co.* v. *Waddle.*[8] Statutory recognition has been given to this exception by the *Companies Consolidation Act* (*Eng.*) *1908,* C. 69, Sec. 76.

It appears also that where a corporation has power by a contract under seal to order work to be done or goods to be supplied, and does so order but not under seal, it will be liable if it accepts the benefit of the executed order: Halsbury at p. 284 of vol. 8 puts this exception as follows:—

'In the absence of an express statutory requirement of a contract under seal wherever the purposes for which a corporation is created, render it necessary that work should be done or goods supplied to carry such purposes into effect, and orders are given at a corporate meeting regularly constituted, and having general authority to make contracts for work, or goods necessary for the purposes for which the corporation was created, and the work is done and goods supplied and accepted by the corporation, and the whole consideration for payment executed, there is a contract to pay implied from the acts of the corporation, and the corporation cannot keep the goods or the benefit and refuse to pay on the mere ground that the formality of a deed or of affixing the seal is wanting:' *Lawford* v. *Billericay Rural Council.*[9]

And again where a contract is executed on the part of a corporation and the other parties to it have received the benefit of the consideration moving from the corporation, such other parties are bound by the con-

[7] (1850) 5 Exch. at p. 450.
[8] (1869) L. R. 4 C. P. 617.
[9] [1903] 1 K. B. 772.

tract, notwithstanding that the contract was not made under the corporation seal: *Fishmongers' Co.* v. *Robertson;*[10] *Australian Royal Mail Steam Navigation Co.* v. *Marzetti.*[11]

These exceptions do not, however, apply if a statute prescribes a particular formality. For instance the *Public Health Act, 1875,* c .55, s. 174, invalidates any contract of a value exceding £50 made by an urban authority, unless made under seal. This provision in effect fixes a limit at which corporate contracts cease to be so trifling as to make the seal unnecessary. If the charter or governing statutory law prescribe the use of a seal by a corporation as necessary whenever it acts there can be no exception engrafted upon that provision. A distinction is also made between executed and executory contracts, the latter being unenforceable unless under seal.

The exceptions to the rule that a *municipal* or other corporation can only act by its seal are in regard to (a) insignificant matters of daily occurrence or matters of convenience amounting almost to necessity, (b) where the consideration has been fully executed, and (c) contracts in the name of the corporation made by agents who are authorized under the seal of the corporation to make such contracts: *Leslie* v. *Malahide.*[11a] See also *Young* v. *Corporation of Leamington*;[11b] *Hunt* v. *Wimbledon Local Board;*[11c] *Smart* v. *West Ham Union;*[11d] *Nicholson* v. *The Guardians of the Bradford Union.*[11e]

Where a parol contract with a corporation has been so far performed that fraud and injustice would result from allowing one party to refuse to perform his part, after performance by the other on the faith of the contract, a specific performance of such a contract may be decreed, notwithstanding the want of the corporate seal: *Steven's Hospital* (*Governors*) v. *John Dyas.*[12]

[10] (1843) 6 Scott (N. R.) 56, per Tindal, C.J., at p. 105.
[11] (1885) 11 Exch. 228.
[11a] 15 O. L. R. 4.
[11b] 8 App. Cas. 517.
[11c] 4 C. P. D. 40.
[11d] 10 Ex. 867.
[11e] L. R. 1 Q. B. 620.
[12] (1864) 10 L. T. 882.

The law in Canada with respect to the necessity of the corporate seal was discussed in the case of *National Malleable Castings Co.* v. *Smith's Falls.*[13] Mr. Justice Garrow in that case followed English decisions with respect to the necessity for a seal being affixed to the contracts of a corporation, stating that the strictness of the common law in that respect was early departed from in the case of commercial or trading corporations in matters of trivial or every day occurrence, which departure widened until it included practically all executed contracts which with a seal would have been lawful. In the case of executory contracts, however, he observed that although the apparent tendency has been towards greater freedom, it cannot be said that the Courts have yet fully approved of placing them entirely in the same category with executed contracts.

The recent case of *McKnight Construction Co.* v. *Vansickle*[14] decided that a trading company, unless forbidden by its charter, has power to sell its business premises in order to secure others more suitable, and that the contract effecting such sale is valid though not under the company's seal.

According to another Canadian case it appears that in the provinces, outside of Quebec and apart from statute, appointments of an important character such as that of manager of a company, in order to be binding must be under seal and should be made by by-law: *Birney* v. *Toronto Milk Co.*[15]

As regards the law in the United States it may be considered as there settled that a corporation when acting within the scope of its powers stands in respect to its ability to contr[illegible] substantially upon the same footing as do natural persons. 'Contracts made on a corporation's behalf by authorized agents, though by parol, are *express* contracts, and, as in the case of individuals, the law will on ordinary grounds imply promises against it. When in its transactions a deed

[13] 14 O. L. R. 22.
[14] 51 S. C. R. 374.
[15] 1 O. W. R. 736.

is under the law the requisite mode of transacting, its seal is necessary:' *Crawford* v. *Longstreet*.[16]

The appointment of an agent by a corporation must be under its common seal, provided that the rule does not apply to trading corporations, or joint stock companies, or industrial or provident societies, nor in any case where its application would cause very great inconvenience, or tend to defeat the very purpose for which the corporation was created. Bowstead on Agency.[17] In *Worrall* v. *Munn*[18] it was said:—

"It is a maxim of the common law that an authority to execute a deed or instrument under seal, must be conferred by an instrument of equal dignity and solemnity; that is by one under seal. The rule is purely technical. A disposition has been manifested by most of the American Courts to relax its strictness, especially in its relation to partnership and commercial tranactions. I think the doctrine as it now prevails, may be stated as follows: if a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal."

Bowstead on Agency, p. 40, states the law to be, that where an agent is authorized to execute a deed on behalf of his principal, his authority must be given by an instrument under seal except where the deed is executed in the name and presence of the principal and the authority to execute it is given him there and then, in which case it may be given by word of mouth or by signs: *Rex* v. *Longnor*.[19] So a partner cannot bind his firm or other partners by deed, unless expressly authorized under seal to do so, except where the deed is executed by the authority and in the presence of all the parties: *Ball* v. *Dunsterville*.[20] And as regards the appointment of an agent for any purpose except the execution of a deed, his appointment may be either by

[16] 43 N. J. 325, at p. 329.
[17] 5th ed. p. 43.
[18] (1851) 5 N. Y. 229.
[19] (1833) 4 B. & Ad. 647.
[20] (1791) 4 T. R. 313.

deed, by writing, or merely by word of mouth, unless the appointment is otherwise provided for by statute or by the terms of the power or authority (if any) under which the agent is appointed, or unless the agent is appointed by a corporation: Bowstead on Agency, p. 41.

Where in the case of a deed of a corporation executed under its common seal it appears that the transaction thereby evidenced is within its powers, and that all the particular formalities (if any) prescribed by its constitution for the execution of its deeds have been complied with, but owing solely to some irregularity which is a matter of the internal management of the corporation, the deed is not binding, the corporation will be estopped from averring the defect of internal management as a reason for avoiding the deed as against any person claiming thereunder as a purchaser for value in good faith and without notice of the defect: *Royal British Bank* v. *Turquand*.[21] Persons dealing in good faith with the Corporation are entitled to assume that all its transactions are regular, when it is regulated by Act of Parliament, general or special, or by deed of settlement or memorandum and articles registered in some public office, are regular, and need not inquire into the regularity of its internal proceedings, what Lord Hatherley called " the indoor management " so that the agent's authority to affix the seal of the corporation to a bond or deed need not be inquired into by a person dealing with it: Palmer's Company Law, (6th Ed., p. 42), as to the rule in *Royal British Bank* v. *Turquand*.

An interesting question may sometimes arise as to the effect of a seal attached to a promissory note. Will the seal make it a specialty and consequently make it recoverable any time within twenty years according to the Statute of Limitations. In *Clark* v. *Farmers Woolen Manufacturing Co.*[22] it was held that a note for the payment of money under seal is not negotiable and

[21] (1856) 6 E. & B. 327.
[22] (1836) 15 Wend. (N.Y.) 256.

that the effect of affixing the seal of a corporation is the same as when a seal is affixed by an individual; it raises the instrument to a specialty. In the case of *Weeks* v. *Esher*[23] an Electric Power Co. executed promissory notes upon which was impressed a corporate seal. The Court said:—

> "We agree with the learned justices below, that in the absence of any recital that the seal of the corporaiton was affixed, and of any evidence to show the fact of sealing, or that the corporate seal was impressed, or that it was in fact the corporate seal which thus appeared, these notes could not be regarded as sealed instruments. Assuming that the presence of the corporate seal upon such an instrument or note could affect its negotiability—a proposition as to which we entertain grave doubts, but which we do not feel called upon to determine—we think that its mere presence, unaccompanied by a single fact evidencing that the company's officers intended to or did, affix it, was quite insufficient to have any effect upon its apparent character."

In the case of in *Re General Estates Company*[24] the directors gave to H. for value an instrument under the seal of the Company headed "debenture" and stamped as a deed, by which the company undertook to pay to the order of J. H. on July 1st, 1867, $1,000 with interest half yearly, on presentation of the annexed interest warrants, it was held that the instrument was recoverable against the Company, as a negotiable instrument, and one of the two judges was inclined to the opinion that it was a promissory note and not a deed. If it were a specialty it would not be recoverable against the Company as a negotiable promissory note.

In the case of *Zampino* v. *Blancheri et al*,[25] it was held that a private writing, described by the parties thereto as an "indenture," and executed under seal, containing an acknowledgment of a personal debt, with hypothec on real property to secure its payment, was not a promissory note, and the prescription of five years did not apply. In the case of *Wilson* v. *Gates*[26] it was decided that an instrument exactly worded like a promissory note,—but witnessed as to signature and

[23] (1894) 143 N. Y. 374.
[24] L. R. 3 Ch. 758.
[25] 24 Que. S. C. 265.
[26] 16 U. C. R. 278.

seal affixed thereto was a specialty and not a promissory note, per Robinson, C.J., who delivered the judgment of the Court. A like decision in *Whittier* v. *McLennan*[21] was considered as binding upon the Court.

It appears therefore, that a promissory note sealed by the maker becomes a specialty, but the mere presence of a seal is not conclusive, and the application of the principle that a seal when affixed with the proper and usual formality converts an instrument in other respects apparently a promissory note into a specialty is of doubtful application: *Matter of Pirie*.[22]

A corporation can execute a promissory note under seal and that was formerly the only way in which it could make a promissory note, but now by statute a seal is not necessary.

Although the necessity for a corporate seal on corporate contracts has in Canada been reduced to the minimum, by the *Companies Act*: R. S. C. 1906, c. 79, sec. 32 (2) and by nearly all our Provincial Companies Acts, it is evident that the virtue of the seal is still with us. Sec. 31 of the Dominion *Companies Act* also reads:

> 'Every deed which any person, lawfully empowered in that behalf by the company as its attorney, signs on behalf of the company and seals with his seal, shall be binding on the company, and shall have the same effect as if it was under the seal of the company.'

Many of the States to the South of us have abolished the use of the private seal, such as Arkansas, Missouri, Indiana, Kentucky, Minnesota, Nebraska, Ohio, Rhode Island, Utah and Washington.

A. J. McGILLIVRAY.

[21] 13 U. C. R. 638.
[22] (1910) 198 N. Y. 299.

UNIFORMITY OF LAW IN THE BRITISH EMPIRE.[1]

At the first Annual Meeting of the Canadian Bar Association, held in Montreal in March last, a valued colleague in the Law Faculty of McGill University, Mr. Eugene Lafleur, K.C., concluded a highly suggestive paper on "Uniformity of Laws in Canada" with a reference to "the movement in all great nations towards the goal which a Belgian jurist called 'the Universality of the Law.'" Starting where Mr. Lafleur left off, but confining my enquiry to the British Empire, I shall try to find out what this phrase, 'the Universality of Law' means. It is an intangible phantom, ever receding as we seek to grasp it? Or is it something earnest and actual, something admitting of literal and concrete expression—a thing to strive after and attain? Such is the topic with which I shall occupy your attention this afternoon.

To speak of universality or uniformity of law in the British Empire seems, indeed, to assert what is contrary to fact. It is rather the astounding diversity of its laws that arrests attention. Even within the narrow compass of the British Isles you have four or five different systems in force. Going farther afield, you have Italian law in Malta, Dutch law in South Africa, French law in the Channel Islands, another brand of French law in Quebec and St. Lucia, yet another in Mauritius and Seychelles. You have the Common Law of England transplanted under every variety of time and circumstance to every variety of latitude and longitude. You have in Asia and in Africa underlying the law thus imported a bedrock of native custom of immemorial antiquity. Lastly, up and down the Empire you have some eighty legislative bodies turning out Acts, Laws, Ordinances with unrelenting activity. Surely, it must be vain to

[1] A paper read before the Ontario Bar Association at its Annual Meeting at Osgoode Hall, Toronto, on January 11th, 1916.

look for uniformity in such diversity, for harmony in such dissonance. The problem is, indeed, a difficult one, but it is not insoluble. To begin with, we need not occupy ourselves with native customary laws. Vastly interesting as these are and regulating in part, as they do, the lives of millions of mankind, they yet lie outside the scope of our enquiry. They are, essentially, different types of what is called "personal law," a law which depends, not on allegiance, not on territory, but on race. They concern men mainly on what I may call the uncommercial side of life, in their family and their homes. If a Bengalee newspaper-editor libels a civil servant, or orders a hogshead of printer's ink, we may safely say that the rights of the parties will not be determined by the laws of Manu. So far as concerns the commercial and economic relations of modern life, tribal and racial laws are of little account, and every day that passes dissolves the foundations on which they rest.

Restricting our research, then, to the systems of law within the British Empire which have a European parentage, we find them all derived ultimately (with whatever admixture of foreign elements) from one or other of two sources, the Common Law of England and the Civil Law of Rome. In Europe, the Common Law is followed in England and in Ireland, in Gibraltar and in Cyprus, but not in Scotland, the Channel Islands and Malta. In Asia, it is largely in force in the dominions subject to the British Crown, except the Island of Ceylon. In Africa, it obtains in all the British possessions or protectorates, except Egypt, where the law is principally based upon the French Code, and the Union of South Africa, together with Southern Rhodesia, which follow the Roman-Dutch Law. On the American continent, the Common Law obtains—I am speaking only of the British Empire—in Canada, except in Quebec, and in British Honduras, but, nominally, not in British Guiana, where the Roman-Dutch Law maintains a vacillating foothold.

It is in force also in the British West Indies, except in St. Lucia, and in the far-off Falkland Islands. In Australasia, the Common Law is unchallenged.

We may think, then, of the British Empire as an Empire of Common Law, containing within it some reserves or *enclaves* of Civil Law, varying greatly in importance and extent. These reserves present, of course, certain family resemblances, indeed a fundamental sameness, just as the systems derived from the Common Law are fundamentally the same. Our pursuit of uniformity in Law, therefore, resolves itself into a comparison of these two family groups. It is perhaps given to few men to know even one system of law thoroughly; to be on intimate terms of knowledge with two is as rare as to be perfectly bilingual. Still, just as those of us who have lived abroad learn more or less successfully to speak a foreign language, so the Common-lawyer who has had to do with the civilians and the civil law (and such I count myself) learns to know something of their mode of expression, and even of the thought which underlies it. If we are to compare two things, we must understand the nature of the things compared. I shall direct your attention to some of the characteristics of the Civil Law in order that we may be in a position to determine whether the gap which separates it from the Common Law is really so wide as the practitioners of the two rival schools are apt to suppose. To a great extent the gap has already been bridged by the absorption in Civil Law jurisdictions of rules and principles derived from the Common Law,[2] and the opposite process is perhaps at work, though less evidently, carrying still further the process of fusion. I say nothing of Constitutional Law or of Criminal Law, for there uni-

[2] I have dealt with this subject in an article contributed to the *Michigan Law Review* of December, 1915, under the title 'The Civil Law and the Common Law—A World Survey.' It should be noted that a pure system of Civil Law is not to be found in the British Empire. Even in the Province of Quebec, the law is largely English in substance.

formity is an accomplished fact. It is to the Private Law alone that my enquiry will be directed.

I have said that the effort to master two systems of law is not unlike the effort to master two languages. It can scarcely be that any one will be equally at home in both. The analogy is worth pursuing further. Just as diversity of language serves to keep men apart, to alienate sympathy, to prevent mutual understanding, so it is with Law. The Civil Law and the Common Law has each its peculiar forms of thought, its own modes of expression. Partly these correspond with real and fundamental differences, but partly also they merely conceal real and fundamental resemblances. A good deal of the misunderstanding that exists between the two systems is due to unnecessary and removeable ignorance. This is intelligible and on one side at least excusable. Small wonder that the civilian stands aghast when confronted with the strange historical survivals which permeate your system, with your distinction of real and personal property, with your queer refinements between freehold and leasehold, conditional limitations and conditions subsequent, contingent remainders and executory interests, easements and profits, and half a hundred things more. This is pardonable, for your law is formless and unsystematised. But there is less excuse for the followers of the Common Law to be unacquainted with the language of the Civil Law. If you have not the time or the inclination to study the historical progress of Roman Law, you can at least, in the Institutes of Justinian acquaint yourselves with the garnered results of a thousand years of development. Certainly the Institutes has its defects as a text-book. Like most things in this world, it might be better than it is. But its defects are defects which stimulate thought. I had rather have a student find his way through it aided by Moyle's or Sandar's commentary than get a facile and undigested knowledge from some second rate epitome. When he has mastered it, he will know the

grammar, so to say, and something of the language of the Civil Law. He will have learnt that a usufruct is the same as, and yet different from, a life-estate. If he takes the trouble to think, he will begin to understand what a fideicommissum is and how far it resembles a trust. Above all, it may begin to occur to him—what I take to be the most essential thing in legal education—that the terms and forms of his own system, even some of its fundamental concepts, are merely transitory and accidental; that they might have been other than they are; that they often might have been better than they are; in a word, that you cannot understand your own law until you understand at least one system of law which is not your own, just as you cannot know yourself until you have learnt to understand and to sympathise with others. If the comparative method of study, and the comparative habit of mind were generally followed and fostered in the legal departments of our academies and law schools, we should have less unthinking eulogy of this or that system, a freer interchange of ideas, a wider outlook, a surer grasp of realities. For, as I have said elsewhere,[3] and I venture to repeat it here, the time is past in which each system of law can be envisaged as a distinct and isolated entity. The purposes which law must effect are the common purposes of civilized mankind; the new needs that arise are world-wide in their incidence. The brotherhood of mankind is not the dream of a silly or frenzied optimism. To realize it may be in time to come the sacred mission of the lawyer, even more than of the diplomat or of the politician.

I will now proceed to the main theme of my lecture, which is a comparison of the Civil with the Common Law, with a view to establishing the principal resemblances and divergences between the two systems. I approach the subject, so far as possible, in a spirit of scientific indifference. I am not going to

[3] In the Article cited above.

exalt the one or abase the other. At the same time, I shall not hesitate to pass judgment upon any defects which may emerge in the course of our enquiry.

Naturally, in treating so wide a material, we must adopt some method of ordered arrangement; and you will not be surprised that I do not go for this to the Common Law—for the simple reason that the Common Law has no ordered arrangement. Nor do I resort to Napoleon's Code, which in this matter adheres too closely to the classifications of the Roman Law. In affairs of this kind *fas est et ab hoste doceri*, so I will follow the German Code and divide the whole field of private law into—

1. The Law of Obligations;
2. The Law of Property;
3. The Law of the Family;
4. The Law of Succession.

1. The Law of Obligations.

Let us transport ourselves in imagination into the Court of Common Pleas in the year 1775 or thereabouts. Mr. Justice Blackstone is on the Bench. We will ask a Serjeant at Law there present to be good enough to tell us the meaning of the word 'Obligation.' If he knows his Commentaries on the Laws of England, he will answer, with an eye upon his Lordship, "An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors and administrators to pay a certain sum of money to another at a days appointed."[4] We say 'Thank you,' and, returning to the 20th century, put the same question to a student of Law of Osgoode Hall. Perhaps he will say he doesn't know. Perhaps he will say nothing. Perhaps he remembers his Anson on Contract and will inform us that "An obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of

[4] 2 Bl. Comm. 340.

another person or group." If that does not satisfy you, turn to Wood Renton's Encyclopaedia of the Laws of England *sub voce* Obligation. You will not find much, but what you will find is full of significance —" Obligation, see Jurisprudence." In those three words, I find epitomised the history of a century of legal development, the story of the peaceful penetration of the Common Law by the terminology of the Law of Rome. You are becoming civilians, you see, in your own despite.

Justinian classifies Obligations as derived from four sources: *Aut ex contractu sunt, aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio.*[5] These distinctions, for what they are worth (and they are not worth very much), have passed into the language of the modern Civil Law. Here, again, you have borrowed. The phrase quasi-contract, if still unfamiliar in practice, has at least found its way into the text-books. You have not, however, taken kindly to the word delict. Still less to the combination quasi-delict, which had no very clear meaning in the Roman Law, and has been abandoned as unnecessary in the most modern codifications.[6] I shall take leave, therefore, to fuse delicts and quasi-delicts under the common name of delicts or torts. The phrase quasi-contract (though not free from objection) I retain as consecrated by usage. I shall speak, therefore, of Obligations as arising from Contract, from analogies of Contract, or from Wrong. The distinctions which these phrases represent are fundamental and must exist in any legal system whatever. They are common, therefore, to the Civil Law and to the Common Law. They present the character of universality, for which we are looking.

The Law of Contract, under modern conditions, is, and must be, much the same the whole world over. The reason why legal systems have differed from one

[5] Inst. 3.13.2.
[6] Planiol, *Traité élémentaire de droit civil*, 6th ed. t. 2 § 827.

another has been partly a real difference of national conditions, history, and manner of life, partly the subordination of the substance to the form, or (which is nearly the same thing) of substantive law to procedure. To-day, the manner of life of all civilised mankind is much the same, and even lawyers have been known to look beneath the surface of their institutions for the purpose which these institutions are intended to effect. It would be strange if such tendencies were not reflected in the sphere of Contract, in which more than in any other department the parties make law for themselves. Here at all events I find little fundamental difference between the systems which from time to time I have had occasion to study, the Common Law of England, the Roman-Dutch Law of South Africa, the Canadian-French Law of Quebec.

The law of offer and acceptance is, and must be, the same in every system. There may, of course, be an honest divergence of view, or an accidental divergence of decision, on such questions as the effect of a lost letter of acceptance. In the British Empire, the principle of *Household Fire Insurance Co.* v. *Grant*[7] has, I believe, met with general acceptance. The law has been laid down in this sense for the Province of Quebec[8] and in the Union of South Africa,[9] and may be stated with some confidence to be universal.

When we come to the very essential question, what conditions the law requires in order that an agreement may rank as a contract, we meet with what seem at first very deep-seated differences between the Common Law and the Civil Law. The Civil Law knows nothing of the contract under seal, and does not admit acquaintance with the doctrine of consideration. In place of the first, it has the notarial instrument, the *acte authentique* of our Quebec law—in place of the second, it speaks of the *cause* of the contract. These differences are, no doubt, important, but they are

[7] (1879) 4 Ex. D. 216.
[8] *McCann* v. *Auger* (1901), 31 S. C. R. 186.
[9] Lee, *Introduction to Roman-Dutch Law*, p. 191.

more important in theory than in practice. As regards the first, on the one hand, the notarial instrument is required seldom and in cases which belong rather to the law of property than to the pure law of contract; on the other hand, the contract under seal is at the present day scarcely distinguished, except as regards its effects, from the simple contract reduced to writing, and there is a growing movement for its extermination. The fact is that neither the notary nor the sealed instrument have any longer a *raison d'être* in a world in which children are taught to read and write. They may survive our time, but *tempus edax rerum* has marked them out for destruction.

As regards the rival claims of cause and consideration, I am not going to take a side. The doctrine of cause is a scholastic figment which can be excised from a code without leaving even a cicatrice to mark its removal.[10] The proof is that all the newest codes have made away with it. As for consideration, I am inclined to say of it that, though "drest in a little brief authority," it is indeed "most ignorant of what it's most assured—its glassy essence." During the long course of its history, nothing of it has remained stable. At one time, it is a *quid pro quo;* anon it is detriment to the promisee; to-day, we are told it "need be neither a benefit to the promisor nor a detriment to the promisee, provided only that the promisee has furnished something sufficient in law which the promisor desired in exchange for his promise, and which the promisee was under no obligation to give.[11] Competent observers of the course of events upon this continent think that the learning of consideration is in a state of flux. It may be in a state of dissolution. If it goes, I know no substitute for it, but to resort

[10] Toute mention de la cause des obligations pourrait donc être effacée de nos lois; aucune de leurs dispositions ne serait compromise. Planiol, *Droit Civil*, t. 2, § 1039; Cp. Lee, *Introduction to Roman-Dutch Law*, p. 198.

[11] Professor Clarence D. Ashley, *The Law of Contracts*, p. 71.

directly (not indirectly, as heretofore) to the intention of the parties. The question whether the parties intended by their agreement to be legally bound is matter of fact and capable of ascertainment. Further, it is essential and permanent. Cause and consideration are not so.[12]

The subject of the vitiating elements, or, as they are called in the Quebec Code, the causes of nullity in contract, corresponds with Sir William Anson's chapter on Reality of Consent. You will not, I suppose, quarrel with art. 1109 of the Code Napoléon which says: "*Il n'y a point de consentement valable, si le consentement n'a été donné que par erreur, ou s'il a été extorqué par violence ou surpris par dol.*"[13] The further question whether contracts affected by such a vice are void or voidable is not, as the Quebec Commissioners seem to have supposed, a mere logomachy. It has great practical importance in regard to the rights of third parties. In relation to this subject-matter, the terminology of the two systems is not identical; the substantive law may not always lead to the same results. But the differences, such as they are, are more likely to be due to careless thinking, or to the influence of a misleading analogy, than to any difference in the moral standard. In the Civil Law systems you will not find some of the phrases to which you have grown accustomed—such as innocent misrepresentation, or undue influence—but you will, I think, find these topics handled under the head of Error. In this department of law at present, much is vague and unsatisfactory in both systems. If matters were really thought out, the Common Law and the Civil Law could scarcely fail to arrive at identical conclusions.

[12] In *Dunlop Pneumatic Tyre Co.* v. *Selfridge* (1915), A. C., at p. 855, Lord Dunedin said: "I confess that this case is to my mind apt to nip any budding affection which one might have for the doctrine of consideration."

[13] Art. 991 of the Quebec Code is to the same effect.

The grounds of illegality in contract are much the same in all modern systems. Peculiar to the Civil Law is the rule which prohibits a contract with regard to a future succession;[14] e.g., a contract to leave property by will to the promisee. The policy of this rule is questionable.[15] On the other hand, English Law, by a peculiar process of evolution, has arrived at a condemnation of so-called marriage brocage contracts.[16] In other systems, they seem to be permitted.

If you speak to a civilian of the 'assignment of choses in action,' he will not understand you, nor you him, perhaps, when he talks of 'cession of actions.' But the subject-matter is the same, and the pertinent rules of law not very different.

Can a third person take advantage of a contract made for his benefit to which he is not a party? In English Law, in the absence of a trust, certainly not. The same negative answer was expressed in the Roman Law maxim '*Nemo alteri stipulari potest.*' But Scots Law recognises the *jus quaesitum tertio,*[17] and in the modern French Law, according to one of its ablest commentators, the maxim is a dead letter.[18] The Canadian French Law seems to stop short of the extreme conclusions of the French Civilians.[19] In South Africa, I am inclined to think, the rule '*Nemo alteri stipulari potest*' still holds good.[20]

In the Common Law, the analogies of Contract (quasi-contracts) are few in number. You have your action for money had and received, which rests upon the fiction of an assumpsit. But you are, as a rule, rigid in your refusal to allow compensation for services rendered without previous request. The *actio*

[14] The rule dates from Justinian, Cod. 2.3.30.2. Cf. C.N. art. 1130; C.C. (Quebec) art. 1061.

[15] Planiol, *Droit Civil*, t. 2, §§ 1013-14.

[16] *Hermann* v. *Charlesworth* (1905), 2 K. B. 123.

[17] *Dunlop Pneumatic Tyre Co.* v. *Selfridge* (1915), A. C. at p. 853, per Viscount Haldane, L.C.; Stair, *Institutions of the Law of Scotland*, 1.10.5.

[18] Planiol, t. 2 § 1211.

[19] See *Belanger* v. *Montreal Water & Power Co.* (1914), 50 (Can.) S. C. R. 356.

[20] Lee, *Introduction to Roman-Dutch Law*, p. 212.

negotiorum gestorum, by which I can recover an indemnity for unsolicited services, is unknown to you, and the principle '*neminem cum alterius detrimento et injuria fieri locupletiorem*'[21] leaves you unmoved. According to the Civil Law, the Good Samaritan has his action for an indemnity against the man who fell among the thieves. According to you, he must look to his conscience for his sole reward. Further, even if the victim of the robbery had expressly promised to compensate him, the good man would still be without redress, for you would have to advise him that the consideration for the promise was past, and that the oil and the wine were not 'moved by a previous request.'

Our next chapter is the Law of Delict or Tort. If you have ever looked for it in a codified system of Civil Law, you have probably failed to find it, and not unnaturally, for it is not there. You may have seen a work by Mr. Edward Jenks and others entitled "The English Civil Law in the Form of a Code" (the word Civil Law is here used in contrast to Criminal Law). A section is devoted to the Law of Torts. It includes some three hundred articles. Turn next to the French Code, which our Quebec Code follows. The whole topic of delicts and quasi-delicts is dismissed in four or five articles.[22] What are we to make of this astonishing diversity? Must we say of the Law of Civil Wrongs in the French system what De Tocqueville said of the British Constitution, "elle n'existe point"? Without going to the length of such a paradox, we must allow that in French Law and in Canadian-French Law, the subject of Torts remains uncodified. The whole topic has been relegated to the Courts. It is matter of Jurisprudence. I suppose that the main categories of actionable wrong are by this time pretty well determined. But the vague generality of art. 1053 of our Quebec Code, so it seems

[21] Dig. 50.17.206.
[22] C. N. 1382-6; C. C. 1053-6.

to me, leaves the edges of the Law of Delicts very ragged. "Every person," it runs, "capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." If you are displeased with my conduct, you have only to charge me with "une faute," and I am already half condemned. The criterion of civil liability (to borrow Selden's famous phrase) becomes as variable as the length of his Lordship's foot.

II. The Law of Property.

I have spoken of some of the differences between the two systems which confront the student in the field of Obligations. I pass to the Law of Property. Here the differences seem to be radical and fundamental. You have inherited from feudalism the distinction between real and personal property. To the Civilian, it is unknown. You have your doctrine of estates. He has nothing of the kind. You retain at the bottom of your system a primitive theory of mortgage. The hypothec of the civilians is derived from the maturity of the Roman Law. You distinguish legal and equitable ownership, and the conception Equity is as clear and well-defined with you as the conception Law. The civilians seem to experience an insurmountable difficulty in understanding equitable ownership, and as for Equity in general, the author of a popular text-book on Canadian-French Law exclaims:—"Equity—cela signifie tout ce que l'on veut et aussi peu qu'on le désire."[28]

I have given you a few of the antinomies between the two systems. Certainly, they are numerous and important. It would be unwise to make little of them. On the other hand, they are not so formidable as they look. Partly, they are merely matter of expression. Partly, they belong on your side, and perhaps on theirs to traditions which have nearly spent their force.

[28] Lemieux, *Les Origines du droit Franco-Canadien*, p. 389.

In the Common Law, the last century has seen a great change. The artificial distinction of realty and personalty has been largely replaced by the more natural, though no less technical, distinction between immoveables and moveables. In the Civil Law, usufruct and emphyteusis have always been real rights, and estates in fact if not in name; and now the ordinary lease for a term of years, if duly registered, confers a right to possess, which can be made good against purchasers from the lessor. You will, indeed, find the lease treated in our Code as a contract and not as a real right, but this is merely traditional arrangement which does not affect the fact that the lease is to-day a kind of ownership in land, in other words, an estate.

III. The Law of the Family.

The phrase Family Law admits of different applications. It is employed in the German Code to express what you have come to call the Law of the Domestic Relations. The French Code scarcely distinguishes this topic from the allied subject of capacity, and this method, though unscientific, has practical conveniences. Perhaps nothing strikes the Common-lawyer, at first sight, so strangely in a code as the prominence given to the Law of Persons. Unless he has had some training in Roman Law, he may very well have had no occasion to ask himself what the phrase means. But every Code, I believe, devotes a book to the subject, and you will find there, along with some familiar matters, much that seems unfamiliar. In particular, you will find a great deal about tutorships and the appointment of tutors. You have, of course, your law of Guardian and Ward, but it cannot be said to play a large part in the law of everyday life. In your system, the testamentary guardian, if he happens to be at the same time trustee, is in practice uncontrolled. He has been known to devour the estates of the widow and the fatherless. The Civil Law seeks to avoid this unhappy event by controlling the appointment and by supervis-

ing the administration of the tutor. In Holland and in Germany the functions of control were vested in Boards of Magistrates known as Orphan Chambers. The institution seems to have done its work satisfactorily. In South Africa the task of supervision is now entrusted to the Master of the Supreme Court, to whom the guardian gives security and renders accounts. In France the Orphan-Chamber was, I believe, unknown. In place of it, some of the 'Customs' attributed the right and duty of control to a collection of relatives summoned *ad hoc* for each occasion and known as the family council. The framers of the Civil Code, rather unhappily, made this custom a rule of general application. According to the Code Napoléon guardians must in certain events be appointed by the family council. By the Quebec law, C. C. art. 249, "all tutorships are dative; they are conferred, on the advice of a family council, by a competent court or by any judge of such court having civil jurisdiction in the district where the minor has his domicile or by the prothonotary of such court." By art. 251, "the persons to be called to a family council are those most nearly related or allied to the minor to the number of seven at least and taken, as equally as possible, from both the paternal and the maternal line;" and by art. 253, "in default of relations of both lines, the friends of the minor may be called to form or to complete the number required." Such are the provisions of the law. What is the practice? The family council, I am told, is as often as not, in default of relatives, made up of law students or any casual persons who may be found about the courts. The institution is, in fact, unsuited to modern conditions of life, and affords little or no protection to minor children. In this respect, at all events, there seems to be an unhappy uniformity between the laws of Quebec and those of the other provinces of Cana[illegible]

The status of married women is an interesting topic for discussion. In the later Roman Law marriage made no change in a woman's contractual or proprie-

tary rights. The barbarian invaders of the Empire took a different view and differed between themselves. On one view—it was that which finally prevailed in the Common Law—the woman brought herself and her goods and chattels as a present to her husband on marriage. According to another view—it was that of the Franks and has passed into the Canadian-French and Roman-Dutch Law—marriage effected a partnership between the spouses with community of goods. In the event of the death of either of the spouses, the whole estate (which during the marriage has been under the administration of the husband) is divided into equal halfs, one half going to the survivor, the other half going to the children or other heirs of the deceased. In England, the Common Law rule was abolished so recently as 1882 by the Married Women's Property Act, which has been followed, I think, in all the Common Law provinces of Canada. Quebec retains its traditional institution of Marriage in Community.[24] I see no reason for seeking to disturb it. But it would be reasonable and proper to give women the same extensive powers of contracting themselves out of it, as they enjoy in South Africa, viz., by reserving to themselves the free control over their property as fully and effectually as if no marriage had taken place.[25]

IV. The Law of Succession.

In the Law of Succession (to which I now pass), you have adopted the policy of the English Land Transfer Act of 1897. The whole estate of the deceased vests for purposes of administration in the testamentary executor or in an administrator appointed by the Court, whose liability to creditors is limited by the extent of the assets. The Civil Law of

[24] In Quebec law (C. C. art. 1275) 'the immoveables which the consorts possess on the day when the marriage is solemnized, or which fall to them during its continuance, by succession or an equivalent title, do not enter into the community.' In the absence of ante-nuptial contract there are no such limitations in the Law of South Africa.

[25] Lee, *Introduction to Roman-Dutch Law*, p. 91.

Quebec (in common with the French Law and the other civil law systems of the continent of Europe) retains the extraordinarily primitive institution of universal succession, which renders the heir answerable for the debts of the deceased, unless he protects himself by claiming benefit of inventory.[26] By this means, he obtains circuitously what the English Law gives him as of course. In the Union of South Africa (another civil law jurisdiction), the whole law of inheritance has gone by the board. The heir, so called, is merely the residuary legatee, entitled to receive from the executor or administrator so much of the estate as remains over after payment of debts and legacies.

I have passed in review a number of topics with a view to illustrating the resemblances, and the differences between the Civil and the Common Law. Sometimes I have indicated my opinion that the differences are more apparent than real. Sometimes I have suggested that the differences are likely to disappear. Sometimes, again, I have pointed out the differences, but made no attempt to conciliate them. I do not know what impression I may have produced upon you. If you are tolerably familiar with both systems, you may perhaps attach more importance to their essential unity than to their unessential diversity. If, on the other hand, you are thoroughly conversant with the one system, and have not given much attention to the other, it is the difference, rather than the similarity, that will strike you. If that is your feeling, you may think that I have not gone far towards establishing my initial thesis, the Uniformity of Law. Let me, then, lay before you a few propositions which either summarize or grow out of my argument. So far as I have not dealt with them, you will be able to develop them for yourselves. They are the following:—

1st. The laws of the Empire are not as heterogeneous as the layman may suppose. They fall into two principal groups.

[26] C. C. Art. 735.

2nd. The differences between these groups are largely differences of expression and of form, not of substance.

3rd. The conditions and objects of all modern systems of Law are similar and tend to become identical.

4th. This tendency exhibits itself in uniformity of legislation.[27]

5th. Existing differences are to some extent a legacy from procedural differences in the past. They do not rest upon fundamental necessity.

6th. History is the hand-maid, not the mistress, of Law. Circumspect, prospect, not retrospect, should be our guiding principle. We live in the twentieth century.

I might say more, but I have said enough. I will only add a few words in conclusion. "What are you after?" may be asked of me. "Do you want a Code for the British Empire?"—Well, no. I hesitate before that conclusion. As things stand at present, if you made a uniform Code for the Empire to-day, you would have eighty legislatures tinkering at it to-morrow. Besides, I am no advocate of Teutonic methods. We are a federation of free nations. Let each section of the Empire keep and make its own law as it pleases. At the same time, there is no need to maintain a wasteful and unnecessary diversity. There are many branches of law which are the same in substance for the whole Empire. There are other parts of the law in which uniformity is desirable and attainable. If, after much labour, any such topic has been codified by the Imperial Parliament, or by one of the Dominions, we should consider very earnestly whether we cannot adopt that codification *verbatim*, instead of doing the work over again for ourselves, and perhaps doing it not so well. But we

[27] Ample illustration will be found in *The Legislation of the Empire, 1898 to 1907*. (Butterworth & Co., 1909), reprinted from the Journal of the Society of Comparative Legislation, and in the annual summaries contained in that periodical.

have a long way to travel before we shall be ready for an Imperial Code. We need to be educated up to it. We need a legal education which will be comprehensive, penetrating and practical—comprehensive, because it will not limit its vision to the narrow range of a single system; penetrating, because it will penetrate beneath the surface and quarry in the mines of understanding; practical, because it will aim at producing lawyers who will be good citizens, and at making of the law not a chaotic agglomeration of survivals from the past, not a delicate work of art, too subtle for common handling, but a rule of right, consonant with the instincts of honest men, subserving the general convenience, promoting the general happiness. If lawyers were trained on these lines, we should have better laws and better justice. The issue is one of Imperial concern. There should be a School of Law in the metropolis of the Empire. Its functions would be, not to lecture to a bench or two of light-hearted students, but to study *au fond* the problems of jurisprudence and of legislation. It would act as a receiving and distributing station of legal information. Its activities would be at the service of every government throughout the Empire. It would collect (if not too late) a library of the law books of the Empire not very inferior, let us say, to the collection of our books to be found in the law library of Harvard or of half a dozen other law schools in the United States of America. It would take in hand the task of codification, and produce a redaction of our law, which might be enacted in various parts of the Empire, as convenience and opportunity might suggest; which would present it to the foreigner in a form which he could understand and might be willing to adopt, instead of resorting, as at present, to France, to Germany, or to Switzerland for a model. All of this and more might have been undertaken by the Inns of Court in London any time these last twenty years. It has not been done. I do not suppose it will be done, unless the

Dominions can stir them up, as, it is said, they will stir up many things after the war. But we may do our part in Canada. By wise co-operation between our Law Schools, Universities, Bar Associations and Government Departments, we can do much to improve the form and substance of the Law, and to make it speak, not a babel of confused voices, but one language of right reason and of natural justice.

McGill University. R. W. LEE.

CURRENT ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.[1]

The K. B. *Law Reports* for January contain an unusual number of cases requiring notice.

Alien enemies — Prerogative of the Crown to imprison. The King v. *Superintendent of Vine Street Police Station,*[2] is a decision of a Divisional Court upholding the prerogative right of the Crown to imprison an alien enemy; and that the Court has no jurisdiction to interfere with the exercise of this prerogative. Also that an alien enemy resident in England who, in the opinion of the Executive Government, is a person hostile to the welfare of the country, and is on that account interned, may properly be described as a prisoner of war, although not a combatant or a spy; and that it is settled law that no writ of *habeas corpus* will be granted in the case of a prisoner of war. This is one of those cases now arising in England which are causing a flutter in what may be called the dovecots of freedom. Doves, however, pertain to peace rather than war. And so Bailhache, J., says (p. 275):—

"Deeply impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm, and I should be prepared to hold, as at present advised, that when the internment of an alien enemy is considered by the Executive Government, charged with the protection of the realm, desirable in the interests of the safety of the realm, and the Government thereupon interns such alien enemy, the action of the Government in so doing is not open to review by the Courts of law by *habeas corpus*."

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it from month to month may rely on no case important for them to be advised of, escaping their notice. Cases under the English *Workmen's Compensation Act*, 1906, are not considered as coming under that category.

[2] [1916] 1 K. B. 268; 85 L. J. (K. B.) 210.

Low, J., after referring to the fact that the inventions and discoveries of recent years, and especially the existing means of communication, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place, says, at p. 278:—

"In my opinion this Court is entitled to take judicial cognizance of these matters and, in a question so greatly involving the security of the realm, to say that when the Crown, in the exercise of its undoubted right and duty to guard the safety of all, represents to this Court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and to treat him as a prisoner of war, he must be regarded for the purposes of a writ of *habeas corpus* as a prisoner of war."

The whole subject will, as we understand, be finally dealt with shortly in the House of Lords.

Criminal law—Foreigner—Translation of evidence. In *The King* v. *Lee Kun*[3] we have an authoritative utterance of the Court of Appeal in England on the duty of translating evidence to foreign defendants in criminal proceedings, as to which we published an interesting letter from Sir Harry Poland to the *Times* in our issue of January last (vol. 36, p. 11). The Court held that when a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. For as Lord Reading says (at p. 341):—

"The trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of

[3] [1916] 1 K. B. 337.

crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law."

The Court further held that if the foreigner prisoner is defended by counsel, the evidence must be translated to him unless he or his counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

Slander—Absence of special damage—Words imputing moral misconduct. *Jones* v. *Jones*[4] is a decision of the Court of Appeal, which, unless overruled, will take rank as a leading case on the law of slander, as distinguished from libel. The Court unanimously decides in it that an imputation of immorality against a person, though he be engaged in a profession or occupation in which a good moral character is specially requisite, is not actionable *per se, i.e.,* without proof of special damage, unless the imputation itself be connected with the person's occupation or employment, or the person slandered be a clergyman holding clerical preferment or employment of temporal profit, in which latter case such imputation of immorality is held actionable *per se* as being a cause of deprivation or degradation. Therefore, the headmaster of a council school, against whom an imputation that he had been guilty of adultery with a certain woman was made, but without any relation to his position as a schoolmaster, was held to have no right of action without proof of special damage. Swinfen Eady, L.J., delivering the judgment of the Court, says (pp. 358-9):—

"The plaintiff claimed that his case fell within the first limb of the passage, so frequently quoted, in the judgment of the Court of Exchequer delivered by Bayley, B., in *Lumby* v. *Allday*[5]:—'Every authority which I have been able to find, *either shows the want of some general requisite, as honesty, capacity, fidelity, etc.*, or connects

[4] [1916] 1 K. B. 351; 85 L. J. (K. B.) 388.
[5] 1 Cr. & J. 305.

the imputation with the plaintiff's office, trade, or business.' The plaintiff contended that imputing moral misbehaviour to him was alleging 'the want of some general requisite,' and that in principle no distinction could be drawn between his case and imputing insolvency to a person who is a trader, though spoken of him in his private capacity. If the Court were at liberty to deal with this case upon principle, there would be much to be said in favour of this view; but the law of slander is an artificial law, resting on very artificial distinctions and refinements, and all that the Court can do is to apply the law to those cases in which heretofore it has been held applicable. It is not like a law founded on settled principles, where the Court applies established principles to new cases, as they arise, which fall within them. . . . When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but when we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the Court."

Then after referring to the authorities he says (p. 361):—

"It is well settled that words spoken, although calculated to injure a person in his profession, vocation, or office, but not relating to his conduct or capacity therein, are not actionable *per se*. These are strong and clear authorities and have been constantly acted upon, and are part of the law of the land."

Shipping—Charterparty — "Commercial frustration" of adventure. Admiral Shipping Co. v. *Weidner, Hopkins & Co.*[6] is a decision by Bailhache, J., which—

(1) affirms, as settled law, that—

"In the absence of conduct amounting to withdrawal of the steamship or of her actual loss and apart from any question of commercial frustration, where a charterparty specifies the causes which are to excuse payment of hire, no other cause can be relied upon by the charterers;"

(2) defines "commencial frustration of an adventure" as follows:

"The happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the

[6] [1916] 1 K. B. 429: 85 L. J. (K. B.) 409.

fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made;"

(3) expresses a doubt—

"whether delay due to a cause contemplated and provided for by the charterparty, even though the delay itself is protracted beyond what might have been expected, ever amounts to frustration of the adventure;"

and, also, whether the doctrine of commercial frustration ever applies to a time charterparty.[7]

(4) holds that, where a charterparty expressly provided that in the event of war affecting the working of the steamer chartered, the charterers had the option of cancelling the charterparty, cancellation was their only remedy, although it might be that the charterers had put it out of their power to exercise that remedy.

Sale of goods—Outbreak of war while contract still executory—Effect of war on contract. The judgment of Scrutton, J., in *Aruhold Karberg & Co.* v. *Blythe, Green, Jourdin & Co.*, noticed at some length in our number for August last (vol. 35, p. 685) has been affirmed by the Court of Appeal.[8]

Breach of promise of marriage—Action against executor of promisor — Special damage. Quirk v. *Thomas*[9] arose out of an alleged breach of promise of marriage made by one Arthur Thomas to the plaintiff. After the writ was issued, but before delivery of the statement of claim, Arthur Thomas died, and the action was continued against his defendant the executor to recover as special damage the loss of the

[7] By a time charterparty is mean't when a vessel is chartered for a certain period of time, as distinguished from a "voyage charterparty."

[8] [1916] 1 K. B. 495.
[9] [1916] 1 K. B. 516.

plaintiff's business as a milliner which she alleged she has given up on the faith of the promise of marriage. It was stated by counsel that the suggestion that special damage could be recovered against an executor in such a case as this was first mooted over 100 years ago in *Chamberlain* v. *Williamson*,[10] and has been referred to in subsequent cases, but no such claim appears to have been actually made until the present action, though circumstances giving rise to it must have existed in many cases. Two of the three judges, however, decide the case upon the ground that even if the action would lie, the damages alleged as special damage, did not arise out of the breach of the contract to marry. Swinfen Eady, L.J., however, says (pp. 525-7):—

> "An action for breach of promise, where no special damage is alleged, does not survive against the personal representatives of the promisor. . . . I have grave doubts whether the action will lie even if special damage be proved. . . . There is no case in which such damage has been actually recovered. The action to recover damages for breach of promise to marry is an anomalous one, and as such actions have been known to the law from a date anterior to 16[illegible], and damages have never yet been recovered after the death of the promisor, the Court would probably take the view that the action ought not to be further extended by judicial decision."

Building contract—Work not completed—Right to sue on a quantum meruit. *H. Dakin & Co.* v. *Lee*[11] is a decision of the Court of Appeal affirming a Divisional Court, to the effect that where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished. The following extract from the judgment of Lord Cozens-Hardy, M.R. (p. 578), expresses the view of all the judges:—

[10] 2 M. & S. 408.
[11] [1916] 1 K. B. 566.

"It has been argued before us that, in a contract of this kind to do work for a lump sum, the defect in some of the items in the specification, or the failure to do every item contained in the specification, puts an end to the whole contract, and prevents the builders from making any claim upon it; and, therefore, where there is no ground for presuming any fresh contract, he cannot obtain any payment. The matter has been treated in the argument as though the omission to do every item perfectly was an abandonment of the contract. That seems to me, with great respect, to be absolutely and entirely wrong. . . . To say that a builder cannot recover from a building owner merely because some item of the work has been done negligently or inefficiently or improperly is a proposition which I should not listen to unless compelled by a decision of the House of Lords."

Shares in limited company — Voting powers retained by mortgagor — Mandatory injunction against mortgagee. The only case in *Ch. Law Reports* for January requiring notice here is *Puddephatt* v. *Leith*,[12] in which Sargant, J., granted a mandatory injunction to enforce an agreement by the mortgagee of shares in a limited company to vote in accordance with the wishes of the mortgagor, for it was one, as he says (p. 202), in which "there is one definite thing to be done about the mode of doing which there can be no possible doubt."

CANADIAN DECISIONS.[13]

Negligence — Injury to patient in hospital — Carelessness of nurse. *Lavere* v. *Smith's Falls Public Hospital*,[14] was a case in which damages were claimed by the plaintiff for injuries received in the defendant hospital. After an operation performed on her she complained of a pain in her foot, and on investigation it appeared that she had been burned by a hot brick which remained in the bed after her return from the operating room. The Ontario Appellate Division hold that as the defendants' express contract with the plaintiff

[12] [1916] 1 Ch. 200.

[13] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[14] 35 O. L. R. 98.

was, *inter alia*, to *nurse* her, they were responsible as in contract for the negligence of the nurse in attendance upon the plaintiff whereby she was injured, since what the nurse did was in the course of her routine of duty as the defendants' servant, and was not done under the orders of the surgeons who had operated upon the plaintiff. Riddell, J., in his judgment discusses the authorities at great length.

Examination for discovery — Improper questions. In view of the liberty usually allowed on examinations for discovery, the *dictum* of Riddell, J., in *Shaw* v. *Union Trust Co., Ltd.*,[15] that, whatever the state of the pleadings, questions put upon the examination for discovery of a party, or the officer of a corporation-party, concerning any matter which cannot give, directly or indirectly, separately or in conjunction with something else, a cause of action or a defence to an action, must be disallowed—may be found useful.

Sale of animal—Warranty. *Cameron* v. *McIntyre*[16] is a decision of the Ontario Appellate Division that when the vendor of an animal agrees to give a written warranty of soundness it is of no importance that the warranty is not reduced to writing: equity looks upon that as done which should have been done; and an action will lie for breach of the warranty of soundness, if the animal turns out to be unsound.

Railways—Limitation of time for commencing action — Dominion Railway Act — Construction of. *Pszeniczny* v. *Canadian Northern R. W. Co.*[17] is a decision of the Manitoba Court of Appeal that, although sub-sec. 1 of sec. 306 of the Railway Act, R. S. C. 1906, ch. 77, provides that actions for damages sustained by reason of the construction or operation of the railway must be brought within a year after the sus-

[15] 35 O. L. R. 146.
[16] 35 O. L. R. 206.
[17] 25 W. L. R. 655.

taining of the damage, yet, as sub-sec. 4 of the same section provides that nothing in the Act shall relieve any company from, or in anywise diminish or affect, any liability or responsibility resting upon it under the laws in force in the Province in which liability or responsibility arise, for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance or non-feasance of such company, it must be held that Parliament did not intend, by sub-sec. 1, to amend or limit the provisions of the Employer's Liability Act, R. S. M. 1913, ch. 1, sec. 12 of which allows a period of two years for the bringing of such action.

There seems nothing calling for special notice in the reports for the Quebec K. B. for January and February last, or in the Quebec S. C. for March.

A. H. F. L.

SOME RECENT SUPREME COURT DECISIONS.

SUPREME COURT OF CANADA.

QUE.] [DECEMBER 29TH, 1915.

CANADIAN GENERAL ELECTRIC CO. v. CANADIAN RUBBER CO. OF MONTREAL.

On appeal from the Superior Court, sitting in review, at Montreal.

Present: — SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, ANGLIN and BRODEUR, JJ.

Contract—Delivery—Specified time—Default—Liquidated damages—Pre-estimate — Penalty—Inexecution — Compensation — Cross-demand—Practice—Arts. 1013, 1076, 1131 et seq. C. C.—Art. 217 C. P. Q.

A contract (in the form usual in the Province of Ontario) for the manufacture, in Ontario, of electrical machinery which was to be delivered within a specified time at Montreal, provided that in case of failure to deliver various parts of the machinery as provided therein the sum of $25 should "be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified, etc." The contractor brought action in the Province of Quebec to recover an unpaid balance of the price and, by the defence, it was contended that the defendants were entitled to have the plaintiffs' claim reduced by a sum equal to the amount so stipulated for default in prompt delivery.

Held, that, on the proper construction of the contract, the intention of the parties was to pre-estimate a reasonable indemnity as liquidated damages for delay in the execution of the contract; that effect should be given to their intention by allowing the deduction of the amount so estimated from the contract price, and that there was no necessity for a cross-demand therefor by the defendants nor that they should allege or prove that they had sustained actual damage in consequence of the delay in delivery. *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* ([1915], A. C. 79); *Wallace* v. *Smith* (21 Ch. D. 243); *Webster* v. *Bosanquet* ([1912], A. C. 394); *Clydebank Engineering and Shipping Co.* v. *Yzquierda y Castaneda* ([1905], A. C. 6); *Hamlyn* v. *Talisker Distillery Co.* ([1894], A. C. 202); *The "Industrie"* ([1894], P. 58); and *Ottawa Northern and Western Ry. Co.* (36 Can. S. C. R. 347), referred to.

Judgment appealed from (Q. R. 47 S. C. 24), affirmed.

Appeal dismissed with costs.

F. W. Hibbard, K.C., and *G. H. Montgomery*, K.C., for appellants.

A. Chase-Casgrain, K.C., and *Erroll M. McDougall*, for respondents.

SUPREME COURT OF CANADA.

ALTA.] [FEBRUARY 1ST, 1916.

DOME OIL COMPANY v. ALBERTA DRILLING COMPANY.

On appeal from the Appellate Division of the Supreme Court of Alberta.

Present:—SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Mining company — Corporate powers — "Digging for minerals"— Drilling oil wells — Carrying on operations — Becoming contractor for such works.

A mining company incorporated under "The Companies Ordinance," ch. 61, N.-W. Ter. Con. Ord. 1905, and certified, according to sec. 16 of the ordinance, to have limited liability under the provisions of sec. 63 thereof, has, by virtue of the authority given to such companies by sec. 63*a* "to dig for . . minerals . . whether belonging to the company or not," power to drill wells for mineral oils on its own property and also to carry on similar work as a contractor on lands belonging to other persons. Idington and Duff, JJ., dissented.

Judgment appealed from (8 West. W. R. 996), affirmed. Idington and Duff, J., dissenting.

Rock oil is a "mineral" within the meaning of sec. 63 of "The Companies Ordinance."

Appeal dismissed with costs.

Geo. H. Ross, K.C., for appellants.
A. H. Clarke, K.C., for respondents.

SUPREME COURT OF CANADA.

ONT.] [FEBRUARY 14TH, 1916

KOHLER ET AL. v. THOROLD NATURAL GAS CO.

On appeal from the Appellate Division of the Supreme Court of Ontario.

Present:—DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Contract — Construction — Conditions — Mutual performance— Damages.

In a contract for the sale and delivery of gas if the vendor, not being in default, is prevented, by the wrongful act of the pur-

chaser, from fulfilling his obligation to deliver, he is entitled to the compensation he would have received but for such wrongful act.

Appeal allowed with costs.

Tilley, K.C., and *W. T. Henderson*, K.C., for appellants.
Collier, K.C., for respondents.

SUPREME COURT OF CANADA.

ONT.] [FEBRUARY 21ST, 1916.

ONTARIO ASPHALT BLOCK CO. v. MONTREAL.

On appeal from the Appellate Division of the Supreme Court of Ontario.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Specific performance — Agreement for sale of land — Inability to perform—Liability to damages—Diminution in price.

A lease of land for ten years provided that on its termination the lessee could, by giving notice, purchase the fee for $22,000. In a suit for specific performance of this agreement,

Held, applying the rule in *Bain* v. *Fothergill* (L. R. 7 H. L. 158), Fitzpatrick, C.J., and Davies, J., dissenting, that if the lessor, without fault, was unable to give title in fee to the land, the lessee was not entitled to damages for loss of his bargain.

Per FITZPATRICK, C.J., and DAVIES, J.,—The above rule should not be applied when the lease contained onerous conditions binding the lessee to expend large sums in improving the property whereby he would suffer special damages if the contract was not carried out.

Judgment appealed from (32 Ont. L. R. 243), affirmed.

Appeal dismissed with costs.

D. L. McCarthy, K.C., and *Rodd*, for appellants.
Cowan, K.C., for respondent.

SUPREME COURT OF CANADA.

ONT.] [FEBRUARY 21ST, 1916.

WOOD v. GAULD ET AL.

Present:—DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Partnership—Dissolution—Death of partner — Survivor's right to purchase share—Goodwill—Annual balance sheet.

If one member of a partnership dies the survivor has a right to take over his interest at a valuation, though there is no express provision therefor in the partnership agreement, if the intention of the partners that he should, clearly appears from its terms, BRODEUR, J., dissented. IDINGTON, J., dissented on the ground that such intention was not clearly manifested.

The partnership articles provided that at the end of each partnership year an account should be taken of the stock, liabilities and assets of the business, and a balance sheet struck for that year; that in case one partner died the co-partnership should continue to the end of the current financial year or, at the option of the survivor, for not more than twelve months from such death; that for twelve months from the death of his partner the survivor should not be required to pay over any part of the latter's capital in the business; and that any dispute between the survivor and representatives of deceased as to the amount of debits against or credits to either in the balance sheet or the valuation of the assets should be referred to arbitration.

Held, DUFF, J., dissenting, that the value of the interest of the deceased partner was not to be determined by the account taken and balance sheet struck at the end of the financial year following his death, but the assets should be valued in the ordinary way.

Held, also, DAVIES and DUFF, JJ., dissenting, that the goodwill of the business was to be included in said assets though it never formed a part of them in the annual sheets struck since the co-partnership began. Judgment of the Appellate Division (34 Ont. L. R. 278), reversed in part.

Appeal allowed in part without costs.

Tilley, K.C. and *Washington*, K.C., for the appellant.

E. F. B. Johnston, K.C., for the respondents.

SUPREME COURT OF CANADA.

ALTA.] [FEBRUARY 1ST, 1916.

THE CONTINENTAL OIL CO. v. THE CANADIAN PACIFIC RWAY CO.

On appeal from the Appellate Division of the Supreme Court of Alberta.

Present:—SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, J.J.

Estoppel—Principal and agent—Receipt delivered before payment.

The local agent of the railway company received the personal cheque of the defendants' agent in settlement of freight charges due by the defendants and thereupon receipted the freight bills. By means of these receipted bills the defendants' agent was enabled to obtain the amount of the freight charges from his employers and absconded leaving no funds to meet his cheque which was dishonoured. In an action for the recovery of the amount of the freight charges,

Held, reversing the judgment appealed from (8 West. W. R. 259), Duff and Brodeur, JJ., dissenting, that the delivery of the receipts in advance of payment had been the means of inducing the defendants to pay over the amount represented by them to their agent and, consequently, that the plaintiffs were estopped from denying actual receipt of payment of the freight charges.

Per DUFF, J., dissenting.— In the circumstances disclosed by the evidence in the case the principle of estoppel could not be applied.

Appeal allowed with costs.

Wallace Nesbitt, K.C., for appellants.

O. M. Biggar, K.C., and *Geo. A. Walker*, for respondents.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The Journal of the Society of Comparative Legislation produces a truly magnificent number for January. It begins with a photograph and appreciation of a man perhaps the best known of all members of the English Bar to Canadians, Sir Robert Finlay. The Appreciation is the more interesting as it comes from the pen of Mr. Justice Rowlatt. We cannot resist quoting the concluding paragraph:—

'His reasoning as an advocate derives its power from no art, save the difficult though apparently natural art of perfect directness and lucidity. He has a mind that works without wear and tear. That at the age of seventy-three he can still conduct the largest practice in the heaviest cases, without sign of worry or fatigue, is no mere result of constitutional strength or placid temperament; it is in no small measure due to the easy and ordered process of his intellect. Sir Robert Finlay is the father of the now practising Bar. Of those still in the active pursuit of the profession, he is the senior in standing, the oldest in years, and at the same time the foremost in business. He enjoys in a degree never surpassed, the affectionate respect of a profession which is proud of him.'

This is followed by an Article on the *International Joint Commission* by Mr. Laurence J. Burpee, its Canadian Secretary. We had occasion to notice this Commission in our issue for October last (Vol. 35, p. 795). It sits under the Treaty between Great Britain and the United States, signed on January 11th, 1909, the object of which is expressed to be to—

'Prevent disputes regarding the use of boundary waters, and to settle all questions which are now pending between the United States and the Dominion of Canada, involving the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise.'

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Numerous exchanges from different parts of the Empire and from the United States are examined, and attention is called to whatever seems most striking and important in them.—Ed. C. L. T.

It is interesting to read that—

'Since its organisation the Commission has had before it a number of applications for the approval of works involving the diversion of boundary waters. . . They have ranged geographically from the St. Croix River, in the extreme east, dividing the province of New Brunswick from the State of Maine, to the Lake of the Woods, in the west. They have embraced such important works as a new water system for the city of Winnipeg, taking its supply from Shoal Lake, a tributary of the Lake of the Woods; huge water power projects on both sides of the St. Mary River, between Lake Superior and Lake Huron; and various other similar undertakings. In every case the decision is final under the terms of the Treaty; in every case up to the present time the Commissioners have been unanimous in their decisions; and in every case the settlement has given satisfaction to both Governments, and to the public and private interests concerned.'

Next comes an Article on Labour Legislation in the United States, by Mr. Samuel Rosenbaum of the Pennsylvania Bar, who sums up results by saying—

'Perhaps it is not too much to say that, as foreshadowed in legislation, the era of strikes and violence between organised labour and its immediate employers is giving way to a period in which the public is imposing upon employers an express legal duty to provide safe and sanitary work-places, and to allow reasonable hours of employment and rates of wage, and executive officers are being clothed with wider and wider judicial powers to aid them in enforcing these statutes.'

The number also contains *Some Notes on the Constitution and Legislation of the Federated Malay States* (a group of States under British protection which has perhaps attained to a higher point of constitutional and economic development than any other British protectorate) by J. R. Innes, the Judicial Commissioner. Both the State and the Federal Councils possess all the attributes of sovereign legislatures; and a long Article by S. E. Minnis on *The Income Taxes of the Self-Governing Dominions* in which are considered the income taxes of the Australian Commonwealth, New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, New Zealand, the Union of South Africa, Prince Edward Island, and British Columbia. As

the writer explains, in the other Canadian provinces no tax of the nature of an income tax is imposed for provincial purposes, but in some there are municipal taxes on income forming a subsidiary part of general property taxes. Such comparative studies are of much value.

Then follow the usual Notes on various matters of interest, including some recent English and Australian cases and Reviews of books; while the bulk of the volume is taken up with the *Review of Legislation, 1914*, covering not only that of the Empire in its various parts, but also that of Denmark, France, Germany, Norway, the United States, and Sweden, with an Introduction by Sir Courtenay Ilbert, G.C.B.

The *Indian Law Quarterly* for October, 1915, makes us think that Mr. Justice Tyabji, late of the Madras Bench, must be a delightful person. In the course of his reply to the address given him on his leaving the Bench, he said:—

> 'The mention of my beloved father's name has completely overpowered me. . . . If you had known my father as well as I do, you would know the great difference between him and me. I discharged my duty to the best of my ability, and did what I thought was right. Intelligence is a divine gift, and if I am wanting in it, it is no fault of mine."

Again at the farewell dinner given to him, he said, in reply to the toast of the judges:—

> "I read somewhere that the relationship between the Bench and the Bar in Madras was not what it should be. . . . For my part I could not see that there was anything wrong in the relationship. Sitting with a fast colleague I have to run a lame-donkey race, but have the satisfaction of seeing the conclusions of my fast colleague to be invariably right."

There follows a notice by the editor of Sir Lawrence Jenkins, K.C.I.E., who recently returned from India, on the termination of his tenure of office as Chief Justice of Bengal. Mr. C. E. Odgers, Administrator-General, Madras, contributes *Some Notes on*

International Law and Their Bearing on some of the Events of the Recent War. He points out how Germany has violated the accepted rules of International law, both as regards neutrals and as regards belligerents. The number concludes with Chapter I. of a learned and lucid disquisition on the *Origin and Existence of Private Property,* by S. Soundararaja Aiyangar, High Court Vakil, Madras.

We always take up the Law Notes (London), with special zest, in this case the number for February. It quotes from what it terms "that masterful paper" the *Daily Mail* an account of—

'The quaint old ceremony of the commoners flogging King Athelstan's land on New Year's Day at Malmesbury. Six men were admitted to common rights, *i.e.*, grants of land under King Athelstan's bequest of land, given as a reward for help in fighting the Danes. King Athelstan was crowned king of the Mercians and West Saxons at Kingston-on-Thames in A.D. 925. Supreme control of King Athelstan's gift is vested in a warden and "freemen." The six new land-holders were taken to their allotments, and a hole was dug in the soil into which each new commoner threw a shilling. Each commoner was "flogged" with a hazel twig, the surveyor repeating the old formula: "Turf and twig I give to thee, the same as King Athelstan gave to me, and I hope a loving brother thou wilt be."'

It is amusing, too, to read the account our brilliant little contemporary gives of the way in which Mr. John Lewis, brewer, Richmond, established, in a great case at Kingston Assizes, in 1758, the right of the public to free ingress to Richmond Park, of which George II had made his daughter, Princess Amelia, Ranger, who endeavoured to restrict the public privileges. Sir Michael Foster, the judge, summed up against the Princess, and the jury adopted his views; and, says *Law Notes*:—

'It is interesting to note that when the judge asked the plaintiff whether he would sooner have a ladder to go over the wall or a door he decided in favour of the ladder, "reflecting that strangers might not be aware of the privilege of admission through a door, which could not stand open on account of the deer, considering, also, that in process of time a bolt might be put on the door and

then a lock, and so his efforts be greatly frustrated: *semble*, also, that a step ladder would signify its own use to every beholder."'

As the *Law Notes* justly adds—

'Mr. John Lewis, brewer, of Richmond, was no fool. Has Richmond Town a monument to keep ever green the memory of a man who championed the rights of the public? How many foreign visitors would Richmond lose if there existed no "free ingress into its" park.

An Article on *Impossibility of Performance due to War* discusses the authorities as to contracts renddered impossible of performance by some such unforeseen happening as, *e.g.*, the present war. As the writer says, perhaps there is in English law no real exception to the principle that impossibility of performance is no defence to breach of contract. What the party has agreed to do he must do, or if that be impossible he must pay damages. The apparent exceptions turn upon the question of construction, what events were within the contemplation of the parties when they entered into the contract? Then comes No. 58 of a series of Articles on *Company Law* being upon the *Power to nominate a Director*. The admirable *Chats with a Student*, are represented this time with one on *The Rule in Allhusen* v. *Whittell*[2] which deals with the adjustment of accounts between tenant for life and remainderman of residuary personalty settled by a will.

Some recent decisions in England under the *Defence of the Realm Acts* and regulations — one of which, the *Zadig case*, we noticed in our last issue— are giving rise to much interesting discussion upon the constitutional safeguards of liberty in legal periodicals. The *Solicitors Journal* for the 19th ult., after referring to John Austin's propagation of the doctrine that all laws are the command of the Sovereign person or body in the State, a doctrine popularised in

[2] (1867) L. R. 4 Eq. 295.

our own day, by Professor Dicey as the "supremacy of parliament," goes on to say—

'The liberties of a minority are in consequence at the mercy of any sufficiently numerous majority. It would have been possible to impose one limitation upon this new doctrine of parliamentary absolutism, and we believe that this is what the great common law judges of the 19th century would have done. They would have held that *Magna Charta* was a document of so high and binding a character that, although Parliament could overrule it, it must be presumed not to do so unless it did this in express terms. . . . But the 20th century has seen the passing of even this limited divinity which in its predecessor still hedged round the Great Charter of English liberty. Accustomed to years of bureaucratic legislation and an ever-increasing infringement of liberty by Parliament, our judges—in the Divisional Court and the Court of Appeal, at any rate—have now declared that *Magna Charta* is but an Act of parliament as all other Acts, and no later statute, at least in war-time, is to be construed—even when patently ambiguous—in the spirit of respect for *Magna Charta*. Such a view would have been impossible in an age reared on Coke and Selden instead of Austin and Dicey. The generation which supported "Wilkes and Liberty" against the autocracy of a House of Commons would not have comprehended its meaning. And if English liberties are to be restored in their full sense at the close of the present war, it is well that the generation of law students in the days to come should be encouraged to commence their study of constitutional law at the fountain head with a perusal of *Magna Charta*.'

The same issue contains the first of what seems likely to be a valuable series of Articles to Canadian practitioners, by T. Cyprian Williams on *The Damages recoverable on a breach by a purchaser of a Contract to sell Land*, in which he devotes himself mainly to a consideration of the recent case of *Keck* v. *Faber*,[3] which he says

'seems to be the first reported case in which a sum of money (as it happened over £19,000) has actually been recovered by a vendor of land as damages for the decreased value of the land at the date of the breach, as compared with that set upon it by the contract price?'

We see the other point of view to that expressed in the *Solicitors Journal* as above noted, in the *Law Times*, for February 12th.

'One is not surprised that the Court of Appeal, upholding the Divisional Court, has held that the regulation made pursuant to

[3] 59 Sol. Jl. 253.

the *Defence of the Realm Acts*, which permits the internment of British subjects under certain conditions, is *intra vires*. By the statute regulations can be made "for securing the public safety and the defence of the realm," and under those statutory powers a regulation has been made for the internment of "any person" in view of his hostile origin or associations, where it is necessary for securing public safety or defence of the realm. No doubt these are very wide powers indeed, but the general opinion clearly will be, that they are no wider than the present occasion warrants. Naturalized aliens of hostile origin are no more likely to be friendly to this country than unnaturalized alien enemies. Of course there may be exceptions, but the regulation amply safeguards these persons, and merely places in the hands of the authorities a very proper power for dealing with those who are suspect in their feelings, towards the country of their adoption.'

The question, however, seems to be, so far as we understand the point, whether *habeas corpus* should be denied, and British subjects refused an opportunity of presenting their cases to the Courts.

The same number of the *Law Times* contains notes of the first two of a series of three lectures recently delivered by Sir John Macdonell Quain, Professor of Comparative law at University College, London, upon "*The Law of Procedure: a Comparative Study.*" They are evidently so interesting that it is to be hoped they will soon be published. Amongst other things Sir John says—

Lawyers were too prone to speak of procedure as if it consisted of no more than the artificial rules of a game. They had not seen in its history what it really was—a continuous effort to do justice: . . . the genius of a people asserting itself in its own way. Nothing was more characteristic of a race, nothing revealed more fully its true nature, not even its literature, or its art, or its history, than procedure rightly understood. He who followed closely the course of an action from its inception to its close in a French, German, or English Court would know more than could be gathered from long travel or much reading of the genius of the particular people. One side of procedure has been too little noted. It was, as De Tocqueville had pointed out in impressive words, a great safeguard against arbitrary conduct on the part of the rulers; legal formalism was the twin sister of liberty.'

The second lecture of Sir John Macdonell dealt with the Athenian system of procedure, in connection with which he makes the significant remark—

'There were no professional judges, or lawyers; and never was there a society in which litigation was more rife.'

The *Virginia Law Review* for February commences with an Article by Clarence O. Amonette on *Usury Laws affecting National Banks;* followed by one by Alex Macdonald on *The Doctrine of Res Ipsa Loquitur as applicable to Injuries to person or property from Electrical Appliances not under the Control of the Person or Corporation furnishing the Electricity.* As the writer says—

'When it appears that all of the appliances are under the control and supervision of defendant, the rule is well settled that the doctrine is applicable, and the power company or person furnishing electricity must rebut the presumption of negligence which the occurrence of the accident creates. A different situation is presented, however, where the electric current escapes from a wire or other appliance not under the control of the defendant, although the defendant furnishes such wire or appliance with the electric current. The decisions on this question are numerous but not harmonious, and it is the purpose of this paper to discuss and analyse these cases, and, if possible, to extract some guiding principle therefrom which should govern the application of *res ipsa loquitur.*'

However we will not pursue the Article further, because it brings us to one of those lines of cleavage between American case law and our own, which make reliance on American authority so misleading, for it appears that the doctrine of *Rylands* v. *Fletcher* has been practically repudiated by all the Courts in the United States. This as every lawyer knows is the leading case on the English principle that where one maintains upon his premises a dangerous instrumentality, such as a wild animal, a high explosive, etc., he is an insurer against injuries resulting from the escape of such instrumentality.

The number concludes with an Article on *Rent as a Priority Claim in Bankruptcy in Virginia,* by Leon Goodman; *Notes, Recent Decisions and Book Reviews.*

We welcome a new legal periodical in the *Southern Law Quarterly* (New Orleans), of which the number for April is before us. It commences with an Article by Professor F. P. Walton, lately Dean of the Law Faculty of McGill, but now Director of the Sultanish School of Law, at Cairo—on *Civil Codes and Their Revision*. Commencing with the statement that it is vain to expect any general agreement about the merits or demerits of codification, he declares himself, after 'a pretty long practical experience of both uncodified and codified systems of law, a strong believer in codification, but, we must not expect it to produce miracles.' He discusses the proper length of Codes, and the propriety of periodical revisions: and it is interesting to read that the German Code has grave defects as to its contents and as to its style, and has met with severe criticism at home, though it was twenty years in the making, was the work of highly trained experts, and every opportunity was given for criticisms and suggestions from legal bodies and business men. In conclusion a number of points are suggested as proper to insert in a revision of any of the older civil codes under the title "of Ownership." Many of the suggested Articles point the difference the civil and the common law.

This is followed by an Article on *The Value and Place of Roman law in the Technical Curriculum* by Charles Summer Lobingier, judge of the United States Court for China, and lecturer on civil law in the University of the Philippines. All the stock arguments are set out,—that Roman law is the mother of other legal systems, which have profoundly influenced the civilized world, that it is impossible to overstate its value as the key to International law, that furnished with a knowledge of Roman law, the English investigator will more accurately gauge by comparison the excellencies and the defects of English law, that the Romans were the first who developed a true system of private law, that Roman law is fast becoming the

lingua franca of universal jurisprudence, that it is a mine of legal terminology. One point he does not develope, and that is that Roman law as set out in Justinian's Institutes is an admirable introduction to the study of analytical jurisprudence, so marked is the turn of the Roman jurists for accurate analysis of legal conceptions and phenomena. Speaking of his own experience in the College of Law in the University of the Philippines, he says—

'I have found not only that, after taking Roman law, the students are better equipped for the subjects that follow (that would be only natural in a civil law jurisdiction), but that academic students,—*i.e.*, those who have taken the studies leading to the A. B. degree—take hold of Roman law better than of any other subject. This I attribute to the facts that it is more closely related to other studies in the arts course,—*e.g.*, Roman history Latin and classical themes generally,—and is taught in much the same way. But the various branches of modern law are so remote from any subject studied in the ordinary undergraduate course, and are usually presented in such a totally different manner, that the student at once finds himself on strange ground and considerable time is needed to adjust himself to the situation.'

Other Articles are entitled *An Example of Homeric nodding in relation to Reduction of Donations inter vivos*, by Charles Payne Henner, professor of law in Tulane University; and *Sugar Trust Litigation in Louisiana* by Walter J. Sutton, Jr., of the New Orleans Bar.

Case and Comment (Rochester, N.Y.) for March is well-inspired in devoting a number to the subject of *Personal Liberty*. The Article which interests us most is on *The Decline of Personal Liberty in America* by the Hon. E. M. Cullen, formerly chief judge of the Court of Appeals of the State of New York. He protests, and cites several recent State statutes which justify his protest, against two tendencies of the times:—

'First, to disregard as legal technicalities, on the plea of necessity, the constitutional safeguards for the security and the protection of the individual citizen as against the government; and, second, to restrict the liberty of action of the individual, when the effect of such action is confined to himself.'

It is not only in the United States, but also in England, and in Canada, that, as we think, there is a growing tendency to undervalue personal liberty. This is exemplified not only by "grandmotherly" legislation, but by a tendency to entrust to executive and administrative officials, and Boards, matters which would formerly,—and should, as we contend,—be left to the regular Courts; also by a tendency to sanction government by Order in Council, instead of by statutory control; also by a tendency to disparage, and in many cases, dispense with trial by jury, which was formerly, and as we think, not without reason, considered to be the *palladium* of our liberty; also by proposals to abolish the grand jury, one of our oldest British institutions. Eternal vigilance is the price of freedom; and we wish Judge Cullen "more strength to his elbow."

The *Illinois Law Review* for February contains a striking Article entitled *The Living Law* by Louis D. Brandeis, of the Massachusetts Bar. By "the living law" the writer means the law which keeps in touch with life, or as he most aptly quotes from Oliver's *Alexander Hamilton*, the law which is "a reality, quick, human, buxom and jolly, and not a formula, pinched, stiff, banded and dusty like a royal mummy of Egypt. He concludes his Article with an admirable parable—

'Charles R. Crane told me once the story of two men whose lives he would have cared most to have lived. One was Bogigish, a native of the ancient city of Ragusa off the coast of Dalmatia,—a deep student of law, who after gaining some distinction at the University of Vienna, and in France, became professor at the University of Odessa. When Montenegro was admitted to the family of nations, its Prince concluded that, like other civilized countries, it must have a code of law. Bogigish's fame had reached Montenegro, for Ragusa is but a few miles distant. So the Prince begged the Czar of Russia to have the learned jurist prepare a code for Montenegro. The Czar granted the request; and Bogigish undertook the task. But instead of utilizing his great knowledge of laws to draft a code, he proceeded to Montenegro, and for two years literally made his home with the people,—studying everywhere

their customs, their practices, their needs, their beliefs, their points of view. Then he embodied in law the life the Montenegrins lived. They respected that law; because it expressed the will of the people.'

Other contents are *The Welter of Decisions* by Professor Edward H. Warren of Harvard; and *Federal Courts and Mob Domination of State Courts* by Professor Henry Schofield, of Northwester University.

The Harvard Law Review for March contains Articles on *The Parental Right to Control the Religious Education of a Child* by Lee M. Friedman; and Pt. II. of the Articles on *Property in Chattels* by Professor Percy Bordwell, of the State University of Iowa.

The *Columbia Law Review* for March has Articles on *The Federal Grade Commission* by Charles W. Needham; *The Doctrine of the Inherent Right of Local Self-Government* by Howard Lee McBain; and *Some Aspects of the Nature of Permanent Alimony* by F. Granville Munson.

The *Michigan Law Review* for March has Articles on *An Inquiry Concerning Justice* by Floyd R. Mechem; *The Michigan Judicature Act, 1915. II.*, by Edson R. Sunderland, with the now strange caption "Forms of Action;" and *Church Cemeteries in the American Law* by Carl Zollmann.

We have also received *The Insurance Law Journal* (N.Y.), for February; *The Scottish Law Review* for February with its excellent Notes from London; and the recent issues of the *Madras Law Journal* now entering on its 26th year; *The Criminal Law Reporter* (Parvartipur, India); *The Madras Law Times;* The *Calcutta Law Journal;* and *The Australian Law Times.*

NEW BOOKS AND NEW EDITIONS.

Admiralty Law and Practice in Canada. A Treatise on the Jurisdiction generally and in particular causes, and on the practice of the Exchequer Court of Canada on its Admiralty side, with the Statutes and Rules of Practice. By Edward C. Mayers, of the Inner Temple, Barrister-at-law, Member of the Bar of British Columbia; First Edition. Toronto: The Carswell Co., Ltd. 1916. London: Sweet and Maxwell, Ltd. pp. xxx, 550, and Index.

The object of this treatise is to supply a handbook of reference to the decisions of the Admiralty Court in Canada. It gives moreover a general and succinct account of Admiralty jurisdiction, with especial reference to its most characteristic feature, the maritime lien. The book seems very carefully done, and to be a credit to Canadian text books. The printing and paper are excellent.

Butterworth's Yearly Digest of Reported Cases for the year 1915, being the first yearly supplement of Butterworth's Seventeen Years' Digest, 1898-1914, and containing the cases decided in the Supreme and other Courts. Edited by Harold Meyer, of the Inner Temple, Barrister-at-law. London: Butterworth & Co., Bell Yard, Temple Bar. 1916. Pp. xlii; 886.

Cases on Company Law. Selected by H. A. Robson, K.C., and J. B. Hugg, Barrister-at-law. Toronto: The Carswell Co., Ltd. London: Sweet and Maxwell, Ltd. 1916.

The desirability of placing actual cases on Company Law before law students was the motive for this collection. The selection of cases does not pretend to be exhaustive. They illustrate, however, all the leading principles and features of company law. Read in connection with the notes, it would be difficult to find a better introduction to company law than this book.

Modern French Legal Philosophy (Modern Legal Philosophy Series: Vol. VII). By A. Fouillée, J. Charmont, L. Duguit, and R.

Demogue, translated by Mrs. Franklin W. Scott and Joseph P. Chamberlain, with an editorial preface by Arthur W. Spencer, and with an introduction by John B. Winslow, Chief Justice of the Supreme Court of Wisconsin, and F. P. Walton, Lecturer in the Khedivial School of Law, Cairo, Egypt. Boston: Boston Book Company. 1916.

We hope to notice this work at greater length in an early issue.

The Grotius Society (Founded 1915). Problems of the War. Papers read before the Society in the Year 1915. Vol. I., Price to Non-members 5d. net. London: Sweet & Maxwell, 3 Chancery Lane, W.C. 1916.

A special notice of this attractive little volume will follow shortly.

We have also received:

Commission of Conservation: Canada. Committee on Forests: Forest Protection in Canada: 1913-1914. Compiled under the direction of Clyde Leavitt, M.Sc.F., Chief Forester, Commission of Conservation, and Chief Fire Inspector, Board of Railway Commissioners, Associated with C. D. Howe, Ph.D., and J. W. White, B.A., C.Sc.F. 1915: Printed by William Briggs, Toronto.

Board of Inquiry into Cost of Living. Report of the Board. 2 vols. Ottawa: Printed by J. de L. Taché, Printer the King's Most Excellent Majesty, 1915.

The Farmer and The Interests. A Study in Parasitism by Claws Ager. Macmillans Publishers, Toronto. Pp. 162. Price 75c.

As the publishers themselves inform us, to beat the farmer into a clear conception of how he is, on every hand, paying someone to take from him the greater part of his produce, is the object of this little book. "Every farmer," they also tell us, "should read it

through three times: once to realise what a fool he is; twice, how, and why he is a fool; and three times, to make up his mind how he is going to assist himself and come into his own." It is rather outside the scope of a legal periodical.

International Review of Agricultural Economics: (Monthly Bulletin of Economic and Social Intelligence). February, 1916. Rome: Printing Office of the Institute.

Elba, a Hundred Years After, by George M. Wrong, M.A., F.R.S.C. From the Transactions of the Royal Society of Canada. Ottawa: 1915.

THE GAZETTES.

The Canada Gazette of March 18th contains the official notice that the dignity of a Knight of the United Kingdom has been conferred upon:—

Brigadier-General Alexander Bertram, Canadian Militia, Deputy Chairman of the Imperial Munitions Board, Canada; The Honourable Frederick William Gordon Haultain, Chief Justice of Saskatchewan; John Kennedy, Esq., Consulting Engineer to the Montreal Harbour Commission; the Honourable Louis Olivier Taillon, K.C., member of the King's Privy Council for Canada.

The Canada Gazette for March 25th, contains a copy of the following resolution passed at a meeting of the Town Council of the Borough of Aldeburgh, on March 1st:—

'That the cordial thanks of this Council be awarded to the Canadian Government for its generous grant of money for the alleviation of distress among boarding and lodging houses on the east coast, owing to the war, the sum of £1,000 having been provisionally apportioned for the relief of sufferers in this Borough.'

The same *Gazette* contains an Order in Council of March 3rd last, prohibiting until September 30th next, the landing at any port of entry in British Columbia of labourers, skilled or unskilled, 'in view of the present overcrowded condition of the labour market' in that Province.

A Supplement to the same *Gazette* contains a set of revised rules of the road for the Great Lakes including Georgian Bay, their connecting and tributary waters.

The Supplement to the *Manitoba Gazette* of March 18th last contains the statutes of the last session of the Legislative Assembly. Amongst them is an Act

to amend *The Companies Act*, amongst other things providing the procedure by which two or more companies, having the same or similar objects within the scope of the Act, may amalgamate. There is also a new *Game Protection Act*. There is also an Act to amend the *Jury Act*, which enacts that—

(*a*) In case a postponement of the trial is asked for by any party, the judge may, if such party is at fault, impose as a condition of granting same, in addition to any other terms, that such party shall pay to the prothonotary a sum not to exceed $100 towards the expenses of the further attendance of the jury for such trial, and so from time to time as often as the trial shall be further postponed on the request of any party.

Another chapter provides a cheap procedure for recovery of small debts not exceeding $50.

LOCAL AND PERSONAL.

U. M. Wilson, son of Uriah Wilson, ex-M. P., has been appointed Crown Attorney for Lennox and Addington, to take the place of the late Hammell M. Deroche.

The Hon. James Kent, formerly leader of the Opposition in Newfoundland, is now a Judge of the Supreme Court.

Instead of a Supreme Court, consisting of a Chief Justice and four puisne judges, the province of Saskatchewan now proposes to have a Court of Appeal composed of a Chief Justice and three puisne judges, and another Court, to be known as the Court of King's Bench, consisting of a Chief Justice and five puisne judges.

The vacancies in the Montreal and Three Rivers Superior Courts have been filled. Mr. Victor Allard, K.C., of Berthierville, has been appointed to succeed the late Judge St. Pierre, of Montreal. Mr. J. A. Desy, K.C., of Three Rivers, will take the place on the Superior Court Bench at Three Rivers left vacant by the late Judge Tourigny.

Seven lawyers, in their capacity of members of the legislation committee of the legislative assembly, have out-voted two confreres and refused to admit women to the bar of the province of Quebec. The matter came before them through debate on Lucien Cannon's effort to open the Courts to women lawyers.

Neil McQuarrie, K.C., stipendiary magistrate of Summerside since 1893, has been appointed judge of the County Court of Prince County, succeeding the late Judge McLeod, formerly a member of the law firm to which Mr. McQuarrie had also belonged.

Another barrister from the office of Borland, McIntyre, McAughey and Mowat, of Saskatoon, has enlisted, being E. W. Van Blaricom, who has answered the call of his alma mater, Queen's University, Kingston, which is organizing a company of its graduates.

A. MacLeod Sinclair, of the firm of Ewing, Harvie & Sinclair, is leaving Edmonton, probably at the end of this month, to take a position with the firm of Lougheed, Bennett & McLaws, of Calgary.

A cable has been received from France, stating that Lieut. A. P. Grothe, a well-known member of the Montreal Bar, who went to the front with the 22nd Battalion, has been wounded in the shoulder.

L. H. Martell, M.A., who has conducted a law office in Windsor for over two years, and Hants Co.'s Liberal candidate in the next Federal Election, has enlisted with the Nova Scotia Highlanders.

John S. Campbell, K.C., St. Catharines, has been appointed County Court judge for Lincoln; G. H. Hopkins, K.C., Lindsay, for Haldimand, and D. Swayze, Dunnville, for Victoria-Haliburton.

Mr. G. G. S. Lindsey, K.C., of Toronto, Ontario, who has been in Pekin for the last year, supporting a grant of a mining concession to large European interests, has finished his work in this connection. The Imperial mandates now officially announce that Mr. Lindsey has been asked to undertake and has accepted the task of drafting new mining laws for China.

G. H. Aikins, only son of Sir J. A. M. Aikins, and a well-known barrister, and Freer Brock, son of the late J. H. Brock, of the Great West Life Insurance Company, have joined the 184th Battalion, now being mobilized by Lieut.-Col. W. H. Sharpe.

Mr. George F. Kelleher has the distinction, it is claimed, of being the first member of the bar in Waterloo county to join the Canadian overseas forces.

Walter J. Lindal, one of Saskatoon's rising young barristers, who, for the past three years, has been connected with the firm of Cruise and Tufts, has taken up active service in defence of the Empire, having been granted a commission with the 223rd (Scandinavian) Battalion.

We regret to see the following deaths reported since our last issue:[1]

Lieutenant J. E. Robertson, formerly in partnership with P. C. Locke, in Winnipeg, killed in action at Hoylake, Belgium:

Qui procul hinc—the legend's writ,
The frontier grave is far away—
Qui ante diem periit
Sed miles, sed pro patria.

The Honourable Mr. Justice Irving, of the British Columbia Court of Appeal at Victoria, B.C., on April 9th.

Charles Alexandre Cheveau, late judge of the Quebec Sessions of the Peace, at Quebec, on March 7th last.

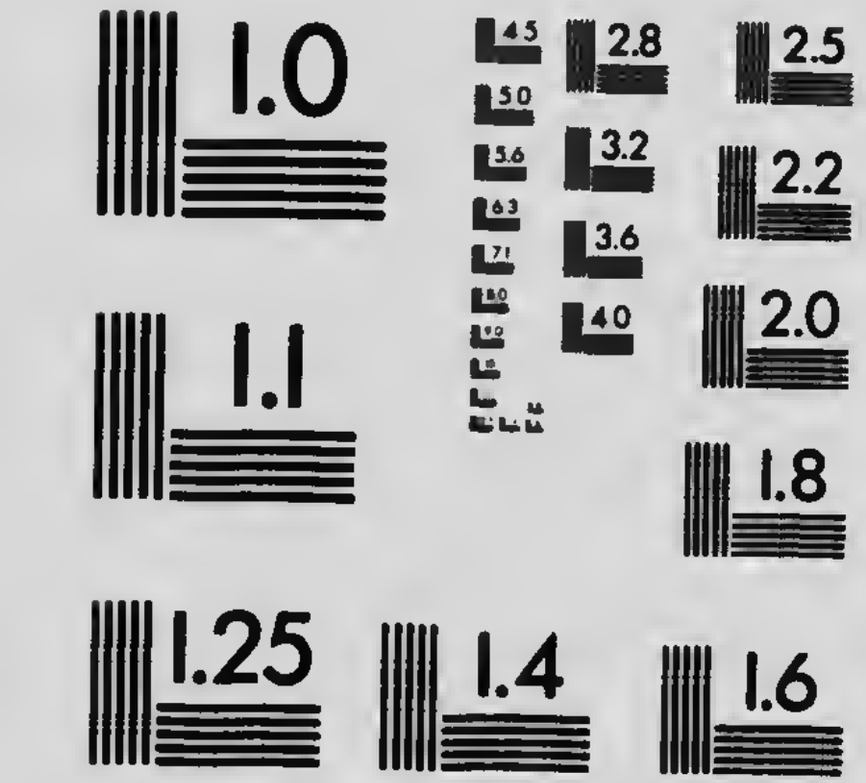
His Honour Judge Edmison, late county judge of the County of Peterborough, at Toronto, on February 24th.

J. P. Bucke, County Crown Attorney of Lambton for many years, and partner of the law firm of Pardee, Gurd and Bucke, Sarnia, at Forest, Ontario, March 27th last.

[1] It is almost impossible to prevent occasional inaccuracies in the obituary column of the C. L. T. Corrections will be always gratefully received and duly recorded in our next issue.—Ed. C. L. T.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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Edward H. Tiffany, K.C., formerly of Ridgetown, and afterwards of Alexandria, at Montreal, on March 15th last.

James Boyd Davis, who formerly practised in Toronto, and latterly in Oakville, at Toronto, on March 6th last.

Hammel Madden Deroche, K.C., at Napanee, March 9th last.

Pierre Amable Archambault, clerk of the Circuit Court at Montreal, in Montreal, on March 11th last.

HON. CHARLES J. DOHERTY, D.C.L., LL.B.,

MINISTER OF JUSTICE.

CHARLES A. MOSS, ESQ.,

TREASURER ONTARIO BAR ASSOCIATION

CHARLES A. MOSS, ESQ.,

TREASURER ONTARIO BAR ASSOCIATION.

The
Canadian Law Times.

VOL. XXXIV. MARCH, 1914. No. 3.

ADDRESS OF MINISTER OF JUSTICE AT BANQUET OF ONTARIO BAR ASSOCIATION.

HON. C. J. DOHERTY, K.C.:—Mr. Chairman, Your Grace, and fellow members of the Ontario Bar: This is no small undertaking that the Chairman has imposed upon me. He told you how kindly and how considerately he had asked me to come here and not bother about making a speech, but just say a few things to entertain you. Now, when I look around and see how highly worthy of entertainment of the highest description is the gathering before me, naturally I may be excused for feeling that the Chairman, while he pretended to be kind, was exceedingly cruel. I might, if he had given me a chance, have made some sort of an effort at making a speech. After all I have not been at the Bar as many years as I have and I was not on the Bench for the years I was there without occasionally having to make a speech, and of course you know the sort of rabid and excited politician I am, and you know how absolutely irresistible is the temptation to a politician to make a speech. The Chairman knew that when he so kindly and considerately intimated to me that I would not be called upon to make a speech; but it is quite another matter when I am asked to entertain this distinguished gathering, and the task seems all the greater when I am called upon to follow the gentleman who was my distinguished predecessor as Minister of Justice, and who gave such a taste of entertainment that I am sure he has left us all wishing for more of the same kind. Now I want to be absolutely frank, I cannot give anything of the same kind. I can say to you, however, with perfect sincerity, and of course in absolute confidence because I would not like it to get to other ears, that I

have been privileged to attend many gatherings of Bar Associations, but I never attended one with as great pleasure, with as perfect enjoyment as I have attended this gathering. Up to this moment that pleasure and that enjoyment were absolutely unalloyed, because I was relying on my treacherous friend the President, and I must say that he carried me through up to this moment in very good shape indeed. I owe him so much for that that I feel that I really—well not just now but in the course of time—will come to be able to forgive him for this last and unexpected act of treachery. He gave me the advantage during the day of learning a very great deal indeed, and he will send me home, if he succeeds in getting me to go home, freighted with knowledge that will last me I hope till your next annual banquet, when I will come back to get some more. I must say I enjoyed and profited very much by the addresses that it was my privilege to listen to to-day at the meeting of the Bar Association. I need say nothing about the address of our friend, the President, which gave us such absolutely satisfactory reasons for the faith that is in him with regard to the utility of Bar Associations in general and the Ontario Bar Association in particular. I was glad to hear him re-echo something of a doctrine that I have preached more or less through the less densely populated portions of our country this fall, that is to say the desirability of the organization of a general or Canadian Bar Association. It is not to be wondered at that in the Province of Ontario, great as your Benchers and your Law Society may be, and they are great (I am one of them), it is not to be wondered at that you realize the importance of organizing and maintaining a Bar Association; because I understand that in this province there are threats abroad, and it is intimated that some day the people will rise in their might and abolish the bar, and when the bar is abolished where will the Benchers be? And how happy will you be to have the Bar Association at least to fall back upon. But that is a peril that perhaps does not equally menace the rest of the provinces of the Dominion, and therefore, perhaps, it does not as urgently call for the organization of a general Bar Association; but, I was glad to learn that the Bar Association of Ontario, while it realized that kindness and consideration for the profession, like charity, begins at home, that it also realized that it

was not necessarily to stay at home. And I was glad, therefore, to hear the Chairman announce the desire that we might hope to have in this Dominion a general Bar Association. As I have said, I have preached that gospel myself to some extent, and I was glad to hear some re-echo of it, and to be thereby assured that some of the seed I had sown had fallen on fertile ground. I am sure there could be no greater guarantee of the successful organization and maintenance of a Canadian Bar Association than the fact that the great Bar of Ontario and the Ontario Bar Association would take an interest in it and be ready to join with our fellow members of the profession throughout the Dominion in giving it a good start, and once started in keeping it going. I do not want, any more than you want me to, to make excuses in order to dilate upon this subject. I should think that the advantages that might be derived from the creation of such an organization would be sufficiently obvious to make it quite unnecessary that I should insist upon it. Your President this morning pointed out some of them, and quite sufficient I think to justify his opinion. There are perhaps one or two considerations that might be added to those that he mentioned. There is of course the great work that might be done by an association composed of members of the Bars of all our provinces towards the assimilating of our laws upon a great number of subjects with regard to which there is no substantial obstacle to their being assimilated. That in itself would be an immense advantage. Then, too, we might all of us learn something of those things in which our systems of law differ, and learning those things might be of a nature to enable us perhaps to appreciate better than we do those particular systems with which we are not specially familiar, with which we are not called upon to deal in our daily vocations, and I venture to say that while for the lawyer of my own Province of Quebec, who has to deal in the main so far as the great bulk of subjects which are controlled by the civil law is concerned, with a system different from that which prevails in the other provinces, there would be an advantage in mingling more familiarly with those who are practitioners of the common law and learning from them, and from their practical and intimate knowledge to appreciate the advantages of that great system, I venture to say that it might not be time

unduly lost for the common law lawyer to devote time to gaining knowledge, which could be gained without great effort, if he was brought more frequently and into closer contact with those of us whose first mistress is the civil law as we have it in the Province of Quebec. There are good things in both systems, and I suppose there are defects in both systems. If we could learn to borrow from each other that which is good, and by the light derived from one another to correct what may be defective, I think there would be a great advantage result to the profession as a whole; it would widen our ideas and our conception.

Sir Allen Aylesworth this morning pointed out that their Lordships who presided in the Judicial Committee of the Privy Council are necessarily called upon in dealing with the cases that come before them to study and to make themselves masters of different systems of law, and that that fact placed them in a position where he did not hesitate to describe them as superior to any of the men that we can provide at Bar or on the Bench in this country. If that be true, and I am not here to question it, how much may we not hope to broaden our conception (and everything that tends to make a man broad minded tends to make him a better lawyer), by closer and more intimate association between the members of the different Bars of the Dominion, those perhaps particularly who practice under systems that differ from each other. But there is, perhaps, a stronger reason even than those that have been invoked; I do not know whether my observation of what goes on around me, not only in this country, but in very many countries of the world, is absolutely correct or not, but it has seemed to me that in our day there was a trend in the direction of diminution in the minds of the general public of respect for the law. We have boasted, and I think in the past boasted consistently with truth, that absolute respect for the law was a characteristic of peoples, who, like ourselves, had the advantage of living under the British system of Government. It seems to me sometimes that there are indications that even among us that absolute respect for the law is perhaps not so strong as it used to be. It would appear to me that a great organization composed of the elite of the members of the Bars of all our different provinces might, if they got together and

set to work, as I am satisfied they would set to work in the proper way, if they got together, do a great deal to maintain and to restore, if that be necessary, the absolute confidence and the absolute spirit of submission to the law on the part of our people generally.

Such an association, apart from dealing with matters of our positive law, would I think naturally turn its attention to the study of the law in its principles. The principles that lie at the basis of the different systems where they differ more in form than in substance, and after all in this country of ours, as well in those provinces where you have the common law as in our province where we have our customary law derived from the customs of Old France, at the basis of all our laws, resting as they do upon the customs of the people, is what was the innate intuition of people in the origin in regard to what was just and what was unjust, and if such an association by its labours could bring the attention of the people generally to that fact, and by its studies and the disquisitions that its members might make as the result of those studies, bring forcibly home to the minds of the people that after all the law does not constitute merely of the positive enactments of the legislature that may or may not in all cases be inspired by a proper view of what is just or unjust, but that the great body of the law under both our systems consists of a system that has sought simply to put into effective practice as between man and man those principles planted in the human heart by the Great Creator that enable them to distinguish between what is just and unjust; and that the whole purpose of our study looked at in that way is first to properly see what those principles are, and then to see to it that they are effectively put into practice without respect of persons, without distinction of class, looking only to the one consideration, that justice may reign throughout the people of the land. Such organization, I think, might lead us back to a realizing sense of what the law is, that realizing sense which the old civil lawyers had when they never talked of the law as *lex*, but when the talked of it as *jus*, the right, that spirit that has prevailed and prevails still down in my own province among our French friends and among those who deal with our law as we have it down there. We do not talk of the law that we practice as the law simply, which implies, I do not say correctly, but the general view implies a

positive enactment of the Legislature; we speak of it as *le droit*, the right; and if we could bring the people of this country to realize what is the real substance of it all, I think we would have made a great step towards bringing those people back if they have strayed at all, or preventing them from straying from the implicit respect for and confidence in the law of which their fathers before them were so proud, and of which, as I have said a few moments ago, we have been so proud to speak of as prevailing among the people who lived under British systems of Government.

There are other things besides the Chairman's speech for which I have to be thankful. I have to express my admiration and my appreciation for the very able and very interesting disquisition of my friend Sir Allen Aylesworth this morning. I know that you know him longer than I, and you appreciate him as well, I will not say better than I, but I cannot help expressing my gratitude to him. When a Minister of Justice goes out to enjoy himself in gatherings of his confreres of the profession there is, as a rule, a ghost that stalks at the banquet, a ghost that wont down. I have to thank Sir Allen Aylesworth for having laid the ghost for me this morning. He said all the things that may be pleaded as extenuating circumstances for the unfortunate Minister of Justice, who has not increased the Judges' salaries. He laid that ghost most effectively, and for that I have to thank him most sincerely. Then this afternoon we had two most, it would not be proper to speak of them as enjoyable, not because they were not so, but because their characteristic was that of being something better than enjoyable, that of being instructive and serving to teach things that, of course, a practising lawyer does not forget, but we people who drift away more or less form the exclusive service of the law are apt to forget. I must say that Sir William Meredith's instruction to us upon the Workmen's Compensation Act shewed an absolute grasp of the subject, and was so clear that it enabled us who have not had the advantage of studying it as he has, to at all events appreciate what were the principles underlying the proposed law and to be able in some sense, at all events, to judge just how far the proposed provisions of that law would meet the requirements: he put it to us in such a manner as to entitle him to our gratitude. As for Mr. Justice Riddell, well, really, I am at a loss what to say. We sat there, and we listened with rapt attention to

the unfolding of the history of some twenty-three different occasions upon which we had reason to be thankful that men had been found by arbitration to settle questions that, under other circumstances, might have given rise to war, and he did that quietly and without any apparent effort, and he gave us every date and every circumstance and every name; and so, for myself, I sat in the condition of the rustics in Goldsmith's Deserted Village, of whom he wrote that,

> "Still they gazed and still the wonder grew,
> That one small head could carry all he knew!"

I am sure that all of us who sat there, great as was our admiration, felt a still greater appreciation of the valuable and interesting information that he conveyed to us, and we all came away thoroughly impressed with the fact that the tale that he told us justified absolutely the eloquent aspiration with which he closed his discourse. So, gentlemen, you see that my day has been a day of pleasure and of profit; and for that I have to thank you, Mr. Chairman, and the members of the Ontario Bar Association. I have to thank the Benchers of the Law Society, because I have been singularly fortunate in this, that while I was originally invited to come and partake of the hospitality of the Ontario Bar Association, I am going away having partaken in large and generous measure of the hospitality, not only of the Bar Association, but of the Benchers of the Law Society as well. So that I go away having been privileged to be the guest of both these great organizations, and I may say that, while I would appreciate and do appreciate most highly the honour that was done me by each of these associations, I appreciate the honour more than doubly because it has come to me from these united associations. I am quite satisfied that, side by side with the great work that the Law Society and the Benchers do for the profession, the great work which they do as being officially the profession in the province, there is room for, would it be *infra dig.* to call them skirmishing operations of the Bar Association on the outside; there is room for a good work by both associations, and I am glad to see them join together in the good work that lies ready for their hands, and I am more than doubly proud of having been the guest of both of them to-day. I have, therefore, to thank you, as I do most heartily thank you, Mr. Chairman, and you the members of the Ontario Bar Association, and to thank my friend Mr. Bruce

and my fellow Benchers of the Law Society for the hospitality which I have enjoyed here to-day. I have to apologise for having so ill requited it as having ventured to overstep the orders of the President of the Bar Association and make something which I am afraid must sound to you awfully like a speech. If I have done so it is because I felt that I had got so much that I could not go away without, at all events, trying to give you something in return for your kindness of heart.

LEGAL EDUCATION.

The recent articles reproduced in the CANADIAN LAW TIMES on the subject of legal education, reveal the fact that there is as yet no one received opinion on the subject in England and that the old debate and questionings still survive. Having spent many years of my life in the education of potential lawyers and always, I hope, endeavouring to make them realise that the lawyer's office was one of the highest dignity, calling for an education of the most liberal description and the highest standard of morality, I rejoice that divine discontent upon this subject still lingers in the Old Country. It has, moreover, been my lot to gain a slight insight into the methods of legal education adopted in Western Canada. There, as in England, there appears to be dissatisfaction and a tendency towards upward movement. These considerations have led me to contribute what I can to promote this healthy spirit of unrest and, as far as in me lies, to attempt to suggest something in the way of an ameliorative. In this article I only touch upon the framework of professional legal education, and not at all upon the methods of imparting legal knowledge (as there can be but little doubt that the difficulties connected with this phase of the subject have been satisfactorily settled in Harvard and other Cis-Atlantic universities).

In attempting to lay down canons directory of the proper framework of legal education, two preliminary inquiries should be undertaken; these once satisfactorily answered, the rest of the scheme will easily, almost automatically, unfold itself. The inquiries I refer to are (1) What manner of man should the lawyer be? (2) What is the content of the lawyer's sphere? The first question is *qualis?* the second *quantis?*

I greatly fear that many persons would, at any rate when speaking unreflectingly, postulate that *imprimis* a lawyer must be a "smart fellow," meaning thereby, endowed with a capacity for making nice distinctions; untrammelled, if not by scruples, at any rate by scrupulosities; keen at the bidding of a fee to make the worse appear the better reason, a winner of cases essentially. The mere statement of such requirements carries with it their condemnation and immediate rejection. Society would

not long tolerate a breed of lawyers whose only ambition was to rise high on the scale which is marked with the names of Dodson and Fogg and Uriah Heep.

The true lawyer, in my opinion, must be a humble and toilful ("painful" is the better word, were it now permissible to use it in its older sense) labourer in the service of practical justice as she shews herself in the legal principles and institutions of to-day, and also must in true zeal for her honour anxiously toil to the end that she does not fall behind the changing needs and standards of a changing and advancing civilization. To fulfil the first requirement he must not only be well versed in the laws of to-day, but also must have a grasp of the elemental principles that lie behind them and of their life history. Historical knowledge is to the lawyer as important as it is to the geologist. To fulfil the second requirement, he must have a sound knowledge of the social conditions, at any rate, of his period and country. He must not live afar from the practical needs of the community, fenced in by any conception of eternal, changeless and self-revealing law. To sum up, the lawyer must be an educated and honourable gentleman.

This brings me to the *quantis*? How far must he be educated? He cannot be omniscient. True, he need not be all-informed, but he must be educated and informed. The clay undergoes much treatment, ere it takes the shape of a cup. Here I should like shortly to set down what I think are the minimum practical qualifications for a lawyer.

1. A sound general education, embracing Latin, French and German (or at any rate, the two first) to the extent of being able to read these languages without any great difficulty. (On this branch I have here nothing further to say, other than to remark that the practice of setting particular books for preliminary examinations defeats its own object.)

2. A sound education preliminary to what I have later given the name of information. This preliminary education ought to consist of (a) a course in political economy, practical and historical; (b) a course in jurisprudence; (c) the study by the law student of some system of law other than his own, preferably the Roman system.

3. Accurate information as to the laws of his own country.

4. Practice in the application of this information.

How, then, are these minimum qualifications to be attained? If it were possible to eliminate all the difficulties presented by the actualities of life, e.g., the eternal lack of pence on the part of the average law student and the necessity often imposed upon him of qualifying for entrance to his profession at a great distance from any centre of learning, and a host of others, the answer would be easy enough —in a well-equipped law school. Here the student, free from thoughts of salary and the petty tasks of precedent filling and attendance on registrars of all sorts, might under the watchful eyes of learned and devoted teachers absorb, not "pick up," the mysteries of law. Here and now such things cannot be; it is necessary to make the most of the actual conditions of things and to leave the ideal still purely ideal.

The proposed course can, however, be made to fit in with things as they are. It corresponds to a considerable degree with the course actually pursued by a not inconsiderable number of lawyers, i.e., an arts course and a law course in the university, followed by attendance on professional lectures and practical work in a lawyer's office.

The demands that may be legitimately made upon anyone seeking admission as a barrister are, then, a university education or its equivalent, and practical desk work, combined with academical instruction of a more practical nature than that given by the university. I have said a university education or its equivalent, but its "substitute" is what I should more correctly have called it. If a student cannot take an intra-mural university degree, he must be allowed to take an extra-mural degree; if he cannot manage even this, then the onus falls upon the Law Society to which he seeks admission to see that he is not more seriously handicapped by his inability than is necessary.

I confess that, dealing with actualities, I do not regard the actual attendance upon university or other lectures as a *sine qua non*. If everything were as it ought to be, such attendance might be regarded as indispensable and is, indeed, at all times greatly to be desired. But on the other hand, all teachers are not heaven born, some can inspire and inform, only too many can do neither. There are, moreover, certain types of mind (as noted by Sir Albert Rollit in one of the articles above referred to) capable of extracting from books more real education and inspiration

than they can draw from an intermediary. In this connection, I adopt without hesitation the words of that high authority just mentioned.

"Whatever may be done towards a more aggregated system of legal studies, with the indirect educational and social advantages of intercourse and inter-communication in the search and research for legal knowledge, there must be no surrender or restriction of the right of the individual student to work out his own salvation in his own way if he thinks proper, and every aid and facility should be given him (shall I add "or her"?) for this purpose by both the schools and the university . . . the continued, undiminished and unrestricted opportunities for law students to obtain the external legal, arts and other degrees of the University of London is a matter of vital moment to the Society itself and its work of legal education, to its students who prepare for the examinations for such degrees and generally."

I would lay down then the rule that there must be this preliminary or educative or university period, whether the same be spent at a university or law school or in self-preparation for the examinations imposed by these bodies or by a law society. The exact relationship that should in my opinion exist between these different authorities I leave for examination later on.

The object of this particular period will be in the main, in the words of the President of Harvard, "to impart, not information, but power." The student will therein gain breadth of view, the mind of the true lawyer, a true conception of the elemental ideas underlying all local law; historical and comparative study will give him a grasp of legal concepts that can be gained in no other way. To this period there might also be assigned in addition to Jurisprudence and Roman Law an elementary study of International Law and of the history of English Law, as being more akin to the other subjects then dealt with than to the subsequent study of particular law.

During the university period there might also with advantage be undertaken the study of local law itself, but only in its generalities, I mean, only in so far as it will naturally fall into its place in the study of comparative jurisprudence, its treatment differing in quantity and not in quality from that accorded to other legal systems.

In passing to the other two periods, that of information and that of practice, we are at once met with conflicting and at first sight incompatible claims, the demands of the law school and the demands of the student's principal. The conflict could easily be obviated by a little give-and-take. As matters stand it is to be feared that a law student is too often required to contend with the difficulties of the law, with a mind somewhat dulled in keenness by lengthy and often uninspiring hours of office work. He cannot give a constant and vigorous attention to his lectures. The chilliness and apparent intellectual inertia of the class reacts at times harmfully upon the most gifted teacher. Indeed, if it failed to do so, that would be proof enough of his unfitness for his position. The results cannot be good. The problem is a difficult one, but should present no insuperable difficulties. It is primarily one for the law society, which controls master and man alike.

Were such a scheme as I have outlined uniformly followed, we would have a system of education that would rise cone-like from a broad base of general jurisprudence, passing through the information period, to terminate in a sharp point, well adapted to deal with any practical matter in hand, all in a state of stable equilibrium. In the first period the student would learn what is involved in the idea "*obligatio*," what in "contract," and would learn to distinguish between the English "consideration" and the French "cause"; in the second period he would learn the requirements of the Statute of Frauds and that it must be specially pleaded, while in the third period experience would teach him the inadvisability of not pleading as he has been taught.

How is all this to be arranged? Who is to co-ordinate the studies pursued in the various periods? Who is to see that they dovetail into one another? Plainly these duties lie primarily upon the benchers or controlling body of the profession, in which the student desires to be enrolled. Their task must needs be a delicate one. I will recapitulate my periods and try to indicate how it could be best accomplished.

(1) The educative period; (2) the informative period; (3) the practice period. Premising that the normal period of preparation for admission as a lawyer should be five years, and allotting two of these to the educative period

and three to the informative period and practice period combined, I would suggest that the controlling body first enquire into the requirements of their local university, if any, for its degrees, and being satisfied therewith, should say to the intending law student, "Some knowledge of jurisprudence and Roman law you must possess. This you may get either by taking a university degree (internal or external); if you cannot shew us that you have such a degree we will apply you with the means of attaining the same result by another way, i.e., by passing an examination similar in every way to the university examination and to attain that result we will provide you with lectures similar to those you could have taken at the university." In issuing this declaration it might be well to conciliate those who pin all their faith to the spoken word (and their contentions would be entitled to prevail if every teaching body attained to the high ideals that are set and lived up to in the best of the class) by stipulating for a severer examination in the case of those who take an external degree. There is but little fear of a university failing to set high enough a standard, and the controlling body would perhaps be well advised to adopt without demur the curriculum of specialists in legal education—indeed I imagine that in most cases the dignity of the university would render it impossible to accept the *ipse dixit* of a non-academic and non-professional (I mean non-professional as far as the profession of teaching is concerned), however distinguished in the field of practical law. This remark is confined to the curriculum for that particular period which I have dubbed the educative period. Indeed, with regard to this particular period, I think the controlling body might go still further, they might with propriety take steps to have their school of law affiliated with the university in such a way that their students after a course of lectures under an approved teacher might take an internal degree.

Upon reaching the informative period there does arise in many cases a difficulty which might well be the subject of compromise and conference. I refer to the fact that the curricula of some universities overlap and encroach upon what is more properly the province of a law society. The educative period is that which peculiarly belongs to the university, the informative period to the law society.

If a university broadens out the original idea of such institutions so as to include within her walls a professional law school, then it would be well for her to take counsel with those who really know the practical requirements of a lawyer and in most cases will surely intend to insist upon these requirements being fulfilled, and it will be equally well for the law society, where possible, to hand over to the university the duty of working out the details of the desiderata of the society. The university programme drawn up upon such a basis would serve excellently for adoption by the law society in laying down regulations for the examination and teaching of students who for one reason or another cannot take a university degree. In working out an agreed scheme it might well be that it would seem wise to lengthen the informative at the expense of the educative period. This can be done all the easier because there must necessarily be some reference to the subject-matter of the earlier period in the lectures of the second period. A good teacher of law will not, nay cannot, lecture without pointing out to his pupils, either directly or in course of illustration, the reality of a science of law "which reduces legal phenomena to order and coherence" (as Professor Holland has it). No more will he be able to explain actions framed in contract and tort without reference to their respective histories; *pactum nudum* and *pactum vestitum* will throw much light on the law of contractual obligations.

The creation of an advisory Board of Legal Studies for the Dominion, composed of representatives from the universities and the law societies, were such a thing possible, would I feel assured result in the working out of a harmonious and logical scheme of legal education, which, when put into effect, would more than repay the trouble and individual self-surrender involved in the establishment of such a central authority.

WALTER L. SCOTT, LL.D.

Since the above was written there has appeared in the English *Law Quarterly Review* No 117 a thoughtful article by J. C. Ledlie on the value to students of English law of an "Einfuhrung in die Rechtswissenschaft" or Introduction to the Science Law, designed to furnish a student

"at the threshold of his course, with an orderly and classified survey of the whole domain of law—primarily his own local law—by way of preparation for a later more detailed study." Reference may be made to Arundt's Juristische Enzyklopaeie und Methodologie and Grueger's Einfuhrung in die Rechtswissenschaft. It is to be noticed that each state of the German Empire prescribes by law "the studienordnung" or course of legal study to be followed by anyone seeking to practice in the state. Such a course of study consists of Vorlesungen (lectures) and Ubungen (classes) to be taken by the student in a prescribed order. Is it altogether too visionary to express a hope that, ere many years have passed away, a Conjoint Board of Studies, formed of representatives from the universities and from a vigorous Dominion Bar Association, will lay down an obligatory Studienordnung for law students and see to it that he is provided with an adequate Canadian Introduction to the Science of Law?

LORD HALDANE ON SHERIFF COURTS.

Glasgow Sheriff Court is cited by the Lord Chancellor as an instance where one of the lower Courts may with entirely satisfactory results try important cases. His remarks were made in June before the Royal Commission on Delay in the King's Bench, but they are given to the public for the first time in the blue-book containing the evidence submitted to the inquiry. They arose in this way: The Commission was examining Lord Haldane on the strictly limited jurisdiction of the County Courts in England, and the consequent necessity of sending actions involving as a rule more than £100 to a Judge of the High Court. County Courts, further, do not possess the power to try libel, slander, seduction, or breach of promise. The Lord Chancellor expressed the opinion that their jurisdiction might well be extended to those classes of actions. He added that they were tried without difficulty in the Sheriff Courts in Scotland. One of the Commissioners pursued inquiries further into the jurisdiction of the Scottish Courts. Lord Haldane, who, although not a Scots lawyer, has intimate connections with Scots law, replied that the Sheriff Court had unlimited jurisdiction. "Some very important cases," he added by way of illustration, "are tried in the Sheriff Court in Glasgow, and the Sheriff Court has grown up to be a very important centre in Glasgow. The Judges are men who are picked for their ability. There is a local Bar, which consists entirely of solicitors—occasionally counsel come from Edinburgh—and they try very important cases." Another passage may also be quoted, namely—"I should say that in Glasgow the Sheriff disposes of civil business, but the Sheriff is generally a big man. The Glasgow Sheriff has a big body before him, mostly consisting of solicitors in Glasgow, men of great capacity."

MAXIMUM WORTH OF PUBLIC MAN.

One gathers from the evidence of Lord Haldane that Judges of the High Court attach the very greatest importance to the pension which awaits them after 15 years' service. The pension is one of the great inducements to accept judicial office, and the Lord Chancellor deprecates any-

thing which would make it bulk less largely in the mind of an eminent counsel who is considering whether he should give up £15,000 a year in order to take £5,000. The latter sum is the salary of the Judge of the High Court. It is a tribute to the spirit which animates the English Bar that the Lord Chancellor is unable to point to a single instance where anybody has refused a Judgeship on the ground that the remuneration is insufficient. He has, he says, known of members of the Bar refusing judicial office because their ambitions were directed to political advancement, but that is quite another matter. It has been pointed out that £5,000 now is not an equivalent to the same sum in 1830, when the present standard of judicial salaries was fixed. Lord Haldane, however, thinks that speaking generally £5,000 a year is very good salary to pay to anybody for public services. "You think nobody is worth more than that?" asked one of the Commissioners. "I am inclined to think no one is worth more than that," replied the witness. "Not even the Lord Chancellor?" the questioner pressed. "I make no exception," Lord Haldane answered. But Lord Haldane gets £10,000.

EDITORIAL.

The Dominion Railway Board has again given judgment disallowing the application of the City of Toronto for uniform telephone rates throughout the city, referring particularly to that part of the city known as North Toronto, with Commissioner Mills dissenting.

According to the information received the chairman, Mr. H. L. Drayton, has upheld the judgment given about a year ago by the assistant chairman, Mr. D'Arcy Scott, on the ground that sufficient time has not elapsed to alter conditions then prevalent. As this journal maintained at the time, the chairman was evading responsibility; we believe he is still doing so and upholding what is one of the weakest judgments ever delivered by the Dominion Railway Board.

In this application ordinary, everyday common-sense was more requisite than profound knowledge of the law, and while it is possible to imagine a desire to support a confrere even though disagreeing with his opinion, this desire can be carried too far when on the other side of the scale is the welfare of a large part of the community to protect the interest of which is the *raison d'être* of the Dominion Railway Board.

The recall of the Judges is a burning question with our brethren to the south of us, and from the information received from those best qualified to speak, it is owing to just such ill-considered judgments as the disallowance of the application of the city of Toronto in this matter that is responsible for much of the difficulty existing in the United States.

It is stated almost as an axiom among the legal fraternity of the United States that there is little or no criticism of the Judges in Canada, which as a rule is indisputable and it would be a great pity if ever the time should come when conditions should be otherwise.

Why the people in the north end of the city should not be entitled to the same telephone rates as those living in the east and west, and why if they do not receive the same consideration it is not discrimination against one part of the city in favour of another; notwithstanding the straw reasons as to distance from the north exchange, and other equally flimsy reasons set up by the telephone company, it is impossible to understand. Gas-mains are laid and gas sold

at the same rate in the north as in the east or west or centre of the city,—electric energy is likewise delivered at the same rate,—no allowance is made by the assessment department of the city in its valuation of property in the north,—no extra discount is given in the payment of taxes,—and why is the Bell Telephone Company permitted to charge double and even treble the rate per telephone in the northern part of the city, as that charged in the east, west or centre? For nearly two years the Bell Telephone Company has owned a site in North Toronto, presumably purchased for the building of an exchange, and had the judgment of the Railway Board been as we believe it should have been and the city's application allowed this new exchange would speedily have been built and the visionary boundaries supported by an equally baseless and puerile reasoning would have been swept away.

The President of the United States in his message to Congress advocates the abrogation of the measure which granted immunity from tolls to the coasting vessels of the United States while levying a charge on the vessels of other nations. The United States in dealing with so important a question as its treaty obligations (and as those whose knowledge of the nation was the most intimate always believed). has decided the question, to use the words of Mr. Elihu Root in his address to the Senate, "in a manner befitting a great nation," and the privileges of the Panama Canal are to be equal to the shipping of all nations.

In a people composed of all nationalities, among which the majority of the new-comers have been subject always to oppression and repression, there undoubtedly will be a mistaking of license for liberty, policy advocated by the yellow journals, which pander to these sentiments, for a time has a great vogue, but the solid, sane reason and appreciation of the true American eventually triumphs, with a result such as obtains in the matter of the Panama Canal tolls.

FRAUD OF AGENT, FRAUD OF PRINCIPAL.

"When one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by holding out the agent as enjoying his confidence."

The above rule had its genesis no less in strict justice than upon a sound principle of public policy. Without it the affairs of every day life could not be carried on. The liability of a principal for the fraud of his agent, after much litigation and many conflicting judgments, has finally been settled on business-like principles by the unanimous decision of the Court of Last Resort, delivered in 1912. For over two hundred years this branch of the law of principal and agent has been in a most unsettled state. The profession hail with satisfaction, that by this recent decision an important legal question has finally been reached, which from the great ability of the eminent jurists, constituting the highest Court of Appeal, commands universal respect. A brief review of some of the leading cases on this subject may at least prove interesting.

In the year A.D. 1700, in an action on the case for deceit, it was held, by Lord Chief Justice Holt, in *Hern* v. *Nichols;* 1 Salk., page 288, the principal was answerable for the deceit of his agent in selling one particular sort of silk for another of an inferior quality. The question to be determined was, did the deceit of his factor beyond the seas bind the principal, when it appeared there was no actual deceit on the part of the defendant. The Chief Justice was of the opinion, that the merchant was liable for the deceit of his agent—"though not *criminaliter,* yet *civiliter:*" for, in the words of the Chief Justice—"Seeing somebody must be the loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver shall be a loser, than a stranger." Upon this dictum of the great Chief Justice, judgment was entered for the plaintiff.

In 1861, in the case of *Udell* v. *Atherton,* 7 H. & N., page 172, the question to be determined was, like that in *Hern* v. *Nichols,* whether the principal, who has had the benefit of a contract made by his agent, is responsible for a deliberate fraud committed by his agent in the making of the contract, by which fraud alone it was obtained. The

principal neither authorized nor knew of the fraudulent conduct of his agent. The case was tried before Martin, B., and his Lordship directed a nonsuit to be entered. On motion for a new trial or that verdict be entered for plaintiff, the Court being evenly divided: Pollock, C.B., and Wilde, B., being of the opinion the rule ought to be absolute to enter verdict for plaintiff: Martin, B., and Bramwell, B., dissenting, the rule was consequently discharged.

Wilde, B., in delivering his judgment, thus pithily deals with the question—"If this action does not lie against the principal, the consequence would appear to be as follows: The man who has reaped the benefit of a fraud committed on his behalf keeps the fruits in his pocket; the man defrauded in the contract has to look to the intermediate person, and not him with whom he contracted. If the agent is a man of no means, this remedy would be fruitless. If the agent is able to pay he does so without remedy over, and the person defrauded is reinstated out of the funds of one man, while the fruits of the fraud are retained by another."

The great leading case on this question is *Barwick* v. *English Stock Bank*, decided in 1867. See L. R. 2 Ex. p. 259, in which the unanimous judgment of the Court (consisting of Willes, Blackburn, Keating, Mellor, Montague Smith and Lush, JJ.), was delivered by Willes, next to Coke and Holt, the most profound master of the Common Law.

In his lucid judgment, Willes said: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and *for the master's benefit*, though no express command or privity of the master be proved. See *Laugher* v. *Pointer*, 5 B. & C. 547, at p. 554. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters aboard, improperly selling the cargo. *Ewbank* v. *Nutting*, 7 C. B. 797. It has been held applicable to actions of false imprisonment, in cases where officers of railway

companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. (Q. B.) 148, explaining (at 3 E. & E. p. 683), *Roe* v. *Birkenhead Railway Company*, 7 Ex. 36; and see *Barry* v. *Midland Railway Company*, Ir. L. Rep. 1 C. L. 130. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. *Huzzey* v. *Field*, 2 C. M. & R. 432, at p. 440. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

It will be seen by this judgment, in order to bind the principal, the act of the agent, whether fraudulent or otherwise, must be done in, concerning and during the course of the business for his principal; and further, within the scope of his authority as such agent.

This judgment settled the question, regarding which many divergent opinions had prevailed and many conflicting judgments had been delivered, whether or not, the principal could be held liable for the fraudulent act of his agent if he had not authorized it, or subsequently approved of it. This contention received its *quietus* in these words of Justice Willes: "It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

In this judgment was another supposed condition, or phrase, around which have since been waged many fierce legal battles—"and for his master's benefit," and which was not finally settled until the year of grace, 1912, in the now well known case of *Lloyd* v. *Grace, Smith & Co.*, of which hereafter. The case of *Barwick* v. *English Stock Bank*, however, met with general approval, notably in the

case of *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 App. Cas. (1874), p. 394.

The principal facts of this last named case were as follows: Plaintiffs were a firm of lumber merchants residing at Liverpool. One Bartlett Lingley was a timber merchant, residing in St. John, N. B., who was in the habit of sending shipments of deals to plaintiffs to sell on commission. Lingley, on the 16th of June, 1868, drew upon plaintiffs, and indorsed to the Commercial Bank of New Brunswick, an incorporated bank, at St. John, N. B., several bills of exchange against cargoes shipped, and two bills for $1,000 each on general account.

Sancton, cashier of the bank, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently and without the knowledge of the president and directors of the bank sent a telegraphic message, partly true, but fraudulently omitting a material fact, which misled and was intended to mislead plaintiffs, and thereby induced them to accept the said bills, and they were compelled to pay them at maturity, as they had been indorsed by the Commercial Bank to their agents in London. The plaintiffs brought an action on the case, in the nature of deceit, against the bank, and recovered judgment in the St. John Circuit Court, before Mr. Justice Weldon, in January, 1871, for the sum of $8,488. Mr. Justice Weldon held that the sending of the telegram was within the scope of the authority of Sancton. On appeal to the Supreme Court of New Brunswick, a rule absolute was made for a new trial, on the ground of misdirection, in directing the jury the act was within the scope of the authority of Sancton, the cashier, and in not leaving to the jury whether he was authorized by the directors of the bank to send the false telegram. The appellants (plaintiffs) applied for leave to appeal to Her Majesty in Council. Leave was granted and the judgment of the Supreme Court of New Brunswick was reversed, and the order directing a new trial discharged.

The argument of Benjamin, Q.C., who appeared for appellants, was so concisely and aptly expressed that it is here in part inserted: "The bank, of course, said the great Jurist, did not authorize Sancton to commit a fraud, but it entrusted him with the conduct of this class of business, and he conducted it unfairly, and committed the fraud in the course of his employment. The bank would not have

been liable if he had committed the fraud while he was not doing the business entrusted to him. It was important for the bank to get the bills accepted by the appellants. The majority of the Judges were misled by the consideration that Sancton had not been authorized to do what he did; but if he was doing the principal's business at the time, the principal is responsible. They failed to distinguish between authority to commit a fraudulent act and authority to transact the business in the course of which the fraudulent act was committed."

In referring to the vexed question as to what acts were within the scope of the agent's authority, Sir Montague Smith, who delivered the judgment of their Lordships, said: "Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds.' His Lordship further remarked, the best definition of it was given by Mr. Justice Willes, in the judgment of the Exchequer Chamber, *Barwick* v. *English Joint Stock Bank*. In conclusion he said: "For these reasons their Lordships are of opinion that Mr. Justice Weldon was right in directing the jury that the sending of the telegram was within the scope of Sancton's authority. This being so, the question whether or not Sancton was authorized to send it by the directors, becomes immaterial."

In 1887, the question came squarely before the Court of Appeal, in the *British Mutual Banking Company, Limited* v. *The Charnwood Forest Railway Company*, L. R. 18 Q. B. D. p. 714, whether a principal was liable in an action for deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends. The case was tried before Lord Coleridge, C.J.

The jury assessed the damages, and the Chief Justice left either of the parties to move for judgment. A motion was made before the Queen's Bench Division on behalf of plaintiffs, and Manisty and Matthew, JJ., directed judgment to be entered for them. On appeal the decision of the Queen's Bench Division was reversed, and defendants held not liable by Lord Esher, M.R., Lord Justice Bowen and Lord Justice Fry. Bowen, L.J., is reported as follows: "There is, so far as I am aware, no precedent in English law, unless it be *Swift* v. *Winterbotham*, a case that was overruled upon appeal for holding that the principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of Willes, J., delivered in the case of *Barwick* v. *English Joint Stock Bank*. "The general rule, says Willes, J., "is that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved." This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank*. *Mackay* v. *Commercial Bank of New Brunswick* is consistent with this principle. It is a definition strictly in accordance with the ruling of Martin, B., in *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, which was upheld in the Exchequer Chamber (see *per* Blackburn, J.)"

Lord Justice Fry's judgment, although short was most emphatic. He said it was plain that the action could not succeed on the ground of estoppel; nor could it be supported on the ground of direct authority to make the false statement; neither could it be supported on the ground that the company was either benefitted by or accepted or adopted any contract induced or produced by the fraudulent misrepresentation.

The question underwent further consideration in the House of Lords, in the case of *Ruben* v. *Great Fingall Consolidated*, A. D. 1906, L. R. 6 App. Cas., p. 439. This action was brought by appellants for damages against the company for refusing to register share certificates, purport-

ing to be issued by the company, bearing the seal of the company, signed by two directors and countersigned by the secretary. The seal of the company was fraudulently affixed by the secretary, and without authority, and the signature of two directors was forged by him. The appellants had in good faith advanced money to the secretary for his own purposes on the security of these share certificates.

Lord Davey is thus reported at p. 445: "But even if I could make the implication that the appellants desire, I do not think it would assist them, for I agree with the learned Judges in the Court of Appeal that every part of the legal proposition stated by Willes, J., in his well-known judgment in *Barwick* v. *English Joint Stock Bank*, is of the essence of it. Willes, J.'s words are these: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." Where, therefore (as in the present case), the secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master."

The appeal was dismissed with costs.

Five years later, in 1911, the question again underwent further consideration, in the Court of Appeal, in the case of *Lloyd* v. *Grace, Smith & Co.*, L. R. 2 K. B., p. 489. The managing clerk of defendant, a solicitor, misappropriated the property of the plaintiff, consisting of real estate and a mortgage, fraudulently to his own benefit.

The facts of this case were briefly these: The defendant, Mr. F. Smith, carried on the business of a solicitor, under the firm name of Grace, Smith & Co., in Liverpool. One Sandles was his managing clerk. Plaintiff consulted Sandles with reference to some investments she held with which she was dissatisfied. Acting upon his advice she deposited with him the title deeds of a freehold property and a certain mortgage she held, and executed a conveyance of them to him for the purpose of making a sale and re-investing the proceeds. He deposited the title deeds of the freehold

property as security for an advance to himself, which he retained for his own use and called in the mortgage debt and misappropriated the same. The defendant was unaware of the whole transaction until after the clerk's fraud was discovered. The plaintiff believed she was the client of defendant throughout the whole transaction. The cause was tried before Scrutten, J., and verdict passed for plaintiff.

On appeal (see *Lloyd* v. *Grace, Smith & Co.* (1911), 2 K. B. D., p. 489) it was held by Farwell and Kennedy, L.JJ., that in taking into his own name a conveyance of the plaintiff's freehold property and a transfer of her mortgage, the managing clerk was not acting within the scope of his authority as managing clerk of the defendant, and that the defendant was not liable for the loss through the fraudulent act of the managing clerk. Held by Williams, L.J., there was such a holding as estopped the defendant from denying authority of his clerk to deal with plaintiff's securities.

Farwell, L.J., in the course of his judgment is thus reported at p. 507: "It is, in my opinion, impossible for this or any other Court to overrule the statement of the law by Willes, J., in the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank,* or qualify it by striking out the words "and for the master's benefit." as Scrutten, J., suggested. The law was stated in the same terms before that case by Holt, C.J., in *Turberville* v. *Stampe,* by Lord Abinger, C.B., in a judgment said to have been penned by Lord Wensleydale in *Huzzey* v. *Field,* and by the Exchequer Chamber in *Limpus* v. *London General Omnibus Co.,* and has been restated and adopted in many cases since, *e.g.,* in the Privy Council in *Mackay* v. *Commercial Bank of New Brunswick,* in this Court in *British Mutual Banking Co.* v. *Charnwood Forest Railway,* and by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank,* and by Lord Davey in *Ruben* v. *Great Fingall Consolidated,* and must, in my opinion, be regarded as an integral part of the law of agency. Lord Selborne . . : "It is a principle not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual." The qualification of the principal's liability is confined to cases where the agent

acts for or with a view to his own benefit to the exclusion of that of his principal, and the words. "for the master's benefit" extend to cases where the servant acts with a view to such benefit whether benefit actually results or not, and although the servant has been expressly forbidden to do the act from which the injury has arisen."

On appeal to the House of Lords, the decision of the Court of Appeal (1911) 2 K. B. 489, was reversed; and it was held a principal is liable for the fraud of his agent, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. See *Lloyd* v. *Grace, Smith & Co.* (1912), A. C. p. 716.

Earl Loreburn, Lord Chancellor, in delivering his judgment, at p. 724, says: "It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorized to receive deeds and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm—and she so treated him throughout—to realize her property. He took advantage of the opportunity so afforded him as the defendant's representative, to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion, there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was intrusted to conduct, on behalf of his principal. . . . I have only to say, as to the authority of *Barwick* v. *English Joint Stock Bank*, that I entirely agree in the opinion about to be delivered by Lord Macnaghten. If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Willes, J., be looked at instead of one sentence alone, he does not say otherwise."

Earl Halsbury, in referring to the wrong construction put upon the words—"and for his benefit"—in *Barwick* v. *English Joint Stock Bank*, thus comments: "Sir John

Holt, the authority who for more than twenty years presided over the Court of King's Bench with the confidence of all parties at a somewhat stormy point of our history, and who has been described as a perfect master of the common law, speaks in the case cited by Willes, J. (*Hern* v. *Nichols*) with no uncertain voice upon the subject, confirmed and adopted by such a Court as I have described after more than two centuries. The case was this: An action on the case for deceit was brought by one Hern against a merchant named Nichols. The reporter seems to have had some difficulty in making out what the particular kind of silk was, for he has left its description blank, but enough of the pleadings given to indicate very clearly what the complaint was, and in effect, it was alleged that one kind of silk was represented to be sold as such, and another and an inferior sort of silk was supplied.

Upon trial, says the report, under plea of not guilty, it appeared there was no actual deceit by the defendant, but it was his factor beyond sea, and the doubt was whether this should charge the merchant; and Holt, C.J., was of opinion that the merchant was accountable for the deceit of his factor, though not *criminaliter* yet *civiliter*, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

The judgment of Lord Macnaghten is a remarkably able one and should be read with care. The learned Lord, after an exhaustive consideration and analysis of all the leading cases upon the subject, concludes as follows: "With the most profound respect for Lord Bowen and Lord Davey, I cannot think that the opinions expressed by Lord Bowen in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, and by Lord Davey in *Ruben* v. *Great Fingall Consolidated*, in reference to the question under discussion, can be supported either on principal or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both.

"The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on

the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

"So much for the case as it stands upon the authorities. But putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr. Smith were not held liable for the fraud of his agent in the present case. When Mrs. Lloyd put herself in the hands of the firm, how was she to know what the exact position of Sandles was? Mr. Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in it members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that her deeds are quite safe in "our" hands. Naturally enough she signs the documents he puts before her, without trying to understand what they were. Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith, who put this rogue in his own place and clothed him with his own authority? If Sandles had been a partner in fact, Mr. Smith would have been liable for the fraud of Sandles as his agent. It is a hardship to be liable for the fraud of your partner. But that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty; but there are such things as fidelity policies. You can insure the honesty of the person you employ in a confidential situation or you can make your confidential agent obtain a fidelity policy.

"With all respect to the learned Judges of the Court of Appeal, I think the decision appealed from is wrong. I think they are in error as regards the law, and I think they have not taken the correct view of the facts. They look at the execution of the deeds by which Sandles cheated Mrs. Lloyd out of her property as if it were an isolated transaction—as a thing standing by itself; whereas the trick was so cunningly contrived as to seem to the victim of the fraud a mere matter of course—a trifling incident in the business about which the firm was being employed. In the result I am of opinion that Mr. Frederick Smith was clearly liable for the fraud of his agent."

This case settles once for all, that a principal is liable for the fraud of his agent in the course of his employment

and acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

A careful consideration of the cases, on this subject, serves to shew the influence of the Judges in moulding our laws. Like freedom, Judge-made law has been gradually broadened down from precedent to precedent. Nor will its influence cease until justice full and complete shall be the birthright of all, from the highest to the lowest. Codes will then come as fruition follows the gathering of the harvest, or, changing the metaphor; codes will come, in the language of Lord Chancellor Haldane: "With the close of the day, after its heat and burden have been borne and when the journey is already near its end."

The words, "and for his (the master's) benefit," in Willes' judgment, delivered forty-six years ago, in *Barwick* v. *English Joint Stock Bank*, proved a veritable stumbling block, and are responsible for the many conflicting judgments in cases of the like kind, so great was the respect paid by the Courts to a dictum of such a consummate master of the common law.

SUMMARY.

1. Seeing somebody must be the loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."—Chief Justice Holt, A.D. 1700.

2. "If this action does not lie against the principal, the consequence would appear to be as follows: The man who has reaped the benefit of a fraud committed on his behalf keeps the fruits in his pocket; the man defrauded in the contract has to look to the intermediate person, and not him with whom he contracted. If the agent is a man of no means this remedy would be fruitless. If the agent is able to pay, he does so without remedy over, and the person defrauded is reinstated out of the funds of one man, while the fruits of the fraud are retained by another." —Wilde, B., A.D. 1861, in *Udell* v. *Atherton*, 7 H. & N. p. 172.

3. "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and *for the master's benefit*, though no express command or privity of the master be

proved."—Willes, J., A.D. 1867, in *Barwick* v. *English Stock Bank*, L. R. 2 Exchequer, p. 259.

4. "Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds."— Sir Montague E. Smith, A.D. 1874, L. R. 5 App. Cas. 1874, p. 394.

5. "There is, so far as I am aware, no precedent in English law, unless it be *Swift* v. *Winterbotham*, a case that was overruled upon appeal, for holding that the principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of Willes, J., delivered in the case of *Barwick* v. *English Joint Stock Bank*. 'The general rule,' says Willes, J., 'is that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved.'"—Bowen, L.J., A.D. 1887, L. R. 18 Q. B. D. p. 714.

6. "It was plain that the action could not succeed on the ground of estoppel; nor could it be supported on the ground of direct authority to make the false statement; neither could it be supported on the ground that the company was either benefitted by or accepted or adopted any contract induced or produced by the fraudulent misrepresentation."—Lord Justice Fry, A.D. 1887, L. R. 18 Q. B. D.

7. "But, even if I could make the implication that the appellants desire, I do not think it would assist them, for I agree with the learned Judges in the Court of Appeal that

every part of the legal proposition stated by Willes, J., in his well-known judgment in *Barwick* v. *English Joint Stock Bank*, is of the essence of it. Willes, J.'s, words are these: 'The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the *master's benefit.*' Where, therefore (as in the present case) the secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise."—Lord Davey, A.D., 1906, In *Ruben* v. *Great Fingall Consolidated*, L. R. 6 App. Cas. p. 439.

8. "It is, in my opinion, impossible for this or any other Court to overrule the statement of the law by Willes, J., in the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank*, or qualify it by striking out the words 'and for the master's benefit.' . . . These words must, in my opinion, be regarded as an integral part of the law of agency."—Farwell, L.J., A.D. 1911, in *Lloyd* v. *Grace, Smith & Co.*, (1911) 2 K. B. p. 507.

9. "The only difference, in my opinion, between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate. . . . With all respect to the learned Judges of the Court of Appeal, I think the decision appealed from is wrong. I think they are in error as regards the law, and I think they have not taken the correct view of the facts."—Lord Macnaghten, A.D. 1912, in *Lloyd* v. *Grace, Smith & Co.* (1911), A. C. p. 716.

10. "If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Willes, J., be looked at, instead of one sentence alone, he does not say otherwise."—Earl Loreburn, Lord Chancellor, in delivering judgment, reversing the decision of the Court of Appeal, in *Lloyd* v. *Grace, Smith & Co.* (1912), A. C. at p. 724.

In the above summary have been grouped, in chronological order, for a period of over half a century, the conflicting decisions of our ablest Judges in several leading cases on this important branch of the law, in order to shew how inveterate becomes error once rooted in the legal system, and, as well, to accentuate the certitude with which the evolutionary process of Judge-made law advances towards the attainment of perfection.

Our system of Judge-made law, or development of law by scientific reasoning, will continue to modify and expand, as in the past it has under such law builders as Chief Justices Coke, Holt and Mansfield, to meet the necessities of a progressive society. Such was the case in Roman law. It continued to develop and expand down to the close of the third century, A.D. This was followed by the period of codification extending to the end of the reign of Justinian.

The uncertain and halting steps with which an important principle of law has been finally settled upon an apparently satisfactory and equitable basis, affords a strong argument in favour of the view, that the law should be reduced, so far as practicable, to the form of a statute or Code. "A code," says Sir James Stephen, "ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries." . . . "An ideal code ought to be drawn by a Bacon and settled by a Coke."

John F. Dillon, LL.D., a distinguished Judge and author, of United States, thus briefly emphasizes his view of the wisdom of undertaking a systematic restatement of the body of our statutory and case law: "In the sense that a code 'aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries,' as that experience is embodied in statutes, in the law reports, and in the writings of the sages and masters of the law—in this practical sense, within these conservative limits, a code in England and a code in each of the United States is, I think, manifest destiny. I venture this prediction, because this is the only remedy which it is possible to suggest to make the overgrown body of our law, I will not say convenient or symmetrical, but reasonably certain, public and accessible. Such a course has been found not simply desirable, but necessary, in the developed stage of every other jural system; and I

am unable to perceive how we can permanently avoid it, whatever our timidity, and however reluctant we may be to enter upon it."

Bacon, three centuries ago, thus expressed his view upon the compiling and amendment of the laws of England: "The work, which I propound, tendeth to pruning and grafting the law, and not to ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation. But in the way I now propound, the entire body and substance of the law shall remain, only discharged of idle and unprofitable or hurtful matter; and illustrated by order and other helps, towards the better understanding of it, and judgment thereupon."

The Imperial Parliament, after great care and much deliberation, finally entered tentatively upon the system of codification.

The Bills of Exchange Act, 1882, was the first instance of the codification by the Imperial Parliament of any portion of the common law. Its adoption has met with marked success. Under the careful oversight of Lord Herschell, chairman of a select Committee of Parliament, to whom the Draft Code was referred, it did no more than codify the existing law, leaving all amendments to parliament. It was most carefully drawn and as carefully considered. The law was contained in 2,500 reported cases, all of which were critically examined, and in 17 statutory enactments.

This was followed by the Partnership Act, 1890, drafted by Sir Frederick Pollock. This has likewise met with reasonable approval.

And, also, the Sale of Goods Act, 1893.

From time to time Royal Commissioners were appointed to ascertain the desirability and practicability of reducing the criminal law of England, written and unwritten, into one code. The report of the Commission on the Draft Code of Lord St. Leonards, Lord Cranworth and others met with such opposition on the part of the Judges, that it was finally abandoned. Their objections, briefly summarized, were not directed so much against the principle of codification itself as from the fact it proposed the abrogation of the common law with respect to criminal offences, and all the rules and definitions of offences, and therefore likely to produce no benefit in the administration of criminal justice, but the reverse.

St. John, N. B. SILAS ALWARD.

THE JUDICIAL COMMITTEE.

Some Constitutional Cases.

The Royal Commissions Case.[1]

The Australians have just had a striking experience of the benefit to be derived from the removal of their cases "from the influence of local prepossessions,"[2] and the consequent submission of them to the influence of British prepossessions, in the case of the *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth*. It is worth calling attention to in Canada.

A Royal Commissioner has not by the laws of England any right to compel witnesses to give testimony; and a Royal Commissioner, with power to enforce exposure of the details of a corporation's business affairs, is repugnant to English ways of thinking. "To be compelled to answer them" (the questions) "is a serious interference with liberty"—in the view of their Lordships. And, therefore, the strong inclination of their Lordships is to declare invalid statutes or powers under which it is alleged that the inquisition may take place. Australians on the other hand (in common with Canadians and many other people) have no prepossession—that is in cases in which the enquiry is set by their government to be advisable in the public interest. And it is this absence and presence of predisposition (I am not complaining of its unavoidable existence) which accounts, I think, for the difference of opinion between the Australian Judges and their Lordships of the Privy Council in the case under review—which accounts for a decision in England declaring to be *ultra vires* statutes which in unanimous Australian opinion was not open to question, and the constitutionality of which was not (in Australia at all events—I cannot say further) attacked.

The statutes authorized the appointment by the Governor in Council of commissioners "to make enquiry into and report upon any matter specified in the letters patent, and which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth."

[1] 1 S. C. L. R. 182. Not yet reported in P. C.
[2] *Ante*. Vol. 33, p. 676

Their Lordships hold that a general authority—such as this—cannot be given to the executive; that parliament must, itself, entrust the commissioner with power to enquire into some *specific* matter; and that to an enquiry so authorized, only, can there be attached the power of compelling the attendance of witnesses and the making of answers to questions. Such a decision is so completely at variance with all Canadian "prepossessions," that it is difficult to believe that their Lordships so intended. For myself, I can make nothing else out of their language. Let us look at the case more closely.

The customs-tariff of the Commonwealth affords somewhat effective protection to the sugar industry, and the excise laws provide for the payment of a bonus in respect of all sugar raised by white labour. The effect has been to develop the production of sugar to such an extent that it now almost completely supplies the local market, and the question is, What is to be done next? Sugar raised by white labour cannot be exported in competition, for example, with Fijian sugar. And if it cannot be exported, are protection and bounty to be continued? These aids may have been advisable when the local supply was short; but what for the future? To obtain accurate information commissioners were appointed to enquire into "The sugar industry in Australia, and more particularly in relation to—

(a) Growers of sugar cane and beet.

(b) Manufacturers of raw and refined sugar.

(c) Workers employed.

(d) Purchasers and consumers of sugar.

(e) Costs, profits, wages and prices.

(f) The trade and commerce in sugar with other countries.

(g) The operation of the existing laws of the Commonwealth affecting the sugar industry.

(h) Any Commonwealth legislation relating to the sugar industry which the commissioner thinks expedient."

Of this commissioner, the Australian Chief Justice said, "It is plain that information on such matters might be very valuable for the purposes of the customs and excise laws, if not for other purposes of Commonwealth government."

The commissioner required the plaintiff company to produce its books and to answer questions "extending" (as their Lordships say) "to the entire field of the company's

affairs, including its internal management." The company objected and asked for an injunction to stay the proceedings. Four Judges sat in the federal Court of Appeal. None of them doubted that the statutes were *intra vires*, but they differed—two against two—as to the right of the commissioner to put some of his questions. They all agreed that questions relating to the operation of the company in matters within the area of federal jurisdiction were competent; but they differed as to questions which related to matters that could be brought within the federal area only by an amendment of the constitution.

In the Privy Council their Lordships thought that it was "impossible to say in advance which of these questions, if they can be insisted on at all, may not turn out in the course of a prolonged inquiry to be relevant or even necessary for the guidance of the legislature in the possible exercise of its powers;" and proceeded to discuss the question of the constitutionality of the statute itself. Referring to sec. 51 of the constitution (which gives, to the federal parliament, legislative authority with respect to certain specified classes of subjects) their Lordships said (italics are mine in all quotations); "None of them relates to that general control over the liberty of the subject which must be shewn to be transferred if it is to be regarded as vested in the Commonwealth. It is of course true that, under the section, the Commonwealth Parliament may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects *specifically*. But this is not what the Royal Commissions Acts purport to do. Their scope is not restricted to any particular subject of legislation or inquiry, and no legislation has actually been passed dealing with *specific subjects* such as those to which their Lordships have referred as matters to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners are now making."

Their Lordships then refer to sub-head 39 of sec. 51, which gives jurisdiction to legislate with respect to; "Matters incidental to the execution of any power vested by this constitution in the parliament . . . or in the government of the Commonwealth . . . or in any department or officer of the Commonwealth;" and then proceed as

follows: "These words do not seem to them to do more than cover matters which are incidents in the exercise of *some actually existing power* conferred by statute or by the common law. The authority over the individual sought to be established by the Royal Commissions Acts, the new offences which they create, and the drastic powers which they confer, cannot, in their Lordships' opinion, be said to be incidental to any power *at present existing* by statute or at common law.

A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law. And until the Commonwealth Parliament has entrusted a Royal Commission with the statutory duty to inquire into a *specific subject*, legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct. Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts in the form in which they stand could, without an amendment of the Constitution, be brought within the powers of the Commonwealth Legislature.

Their Lordships hesitate to differ from Judges with the special knowledge of the Australian Constitution which the learned Judges of the High Court, and not least the Chief Justice and Mr. Justice Barton, possess, but the question they have to decide depends simply on the interpretation of the language of an Act of Parliament, and in the present case they have formed a definite opinion as to the interpretation which must be placed on the words used. Without redrafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the sugar industry contemplates in order to make its inquiry effective. They think that these Acts were *ultra vires* and void so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition."

In other words (as I understand the decision) the Commonwealth has power to issue such a commission as that in question; but it must exercise its authority by legislation providing for inquiry into that "specific subject" and it cannot authorize the Governor-General in Council to issue a commission to make similar inquiry.

Most respectfully, I repeat that but for the pressure of "prepossessions," and a determination to make "interference with liberty" as difficult as possible, it would be quite impossible to arrive at the conclusion reached by their Lordships.

IS THERE A FEDERAL SYSTEM IN CANADA?

Amid recent surprises with reference to the presence of some curious twists in our constitution, nothing can be more disturbing than the declaration that we have not in Canada a federal system at all. Our constitution asserts that we have. Lord Haldane and the Judicial Committee say that we have not. During the argument of the Australian case, above referred to, Lord Haldane said: "With deference to a great many people who talk on the platform just now of the federal system—in Canada there is no federal system. What happened was this: An Act was passed in 1867 which made a new start and divided certain powers of government, some being given to the Parliament of Canada and some to the Parliament of the provinces. The provinces were created *de novo*. The provinces did not come together and make a federal arrangement under which they retained their existing powers and parted with certain of them, and an Imperial statute was got to ratify the bargain; on the contrary the whole vitality and ambit of the Canadian Constitution was a surrender, if you like, first, and then a devolution. . . . It was contemplated under the Canadian Constitution that there should be more states and other states; instead of Upper and Lower Canada, with a single parliament, there was a splitting up; there were new states constituted, and provision made for their boundaries and so on."

Sir A. Finlay: "One thing that was done was to separate Quebec and Ontario."

The Lord Chancellor: "Yes, so that really was not a federal arrangement at all. The meaning of federal

arrangement is that a number of states come together and put certain of their powers into common custody, and that is the federal constitution in Australia; but in Canada, not at all. . . I am sorry to say that even the legislature did not know the meaning of words, because the word 'federal' occurs in the Canadian Act, but it is as clear as can be that it was not 'federal' at all."

Lord Moulton said: "One could not imagine Canada's accepting such a surrender as the Lord Chancellor had described, of all rights they possessed. It was impossible to make the present rights of the Canadian colonies out of their past rights. There was a surrender and a repartition."

In their reasons for judgment, their Lordships said: "The British North America Act of 1867 commences with the preamble that the then provinces had expressed their desire to be federally united into one Dominion with a constitution similar in principle to that of the United Kingdom. In a loose sense the word 'federal' may be used, as it is there used, to describe any arrangement under which self-contained states agree to delegate their powers to a common government with a view to entirely new constitutions even of the states themselves. But the natural and literal interpretation of the word confines its application to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions. . . Of the Canadian constitution, the true view appears, therefore, to be that, although it was founded on the Quebec resolutions, and so must be accepted as a treaty of union among the then provinces, yet when once enacted by the Imperial parliament it constituted a fresh departure and established new Dominion and Provincial governments with defined powers and duties both derived from the Act of the Imperial parliament, which was their legal source."

Before examining the two reasons assigned for the opinion that we have not a federal constitution, let us distinguish between (1) a federal constitution and (2) the method by which it is brought into existence. It will be observed that their Lordships dwell upon the method, and appear to assume that if that method be not adopted—if the antecedents of a state are not of a particular character, its constitution cannot be federal. With deference, that appears to me equivalent to saying that a constitution could

be denied the characteristics of an hereditary monarchy, because the state in its previous history, had been republican.

Surely our political nomenclature is properly applicable to constitutions as they are, and ought not to be regulated by reference to what they formerly were. For example if ten States, by an indisputable federal arrangement, should adopt a federal constitution, in form exactly the same as another framed by reduction of a unitary government, I should, somewhat confidently, describe them both as federal constitutions. In other words, if the United Kingdom should adopt a constitution dividing its territory into ten states; assigning to a central parliament the same authority as the United States Congress, and to the States the same jurisdiction as the American states, I should not hesitate to say that the new constitution was federal. Would you?

One reason given by their Lordships in support of the declaration that Canada has not a federal system is that one of our constituting provisions was split into two, and that provision was "made for their boundaries and relations and so on." Now their Lordships agree that "the true federal model" was adopted by the United States; but suppose that in framing that constitution, the State of New York had been divided into two states (that is to say that the sovereignty of New York State had been distributed between two States) should we be wrong in speaking of the present United States constitution as federal? Would the voluntary partition of one state have taken the case out of their Lordships' definition? Moreover, if their Lordships' view is correct, although the United States constitution was at one time federal, it has long ceased to bear that character; for, of its forty-nine states, only thirteen were parties to the original pact. If the word *federal* must be confined "to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions" then the United States constitution cannot now be federal.

The second reason offered by their Lordships is that our provinces not only did not "continue to preserve their original constitutions" but surrendered them and took some again by "partition." There was "a fresh departure." So that even had there been no splitting-up of one province our constitution could not be federal. Whatever may be said of a case in which there is a surrender in one

year and reconstitution twenty years afterwards, one cannot help saying that, in the Canadian case, the surrender and reconstitution (if that was really what happened) were not only simultaneous but that they both rested upon the one agreement.

If the rule is perfectly absolute that the *old* powers must be *retained*, and cannot, even in point of drafting form, appear to have been *exchanged* for new powers of precisely similar character, then, of course, our constitution is not federal. But suppose that our draftsmen had proceeded the other way? If, observing that the constituting provinces had, at the moment, all the jurisdiction, the draftsmen had *left* in the provinces the precise authority which they have now, and had given all the rest to the Dominion, then our constitution would have been federal! Prior to 1867, the provinces had jurisdiction over all subjects—from A to Z; the draftmen provided that A to M should be *assigned* to the Dominion, and N to Z to the provinces, and they made a non-federal constitution. But if they had provided that A to M should be assigned to the Dominion, and that N to Z should be *retained* by the provinces, they would have followed "the true federal model adopted in the constitution of the United States." I confess inability to appreciate these distinctions. They do not shake my faith in the validity of Lord Watson's elaborate sentence; "The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy."[3]

Lord Watson regarded the reality and not the form. To his mind, there was no surrender and repartition. The provinces retained—did not acquire—their independence and autonomy, and "a federal government" was formed.

WHAT IS AN UNCONSTITUTIONAL STATUTE?

The peculiarity of the perplexities which sometimes confound a colonial advocate when addressing the Judicial Committee can be fully appreciated only by those who have

[3] *Maritime Bk.* v. *Receiver General*, 1892, A. C. 441.

suffered. On one occasion after frequently using the phrase "patent from the Crown," one of their Lordships asked me if I was not assuming an unnecessary burden in so speaking of the document—"I understand that it was a mere grant from the Crown." Sometimes, in that way, the misunderstanding is removed. Sometimes it remains—as one may see when the judgment is read. It happens, too, that views which, with us, are absolutely fundamental, conflict with British fundamental views, and then the poor advocate has little chance. The following is an example of what happened to an Australian lawyer.[4] The italics are mine—

"Mr. Poley:—Now, my Lords, those are substantially the points, but the matter on which we are asking your Lordships for leave to appeal is not, I submit, done away with by reason that an income tax has been passed by the Commonwealth making federal servants liable to pay income tax, and for this reason. If this is an implied power under the constitution that these officers shall not be liable for taxation the income tax itself must be unconstitutional.

The Earl of Halsbury:—I do not quite understand that. It is now an act of parliament.

Mr. Poley:—It is an act of parliament, but if it is an act of parliament which is contrary to the constitution in that sense it may be *ultra vires*.

The Earl of Halsbury:—I am not aware that there is any power in this Board to disregard an act of parliament.

Mr. Poley:—I imagine that you must look at the constitution to see whether the law was passed in accordance with the constitution and assuming that upon an examination of the constitution you find there was no power to pass such a law the court could say that the law was not in existence—that it was *ultra vires*.

The Earl of Halsbury:—That is a novelty to me. I thought an act of parliament was an act of parliament and you cannot go beyond it.

Mr. Poley:—Here no doubt, but where you have an act of parliament under a constitution which gives the legislature certain powers and the legislature goes beyond those powers the act is unconstitutional. In that sense under the federal constitution it has been so held.

[4] *Commissioners of Taxation for New South Wales* v. *Baxter*, 28 November, 1907.

The Earl of Halsbury:—Do you mean if some privilege were given under this act and there was an act passed by the legislature of one of these states and that act became an act of parliament by His Majesty's assent that that could be disregarded by any court?

Mr. Poley:—Possibly not after a period of two years had elapsed; but during the period of two years it might be called in question as an unconstitutional exercise of the power.

The Earl of Halsbury:—I do not know what an unconstitutional Act means."

In thus saying, Lord Halsbury was but repeating the view which, through him, the Judicial Committee as a whole had expressed in a previous case.[5] "But here the analogy fails in the very matter which is under debate. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an act of parliament as much as any Imperial act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any act of parliament extending to the colony, it might be inoperative to the extent of its repugnancy (see the Colonial Laws Validity Act, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. But in the British constitution, though sometimes the phrase "unconstitutional" is used to describe a statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law and must be obeyed."

There is, in the United Kingdom, no such thing as an unconstitutional act of parliament. And that, therefore, is one of the many—very many, prepossessions which the Canadian advocate has to try to eradicate in an address which should commence with common understanding of fundamentals. I think—I am almost sure—that I lost one

[5] *Webb* v. *Outrim*, 1907, A. C. 88.

branch of a case[6] because some of their Lordships were not familiar with "Consolidated" statutes, and did not appreciate their relation to the previously existing statutes.

IN INTERPRETING A CONSTITUTION, CAN ITS ANTECEDENTS BE CONSIDERED?

When considering the validity of an Australian statute, the Australian Chief Justice said[7]: "It is a matter of common knowledge that the framers of the Australian constitution were familiar with the two great examples of English-speaking federations, and deliberately adopted with regard to the distribution of powers the model of the United States in preference to that of the Canadian Dominion."

In a later case,[8] their Lordships of the Privy Council quoted this language and added: "It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation."

Is that right or is this—quoted from their Lordships' decision in the Royal Commissions case? "In fashioning the constitution of the Commonwealth of Australia, the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part."

It is sometimes said that certainty and finality and uniformity can be obtained only by submitting our cases to the Judicial Committee!

[6] *McHugh* v. *The Union Bank*. See 33 C. L. T. p. 669.
[7] *Deakin* v. *Webb*, 1 C. L. R., 606.
[8] *Webb* v. *Outrim*, 1906, A. C. 90.

REPORT OF THE LEGISLATION COMMITTEE OF THE ONTARIO BAR ASSOCIATION FOR THE YEAR 1913.

To the President and Members of the Ontario Bar Association:

The report of your Legislation Committee for the past year has been rendered more than usually onerous by reason of the extraordinary large volume of legislation passed by the Provincial House during the session 3-4 George V.

The 1913 Ontario Statute, as you are aware, is a formidable volume comprising some 152 Acts, 88 of which are Public Statutes, and many of them revisions of former Acts intended to take their place in the new Revised Statutes.

Following traditional methods, we propose adverting briefly to certain features of the legislation for the past year, and to add a number of suggestions as to changes or amendments in existing legislation considered advisable.

First then, referring to the Ontario Statute for 1913, the profession will be delighted to learn that 'the consummation devoutly to be prayed for'—the final and complete revision of the Public Statutes of Ontario—is speedily approaching completion.

Chapter 2 is an Act respecting the revision and consolidation of the Statutes of Ontario.

The preamble contains a useful, historical and chronological record of the appointment, constitution and work of the Royal Commission appointed for the purpose of revising and consolidating the statutes. It recites the progress of the work and the revision of portions already completed and enacted into law in the various annual statutes, and that it is in the public interest that the revision be completed as soon as practicable and before another session of the Legislature, a sentiment to which the profession at large will heartily subscribe.

Section 1 provides that so soon as the revision is completed, a printed roll thereof, attested by the signatures of the Lieutenant-Governor and the Provincial Secretary, shall be deposited in the office of the Clerk of the Assembly, and section 4 provides for the same coming into force under

the name of Revised Statutes of Ontario, 1914, by proclamation of the Lieutenant-Governor in Council.

This statute then declares the powers conferred upon the Commissioners in connection with the revision, which are shortly: To make alterations in statutes to preserve a uniform mode of expression; to make minor amendments more clearly to declare the intention of the Legislature; to reconcile seemingly inconsistent enactments; to correct clerical or typographical errors; to improve the arrangement of the statutes, and to eliminate the obsolete, unsuitable and useless, and submit such changes as might be deemed advisable in the public interest.

By section 9 the Revised Statutes shall not be held to operate as new laws, but as a consolidation of Acts repealed and supplanted thereby.

Section 14 provides that the Act shall be re-printed with the Revised Statutes.

Your Committee is advised that the revision of the statutes is now fully completed and the work of printing under way, and that the Revised Statutes of 1914 will make their appearance some time during the next month.

That Omnibus measure, the Statute Law Amendment Act, ch. 18, contains the usual grist of miscellaneous amendments to numerous Acts.

By section 1 we are reminded of the disappearance of the old High Court and the substitution for these words where they occur in any Act of the Legislature, of the words: "The High Court Division of the Supreme Court of Ontario," this being an amendment to the Interpretation Act, 7 Edw. VII. ch. 2.

A further amendment to this Act provides that every Justice of the Peace having authority in Ontario shall have the same powers to take and receive affidavits and affirmations as commissioners appointed under The Commissioners for Taking Affidavits Act.

Section 15 makes an important amendment to the County Courts Act, 10 Edw. VII. ch. 30.

This Act requires a defendant disputing the jurisdiction of the Court to give notice thereof in his appearance, and the amendment provides that such notice may be given either in the appearance or in the statement of defence. Corresponding changes are also made in the Act to give effect to this amendment.

The Arbitration Act, 9 Edw. VII. ch. 35, is amended by adding a sub-section to sec. 33 thereof, that when an award is set aside, the Court, or a Judge setting same aside, may direct as to costs of the reference and the award.

An amendment also appears to the Execution Act, 9 Edw. VII. ch. 47, by enabling the sheriff in executing a *fi. fa.* lands to sell lands of an execution debtor, including any lands held in trust for him by some other person.

Provision is also made under the Administration of Justice Expenses Act, in criminal matters for engaging and paying for special services of medical practitioners, land surveyors or any other person, subject to the approval of the Attorney-General; also for procuring the attendance of witnesses residing outside the province and recouping them for loss of time and expenses in attending trial.

Sections 24 and 30 of the Statute Law Amendment Act afford evidence of the discretionary powers and advantageous exercise of same by the Royal Commission in the revision of the statutes, in transferring these sections from the Judicature Act to the respective Acts to which they properly belong.

One is the section enabling a mortgagor, not in default, etc., to sue or distrain in his own name; the other deals with the condition of relief from forfeiture in the case of a breach of a covenant in a lease to insure.

These sections now take their place, the one in the Mortgages Act and the other in the Landlord and Tenant Act and are omitted from the new Judicature Act appearing in the present volume.

The sections amending the Public Libraries Act illustrate the danger and inexpediency of hasty and ill-considered legislation.

These amendments were intended to radically change the constitution of public library boards, but were fortunately discovered before being enacted and through the vigilance and exertions of the Ontario Library Association and of the Toronto Public Library Board in particular, a section was added providing that they should not come into force until a date fixed by proclamation.

The Ontario Companies Act as revised and re-enacted, 2 Geo. V. ch. 31, is made the subject for three more pages of amendments.

It is to be hoped that as revised in 1912 and re-revised in 1913, this Act will be sufficiently perfect not to require the attention of the Legislature for some time to come.

Private companies are now required to have the words "Private Company" upon their seals and share-certificates.

Special provision is made to validate the payment of dividends by mining and kindred companies out of wasting assets.

The Judicature Act has been revised and re-enacted and appears in ch. 19 with numerous changes and amendments engrafted on the former Act.

Under sec. 62, in Actions for Malicious Prosecution, the Judge shall decide all questions both of law and fact necessary for determining whether or not there was reasonable and proper cause for prosecution.

Section 98, sub-sec. (1) provides that every Local Registrar, Deputy Clerk of the Crown and Pleas, Deputy Registrar and Clerk of the County Court, shall, *ex-officio,* be a special examiner for the county for which he is appointed.

An amendment to the Ontario Insurance Act 1912 requires companies registered under this Act, except industrial companies, to send notices to the insured within one month of the date of the insurance contract, requiring the insured to produce evidence of age, and such notices must be sent out annually thereafter until age is proved, otherwise the companies will be deemed to have admitted same.

The revision of the Ontario Railway Act appears in this volume, extending over some 800 sections, with amendments and new provisions too numerous to refer to in detail within the scope of this report.

The Ontario Railway & Municipal Board Act has also been revised and consolidated with a number of changes, the most notable of which appears to be the power conferred on the Lieutenant-Governor in Council under section 7 to vary or rescind the orders or regulations of the board, this feature being adopted from the Dominion Railway Act. This amendment is made retroactive.

New and advanced legislation appears upon the Statute book this year for the first time under the title of the Hydro-Electric Railway Act, whereby power is conferred upon the Hydro-Electric Power Commission of Ontario and Municipal Corporations, with the sanction of the Lieutenant-Governor in Council, to enter into agreements for the con-

struction, equipment and operation of electric railways to be operated by electrical power or energy supplied by the Commission.

The Act provides that where the construction and operation are to be undertaken by municipal corporations, the management must be vested in a public utilities commission approved by the Lieutenant-Governor in Council and subject to the powers conferred by the Public Utilities Act.

The Public Utilities Act also appearing this year for the first, is practically a consolidation of various old statutes relating to public Utilities redrafted and re-arranged and with certain new features added.

One part provides that the council of a municipal corporation owning or operating a street or other railway or telephone system, may pass a by-law, with the assent of the electors, to provide for the entrusting of the construction of the work and management of same to a commission known as the Public Service Commission of the municipality interested, or an existing Public Utilities Commission established under this Act.

The limitation of actions is six months from the commission of the act complained of, or in case of a continuation of damages, one year from the original cause of action. This provision is adopted from the Municipal Water Works Act R. S. O. 1897, and now applies to all public utilities under the Act.

Underground conduits for conveying any public utility along highways, etc., are required, except under certain conditions, to be laid not less than six feet from existing conduits of any other person, and notice of claim for damages for default in so doing must be given within one month after expiration of any calendar year in which the damages were occasioned.

Another important Act which has received the attention of the revising commissioners and legislature during the year is the Municipal Act. As now consolidated, it covers some 250 pages on the Statute Book, and has apparently received very careful revision, and numerous redrafted, amended, and new sections are now in evidence.

Hereafter any person at the time of a municipal election, liable to the corporation for arrears of taxes, will be ineligible to be elected to the council.

Under section 249 a by-law passed by a council in the exercise of its powers and in accordance with the Act and in good faith, shall not be quashed on the ground of its being unreasonable.

Under section 259 a certificate of the clerk or assessment commissioner as to the prescribed number of electors having signed an application for the passing of a by-law, where, under any Act, there is such requirement, shall, hereafter, be final and conclusive as to the matter referred to.

The powers of a council are further extended in expropriating or otherwise acquiring or disposing of lands for municipal purposes under part 15 of the Act.

The liability of such corporations for damages from accidents occasioned by want of repair is limited by requiring that all actions for such damages, whether resulting from nonfeasance or misfeasance, shall be brought within three months from the time sustained.

The requirements as to notice of action remain the same as under the repealed Act of 3 Edw. VII.

A new provision is also added, making it a condition precedent to right of action that the claimant shall have suffered damages beyond what he has suffered in common with all others affected by the want of repair.

The necessity of cities and towns assisting in providing improved housing accommodation is recognised by the new enactment to encourage housing accommodation in cities and towns.

Dividends of such companies are limited to 6 per cent. per annum, and provision is made for municipal corporations guaranteeing their securities up to 85 per cent of the value of the lands and improvements, subject to the assent of the electors, but with power for council to dispense with same if the project is approved by the Provincial Board of Health.

The council has also representation in the management and control of the enterprise.

DOMINION STATUTE, 1913.

In addition to the above the following Acts of the Dominion Parliament may be found of interest to the members of the Association.

1. The Bank Act, ch. 9. This Act, which came into force on July 1st, last, is a complete, if not drastic, revision

of the former Act, with numerous changes and additions intended for the greater protection of the public, as well as shareholders. A compulsory shareholders' and permissive government audit are among the special features of the Act, which must be carefully perused and studied throughout by each member for himself, as the changes are too numerous to comment on in detail.

2. The Criminal Code Amendment Act, 1913, ch. 13. This Act amends the Criminal Code R. S. C. 1906, in a large number of important particulars such as the restriction of the sale and use of certain dangerous weapons without a permit, the offence of procuring for immoral purposes, the keeping of gaming or disorderly houses, neglect to provide for wife or children, the making of false statements in writing with intent to obtain advances, etc.

3. An Amendment to the Exchequer Court Act, ch. 17. This Act makes provision for an Appeal to the Exchequer Court by an applicant for a patent from an adverse decision of the Commissioner of Patents at any time within six months after notice mailed to him by registered letter and give this Court exclusive jurisdiction to hear and determine any such appeal.

4. The Gold and Silver Marking Act, 1913, ch. 19. This is an important Act intended to protect the public from fraud in the manufacture or sale within Canada of articles made from gold or silver or plated with either of these precious metals.

5. An Act to amend the Government Railways Small Claims Act, ch. 20. Provides for claims against his Majesty not exceeding $500 arising out of the operation of the Intercolonial Railway being sued in a Provincial Court, having jurisdiction to this amount over like claims between subjects.

6. An Act relating to Parcel Post, ch. 35. Provides for the establishment and maintenance in Canada of a Parcel Post System for conveyance of parcels of all kinds including farm and factory produce, subject to such exceptions and regulations as may be made by the Post-Master General. The Act is to come into force on a date to be proclaimed.

7. An Act to amend the Prisons and Reformatories Act, ch. 39. Provides in the main for special power of sentencing certain persons convicted of crimes to imprisonment for indeterminate periods.

8. An Act to amend to Judge's Act, ch. 28. Among other provisions, the Act fixes the salary of County Judges in Ontario at $3,500 for the Judge of the County Court of York, and at $3,000 per annum for all other County Court Judges. Such Judges are also compulsorily retired on attaining 75 years of age, or they may resign after 30 years of service on the Bench, in either case retaining their full salaries for life.

9. An Act respecting the Superior Courts of the Province of Ontario, ch. 50. This Act in effect substitutes the words, "a Divisional Court of the Appellate Division of the Supreme Court of Ontario" for the words, "Court of Appeal for Ontario," and the words, "High Court Division of the Supreme Court of Ontario" for the words, "High Court of Justice for Ontario," where references are made thereto in Acts of the Parliament of Canada.

10. An Act to amend the Supreme Court Act, ch. 51. Defines the meaning of final judgment; gives power to the Court in admiralty cases to call in the aid of one or more assessors specially qualified and try and hear an appeal wholly or partially with their assistance.

It fixes three sessions of the Court a year, commencing the first Tuesday in February, second Tuesday in May, and second Tuesday in October, subject to change by the Governor-in-council or the Court on publication in the *Canada Gazette* of four weeks' notice thereof.

As affecting our foreign or international relations, mention may here be made of the Japanese Treaty Act, ch. 27, and the West Indian Trade Agreement Act, ch. 56, the former, with certain reservations, confirming a Treaty of Commerce and Navigation signed between the United Kingdom of Great Britain and Ireland, of the one part, and the Empire of Japan, of the other part, in April 1911, and which may be usefully referred to, to ascertain the rights, privileges and li nitations of Janapese subjects in this country, as well as of British subjects in the Empire of Japan. The latter Act confirming an agrcement of 9th April, 1912, by representatives of Canada on the one part, and of the West Indian Colonies on the other, establishing a preferential trade compact extending over a numerous list of articles.

SUGGESTIONS AS TO FURTHER LEGISLATION.

Your committee recognize that the work of revising and consolidating the Statutes has been one of undoubtedly great magnitude and prosecuted with consummate skill, ability and thoroughness becoming the eminent jusists who undertook the work.

The protracted, though unexpected, delay in completing it has been obviously a source of considerable inconvenience to the profession, and now that the work has been completed it is to be hoped that any proposed changes or amendments in the existing Statutes should receive due and careful consideration, and should be either drafted or at least revised by counsel known to have special qualifications in the particular branch of law required.

This suggestion applies not only to the existing statutes, but with even greater force to the drafting and devising of new Acts.

By adopting this method our legislation would be scientifically and skilfully prepared, there would be less uncertainty and conflict of authorities as to the interpretation of statute law, the work of the decennial revision greatly facilitated and the delay incident to the last revision thereby avoided.

Referring to particular statutes, your committee would make the following suggestions for consideration:—

(1). Under the Division Courts Act: In case a summons is not served by the bailiff within ten days and good reason not shewn for such default, the suitor should be at liberty to take out the summons and have the same served himself, in which case the bailiff should not be entitled to fees for services. This should apply as well after as before judgment.

(2) That under the same Act, some less expensive and more expeditious procedure should be adopted to enforce payment of small claims, say under $25.

(3) That any claims under this Act, exceeding $50, where particulars equivalent to a specially endorsed writ in the Supreme Court of Ontario are given and the defendant disputes the claim, the Judge should be given the discretion of allowing a counsel fee of $5 to the successful party where he appears by solicitor.

(4) That appeals from the judgment of a Division Court Judge should be made direct to a Judge of the Supreme Court of Ontario in Chambers and not to the trial Judge, and the right of appeal should be granted in all claims over $50. The procedure might be made simple and the appellant required to deposit a small sum as security for costs.

(5) Under the Surrogate Courts Act. In non-contentions matters a solicitor in conduct of a matter should be authorized to take any affidavit required therein. This would be a great convenience, especially to many solicitors practising in small places throughout the province, and at the same time would be in harmony with the practice in other non-contentious business.

(6) Under the increased jurisdiction given to County Courts, the Judges of these Courts have now discretionary power to give a fiat for a counsel fee not exceeding $75. It is recommended that the same discretionary power should be given to the Judge in Surrogate Court cases, where the subject-matter of suit involved is large and the issues involved complicated.

(7) The subject of salaries to Crown officers discussed on former occasions by this association has received the further attention of your committee, who strongly recommend that, wherever possible such arrangement should be made and salaries paid to these officers as would enable them to devote their entire time to their official duties and relieve them from the necessity of resorting to private practice to supplement their income.

This observation applies with particular force to the cases of Crown attorneys and police magistrates who are continually administering justice in all sorts of criminal matters where the public is concerned.

Your committee conceives that it is neither fitting nor consistent with the fundamental principles of English jurisprudence that the Legislature should place Crown officers in the wholly anomalous and dual position of holding a general brief for the Crown in all criminal matters and a special brief for the subject in civil matters. Such conditions too frequently result in a conflict of duty and interest.

The temptations to a practitioner, however conscientious, are great, and the quality of justice is thereby apt to be strained. In large cities, this anomaly should be at once

discontinued and the salaries of such officers if necessary increased to properly compensate them for the services rendered.

In smaller places where the Crown work is not sufficient to occupy the entire time of the officials, the positions should, wherever possible, be combined with other offices in the gift of the Crown, and in that way the same result will be attained.

The abuses incident to existing conditions have been frequently commented on in the Courts, as for instance in the recent case of *Fritz* v. *Jelf* reported in the current number of the *Weekly Notes,* and in the case of *Re Holman & Rea,* 4 O. W. N. 434, and *Livingston* v. *Livingston,* 13 O. L. R. 604.

Your committee would further recommend that the requirement for registration of partnership agreements (now six months) should be limited to say, thirty days. This would allow ample time to conform with the simple procedure required and at the same time would be a great convenience to the public having dealings with the members of the firm.

The Mechanics' Lien Act, should, in the opinion of your committee, be amended by allowing a claimant, who has duly filed and served his statement of claim, to note the pleadings closed against the defendant in default in delivery of his statement of defence, and thereafter to proceed to trial to settle the rights of other claimants interested, without further reference to the defendant in default. At present, as you are aware, it is necessary, even though a defendant may be in default in delivering defence, to serve the defendant with notice of motion to fix the date of trial, and after that to again serve him with a notice of trial.

Under this Act, too, moneys should be payable out of Court on *præcipe* direct to the parties interested instead of the present anomalous practice of being obtained by the Judge or referee trying the case.

SALARIES OF COUNTY JUDGES.

In view of the present substantial increase in the jurisdiction of County Courts and the greater measure of work and responsibility thereby involved, as also having regard to the entirely inadequate compensation heretofore paid to such Judges, your committee would recommend that their

salaries should be materially increased and the occupants of the County Court Bench thereby placed in circumstances of independence and in keeping with their dignified position.

The salaries of Superior Court Judges might also, considering the increased cost of living, receive due consideration on the part of the Government.

FEDERAL BANKRUPTCY LAW.

Your committee would further recommend that a bankruptcy law should be enacted by the Dominion Parliament applicable to the whole of Canada. The need for such legislation has long been sorely felt, and the rapid increase in the facilities of communication and transportation in this country and the phenomenal growth of inter-provincial trade which has taken place during the past few years, render uniform laws and procedure in insolvent matters the more imperative, and it is to be hoped that this matter will be pressed upon the attention of Parliament for early consideration.

TRADE AGREEMENTS.

The practice adopted by certain manufacturers and other wholesale dealers in fixing uniform prices of their wares to be charged by retailers, and refusing to deal with those who will not agree to conform to their schedules, should be prohibited. This practice is especially prevalent in the case of manufacturers of some well established specialty or of some patented article. In the case of some patented articles particularly, where valuable privileges are granted to patentees under the authority of a statute, it is only reasonable and proper that these privileges should not be abused. In all such cases the public should be protected.

All of which is respectfully submitted

Signed on behalf of the Committee.

"N. B. GASH,"
Chairman.

December 29th, 1913.

PERSONAL.

The annual meeting of the Manitoba Bar Association was held at the Fort Garry Hotel, Winnipeg, on Saturday the 24th day of January, 1914.

Mr. W. J. McWhinney, K.C., of Toronto, vice-president of the Ontario Bar Association, took a leading part in the discussion upon the proposed formation of a Canadian Bar Association.

During the afternoon session, Mr. Frank B. Kellogg, of St. Paul, Minn., retiring president of the American Bar Association delivered a very interesting address upon, "The Influence of the English People upon Constitutional Government." This was followed by an address on "Education" by Mr. Justice Galt.

The annual dinner was held at the Fort Garry Hotel, at 7.00 p.m.

Hon. E. McLeod of the Supreme Court of New Brunswick was appointed Chief Justice to succeed Judge Barker, recently retired.

William Douglas Gausby, barrister, of Hamilton, has been appointed assistant registrar of the appellate division of the Supreme Court of judicature of Ontario.

Mr. George F. Shepley, K.C., one of the most widely known members of the Bar in Canada, was recently inaugurated as Treasurer of the Upper Canada Law Society, in succession to the late Sir Æmilius Irving, who held the post for many years. The proceedings were quite informal.

There was a very large attendance of members of the High Court and members of the society, which was a tribute to the legal eminence that Mr. Shepley has achieved at the Bar, the candidate being the unanimous choice of the members of the society for the position.

The appointment was received with gratification by the members, not only on the basis of Mr. Shepley's qualifications, but because of the fact that his health has been restored. A significant feature of the inauguration ceremony was the presence of several members of the High Court.

In accepting the office, Mr. Shepley expressed thanks for the honor bestowed upon him, and made kindly reference to the late Sir Æmilius Irving.

At a meeting of the Benchers of the Law Society of British Columbia, recently, the following were called and admitted to the bar: For call—Robert Macabster Chalmers, Arthur Clifton Skaling, Elmore Meredith, William Allan Riddell, Evelyn Fitzgerald Sargeant, Robert James Clegg. For admission—Edward Courtenay Mayers, Arthur Clifton Skaling, Robert Macabster Chalmers, Robert James Clegg, William Riddell, Elmore Meredith, Gwynne Henry Meredith, Gilbert Cecil Tarr, Avard Vernon Pineo, Harold Eric Landman, Stephen Alfred Herman Trumpler, David Henry Conyn Balleny, Edward William Davis. Subsequently they were presented to Mr. Justice Gregory in the Supreme Court, before whom they were sworn.

M. C. Shee, who for 10 years has been associated in practice in Dublin with his brother, J. J. Shee, M.P., will become a partner of M. W. McDonald, of Calgary.

Lewis H. Martell, B.A., B.C.L., member of the Bar of the Province of Nova Scotia, has resigned the position as Assistant Superintendent of Fisheries for Canada, and is returning to his native province to resume the practice of law in the town of Windsor.

Attorney-General Grimmer of the Flemming Cabinet was appointed Chief Justice of the Court of Appeals for New Brunswick.

Sir William Meredith, president of the Appellate Division, with the assistance of Messrs. Justice Kelly and Middleton, will form a board of instruction for the purpose of coaching the legal officials at Osgoode Hall in the new rules of practice with the object of securing uniformity in handling and prompt despatch of all cases coming before the Court.

The annual banquet of the Moose Jaw Bar Association, held last evening in the grill room of the Royal George Hotel, was a great success. The distinguished guest of the evening was His Lordship Chief Justice F. W. G. Haultain, of the Saskatchewan Supreme Court, while Judge Leahy, of Regina, and Judge Smyth, of Swift Current were also

present. The principal speakers of the evening were: The Chief Justice, W. E. Knowles, M.P., W. B. Willoughby, K.C., M.P.P., and Judge Leahy. H. Davidson Pickett fulfilled the duties of chairman in a very capable manner, and after the bounteous fare provided by the Royal George had been disposed of and the toast, "The King," hououred in the usual way, Mr. Pickett called on Chief Justice Haultain, who responded to the toast "The Bench." His Lordship explained, in opening, that owing to the fact that he had been so busily engaged in Supreme Court work he had not had time to prepare a speech. He referred to the tendency to give an Imperial application to everything, and he stated that he considered an Imperial application of the bench, and the bar was not always realized, He then pointed out the position which British law and British justice had taken in the world. His Lordship also spoke briefly on the position the bench held in the British Empire, and he expressed the opinion that this was due to the permanency of the tenure. In concluding, he referred to the personnel of the Saskatchewan Bench, and praised its high standard, and he thanked the members of the bench and bar present for the assistance which they had given him since his elevation to the Chief Justiceship.

The toast "The Bar" was ably proposed by Judge Leahy, of Regina, who has recently been elevated to the bench. W. F. Dunn, police magistrate, made a very able response to this.

W. B. Willoughby, M.L.A., responded to "Our Lawmakers," and in his remarks he referred to the demands being made by the people of Canada for the Initiation, Referendum, and Recall. In speaking of his subject, he referred to the difference in the constitution of the United States and the Dominion. He was inclined to think that it was an innovation which would not be adaptable to British constitutions.

George W. Maxwell, for many years with Kirkpatrick and Rogers, lawyers of Kingston, died recently of pneumonia, after a short illness.

The name of Hedley E. Snider, who for several years has been with Kerr & Thomson, barristers of Hamilton, has been added to the firm name which now appears as Kerr, Thomson & Snider.

Eight young lawyers were admitted to practice at the conclusion of the examinations in Laval University recently. They are: J. P. Lanctot, Sherbrooke; Leatare Roy, Levis; C. E. Bruchesi, Montreal; J. McNaughton, Montreal; N. Pouliot, Riviere du Loup; A. Angers, Beauceville; L. St. Denis, Montreal, and R. Brodeur, Ottawa. The following students were admitted to study: A. Desjardins, N. Beauchamp, T. Coonan, S. Cameron, E. Marcotte, N. Paquet, P. Brais, S. Senecal, H. Babcock, J. A. Demers, J. Elliott, A. Regnier and A. Allard.

Sir Joseph Dubuc, 73 years old, former Chief Justice of the province of Manitoba, died in Los Angeles after a short illness. He was a former speaker of the Provincial Legislature and for many years was vice-chancellor of the University of Manitoba. From 1901 until 1909 he was Chief Justice of the Court of King's Bench.

J. W. G. Morrison, who for the past three years has been practising law at Vermilion, has returned to Edmonton and opened offices at 441 Tegler Block. The business at Vermilion will be carried on under the firm name of Morrison & Campbell.

Former Secretary of War, Jacob McGavock Dickinson, announced recently his intention of resuming the practise of law in Chicago after a lapse of more than four years. Mr. Dickinson, who received his legal training at Columbia College, New York; Leipzig, Germany, and Paris, has opened an office in room 800 the Temple. Attorney Dickinson began his service as Secretary of War in 1909, under President Taft. Previous to that time he had practised law in Chicago since 1899. He has served on the Supreme Bench of Tennessee and as assistant attorney-general of the United States. He is a member of many of Chicago's most prominent clubs.

W. M. Rose, barrister, formerly of Rosthern, Sask., has formed a partnership with J. C. Martin, of Regina, where he will reside in future, and has severed his connection with McCrasey, Mackenzie, Hutchinson & Rose, of Saskatoon. This firm will in future be known as McCraney, Mackenzie & Hutchinson, and has taken into its membership W. D. Thomson, formerly of Rosthern, and J. W. McFadden, who have been in the office for some time.

G. V. Pelton, LL.B., of Edmonton, who was for some time associated with the law firm of Gricsbach, O'Connor & Co. and has lately been practising on his own account, has joined Messrs. E. B. Edwards, K.C., and Lucien Dubuc, in partnership, at 113 Jasper avenue E. The new law firm will be known as Edwards, Dubuc & Pelton.

The annual meeting of the Hamilton Law Society was held January 13th in the law library, when the accounts for the year were passed and the officers were elected for the ensuing year. The following are the officers, all re-elected with the exception of the assistant secretary, which is a new office:—

S. F. Lazier, K.C., president; William Bell, K.C., vice-president; Walter T. Evans, secretary; F. F. Trelcaven, assistant secretary; W. A. Logie, treasurer; John W. Jones and W. S. McBrayné, auditors.

S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, K.C., George S. Kerr, K.C., and George S. Lynch-Staunton, K.C., trustees.

The legislation committee was re-elected.

Some discussion occurred about the new revision of the statutes, and the local legal lights were of the opinion that the revisors took too long a time to do the work. A resolution to this effect will be forwarded to the provincial Government.

A resolution recommending certain amendments in connection with charges of Toronto agents was also passed, and will be forwarded to Justices Middleton, Meredith and Kelly, who constitute a committee in charge of the tariff amendments.

An acknowledgment of the note of condolence and sympathy sent to the family of Sir Æmilius Irving on the occasion of their recent bereavement, was read. Sir Æmilius was the first president of the local association.

The trustees reported that the membership had increased to a total enrolment of 86. The library now contains 5,131 volumes, of which number 149 were added last year. The library is insured for the sum of $8,800.

The treasurer's statement shewed the total receipts for the year were $2,015.35, and the disbursements $1,674.63, leaving a cash balance of $340.72.

At the last meeting of the Council of the Ontario Bar Association the CANADIAN LAW TIMES was named as the official organ of the Association.

Mr. Samuel D. Schultz, of Vancouver, has recently been appointed a County Court Judge. Mr. Schultz is a graduate of Toronto University and a member of the Ontario Bar. He was called to the Bar of British Columbia in 1893 and after some years practice in Victoria he moved to Vancouver where he has since been practising. Recently he became senior partner of the firm of Schultz, Scott & Goodstone. His appointment to the Bench will be received with favour not only by members of the profession but by his many friends in all parts of the Dominion.

The annual meeting of the Nova Scotia Barristers' Society took place in the west Court room of the Court House, Halifax, on Saturday afternoon, February 28th, 1914, John T. Ross, K.C., the vice-president in the chair in the absence of the president. The financial, librarian and society's reports were adopted and passed unanimously. On motion of R. E. Harris, K.C., and J. A. Chisholm, K.C., it was resolved to encourage the formation of a Dominion law society such as outlined at Ottawa a few days ago, and the action in that behalf was left with the incoming council. The election of officers was proceeded with and resulted as follows:—

John T. Ross, K.C., president; John J. Power, K.C., vice-president; W. R. Foster, secretary; J. L. McKinnon, treasurer; Hon. Attorney-General Daniels, ex-officio, Jos. A. Chisholm, K.C., C. J. Burchell, K.C., W. H. Fulton, K.C., E. H. Covert, K.C., James A. McDonald, Edmund P. Allison and Fred. P. Bligh, councillors; Dr. J. Johnston Grant, K.C., Court House Commissioner; T. W. Murphy and J. M. Davison, auditors.

The members of the last council residing in all the counties of the province were re-elected, with the exception of Victoria county which has no resident barrister.

After a brief discussion on legislation effecting the society to be introduced at the present session of the Legislature, the meeting adjourned.

The annual meeting of the Law Society was held at St. Johns, Nfld., recently, Mr. D. Morison, K.C., presiding and many of the members present. The Bench reported the affairs of the institution to be in very flourishing condition. The greatest pleasure was expressed by all on hearing that the consolidation of laws was to be taken up without delay as mentioned by Rt. Hon. Sir E. P. Morris in the House the previous afternoon. Some other matters of interest were discussed after which the meeting closed.

C. F. Blair was appointed city solicitor for Regina, in succession to S. P. Grosch, selected for the local government board. Mr. Blair has been a member of one of the prominent local legal firms, which includes W. M. Martin, M.P.

Oliver E. Culbert, of Lougheed, Bennett and McLaws, Calgary, Alta., was sworn in as a barrister by his lordship Mr. Justice Beck, recently. Mr. Culbert, who has practised with considerable prominence as a member of the Ontario Bar, at Ottawa, was introduced by James Muir, K.C., president of the Alberta Law Society.

A special meeting of the St. John Law Society was held in the Pugsley building, February 16th, at which M. G. Teed, K.C., president of the society, occupied the chair. A resolution was passed recommending the amalgamation of the Supreme Court Reports and the reports of the Supreme Court in Equity into one, as had previously been recommended by the Barristers' Society of New Brunswick at their last meeting in Fredericton. It was also recommended that cases before the King's Bench Division tried without a jury, decisions given in chambers, and practice cases and decisions of the Probate and Divorce Courts be also reported.

The resolution will be forwarded to the Barristers' Society of New Brunswick and the whole matter will be left in their hands.

Word is to hand of the swearing in as a barrister in Edmonton of Mr. D. W. MacKay, son of Mr. W. J. MacKay, of Bennington.

There was a large attendance of barristers at the dinner given to His Honour Chief Justice McLeod at the Union

Club, by the Barristers' Society of New Brunswick, and the function was of the most enjoyable nature. The speeches were of a high order. In the absence of Mr. J. B. M. Baxter, the president, who was called out of town, Mr. A. R. Slipp, K.C., occupied the chair. Among the guests were Mr. Justice White, Mr. Justice McKeown, Mr. Justice Crocket, Mr. Justice Grimmer, Sir F. E. Barker and Hon. George J. Clark, Attorney-General.

Thomas Snider, K.C., born in Norfolk county and a lawyer in Cayuga county for many years, died recently, following an operation. He was in his fifty-eighth year. A widow and three sons survive. Judge Snider, of Hamilton, and Sheriff Snider, of Simcoe, are brothers.

The annual dinner of the Osgoode Literary and Legal Society was held February 12th, at McConkey's restaurant. Mr. J. D. Falconbridge presided. Speeches were delivered by Sir Allen Aylesworth, Mr. Justice Riddell, Mr. James Bicknell, Mr. E. F. B. Johnston, Mr. S. C. S. Kerr, Mr. J. C. McFarlane, Mr. H. S. Hamilton, Mr. Hugh McLaughlin and Mr. H. A. Beckwith.

E. A. Condie, Winnipeg, has taken into partnership F. Trafford Taylor, LL.B., and the new firm will engage in the practice of law under the name of Condie and Taylor, at new offices, suite 202, McArthur building.

Mrs. R. Jameson, the first woman Judge in the Dominion of Canada, has been appointed to take charge of and render decisions in the Juvenile Court of Calgary, Alta.

The formal institution of a law school under the *aegis* of the Law Society of British Columbia marks the beginning of a new epoch in legal education in this province. The decision to form a law school was made possible by the action of the Benchers, who recently voted a money grant to supplement the fund of $2,500 raised by the Law Students' Society, and gave formal consent to the forming of the school. Mr. L. G. McPhillips, K.C., has been appointed by his fellow benchers to be the responsible Bencher for supervising the work of forming the school. Mr. D. A. McDonald of the firm of Bourne & McDonald has been ap-

pointed dean. Associated with Mr. McDonald will be a number of eminent barristers. Mr. Martin Griffin, Mr. R M. Macdonald and Mr. R. W. Hannington are among the lawyers who will give lectures, and the names of others will be announced later. At least four lectures a week will be given each student.

Probably the most distinguished gathering of Canadian lawyers that ever met together at one time sat down to dinner in the Chateau Laurier, recently, as the guests of J. A. M. Aikins, K.C., M.P.

There were about sixty in the gathering and they came from all parts of Canada. Those who were not K.C.'s totalled less than half a dozen. There were men who have figured in some of the most famous cases in the history of the Dominion; many had worn their silk and argued cases before the Privy Council in London. Premier Borden was there and so was Hon. C. J. Doherty, Minister of Justice; also Hon. L. P. Pelletier, K.C., M.P., Hon. J. D. Hazen, K.C., and many Parliamentarians.

The object of the meeting was to discuss the advisability of forming a Canadian Bar Association. Some time ago Hon. Mr. Doherty suggested the formation of such an association, whereat J. A. M. Aikins, K.C., M.P., got busy and the meeting was the result of Mr. Aikins' interest in the matter.

It was decided to form a Canadian Bar Association and a tentative constitution will be drawn up and discussed at another meeting to be held in Ottawa some time in the near future. Meanwhile, provincial Bar associations and county law societies will be invited to become interested in the project. Those who were guests of Mr. Aikins, from Ontario, were: F. M. Field, K.C., Cobourg; John J. Drew, K.C., Guelph; Frank Denton, K.C., A. J. Russell Snow, K.C., N. B. Gash, K.C., W. J. McWhinney, K.C., J. Strachan Johnston, K.C., all of Toronto; J. F. Orde, K.C., Geo. F. Henderson, K.C., A. E. Fripp, K.C., M.P., Col. Andrew Thompson, F. D. Hogg.

The Medicine Hat *Morning Times* of February 3rd, reports that the new city solicitor will be Neil McQuarrie. Summerside, a practising barrister of the maritime provinces, his engagement having been recommended by the committee having the matter in hand.

The results of the Nova Scotia Bar Society's law examinations held before Registrar J. L. Barnhill, have been made known. Eleven of the candidates passed the final examinations; J. W. McDonald, Pictou; D. D. McDonald, Pictou; W. L. Murray, Halifax; E. T. Parker, Windsor; E. MacKay Forbes, Glace Bay; V. R. Smith, Amherst; W. D. Barss, Dartmouth; J. McD. Stewart, Halifax; H. H. Pineo, Berwick; L. E. Ormond, Parrsboro; W. M. Nelson, Tatamagouche.

Sir Lomer Gouin, Prime Minister of the province of Quebec, and Hon. Rodolphe Lemieux, M.P., for Rouville, have retired from the legal firm of Gouin, Lemieux, Murphy, Berard and Perrault. It is understood that neither will at present form any new legal alliance, their time being taken up with their duties in public life at Quebec and Ottawa. A new firm has been formed by Messrs. D. R. Murphy, K.C., L. P. Berard, K.C., and Antonio Perrault, and will be known as Murphy, Berard & Perrault. Mr. Murphy, the head, is looked upon by his confreres as an able and safe lawyer. Sir Lomer Gouin and Hon. Mr. Lemieux took Mr. Murphy into their firm when their former partner, the present Mr. Justice Martineau, was appointed to the Superior Court bench. Consequently his taking the place as head of the new firm is what would be expected. Sir Lomer Gouin and Mr. Lemieux, who have just retired from active legal work, were at one time partners of the late Hon. Honore Mercier and were both men of mark at the Bar of this district. While both were active in political work, they gave a great part of their time to their law office until Mr. Lemieux became Solicitor-General and later Postmaster-General, and Sir Lomer minister under Hon. S. N. Parent and later Prime Minister. Hon. Rodolphe Lemieux was engaged in a great many criminal cases and was also Crown Prosecutor, his eloquence coming into prominence in many a *cause celebre* before Judge and jury.

Joshua Denovan, barrister, has removed his office to the Canadian Pacific Railway Company building, corner of King and Yonge streets.

JUDGES MAKE DRASTIC ORDER.

If lawyers will procrastinate and waste the time of the Judges, they must be made to pay for their delinquency in real coin of the realm and also suffer other inconveniences.

This was the effect of a decision arrived at by the Judges at a meeting in Osgoode Hall recently. Practically all the Judges were present, and the consultation had particular reference to the ever-increasing non-jury list and the fact that it is only by accident, despite the long list, that a Judge strikes a case that is ready to go on. The climax was reached, when out of a dozen cases not a single one was found ready to be proceeded with.

At the opening of the Non-jury Assizes at the City Hall, Mr. Justice Middleton announced the decision of the Judges. "The result of that discussion," said he, "is that, without exception, from this time on, if a case is not heard when reached, it will be struck out of the list, and the liberty of re-entering it at the foot of the list will only be given on giving of proper notice, and payment of fees, and even then it will not be called again until every case on the list has had an opportunity of being heard.

"Hitherto, it has been too easy to procrastinate, while the work is so congested that extra sittings will have to be held, and at the same time half the time of the Judges is wasted by cases not being ready."

LORD HALDANE'S REAL PROPERTY AND CONVEYANCING BILLS.

By Arthur Underhill, in Law Quarterly Review.

As is well known, the Lord Chancellor, in the course of last Session, introduced into the House of Lords two Bills, one called the Real Property Bill, dealing with divers amendments of the law of real property, and the other, bearing the more modest title of the Conveyancing Bill, intended to make extensive alterations in the practice of conveyancing. The two Bills, however (as was inevitable), overlap, and if they could have been consolidated there would have been a considerable gain in point of lucidity. Probably it was considered that two separate Bills were essential for parliamentary reasons, so that opposition to one might not imperil the other.

I have been asked by the Editor of the *Law Quarterly* to write a short account of both Bills; but seeing that they are crammed with detail, it is impossible, in the space allotted to me, to give more than a rough sketch of the proposed legislation. Therefore such criticism as I have to make will be confined to questions of principle.

(1) THE REAL PROPERTY BILL.

Speaking broadly, the Real Property Bill seems to me to be a well-conceived measure. It purports to make amendments in:—

(a) The general law of real estate.
(b) The Settled Land Acts.
(c) The Land Transfer Acts, and
(d) to abolish copyholds and other special tenures.

To take the general law first the Bill (Part IV.) proposes to amend it in the following particulars:—

1. Words of limitation are no longer to be necessary in a conveyance of the fee simple, thus extending the provisions of the Wills Act to conveyances *inter vivos*.

2. A devise to an infant contingently on his attaining twenty-one is to be construed as vested subject to be divested, a useful provision which will bring all infants' estates within the Settled Land Acts, and also within sec. 43 of the Conveyancing Act, 1881.

3. Acknowledgments of deeds by married women, and enrolments of disentailing deeds, are abolished.

4. A tenant in tail is to be capable of devising the fee simple.

5. The rule in *Hopkinson* v. *Rolt* is reversed in the case of mortgages for future advances not exceeding a stated sum.

6. The Court is empowered to discharge obsolete restrictive covenants. Why not add a time limit automatically extinguishing these annoying incumbrances after, say, fifty years?

7. Death Duty charges and Public Health charges are to be registered as Land Charges, and, if not registered, are to be negligible by purchasers or mortgagees.

8. The effect of irrevocable powers of attorney given to a purchaser for value is extended by sec. 48 to the assigns of the donee.

9. Receipts under seal on mortgages are to operate as reconveyances.

10. A deed purporting to transfer a "mortgage" is to pass, without more, the legal estate and all the rights of the mortgagee.

11. Under an open contract, the purchaser is to be restricted to a thirty years' title instead of the forty years prescribed by the Vendor and Purchaser Act. This is a questionable provision, as it exposes purchasers to the danger of undisclosed prior legal interests, and possibly even to prior equitable ones.

So much for amendments of the general law of real property. Let us now turn to the proposed amendments of the Settled Land Acts. These are too numerous for mention in detail, but the chief of them are as follows:—

1. The trustees of an earlier subsisting settlement are to be *ex officio* trustees of the compound settlement consisting of it and any subsequent documents.

2. The express restoration of an existing life estate is not to prevent the life tenant exercising the powers of a tenant for life under the instrument by which the restoration is made.

3. The Court is empowered to sanction any leases by life tenants, however long.

4. The surrender of a life estate to the next remainderman is to extinguish the powers of the surrenderor.

5. Section 4 is at first sight obscure, but appears really to form part of the subject dealt with by sec. 8 (*infra*), and ought to be transferred to that section.

6. Trustees who were originally trustees for sale, or with power of sale, and their successors in office are to remain trustees for purposes of the Settled Land Acts, notwithstanding that the trust for, or powers of sale has ceased.

7. Sections 7 and 8 contain useful provisions extending the powers of a life tenant of a settled base fee to the entire fee simple, and giving the powers of a tenant for life to a tenant in fee (or the absolute owner of a term of years), where any charges still exist under a settlement. Hitherto, although such powers were incident to a tenancy in fee with an executory limitation over, they were not incident to a tenancy in fee simple absolute, and the amendment is a sensible and useful one.

8. Section 11 gives all the powers of a tenant for life under the Settled Land Acts to the trustees, where there is no life tenant; and sec. 13 gives the like powers to trustees under a trust for sale.

9. The Settled Land Act powers in relation to married women are slightly amended, as also are the provisions in relation to estates settled by different instruments upon the same limitations or trusts.

10. Further dealings between tenant for life and trustees are authorized, and power is given to charge by way of additional or substituted security, and to raise money for improvements.

11. The ambiguity in the Settled Land Acts as to the tenant for life, where land is held in undivided shares, is cured, and further applications of capital moneys are permitted, and further improvements authorized.

12. Lastly, sec. 25 contains a useful provision that, if it is shewn to the Court that a tenant for life has ceased to have a substantial interest in the estate, or has unreasonably refused to exercise the statutory powers, the Court may confer the statutory powers of a tenant for life on the trustees or other persons.

It is a pity that the bill does not set at rest the doubt which afflicts some minds (although I never felt it myself) whether a mortgagee of the fee simple loses his security by joining in a sale, or whether (as is continually done in practice) his security can be shifted from the land sold to the

capital money produced by the sale. This might easily be made clear in sec. 15, by authorizing a charge of an incumbrance not only on other parts of the settled land, but also on capital moneys arising under the Settled Land Acts.

So far we have been considering mere amendments, for the most part useful, of existing law. Part II, however, is of a far more radical character, and will doubtless create considerable opposition, for it proposes to sweep away at one blow all copyhold, customary, and other local tenures, and all perpetually renewable leases, and to turn all land held under these tenures or on such leases into ordinary freehold. The Bill, however, contains provisions intended to preserve the material beneficial interests of lords and stewards in respect of quit rents, chief rents, fines, reliefs, heriots, dues, forfeitures (other than forfeiture for alienating by common law assurance or for alienation without license), and all rights as to timber.

Nevertheless, these manorial incidents are to be capable of being compulsorily extinguished either by the lord or tenant on the basis of proper compensation.

With regard to minerals, both lord and tenant are to have the right of acquiring them compulsorily; and if both desire to exercise the right the question is to be referred to the Board of Agriculture.

While feeling a sentimental regret at the disappearance of Gavelkind and Borough English, the weird tenures which prevail in northern manors, and the traditional ride of the frail widow on the black ram, I must candidly confess that this part of the Bill, if passed, will effect a real reform. But (as it necessarily alters the rights of many widows and widowers) it might well be supplemented by a section substituting for the existing unequal rights of tenant by the curtesy and doweress the more equitable custom prevailing in many manors which confers a life interest in a moiety of the land on a surviving husband or wife.

By Parts V and VI of the Real Property Bill, divers amendments of the Land Transfer Acts are effected, mainly intended to carry out the recommendations of the Land Transfer Commissioners. These are too numerous to be mentioned in detail, but apart from drafting amendments intended to meet slips in the existing Acts, the principal matters dealt with are as follows:—

Part I of the Land Transfer Act 1897 is very materially amended. In it the expression "[illegible]e" is to include real estate held on trust or by way [illegible]tgage, and a testator is to be deemed to have bee[illegible]ed to real estate passing under his will by reason of the exercise of a general power, and also to real estate in which he had an estate tail or base fee and which he effectively disposes of by his will, but only to the extent of such disposition. This is, of course, in order to carry out the provision, above referred to, giving power to tenants in tail to dispose of entailed lands by will. Estates tail and base fees not so disposed of are not to vest in the personal representative. An assent in writing by any personal representative is to operate as a conveyance, and is to be conclusive in favour of a purchaser. The following matters are also dealt with:—

1. The making of mortgages off the register protected by cautions on the register is authorized, and the greatest latitude is given to the registered proprietor to deal with his registered estate by way of mortgage or charge.

2. In settlements of registered land the tenant for life is to be registered as the proprietor of the fee simple or term of years settled.

3. The description of land on the register is to be in accordance with the usual practice in well-drafted conveyances, i.e., is to be verbal as well as by reference to plan.

4. Possessory titles are to become automatically absolute after the land has been for a certain number of years on the register.

5. The Statutes of Limitation are to apply in the case of registered lands.

(2) THE CONVEYANCING BILL.

This Bill is more ambitious than the Real Property Bill. Its object is to make the title to land approximately the same as the title to stocks, while preserving the general principles of law relating to freeholds. This seems to me to me to be a mistake. The law of real estate is now so difficult and complicated owing to the tinkering and ill-directed efforts of Parliament from the time of *de donis* downwards, that it is quite hopeless for any one who is not a trained real property lawyer to acquire even a general grasp of it. That is surely a scandalous state of affairs, and calls for something bolder and more sweeping than a Bill

which is admittedly only designed to enable a purchaser or mortgagee to shut his eyes with safety. It would be infinitely better to abolish *uno flatu* the whole of the existing law of freehold land, and to substitute the law relating to chattels real, as has been actually done in some of our Colonies. It could be done here in a Bill of moderate compass and is the line of least resistance, and practitioners already familiar with the law as to chattels real would find no difficulty in accommodating themselves to the new order. It would also have the advantage, incidentally of rendering obsolete the whole law of equitable conversion and inheritance which, now that the Settled Land Acts have permitted life tenants to sell the family estate and to substitute the proceeds of the sale for the land itself, is no longer of the importance that it once was. If coupled with a provision enabling property of all kinds to be settled by way of trust, for an interest analogous to an estate tail,[1] the suggested reform would answer every purpose.

The Conveyancing Bill does none of these things. It is designed (and very cleverly designed and drafted by men whose learning and ability and practical acquaintance with the subject are beyond all question and whose industry is beyond all praise) to relieve purchasers and mortgagees of the trouble of investigating the rights of persons claiming under settlements, but so far from simplifying the law of real estate it would render it more complicated and technical than ever.

However, that is another story, and my present business is merely to give an account, more or less intelligible, of the contents of the Bill.

Now, as every lawyer knows, in the case of stock the entire legal ownership must be transferred. In other words, it cannot be divided up into particular estates and remainders, although limited interests, corresponding approximately to particular estates and remainders, can be created in settlements of stock by vesting the stock in trustees upon trusts for persons in succession. The ostensible object of the Bill is to extend this principle *cy près* to land, so that purchasers and mortgagees shall henceforth only be required to investigate the successive transmissions and transfers of the entire fee, or of the entire term, all life estates,

[1] Suggested by my friend Mr. C. P. Sanger.

remainders, shifting uses, executory limitations, and powers of appointment and the like being made to take effect in future by way of trust only, and all trusts being kept off the title. The interests of beneficiaries (other than a life tenant in possession) are to be protected exclusively by cautions and inhibitions lodged at the Land Registry (like *lis pendens*), or, in the case of settled land, by the ingenious scheme explained below.

To carry out this broad general principle, the Bill provides that henceforth the only "estates" which can be created (except by means of a trust) shall be (1) fee simple, and (2) terms of years absolute taking effect in possession within twelve months.

If the Bill had proceeded on these simple lines, and had confined abstracts to legal estates in fee and legal terms, I should not have ventured to criticize it, because its ostensible object of approximating real estate titles to titles to stock would have been carried out. But unfortunately (as I think) it is overlaid with a mass of detail, and enriched with a strange, weird, and unfamiliar nomenclature, with the sole object, apparently of placing equitable fee simples and terms (including equities of redemption and equitable mortgages) in the same position, *qua* purchasers and mortgagees, as if they were corresponding legal estates.

Whether this was inevitable or not is discussed below, but it most certainly is inconsistent with the principle of making the title to land approximate to the simplicity of the title to stocks, the foundation of which is to ignore all equities.

But, before discussing this question, it is necessary to give a more detailed account of the provisions of the Bill.

By section 1 it is enacted that, after the passing of the Act (except as authorized by the Act), land shall not be capable of being disposed of[2] so as to transfer or create any estate other than a fee simple or a term of years absolute to take effect in possession not later than twelve months after execution. So far, so good. But the very next subsection allows all estates now capable of being created to be created by way of trust. It would seem, therefore, that the Bill would authorize

[2] Estates by the curtesy or in dower are not expressly provided for, but they appear to be 'subordinate interests taking effect only in equity' under sec. 5 (1).

(1) Legal estates in fee or for years only.

(2) So-called equitable estates of all kinds by the interposition of a trustee.

(3) Equitable estates in fee or for years without the interposition of an express trust.

Then a little later on we find both equitable and legal estates subdivided into

(1) Proprietary estates which must be fee simples or terms of years legal or equitable, and

(2) Subordinate estates, which include not only all estates which are not proprietary (e. g. life interests), but also all proprietary estates which are subject to another proprietary estate (e. g. equities of redemption). Then we have "paramount estates" and "paramount interests." terms which are only relative to estates or interests which are, *qua* them, "subordinate."

The Bill further contains a list of "paramount interests" (as distinguished from "paramount estates") which includes easements, the right to enforce restrictive covenants of which a purchaser has notice (a purely equitable interest this), and the estate or right, "in respect of occupation of every actual occupier;" but excludes *lis pendens*, judgments, deeds of arrangement, annuities, and any charge or liability placed upon a proprietary estate after the commencement of the Act by force of any Statute, and any restrictive covenant of which a purchaser has no notice, and (in reference to settled land) any charge, estate, or interest capable of being overreached by the Settled Land Acts.

Of these estates and interests, proprietary estates which are not subordinate, and paramount interests, are alone to be disclosed to a purchaser or mortgagee; and proprietary estates are only to be capable of being disposed of, so as to transfer the whole proprietary estate, with or without mines or surface, or as to create a term of years, an easement, or a rent. Any attempt to create any other kind of interest will only operate to create a trust or subordinate estate or interest. All powers, shifting uses, and executory limitations given to any person other than the proprietor and enabling such person to convey a proprietary estate are abolished, but all such interests are to take effect as trusts, and create subordinate interests. But this is without prejudice to the priorities which would have been gained by reason of the interests being legal if the Bill had not passed.

Finally, the proprietor of a proprietary estate is given power to convey it or to create another proprietary estate out of it (e.g. a term of years), as fully and completely as if he were absolutely entitled for his own benefit, subject only to such paramount interests as would now affect a purchaser without notice (which by section 2 include any equitable proprietary estate which has priority over the proprietary estate which is dealt with), and to such paramount interests as he may have notice of, and to all such subordinate rights as may be protected by cautions and inhibitions at the Land Registry. A purchaser or mortgagee will accordingly hold the proprietary estate created or conveyed (whether rightfully created or conveyed or not) discharged from all subordinate estates and interests, charges, liabilities, rights, and claims including unprotected death duties.

These provisions as to priority are very difficult to construe. It is by no means clear whether "priority" refers to order of date, or to priority according to well settled principles of equity. In the former case a legal mortgagee without notice of a prior equitable mortgage would lose security. Under this complicated scheme, therefore, an abstract of title must contain (as now) every legal and equitable dealing with the entire fee or entire term (as the case may be) which affects the vendor. The only transactions which are to be excluded are settlements creating limited interests. There may, therefore, be half-a-dozen or more collateral proprietary estates running contemporaneously. For instance:

(a) a term of years vested in a lessee (this would be a paramount proprietary estate to the extent of the term);

(b) A legal first mortgage of the fee (a subordinate estate *qua* (a) but paramount to (c), (d), (e), and (f));

(c) a second mortgage of the fee (subordinate to (a) and (b) but paramount to (d), (e), and (f));

(d) a third mortgage of the fee (subordinate to (a), (b), and (c) but paramount to (e) and (f));

(e) a fourth mortgage of the fee (subordinate to (a), (b), (c), and (d) but paramount to (f));

(f) finally, the equity of redemption of the mortgagor (subordinate to all the above).

So far with regard to unsettled land. With regard to settled land, the authors of the Bill were confronted with the Settled Land Acts, the policy of which is to vest powers

of sale, &c., in every tenant for life instead of in the trustees of the settlement. That policy is, of course, fatal to the actual assimilation of the title to land with the title to stock. To solve this riddle, the authors of the Bill have made it compulsory that the fee simple or term, the subject of the settlement, should be vested from time to time (preferably by deeds other than the settlement itself) in the person who, under the settlement, would have the powers conferred on tenants for life and other limited owners by the Settled Land Acts. By these deeds, trustees for the purposes of the Settled Land Acts are to be appointed, and (where desired) extensions of the Settled Land Act powers are to be given. On the death of a life tenant, the fee or term vests in his personal representative, who after payment of death duties, transfers it by a similar deed to the next person entitled under the settlement. A purchaser or mortgagee cannot go behind these deeds, and is entitled to assume that the person to whom the fee or term is so conveyed, has all the powers of a life tenant under the Settled Land Acts without any further inquiry; but of course he has to pay the purchase money, &c., to the trustees. Instead, therefore, of a purchaser or mortgagee being worried with the question whether the vendor or mortgagor is a life tenant within the meaning of the Settled Land Acts, he is presented with a kind of certificated life tenant and certificated trustees, with whom he can deal within the limits of the Settled Land Act powers, without further investigation. These provisions add to the complexity of the scheme, but probably they are inevitable, having regard to the general policy of the Settled Land Acts; and I think they would probably be useful even if the rest of the Bill were dropped, particularly in areas where registration of title is compulsory, as they would relieve the Registrar from the necessity of construing settlements and automatically present him with a proprietor whom he would be bound to register.

It will be seen from the above, the scheme of the Bill is very complicated, and that the complication is mainly caused by the supposed necessity of dealing with equitable fee simples and equitable terms as proprietary estates. It is submitted that there is no such necessity, that it is quite inconsistent with the root idea of approximating the title to real estate to the title to stocks, and that, in the result, the only effect of the Bill in shortening and simplifying titles

will be to eliminate the titles of limited owners and others under real estate settlements, substituting instead a certificated tenant for life with whom a purchaser or mortgagee may safely deal. But if so, the same result would be attained if the Bill were shorn of all its clauses except those relating to settlements of land.

Now to eliminate equitable fees and terms would obviously be an immense advance in point of simplicity, and consequently a desirable thing in itself. Let us consider whether the difficulty of doing so is insuperable.

So-called equitable estates are after all only "estates" by analogy. They are not rights *in rem*, but only *in personam*. To confuse legal estates with equitable interests is merely "darkening counsel." If we can, without any great frauds resulting, confine the title in the case of stocks to the legal registered title, why not revert to the simplicity of the Common Law, and confine the title to land to legal estates, at the same time restricting legal estates to fee simples and terms of years, and treating equities of redemption like other equitable interests as mere fiduciary interests binding on the legal owner personally, but protecting the securities of equitable mortgages by deposit, by a provision that a purchaser or mortgagee taking from a proprietor without delivery of the title deeds is to take subject to the rights of any morfgagee who has got them?

It must, however, be admitted that there are two sides to the question, and no doubt the authors of the Bill have been so deeply impressed with the fact that a fee simple owner is none the less the real owner because he has executed a legal mortgage, or because a bare legal estate is outstanding, that they have felt compelled to include these equitable interests as proprietary estates.

Yet in the case of an equity of redemption, it would make no material difference if his interest were excluded from the definition of "proprietary estate;" for he would, as the Bill stands, have to disclose the paramount estate created by the mortgage under which alone his "proprietary estate" (i.e., his equity of redemption) arises.

But then there is the not uncommon case of a bare legal estate outstanding in a trustee under an extinct express trust, and it may be urged that this might create difficulty. But this could, and I may add ought to be obviated, by a

new provision automatically vesting such outstanding bare legal estates in the absolute equitable owner of the fee simple.[3]

The above cases present very little difficulty; but a much more serious question is raised with regard to settled land, and I frankly recognize that if the abstract is (as I have suggested) limited to dealings with the legal fee or legal term, the result might be to upset the application of the scheme to settled land, wherever the legal fee simple is vested (as it often is) in a mortgagee who has priority over the settlement.

It is, however, suggested that this difficulty might be met by enacting that, in the application of the Bill to settled land, the tenant for life to whom a conveyance of an equitable fee has been made under the provisions of the Bill, shall have all the powers conferred on him by the Bill, notwithstanding that the legal estate is outstanding in a mortgagee, but subject to the rights of all persons claiming in priority to the settlement. The provisions of the Bill in relation to settled land are special, restricted, and exceptional, and this further clause would not add materially to their complexity.

The Bill also contains provisions as to infants' estates, dispositions or trust for sale, appointments of new trustees, appointment of special executors, death duties (substituting the purchase money for the land and freeing the purchaser unless protected by a caution), the bankruptcy of a proprietor[4] and the lodging of cautions and inhibitions by his trustee, and extending the rule as to the protection of *bona fide* purchasers of personal estate of a bankrupt to purchasers of his real estate.

To sum the Bill up, it may be described as a Bill to shorten abstracts, simplify searches and inquiries, relieve purchasers and mortgagees from all difficulty as to questions of pedigree, and render the registration of title to settled land less onerous and difficult than it is now. But it does not simplify the cumberous and archaic law of real estate; nay, adds considerably to its complexity and obscurity.

[3] Such bare legal estates never vest in the equitable owner under the Limitation Acts.

[4] These provisions are most difficult to construe, and, indeed, sec. 25, sub-sec. 8, seems to be reduced to a nullity by the proviso in paragraphs (*a*) and (*b*).

For my part, I would rather lighten the ship by casting overboard all "the lean and wasteful learning" which has accumulated round the Statute *de bonis* and the Statute of Uses, and assimilate the law of real estate to that of chattels real. But if that is "too advanced," then I would simplify the present Bill by eliminating equitable estates from the title in the manner above indicated, when the Bill would, I think, work fairly well. But if that cannot be conceded, then in my view it would be far better to confine this Bill to the group of sections dealing with settled land. If this group of sections were simplified and added to the Real Property Bill as amendments to the Settled Land Acts, the net result would, I think, be to confine abstracts of title to dealings with entire fees or entire terms, which after all is the only ostensible objection of this elaborate Bill. As the Bill stands it seems to me that its other provisions afford an excellent illustration of the French epigram, "*plus ca change, plus c'est la même chose.*"

SOME PERTINENT POINTS OF LAW.

Municipal Law—Municipal Taxation — Village or Town Lots used as Agricultural Lands.

1. Under the Cities' and Towns' Act, real properties should be assessed, for purposes of municipal taxation, at their real value.

2. If a lower standard or basis of taxation is adopted by the assessors or valuators, the same standard should be applied to each and every assessable property within the municipality, uniformity and equality of assessment being the fundamental principle underlying taxation for municipal purposes.

3. Lands situated within a town or city, which are actually used as, or form part of a farm, shall be taxed as agricultural lands.

4. Village, town or city lands within the residential portion of a municipality, for which there is a ready demand, as building lots, and to which municipal services, such as water, light, etc., and police protection are available, should be taxed as town lots, notwithstanding that, at the time, they are used for the raising of agricultural products or for pasturage purposes: *Laurie* v. *Corporation of Montcalm*, 1913, 20 R. de J. 1.

Practice—Extension of Delay for Appeal—Winding-up Act.

Where a right of appeal, by leave of a Judge of the Court which rendered the judgment, is given and it is provided that such appeal shall not be entertained unless the appellant has, within fourteen days from the rendering of the decision, "or within such further time as the Court or Judge appealed from" allows, taken proceedings to perfect his appeal, and given security, an order giving further time to appeal may be made after the expiry of the fourteen days: *Calumet Metals Co.* v. *Eldridge*, 1913, 20 R. de J. 21.

Suit in Revocation of Gift Inter Vivos — Ingratitude— Notice Given by Donee in the Newspapers Repudiating Liability for any Unauthorized Advances made to the Female Donors.

As a consequence of the obligation laid upon a donee of paying the cost of the clothing, food and other necessities of two female donors, it does not follow that he is deprived of his right to control any such purchases himself and to choose the tradesmen at whose establishments the donors will be provided for. A notice, published in the newspapers by the donee, that he will not pay any accounts for those purposes which are not authorized by him, does not constitute ingratitude within the meaning of the law and entailing revocation of the deed of gift: *Beaulieu* v. *Frank*, 1913, 20 R. de J. 26.

Moving Picture Halls and Theatres—License Fees—Interpretation of Statutes.

Art. 1301 (d) R. S. Q. only applies to moving picture halls proper and does not embrace theatres or other places of entertainment where moving pictures may be displayed occasionally or incidentally.

Hence, an establishment giving vaudeville performances, fully equipped with theatrical paraphernalia (scenery, mechanics, etc.), and having a real company of actors, does not fall under this article, although films are shewn regularly on the screen between the vaudeville acts at each performance; such establishment is to be classed as a theatre and not as a moving picture hall.

Where a *quasi* penal statute is ambiguous and offers two possible interpretations the same must be construed strictly and that interpretation adopted which is the more favourable to the defendant: *Boisseau* v. *People's Amusement Co.*, 1913, 20 R. de J. 32.

Transaction—Error of Law—C. C. 1918, 1920, 1921.

In the present case, the agreement bears the characteristics of a transaction entered into with the view of obviating a suit at law between the parties by mutual and reciprocal concessions.

It is of the essence of the contract of transaction that it should not be disturbed for error of law: *Crepault* v. *Bellehumeur*, 1913, 20 R. de J. 36.

Municipal Law — Liability of Municipal Corporations for Accidents Arising from Falls upon Sidewalks—Accidents due to Climatic Changes.

A municipal corporation cannot be held liable for an accident happening upon an icy sidewalk in the winter time, when, after every diligence was shewn in the up-keep of the sidewalk, it became dangerous to safety through a sudden climatic change: *Girard* v. *City of Montreal*, 1913, 20 R. de J. 43.

Possessory Action — Negative Petitory Action—Public and Front Roads—Possession—Ownership.

As regards the corporation defendant, or any one else, the plaintiff did not have possession of the ground covered by the road in question for more than a year before suit. It is not a question of a road tolerated upon land belonging to the plaintiff, but the land in question, since 1855 and ever since, was always used for a public road; it was granted by plaintiff's predecessors in title to the public for use as a highway, and at the request and with the consent of such predecessors in title; the defendant municipality's council always considered it as a public road; the lands in question never had any other road, which, quite rightly, had always been considered as their fronting highway: *Belisle* v. *Corp. of St. Eloi; Belisle* v. *Gagnon*, 1912, 21 R. de J. 52.

Municipal Law—Proceedings by way of Quo Warranto—Want of Capacity to Act as Reason for Declaring Vacancy in Office of Municipal Councillor—M. C. 207, 283, 337; C. C. 987.

In the present case, even if the defendant had sold the property upon which his realty qualification was based in such a way as to render disqualified from acting as municipal councillor, such want of capacity lasted only so long as it existed, and did not create a vacancy in his office, provided the formalities required for the vacating of the seat had not been observed.

The seat of a member of a municipal council cannot be declared vacant by proceedings in *quo warranto* by simply relying upon a want of capacity which had ceased to exist when proceedings were first had: *Landry* v. *Beauregard*, 1913, 21 R. de J. 73.

Sale—Agency—Promise to Pay — Evidence — Pleading.

1. In an action for goods sold and delivered by plaintiff, personally in part, and by its agent for the balance, and entirely delivered by plaintiff to defendant, plaintiff will after proof of sale and delivery, be permitted to produce correspondence tending to explain why payment had not been made of part, at least, of plaintiff's account, according to promise, notwithstanding absence of an allegation of acknowledgment to owe and promise to pay; and oral evidence of the conversation referred to in the letter will be allowed.

2. The items of the account for work and labour done and for interest on past due accounts, will not be allowed in the absence of allegations covering the items.

3. Written evidence (invoices, receipts, bills of lading, cheques), relating to previous sales and delivery of similar goods, between the same parties, by the intermediary of the same agents, is admissible as proof that defendant was dealing with the plaintiff as its principal, and not with the agent, as such.

4. Even if defendant had not known of the agency of B. & B., and had presumed it was dealing with them, as principals, the agency having been established, plaintiff had right to sue in its own name: *Imperial Wire & Cable Co.* v. *Dorchester Electric Co.*, 1913, 21 R. de J. 88.

Liability of Municipal Corporations for the acts of Constables or Officers Employed by Them — Distinction between acts of Municipal Officers Acting as such or as Police Officers in Matters Affecting Public Order— Putting under Arrest—Breach of the Peace—English or French Public Law—C. C. 1053, 1054; M. C. 199.

Municipal corporations, being bodies politic, are under the control of the public law, but nevertheless they remain subject to the control of the civil law in their relations with the other individual members of society. As civil persons, such corporations are answerable to the provisions of articles 1053 and 1054 of the Civil Code. Their civil liability is also asserted in several provisions of the Municipal Code, and in the general clauses of the Cities' and Towns' Act, and, more particularly, as to the acts of officers in their employ, in articles 199 M. C., and secs. 5864 and 5865 R. S. Q.

It is not necessary that appeal should be made to English public law to determine the rights, the powers and the liability of such municipal corporations, such liability having always been determined according to the public law of France, which is that of this province.

In certain respects, however, the constables or police officers appointed by municipal corporations may and should be considered as agents of the Crown, and municipal corporations incur no liability in that regard. Nevertheless, there is no reason for applying in this Province the absolute rule of the utter lack of responsibility of municipal corporations, in so far as such officers of the Crown or State are concerned, as prevails in England and in the United States.

Municipal corporations in this province, sued in damages for the acts of their police constables must be held answerable, unless it be shewn that their officers acted beyond the bounds of their ordinary duties, beyond the duties for which they are specially appointed, as, for instance, in the execution of a warrant of the Attorney-General or of any other means adopted in the interest of the public peace: *Chevalier* v. *Corp. of Three Rivers*, 1913, 21 R. de J. 100.

CANADIAN SIDE-LIGHTS ON PROSPECTIVE CHANGES IN PENNSYLVANIA PROCEDURE.*

BY DAVID WERNER AMRAM.

An examination of the new rules of the Courts of Ontario, by a Pennsylvania lawyer, must suggest many comparisons with the system of practice with which we are most familiar. To the man of impulsive temperament, if such there be at our Bar, would come the temptation to see in the excellencies of these rules merely an opportunity to hastily condemn the rules of our own Courts. The rigid conservative at our Bar, if such there be, would wave these Ontario rules aside with solemn words and dignified gesture. Between those who hastily seize upon and those who sturdily reject, everything new, there is a large class accessible to new ideas and gifted with sufficient knowledge and understanding to appraise their essential value and practical applicability. I take it for granted that the members of the Law Association belong to this class, who in all things seek the middle way, the way of safety, true to the best traditions of our Bar and ever anxious for continuous improvement in our methods of procedure, so that in the struggle for rights between men, it may be more and more certain that right will prevail. Under the influence of some such thoughts as these, I looked through the volume of the Consolidated Rules of Practice of Ontario or to give their full title: "The Rules of Practice and Procedure of the Supreme Court of Ontoria (in Civil Matters) prepared by the Honorable Mr. Justice Middleton, under instructions from the Honorable the Attorney-General. Approved by his Honor, the Lieutenant-Governor in Council, under the Judicature Act, Section 103, to go into effect on the first day of September, 1913."

The Judicature Act of 1913,[1] under which these rules were adopted is the last word in Ontario on the subject of constitution and organization of the Courts and of the principles which govern their practice and procedure. It is a lineal descendant of the Judicature Act of 1881, which, in turn was an offspring of the famous English Judicature Act

*An address before Law Association of Philadelphia, December 19, 1913.

[1] See the Act of 3 George V, cap. 19.

of 1873;— a notable and distinguished pedigree. So excellent has been the working of these Judicature Acts and the Rules of Court promulgated under them, that our own Judges in their last revision of our local Rules of Court, have paid them the compliment of adopting a number of their provisions.

Examination of the Ontario Judicature Act shews that it is largely concerned with laying down broad principles, while leaving methods of procedure entirely to the Courts. This is a principle of differentiation of function between legislature and Courts for which many of the best men at the Pennsylvania Bar have pleaded for many years, and which has often found expression in the reports and debates of the Pennsylvania Bar Association. The attempt to lay down rules of Court in acts of Legislature has justified the criticism that they hamper rather than promote the efficiency of our procedure. A Court which makes its rules may reserve to itself the right to modify them, so that through their too strict interpretation they may not lead to injustice. Where the rule is laid down by the legislature, the sound discretion of the Courts cannot be exercised at all and the rule of procedure attains the same dignity and inviolability as a rule of substantive law. The Ontario Court in proceeding to formulate and promulgate its rules finds itself unhampered by legislative interference, and is allowed free play for its wisdom to determine how the business of litigation can best be done, so that, to use the words of Rule 183: "A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case."

We, in Pennsylvania, have enjoyed the benefit of the Amendment Act of 1806, and supplementary Acts which, coupled with the common law powers of our Courts, have enabled them to follow the same principles which are so well expressed in this Ontario Rule of Court. It were well if the powers of our Courts were still further enlarged in this respect by the abolition of all legislative rules, so that procedure might be regulated entirely by the tribunals before which the causes are litigated. The danger that once existed at common law whereby rules of practice through

long use became inflexible need not be feared. Of course, we are occasionally reminded of our imperfections when we observe a Judge applying a rule of Court as if it were a law of nature, but generally a reasonable discretion is exercised by our Courts in their efforts to do justice. The ultimate power to correct an abuse would lie in the legislature and could, in an extreme case of judicial obstinacy, be invoked. In modern times, however, this is not to be feared. Notwithstanding much popular outcry to the contrary, our Courts reflect public opinion and desire to accommodate themselves to the views of public policy that public opinion imposes. They will not yield to public pressure unless the pressure is long continuous and based upon a well reasoned and fundamental demand. In the present flux of public opinion on nearly all questions of law, ethics and expediency, our Courts are the only stable institution in the midst of a swirling maelstrom of change. They are contributing their proper share to the progress of society, which lies along the resultant of its radical and conservative forces. I would recommend to lawyers radicalism in thought coupled with conservatism in practice. The former is an insurance against the deadening influence of the worship of the *status quo;* the latter, a safeguard against the hasty destruction of the methods whereby we work out our theories of justice and law; and the combination of the two should result in a sober and scientific but continuous building up on existing foundations, and even in the gradual removal of these foundations, stone by stone, while new material is being substituted, so that the stability of the edifice remains unimpaired.

No doubt the interference of legislatures with the normal development of common law and procedure has served a good purpose and is justified by history. It has continued long enough, however, to have fully impressed its lesson upon the mind of all the ministers of justice on the Bench and at the Bar, and it may now be retired in favor of the older method of allowing the law, at least so far as practice and procedure are concerned, to be developed solely through the instrumentality of its experts. No theory is more crude than that which maintains that our legislatures are more expressive of the public will and more responsive to public ideas of right than our Courts. The Courts are composed of Judges and attorneys-at-law, who like all other men are

impressed by the influence of the spirit of the time. Occasionally an illustration may be cited to the contrary such, for example, as the decision of the Supreme Court of the United States in *Slocum* v. *The Insurance Company*,[2] which unquestionably marks a step backward, as pointed out so brilliantly by Mr. Justice Hughes in his dissenting opinion. This case merely illustrates that Courts are not perfect, but it by no means proves that they are less perfect than the legislatures. Granting all that may be said against such occasional illustrations of judicial insensibility to contemporary needs or tendencies, it remains true that Judges express the ideas of right and expedience dominant in their day, modified, however, by the whole body of law and practice that has been handed down by tradition. For the individual in the pursuit of his own affairs radicalism, modernity and self-expression may be permitted almost indefinitely; for a community of millions of people, social life must perforce be regulated largely by the rules made by the dead and not by the living.

The fundamental characteristic in the organization of the Courts of Ontario is the single Court, a Supreme Court consisting of two divisions, the Appellate Division and the High Court Division. The latter is the trial Court for all causes.

"Every Judge appointed to the Appellate Division or to the High Court Division shall be a Judge of the Supreme Court and shall be *ex officio* a Judge of the division of which he is *not* a member, and, except where it is otherwise expressly provided, all Judges of the Supreme Court shall have in all respects equal jurisdiction, power and authority."[3]

Any Judge of the Supreme Court and any retired Judge of that Court may sit and act as a Judge of either of the Divisions of the Supreme Court or perform any official or ministerial act for or on behalf of any Judge absent for illness or any other cause, or in place of any other Judge whose office has become vacant, or as an additional Judge of a Divisional Court.[4]

A distinction is maintained between the Judges of the Appellate Division and of the High Court Division, but it is

[2] 228 U. S. 364 (1913). For a criticism of this case, see 61 *University of Pennsylvania Law Review*, 673, October 1913.—*Editor.*
[3] Judicature Act §8.
[4] See, *ibid.* §14.

provided that the Judges of either of these divisions may sit in the other if necessary, and it is furthermore provided that in addition to the Judges who sit continuously in the Appellate Division, five Judges of the High Court Division shall annually be selected to sit as appeal Judges for one year, so that there shall be at all times at least two Appellate Courts in session, and if necessary an additional temporary Appellate Court may be organized by the Judges.[5]

"Where in any action or other proceeding the constitutional validity of any act or enactment of the Parliament of Canada or of this (Ontario) Legislature is brought in question, the same shall not be adjudged to be invalid until after notice has been given to the Attorney-General for Canada and the Attorney-General of Ontario," who "shall be entitled, as of right, to be heard either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding."[6]

What a difference it might have made in the decision of *Slocum* v. *The Insurance Company*,[7] if this rule had been in force in the Supreme Court of the United States.

The Lieutenant-Governor in Council shall convene in annual Assembly the Judges of the Supreme Court "for the purpose of considering the operation of this (Judicature) Act and of the Rules (of Court), and the working of the offices and the arrangements relative to the duties of the officers of the Court, and of enquiring and examining into any defects which may appear to exist in the system of procedure or the administration of justice in the Supreme Court or in any other Court, or by any other authority."[8] and this council shall report amendments or alterations to the Act and any provisions that cannot be carried into effect without legislative authority, for the purpose of improving the administration of justice.

Without going into further details it appears from these and other provisions of the Judicature Act that there is but one Court, the Judges of which may sit either as trial or as appellate Judges; that two Divisions of the Court sit to hear appeals; that the chief law officers of the Crown must be heard in all questions affecting the constitutionality of an act

[5] See, *ibid.* §§38, 39.
[6] *Ibid.* §33.
[7] See note 2 *supra.*
[8] *Ibid.* §113.

of legislature; and that the Judges are required to meet in council annually for the purpose of considering the working of their rules and of making such recommendations as in their judgment are advisable.

From time to time voices have been raised in Pennsylvania in favor of some of these provisions, but it has never yet been determined to what extent they are applicable to our State. There is here a fruitful field for inquiry, either by this Association or by the Pennsylvania Bar Association, or by a Commission of lawyers appointed by the Legislature.

Quite recently, the attempt was made to apply one of these principles to the county of Philadelphia by consolidating its Courts of Common Pleas by the Act of June 11th, 1913. This Consolidation Act, alas, has gone to join the Five Judges Bill in the limbo of unconstitutional stillbirths, and there remains nothing but the faint but fragrant memory of a long-desired possibility. But why shed tears over the early demise of this hope of the family, when an elder brother survives fully able to perform all that was expected of this mourned one. The Act of March 9, 1885,[9] provides that, "in all counties in which there are two or more Courts of Common Pleas, the Judges of any of the said Court shall, at the request of any of the other Courts of Common Pleas of the same county, have full authority to perform any judicial duty in such other Courts, with the same effect as if they were members thereof; provided that nothing in this act shall be construed to entitle a Judge so called upon to act for another, to receive extra compensation therefor."

There can be little doubt of the constitutionality of this Act, especially since the Act of March 24th, 1887,[10] was held constitutional in *Commonwealth* v. *Bell*,[11] and since the Act of 1885 has been on the books for eighteen years and has been enforced in part by the Philadelphia Rules of Court, and practice.[12] It seems that the Supreme Court would in considering the constitutionality of such an act take into consideration the fact that it has been on the statute books for a long time unimpeached.[13]

[9] P. L. 5, §1.
[10] P. L. 14, §1.
[11] 4 Pa. Sup. Ct. 187 (1897).
[12] See, Phila. Rules 5 and 87 and Rules of Court of 1897. page 9 as amended March 4, 1901.
[13] See, *dictum* of Mr. Justice Potter in Gottschall v. Campbell, 234 Pa. 351 (1912).

Under the Act of 1885 the Judges of Philadelphia could by rule of Court, for all practical purposes, while retaining the separate forms of the five Courts, amalgamate them into one Court and thus produce the result aimed at by the defunct Consolidation Act. Does the Bar at Philadelphia really think the consolidation of the Courts desirable? Then let it petition the Courts to act under the Act of 1885. No one doubts that if the Bar is substantially unanimous in its request, the Bench will with characteristic grace yield to this demand and grant the relief prayed for.

There being but one Court for Ontario it naturally follows that there is but one set of Rules of Court. Here, again, is a subject that has been agitated in Pennsylvania for many years. I recall the labour of love performed by Alexander Simpson, Esq., of this Bar, when in 1896 he prepared a comparative study of all the rules of Court of the then existing fifty-one judicial districts of Pennsylvania. The object lesson was not lost and at a subsequent convention (the first and I believe the last) of the Judges of Pennsylvania, held in December of the same year, the question of uniformity in the rules of procedure was discussed. From time to time the matter has come up again at meetings of the Pennsylvania Bar Association, but nothing new has been added to the discussion that originally arose.

I have so doubt that it would be possible and practicable for the Supreme and Superior Court Judges, in council assembled, to promulgate rules of Court for all the Courts of Pennsylvania, wherein allowance would be made for the special needs of different localities, due to difference in density of population, in distance from county seats, in convenience of transportation, etc. And I do not share the opinion expressed by some of the Judges in the convention of 1896 that their own local affairs can be best regulated by themselves. The problems are all well known and the appellate Courts represent all sections of the State.

Again it may be possible to divide the State into districts, similar to the three districts into which federal jurisdiction is divided, to be organized as District Courts of Common Pleas, composed of all the Judges in the district, and being branches one, two and three of the Court of Common Pleas of Pennsylvania. A flexible system might be devised whereby Judges may be transferred from one

district to the other, as is now sometimes the practice under several acts of Assembly, and whereby a judicial committee of each district, together with the Judges of the Appellate Courts may constitute a judicial council performing the functions of the Ontario Judicial Council as above outlined, and making the Rules of Court and annually re-examining them. Whether such a plan is desirable or practicable or even worthy of consideration, I leave to my brethren of the Bar to be considered by them either in their individual or collective capacity. There is much more to be learned on the practical aspect of this question by study of the judicial systems in jurisdictions other than our own, and I have ventured merely to suggest the topic as a result of my reading of the Ontario Rules of Court.

How is the Bench of Ontario recruited? I am indebted to the Honourable Mr. Justice Riddell of the Supreme Court of Ontario for the following information.[14] The Minister of Justice, especially if he is not a member of the Bar of the particular province for which an appointment is to be made, consults privately such of the Bar as he sees fit, regarding available men. Any member of the Bar may advocate an appointment, but in most instances it would be fatal for any one desiring a judgeship to solicit it direct or through his friends. No one asking for the position would be deemed worthy of it. The Bar in its collective capacity does not express any opinion; the Legislature has nothing to do with the selection, the Judges would not think of interfering with the choice or advising as to it. The choice of the man is made by the Minister of Justice, and submitted by him to the cabinet. If the cabinet approves, an order in council is passed; if the cabinet disapproves, a further recommendation is made by the Minister of Justice until the cabinet is satisfied. The recommendation of the cabinet is made to the Crown and the appointment is thereupon made.

There is hardly any criticism of Judges or Courts in Ontario. The spectacle furnished by the United States in which the Courts of Justice are daily, I might say hourly, held up to criticism, ridicule, contempt and even vituperation excites unbounded surprise across our northern border. The people of Canada are satisfied with their Judges and

[14] See 62 *University of Pennsylvania Law Review*, 17 November 1913, "The Courts of Ontario."—*Editor.*

their administration of the law, and yet they have absolutely nothing to do with their selection or appointment. What do the people want? They want justice. If the Judge is able and upright, they are satisfied. It is not true that citizens of this county will not be satisfied with the judgment of a Judge from another county, whom they have not helped elect. The citizen wants the law of Pennsylvania applied honestly and fairly to his case and he cares nothing about the residence, race, religion or politics of the just Judge. We need, therefore, not be too closely wedded to any system of election or appointment, for other methods are just as good. Any method which will end the disgraceful spectacle which newspaper headlines furnish, such as "Judgeship Won by Advertising," "Nonpartisan Judicial Ballot a Farce," "Recalling Gang-Made Judges," "Governor Drags Courts Into Politics," will be an improvement over methods which invite, or at least make possible, such outburst. What shall we do? Shall we continue the present method, recently adopted in so many states, of electing Judges on a nonpartisan ballot? Shall we return to the former method of appointment by irresponsible political leaders under the guise of a popular election? Shall we frankly abandon the elective system and adopt the New England practice of appointment by the Government or the Legislature or both? Shall we adopt a system like that of Ontario by appointment through the chief law officer of the State by and with the advice and consent of the cabinet? Shall we adopt the system in vogue in the Jewish Commonwealth according to which the Supreme Sanhedrin appointed commissioners who selected the local Judges from among whom the Judges of higher Courts of twenty-three and the Supreme Court or Sanhedrin were selected:[18]—a system which might be adopted so as to make our Supreme Court responsible for the appointment of the Common Pleas Judges from among whom the Appellate Courts are recruited? Whatever the plan there is room for study and discussion instead of the aimless and thoughtless criticism of our present system.

Another fundamental point of difference between Ontario and Pennsylvania is to be noted in the complete merger of the procedure in law and equity. We have in Pennsylvania

[18] See, Talmud Babli Sanhedrin 17b: Maimonides Sanhedrin 2: 7, 8.

long since enjoyed the benefit of the application of equitable principles in common law Courts and the administration of both systems by the same Judges, but we still recognize chancery procedure as distinguished from practice and procedure at law and our Courts have still to consider questions of jurisdiction as between the law and equity side of the Common Pleas Court. All this has been avoided in England since 1873 and in Ontario since 1881. It should be possible for Pennsylvania to study with profit the experience of these and other jurisdictions and perhaps make further salutary changes in its system.

Looking more closely into the Ontario Rules of Court a comparison with our own Philadelphia Rules at once suggests itself. So far as pleading is concerned, we have done well. Our system is inspired by the same principles of modernization as in other jurisdictions. Our difficulties, such as they are, are due to the fact that the Courts have not yet been unfettered by legislative enactment. If all legislative rules of Court in Pennsylvania were abolished by the act of legislature and power were conferred on a council of Judges to reformulate them, I have no doubt that Pennsylvania would immediately step abrest of the most efficient system in modern times.

In Ontario all actions, whether at law or in equity, are commenced by a writ of summons, are pleaded to issue by a statement of claim, and a statement of defence, and, if necessary, plaintiff's reply; with full power in the Court to allow any and all amendments that may be deemed necessary and to bring in by third-party procedure any person or persons who may have any interest in the controversy. All persons may be joined as plaintiffs "in whom any right to relief in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise;" and all persons may be joined as defendants against whom a plaintiff "claims any right to relief, whether jointly, severally or in the alternative; and judgment may be given against one or more of the defendants, according to their respective liabilities." The Court has power in the exercise of its discretion to order separate trials, to grant judgment for one or more of the plaintiffs against one or more of the defendants, or make

any other order that may be deemed expedient.[16] It is not necessary that every defendant "shall be interested as to all of the relief claimed, or as to every cause of action included therein" and several causes of action may be included in the same proceeding.[17] If there are many persons having the same interest, "one or more may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of all."[18]

It becomes possible under the Ontario system to dispose of the interest of all parties to a controversy in one action, and all differences between law and equity, contract and tort, right to property or right to damages are merged in the fact that the controversy arises out of the same transaction and that all of the parties have an interest in the whole or some part of it. The effect of this rule is to prevent multiplicity of actions and reduce the amount of litigation arising out of a single transaction.

It was feared at one time by the Bar of Ontario that this and other rules making for simplicity and speed would affect the business of the Bar, but the result has proved quite the contrary. The knowledge that all controversies arising out of a single transaction may be disposed of at one trial swiftly, justly and certainly has encouraged litigation. I have before me the calendar of the Supreme Court of Ontario, Appellate Division, for appeals entered for the session of one month commencing April 7, 1913. There are sixty-nine case on the list, fifty-one of which are from judgments entered during 1913. That is to say, within three months of the date of the argument on appeal; thirteen within six months and five older cases antedating this period. Of the cases in 1913, five are less than a month old since judgment, thirty-one are less than two months old. The Appellate Divisions of Ontario hear and dispose of about eight hundred cases per annum, whereas the average record of the Supreme and Superior Courts of Pennsylvania is about twelve hundred cases per annum. It will be seen, therefore, that in Ontario with a population of about three millions as against a population of eight millions in Pennsylvania, the appellate Courts dispose of nearly twice as many cases in proportion to population as the appellate Courts of Penn-

[16] See, Rules 66 and 67.
[17] See, Rules 68 and 69.
[18] See, Rule 75.

sylvania. This should allay the fears of members of the Pennsylvania Bar that simplicity and speed would reduce the emoluments of the profession. The simpler the procedure and the more expeditious the trial the greater will be the interest of the public in this method of adjusting its difficulties and the greater the amount of business that the Bar will be called upon to administer.

One of the startling methods for saving time is that laid down in one of the Ontario Rules;[19] "(1) On all appeals or hearings in the nature of appeals, and on all motions for a new trial, the Court or Judge appealed to shall have the powers as to amendment and otherwise of the Court, Judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the Court, or Judge appealed to or as may be directed (2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment, order or decision from which the appeal is brought. (3) Upon appeals from a judgment at the trial, such further evidence (save as mentioned in sub-section (2)) shall be admitted on special grounds only, and not without leave of the Court."

Under this rule, the Court on appeal will hear testimony if necessary to supplement the record from the trial Court instead of sending the case back for retrial with all the attendant delay, cost and disappointment.

Where a plaintiff has filed a statement of claim or defendant a statement of defence either party may be cross-examined by the other prior to the trial upon the allegation in their respective pleadings. I am further told by Mr. Justice Riddell that although this rule does not meet with universal satisfaction, it results in the disposition of at least one-third of all litigation without trial by reason of the disclosure that parties are obliged to make of the very essence of their case. The principle that seems to prevail in Ontario is that no litigant shall be permitted to take advantage of anything except the real merits of his case. If a man swears to facts in an affidavit of defence which, if true, would constitute a good defence, the plaintiff in Pennsylvania is for the time being helpless and the case is set down for trial. In Ontario the plaintiff may cross-examine the defendant upon his statement of defence and thus elicit the

[19] See, Rule 232.

fact that the defence is merely colorable and that the proofs at the trial would fall short of the defence set forth in the pleading. Upon the statement of defence and the cross-examination the matter may then be brought before the Court by a proceeding similar to our rule for judgment for want of a sufficient affidavit of defence, and the Court in granting or refusing judgment will consider the sufficiency of the statement of defence in the light of the cross-examination of the defendant and give judgment accordingly. The same rule applies to a cross-examination of the plaintiff upon his statement of claim.[20]

In *Kibbe* v. *McKinley*,[21] the late President Judge Finletter decided that it is not unreasonable to require claimant in interpleader to submit to examination upon his affidavit of claim, for if the claim is a just one the preliminary examination will establish it and no one should be allowed to profit by an unjust claim. There is, therefore, nothing in the objection that he is compelled to disclose his evidence of ownership. If this is a sound and good rule of practice under the Interpleader Act, why should it not be extended to all pleadings in all actions?

A series of Rules looking to a similar result are those relating to the production of documents.[22] With us, documents may be ordered to be produced at the trial, or a notice to produce at the trial may be given, but such production cannot be enforced before the trial unless the issue is forgery or unless the pleadings cannot be prepared without such inspection, or, generally speaking, unless the party calling for the documents has a common interest in them with the party in whose possession they are. In Ontario the rule[23] is that, "each party after the defence is delivered, or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action; and produce and deposit the same with the proper officer for the usual purpose."

Documents in possession of persons not parties to the action may be compelled to be produced for inspection.[24]

[20] See, Rule 327, *etc.*
[21] 20 Phila. Rep. 232 (Pa. 1889).
[22] See. Rules 348, *etc.*
[23] See. Rule 348.
[24] See, Rule 350.

If the right to discovery or inspection depends upon the determination of some question in dispute, the Court may try and determine the question in dispute before deciding as to the right discovery or inspection.[25]

A word with reference to jury trials. The Judicature Act[26] provides that, "actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment shall be tried by a jury unless the parties in person or by their solicitors or counsel waive such trial."

Actions for damages for injuries by reason of the default of a municipal corporation in not keeping in repair a highway or bridge shall be tried by a Judge without a jury.[27] Subject to the Rules of Court and except where otherwise expressly provided by the Judicature Act, all issues of fact shall be tried and all damages shall be assessed by the Judge without the intervention of a jury, but the Judge may direct a jury trial.[28] If a party desires a jury trial, notice must be given, but notwithstanding such notice the Judge presiding at the trial may dispense with the jury.[29] It shall be sufficient if ten of the jurors agree and they may render a verdict, and if more questions than one are submitted to the jury it shall not be necessary that the same ten jurors shall agree to every answer.[30] If a juror dies or becomes otherwise incapacitated from acting, the Judge may discharge the juror and proceed with eleven jurors, ten of whom may give the verdict or answer the questions submitted to the jury.[31] The jury shall not give a general verdict if directed by the Court not to do so. They shall give a special verdict if the Court so directs.[32] Except in an action for libel[33] the Judge may direct the jury to answer any questions or facts put to them by him and the jury shall answer the questions and not give any verdict.[34]

[25] See, Rule 352.
[26] §53.
[27] See, §54.
[28] See, §55.
[29] See, §56.
[30] See, §58.
[31] See. §59.
[32] See. §60.
[33] Until 1913 a jury could not be directed to answer questions in actions for slander, crim. con., seduction, malicious arrest, malicious prosecution and false imprisonment.
[34] See, §61.

"The Court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such way as it thinks fit, to enable it to determine any matter of fact in question in any cause or proceeding, and may act on the certificate of such persons."[35]

It may be difficult to realize that these provisions of the Judicature Act and the Rules of Court of Ontario have been promulgated in a country which adopted the common law and procedure of England in 1792, and has since then flourished under that system. In England, the jury system performed an inestimable service in the development of the English constitution and the maintenance of the liberties of the people. The English colonies children of the mother country, inherited this system. In the course of time England and her colonies realized what even Blackstone,[36] despite his eulogy of the jury foresaw, that this institution, notwithstanding its antiquity, respectability and honorable achievement, no longer satisfied the demands of justice, and accordingly they proceeded to modify it and now we have the interesting spectacle of an English country practically abolishing trial by jury and substituting trial by the Court, except in certain classes of torts. The American states were also children of the mother country, but nearly a century and a half ago they repudiated her parental control, and established themselves as free and independent states. What they took from England before that time they have clung to with much tenacity, and although they realize the imperfections of the jury system they seem to find it difficult to attack the problem with anything like the boldness shewn by England and her colonies, because of the bar of the state and federal constitutions. It will probably require the experience of many, many more years before the Seventh Amendment to our Federal Constitution will be changed. In the meantime it seems to be the policy of the more progressive states to limit the right of trial by jury by requirements that jury trial must be asked for, that jury fees must be deposited and by encouraging the bar to agree to accustom the people to trial by the Court without jury by agreement of the parties. That the jury in civil cases is an anachronism and an absurdity has been frequently asserted, especially by those whose experience in Courts of equity, Courts of bank-

[35] Rule 268.
[36] See, 3 Bla. Comm. 381.

ruptcy and before masters and referees have convinced them that the issues in civil cases can be more effectively disposed if by trained experts than by jurymen chosen at large. In Ontario the Court[37] calls in what is virtually a jury of experts, for the purpose of assisting it in determining matters of fact, and gives to the certificate of such persons the weight to which an expert opinion by a disinterested and competent person is reasonably entitled.

It is impossible within the limits of this address to point out all of the significant rules and points of procedure in force in Ontario. Those who are interested in the further improvement of our own system, notwithstanding its many already existing excellencies, will do well to study the system in this neighboring province.

We have passed the age when progress with us is unconscious, when we go on like creatures living in the state of nature, subject merely to the forces that impel us from without. In the field of jurisprudence we have become self-conscious and even sophisticated and we realize the possibility within certain limits of making improvement as the result of deliberate experiment. This is the method of the scientist, the method by which facts are examined, working hypotheses proposed and conclusions reached as a result of an attempt to explain all existing facts by general underlying laws. In our effort to improve our legal system we need the method of discovery for a long time to come. This is virtually a method for the collection and examination of the data of experience here and elsewhere in order that from them principles may be discovered which may again be formulated in the terms of new methods. It is a system of legal education not limited however, as heretofore, to the education of applicants for admission to the Bar but to the education of the Bar itself. According to our system, the Bar neglects its students as soon as they have been sworn in. Is it impossible for the Bar to establish an equivalent to the system of post graduate instruction, whereby the minds of its own members may be enriched and enlightened by the continual study not merely of the principles and practice of the law in their own jurisdiction for immediate practical results in litigation, but for the study of the experiences of other places and other nations, in order that

[37] Under Rule 268.

provincialism may be replaced by urbanity and our views of principles and methods may be enlarged and refined?

I am afraid that we do not have enough men at our Bar who are interested in the science of law. There are many excellent lawyers and Judges, but few jurists, although by courtesy of the newspapers all Judges are so called. The science of the law is sometimes taught in the post graduate schools of the universities, but not as a rule in the schools of law. The purpose of the schools of law has been and is, to graduate lawyers trained in the methods of legal thought and legal reasoning with a fair knowledge of the principles of law which they shall be called upon to apply in practice. There is a great field here as yet unbroken. Eventually the State will realize its importance, and reward those who devote themselves to it by giving them an opportunity to translate into life the results of their so-called unpractical studies. That will be the day when the legislation will be directed by scientifically trained jurists instead of the untrained representatives of the people. Year after year there is pointed out to us the folly and absurdity of much of our legislation. We are shewn the accumulation of freak laws and inconsistencies and redundancies and contradictions, and the enormous waste not only of the public time and funds required to produce this crop of thistles, but the incalculable waste which results from the attempt to apply and administer such laws. Legislative reference bureas of all sorts, such as the one established in Pennsylvania in 1909, somewhat minimize this evil. It is not to be expected that any substantial result of permanent value will be obtained until it is generally realized that law, whether it be an art or a science, requires not only special skill in its administration by the Bar and interpretation by the Bench, but and above all the highest skill and wisdom and knowledge by the legislators who make it.

In Ontario they have a method of nipping in the bud much bad legislation, by a system which has not been expanded to its full possibilities. Chapter Fifty-two[38] provides, that the Judges shall be paid one thousand dollars in addition to their salary for the performance of duties assigned to them by the provincial legislature, outside of their ordinary duties, such as matters connected with provincial election, estate bills, regulations to govern the practice of

[38] See, R. S. O. 1897.

the Surrogate Courts, etc. The practice is to refer all Estate Acts[39] to two Judges for an opinion on their justice and expediency. By chapter eighty-four it is provided that the government, that is, the Lieutenant-Governor in Council, may refer to the Court for hearing or consideration "any matter which he thinks proper to refer" for an opinion as in an ordinary action. If the question is the constitutional validity of an Act of the Legislature or a proposed Act, either before or after the question arises in an actual case, the Attorney-General of Canada must have notice and a right to be heard, and the Court may direct any interest to be notified with the right to be heard, or request some counsel to represent such interest. The opinion of the Court is a judgment subject to appeal as in an ordinary action.

How much chaff could be eliminated from our legislative hopper before being ground out as legislation, if some such practice were in force here under a constitutional amendment to Article V., section twenty-one![40]

Much might be said in favour of a legislative system differing entirely from our own, and much might be said for a system of legislation by experts, as opposed to the present system of untrained representatives of the people. On the other hand the representative system is not to be despised. Whoever our legislators may be, it will be conceded that participation in that great work of making a people's law should require some proper preparation, ' r the words of the Jewish Master of Jurisprudence[41] are ' l true to-day, "prepare thyself by study of the law, for knowledge of it is not inherited." A most encouraging sign of the times is the tendency to rely on the expert, and the willingness of the citizen to waive his inalienable and constitutional right to muddle all things by the expression of his views and the exercise of his power. We shall no doubt reach the day when it will be understood that the untrained citizen assisted by the otherwise unoccupied politician, are not divinely inspired instruments for expressing the will of the people and that law making as well as law administration had better be left to the professional experts, whose training makes for efficiency.

[39] *I.e.*, private acts changing the legal effect of wills, settlements, etc.

[40] See 1 P. & L. Dig. of Laws, 130 (2nd Ed.).

[41] Rabbi Jose ben Halafta, cited in Mishnah Aboth 2: 17.

INTERNATIONAL LAW.

Cession and Nationality.

The Porte has experienced considerable difficulty during the course of the peace negotiations with Bulgaria and Greece, in settling questions of nationality regarding the population of the transferred regions. Such difficulties are of recent origin. In olden times it was the territory alone to which the conqueror looked. By virtue of his new territorial sovereignty he became entitled to the submission of every person actually within that territory, and that was enough for him. The tendency in quite recent years to lay additional stress on the personal tie between State and subject, and to assert limitations on the autonomy of the territorial sovereign when the subjects of other States are concerned, has brought about an entirely new situation. The conqueror now no longer thinks of soil but of souls. The cession is not a cession of territory only but a cession of subjects. The first glimmerings of the new state of affairs appeared when cessions were made dependent on plebiscites of the ceded territory. Then the status of the population began to be the subject of special provisions. As in the case of the cession of Heligoland, an option to retain their former nationality was conceded to them. And now the position of the inhabitants is, perhaps invariably, made the subject of special regulations. On the occasion of the recognition of Servia as an independent kingdom, the nationality of the Ottoman inhabitants was the subject of very vague provisions, which gave rise to an acute controversy, dealt with in an able fashion by Prof. Peritch, of Belgrade, in "A Case of Change of Nationality without Cession of Territory." In fact, the provisions of treaties cannot be too explicit on this head. "Inhabitants" is an ambiguous word, and cannot safely be employed to designate the transferred population. Transitory allegiance is transferred over many commorants who do not "inhabit" the district: not a few "inhabitants" owe permanent allegiance to other States altogether. It is said that Greece and Bulgaria are pressing the view that Ottoman natives of the ceded districts ought to be transferred, equally with residents; it is difficult to see why this should not be ad-

mitted, if once we begin to cede persons as separate items in the parcels of conveyance. If, as is alternatively urged, these non-resident natives receive an option to choose Ottoman or Balkan nationality, the result will be practically identical—for being of Balkan races they will naturally choose to become Greeks or Bulgars. Either way, Turkey loses many subjects actually inhabiting and settled in her restricted dominions. Formerly this would have been ridiculous. It is a tribute to the force of the modern revival of the personal tie of nationality that it no longer seems so.

June, 1916

July, 1916

August, 1916

September, 1916

October, 1916

Our London Letter.

War Crimes and War Criminals (Pt. 1).
By Dr. Hugh H. L. Bellot, Hon. Secretary Grotius Society.

The Judicial Committee: The Bonanza Creek Gold Mining Co. (concluded).
By John S. Ewart, K.C., Ottawa.

Admissibility in a Libel Suit of Evidence of Provocatory Writings by the Plaintiff.
By F. Heap, Winnipeg, Man.

November, 1916

Our London Letter.

The Ideal of an Imperial Constitution.
By J. Berriedale Keith, D.C.L., D. Litt.

Company Law.
By the Honourable H. A. Robson, of Winnipeg, Manitoba.

War Crimes and War Criminals.
By Dr. Hugh H. L. Bellot, Hon. Secretary Grotius Society.

December, 1916

Our London Letter.

The Codification and Consolidation of the Commercial Laws of the Empire.
By R. W. Shannon, K.C., Legislative Counsel for Saskatchewan.

Certiorari.
By His Honour Judge W. B. Wallace, Halifax. N.S.

The Case of the Appam.
By Professor Edwin Maxey, University of Nebraska.

The Canadian Law Times.

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BY THE WAY.

The American Philosophical Society held at Philadelphia for promoting useful knowledge announces that an award of the Henry M. Phillips prize will be made during the year 1918. The subject upon which essays are to be submitted is '*The Relation of the Initiative, Referendum, and Recall to Constitutional Government.*' The Prize for the crowned essay will be $2,000 gold coin of the United States, to be paid as soon as may be after the award. The competition for this handsome prize is open to all nationalities, but if the essay is written in any other language than English, an English translation must be furnished. The essay is to contain not more than 50,000 words exclusive of notes, and must be in the possession of the Society on or before December 31st, 1917. Any further information as to regulations and requirements can be obtained from the Secretary of the American Philosophical Society, 104 South Fifth Street, Philadelphia.

We see that the Political Educational League of Manitoba is proposing certain amendments to existing laws which are deemed unjust to women. One of them must, one would think, commend itself to every thinking man without any special reference to women at all. It is that it should be made impossible for a person to will away all his or her estate from wife or

husband and family without just and sufficient cause. Of all the blots on our English common law which indolence and irrational conservatism have preserved for eight hundred years or more, one of the most discreditable is the unrestricted power which any man who cannot be shewn to be *non compos mentis* or subjected to undue influence, has over the disposition of his estate by will. Sir Henry Maine explains it as a result of the feeling inspired by the rule of primogeniture in the descent of land,—that if it was right that the eldest son should inherit all in that case in total disregard of any claim by other children, there was no reason why the existence of children should restrict in any way a man's freedom of disposition by will. He does not, however, concern himself with the injustice of the system. It was not the system in ancient Rome, where the *querela inofficiosi testamenti* secured for children disinherited by their father's will, without just cause, one-fourth of what they would have received on intestacy, the *quarta legitima* as it was termed. Modern civil law countries such as France and Spain and Scotland (where they still speak of the *legitim*, or "bairns' part of gear") maintain the same principle, though Quebec has discarded it. So too, in Louisiana a testator who leaves a legitimate child can only dispose of two-thirds of his estate to other persons; of one-half if he leaves two children; of one-third if he leaves three children, or a greater number. Only in certain extreme cases is he allowed to disinherit his children altogether. Similar laws exist in many other States of the Union. But we in Ontario, with less excuse than England where Parliament is overloaded with work, continue to allow our law to be disfigured by a system under which a man can cut off all his children, however deserving, with a shilling, and leave his estate, if he wishes, to found a home for lost dogs.

The great problem of the better adjustment of the constitutional arrangements of the Empire continues to occupy the minds of thinkers, and the pages of periodicals. At a recent conference of members of the British and Dominion parliaments no less a person than Lord Milner declared it to be essential that there should be created a new Imperial Cabinet, which should be answerable to a Parliament representing all the democracies of the Empire, and elected for the exclusive purposes of looking after their common interests; and that financial provision should be made for the needs of the Imperial Government. Mr. J. A. R. Marriott, in the January XIXth Century, supports a similar scheme, and considers that Mr. Lionel Curtis has propounded, in his *Problem of the Commonwealth*, 'a complete and coherent constitution of the Empire,' though he admits the difficulty of giving an authority apparently external to each Dominion powers of taxation. This difficulty, however, he contends must be courageously faced and solved, 'unless we are to be overwhelmed by difficulty incomparably more formidable.' Mr. Arthur Poley, however, who a year or two ago published a book on *Federations of the United States and British Empire*, writing in the current number of the *Journal of the Society of Comparative Legislation*, considers the British Empire not ripe at the present time for such a complete federation, but suggests that the Privy Council should become an Imperial Privy Council and that the Dominion Cabinets should be Committees of it. It is strange that none of these gentlemen refer to the statesmanlike remark of Mr. Herbert Samuel in the XIXth Century for October, 1912, that—

> 'It is interesting to note that Switzerland, the United States, and Germany, have all, on the road to a more perfect Federation, passed through the stage of centralising authority in the hands of a body formed by and acting through the governments of the constituent states. It may be that the future holds in store a transitional constitution of the same limited type for the British Empire also.'

The introduction into the Imperial parliament of a bill to abolish the Grand Jury in England during the war again brings up the question of the merits of that ancient institution of whose foundation in the "accusing jury" of Henry II.nd's reign, we may now celebrate the 751st anniversary. The Grand Jury has been abolished in the Yukon and North-West Territories, but not in Ontario; and we trust that a feature of our administration of criminal justice so instinct with the genuine spirit of British liberty, will long continue. The views of a man with the great experience of criminal procedure of Sir Harry Poland are so important that we reproduce here his defence of the Grand Jury contained in a letter to *The Times* of January 25th.

To the Editor of the *Times*,

SIR,—

The letter of "Common Law," which appears in *The Times* of January 16th is evidently written by one who has studied the subject, and is, therefore, entitled to full consideration, but I must be allowed to put a colossal query against his first sentence, which is as follows:—

'The majority of those qualified to judge are probably now agreed that the intervention of a Grand Jury, with power to throw out a bill, is no longer necessary for the protection of accused persons.'

Permit me to give some instances. In 1865 Colonel Nelson and Lieutenant Broad, R.N., were ordered by Governor Eyre to hold a court martial on one Gordon who was believed to be one of the leaders of the rebellion in Jamaica. He was found guilty and executed. When these two officers returned to London in 1867 some private prosecutors called "the Jamaica Committee" obtained at the Bow-street Police Court warrants from Sir Thomas Henry to arrest them on a charge of murdering Gordon. They were held to bail and afterwards committed for trial for that offence at the Central Criminal Court, bail being allowed as before. Lord Chief Justice Cockburn charged the Grand Jury for a whole day, and endeavoured to get the Grand Jury to find a true bill against them. The Grand Jury, however, threw out the bill, and so saved these two officers the ignominy of standing in the dock at the Old Bailey on a charge of murder. After the magistrates at Market Drayton had refused to commit Governor Eyre on a charge of murder preferred by the same Jamaica Committee in 1867, they prosecuted him under the Colonial Governors Act for oppression in his office of Governor, and Mr. Vaughan, at the Bow Street Police Court, held him to bail to answer the charge in the Court of Queen's Bench at Westminster. Mr. Justice Blackburn then

charged the Grand Jury who forthwith threw out the bill. The population of Jamaica was 400,000, the white population 13,000 to 14,000, and the remainder "coloured." The Governor had to act with vigour to prevent the black population from getting the upper hand. I was one of the counsel for the accused in these two cases, and feel strongly that the Grand Jury did a public service in putting an end to these prosecutions, the accused having acted in good faith in suppressing the rebellion.

I will give some other instances. A man in high position in the Church was committed by a Metropolitan Police magistrate to take his trial at the Old Bailey for an assault on a boy in the park, but the Grand Jury threw out the bill. A nobleman was committed by a Metropolitan Police magistrate (I forget what the offence was), and again at the Old Bailey the Grand Jury threw out the bill. Mr. Montague Sharpe, the learned chairman of the Middlesex Sessions, has stated that the Grand Jury at that Court ignore a considerable number of bills for charges made in the Metropolitan Police district. He also stated that—

> "At a recent meeting of the Society of the Chairman and Deputy-Chairman of Quarter Sessions a resolution was passed expressing the opinion that it was undesirable to abolish Grand Juries."

I could give other instances of the value of the Grand Jury in stopping prosecutions. . . . It must also never be forgotten that not even the King, represented by the Government of the day, nor any private prosecutor, can put any man on his trial at the Assizes or Quarter Sessions unless the Grand Jury representing the country give their consent to this being done.

There is another use for the Grand Jury, and that is, where magistrates have refused to commit, the Crown or a private prosecutor can present a bill to the Grand Jury and take their opinion on the subject. See *R.* v. *Hunt and others* (1 State Trials, N. S. 175, note h.), from which it appears that bills were presented by private prosecutors to the Grand Jury at Lancaster, and ignored by them, after what are known as the Peterboro riots (1820) against a constable for perjury, and against the yeomanry for maliciously cutting and wounding persons when the yeomanry were engaged in suppressing the riots. . . . .

I have more to say on the subject, but this letter is already too long. What I want, however, to do is, if I may be pardoned the expression, to put the drag on and to prevent the Grand Jury system from being put an end to because in war time it is inconvenient for some persons to attend on the Grand Jury. I may say, by the way, that men who do not serve on the Grand Jury must serve on the Petty Jury.

Your obedient servant,

HARRY B. POLAND.

Inner Temple.

OUR LONDON LETTER.

44 BEDFORD ROW,
LONDON, W.C.
JANUARY 6TH, 1917.

The Editor,
"Canadian Law Times,"
Toronto, Canada.

SIR.—The month has been crowded with great events, foremost amongst which must be reckoned the constitution of the new Ministry and the innovation of a Cabinet of four, leaving all the heads of Public Departments outside. This reduction in the size of the Cabinet is itself a sufficiently drastic change. The other most striking innovation is the introduction into the Ministry of specialists as heads of Departments instead of politicians, a change which common-sense must approve. There has been much discussion of late on the time-honoured theme of the wisdom (or un-wisdom) of Government by lawyers. In the new Ministry eight lawyers are to be found as against seven in Mr. Asquith's Government. Mr. Asquith, an eminent member of the Bar is succeeded as Prime Minister by Mr. Lloyd George who was in active practice as a solicitor until on the formation of the Liberal Government in December, 1905, he assumed Cabinet office as President of the Board of Trade. Lord Milner, who is one of the members of the War Cabinet, is a barrister who has never practised. The appointment of Sir Robert Finlay as Lord Chancellor (a position which many thought should have been his on the formation of the Coalition Government), gives great satisfaction and is a fitting crown to a most distinguished career. Lord Finlay of Nairn—for that is the title he has chosen—was born at Edinburgh 74 years ago and first won distinction as a doctor of medicine. Called to the Bar in 1867 he rapidly came to the front. He was Solicitor-General from 1895 to

1900 and Attorney-General from 1900 to 1906 and only the uncertainties of politics have prevented him from becoming Lord Chancellor earlier. The new Home Secretary, Sir George Cave, K.C., is a Londoner, and is 60 years of age. He has been Recorder of Guildford, Standing Counsel to Oxford University and Attorney-General to the Prince of Wales. A brilliant classical career at Oxford was followed by success at the Chancery Bar of which he is one of the recognised leaders. On the formation of the Coalition Government, Sir George Cave became Solicitor-General. He is the first Chancery Lawyer to occupy the position of Home Secretary. Mr. Gordon Hewart, K.C., who is the new Solicitor-General and upon whom the King has conferred a Knighthood, is two years older than his legal chief, Sir F. E. Smith. After a successful career at Oxford he was engaged in journalistic work for some years in London. Called to the Bar in 1902 at the comparatively late age of 32 he rapidly acquired a substantial practice. After spending his career as a "junior" at Manchester and Liverpool, he took silk in 1912 and settled in London. The outbreak of the war and the resulting absorption of so many leading advocates in administrative posts brought Sir Gordon Hewart more than ever to the front and he thus becomes a law officer after the comparatively short interval of 14 years from commencing to practise. Lord Robert Cecil, K.C., remains at the Foreign Office as Minister of Blockade while his uncle, Mr. Balfour (who is not a lawyer), has become Foreign Secretary.

Rumour had it that Lord Reading was to be the new Lord Chancellor, but it is little likely that anyone would forsake the security of tenure which attaches to the office of Lord Chief Justice for the uncertain political dignity of a seat on the Woolsack. Lord Buckmaster's experience as Lord Chancellor shows how uncertain a political career is. Prior to his appointment as Solicitor-General, the ex-Lord Chancel-

lor was in busy practice at the Chancery Bar, and now after filling the office of Lord Chancellor for 18 months he goes into dignified retirement in the House of Lords while still in the prime of life. One can well understand why, when the Coalition Government was formed in 1915, Sir John Simon who was then 41 preferred to become Home Secretary to Lord Chancellor. It is rather remarkable to have to chronicle that in these times no fewer than four ex-Lord Chancellors are receiving a pension of £5,000 a year. The stipulation made by Lord Finlay on accepting office that his rights to a pension should be waived is a public-spirited action which deserves more than passing mention. Those persons who find material for criticism in the fact that an ex-Lord Chancellor receives a pension of £5,000 a year, however, overlook the fact that ex-Lord Chancellors take part regularly in the work of the House of Lords and the Judicial Committee of the Privy Council, in fact do just the same kind of work as that done by the Lords of Appeal in Ordinary who receive £6,000 a year. The attendance of the ex-Lord Chancellors is no less regular than that of the Lords of Appeal as a perusal of the House of Lords Reports will shew. To this should be added that an ex-Lord Chancellor cannot return to practice at the Bar, so that unless some pension were offered him, a successful barrister would be unlikely to accept so precarious an office as that of the president of the supreme Appellate Tribunal.

There has been some correspondence in "The Times" as to the desirability of detaching the great office of Lord Chancellor from party politics and making the occupant of the Woolsack a permanent official like the High Court Judges, removable only upon an address from both Houses of Parliament. Bagehot writing so far back as 1865 said: "The Lord Chancellor is a judge, and it is contrary to obvious principles that any part of administration should be intrusted to a judge; it is of very grave moment that the

administration of justice should be kept clear of any sinister temptations. Yet, the Lord Chancellor, our chief judge, sits in the Cabinet and makes party speeches in the Lords." And Lord Brougham, who had himself been Lord Chancellor, writing in 1861 said: "Judges ought to be excluded from all share in the Government of the State and be incapable of holding political office."

The Lord Chancellor has appointed a committee to consider and report as to the existing arrangement and distribution of the County Court Circuits and Court centres with special reference to the necessity of providing convenient access to the courts for litigants and the desirability of effecting economy both in time and money in administration. That some reform is necessary is readily apparent from the last County Court returns. These shew that the working days of a County Court judge are except in one or two instances less numerous than those of a High Court judge. No judge apparently sits as many as 200 days, while 25 judges (nearly half the total number) sat less than 150. One judge sat only 88 days. It must be remembered, that some of the County Court judges have to spend a considerable time in travelling; but it is clear, that even when everything is taken into account, the average County Court judge works only three days a week.

From the Annual Report of the Bar Council we learn that the Council suggested to the Benchers that they should make such an alteration in their Regulations as would empower them to suspend from practice an alien member of the Bar during the war but that the Benchers did not deem it desirable to make the alteration.

Following the suggestion of the Lord Chief Justice that litigants should where possible dispense with the service of juries during the war comes the announcement by the Attorney-General that the position of grand juries is under serious consideration.

The new *Larceny Act* came into force on the 1st inst. It is a curious measure. While to a large extent of a consolidating nature, dealing with most kinds of larceny and covering burglary and housebreaking, it leaves some of the previous enactments unrepealed.

One of the most important events of the month has been the summoning of an Imperial Conference for a date not later than the end of February. This step which was foreshadowed in Mr. Lloyd George's first speech as Prime Minister has met with universal satisfaction here and will be approved no less by the Dominions.

Mr. Bonar Law, speaking in the House of Commons, whilst fully admitting the constitutional doctrine that a Minister of the Crown should be a member of one of the Houses of Parliament, stated that, in the circumstances of the present crisis, it was not intended that the Controller of Shipping should be a member either of the House of Lords or of the House of Commons.

Since my last letter a distinguished ex-judge has passed away. Sir Roland Vaughan Williams who died on December 8th, at the age of 78 came of a legal stock. His father was a judge of the Court of Common Pleas from 1846 to 1865 and his grandfather was a well-known Serjeant. Born in 1838 and educated at Westminster and Christ Church he was called to the Bar by Lincoln's Inn in 1861. At the Bar his reputation was rather for learning than for advocacy, but he obtained a substantial practice. He did not take silk until 1889, and in 1890 he was made a Judge of the King's Bench Division in succession to Mr. Justice Manisty. He had previously published a treatise on Bankruptcy (of which eight editions have appeared), and it was doubtless by reason of the acquaintance with bankruptcy law and practice thus obtained that in 1891 bankruptcy business was specially assigned to him. In 1897 Vaughan Williams became a Lord Justice of appeal, a position which he retained until his

retirement from the Bench in 1914. As a judge of first instance his best known decision is that of *Broderip* v. *Salomon* "the one-man company case." His judgment in that case after being affirmed by the Court of Appeal was reversed by the House of Lords. As an Appeal Judge he was somewhat trying both to his colleagues and the Bar. Restless in his seat, he was prone to put involved and not always lucid propositions of law before counsel for consideration. He was, however, always patient and courteous and after his death received from one of the daily papers what is perhaps the best tribute which could be desired. He was, said the writer in the paper, "an upright judge." When the Liberal Government came into office in 1905 a Royal Commission was appointed to inquire into the position of the Welsh Church of which Sir R. Vaughan Williams was made Chairman.

Sir Samuel Evans, who has administered his responsible duties in the Prize Court with such conspicuous ability, worthily maintaining the great traditions of that tribunal, has been created a G. C. B.

At the close of the Michaelmas Term the Courts were, despite the fact that many judges have been occupied otherwise than in judicial duties, well abreast of their work.

W. E. Wilkinson.

THE PLACE OF THE LAWYER IN THE BUSINESS LIFE OF WESTERN CANADA.

One may speak in praise of the Common Law though one does not regard it as an unerring system originating in the bosom of the Almighty and working constantly with infallible results in the dry light of reason for the discovery of truth and the fulfilment of divine or even human justice in the infinite daily affairs of mankind. Some such romantic view of law is to be found, I believe, in Hooker's Ecclesiastical Polity, though I speak from ancient memory. It is enough to be able, as one can do, to humbly agree with Coke that "law is the perfection of reason," or with Dr. Johnson, who was not a lawyer, that "law is the science in which the greatest powers of the understanding are applied to the greatest number of facts." That defines law exactly, and as it should be meted out in each day's application of it. Nothing finer can or need be said of it. Unfortunately, lawyers, however well-meaning, are prevented by either unsuspected constitutional defects or inherent disability of some kind from impressing their views at all times and with equal success upon the judges, with the result that cases are sometimes decided in a way that does not enable disappointed litigants to consider law an exact science. An ideal administration of justice presupposes that the short-comings of the lawyer will be redressed by the Bench, and that the judicial capacity of a Cairns will always be available for the purpose. Because this desirable and pre-requisite condition is not always provided it has happened that even judges complain of judicial misadventures on the part of their brethren, and no less an authority than Lord Halsbury has made the historical statement that law is not a logical code, and that every lawyer must acknowledge that law is not always logical at all. Obviously the statement is not accurate, for what is not

founded on reason has and can have no place in English law. It is here that lawyers make a distinction between law as a philosophic system and the judgments of the Courts when they fail to be grounded on ultimate logic. The true lawyer as a true son of his profession, never, no matter what happens, forgets the fundamental principle of English jurisprudence contained in the orthodox doctrine of legal infallibility. In so far as judgments fail to give effect to true reason they are wholly of no account as statements of the law no matter how binding and awkward for the time being they may be. They must and eventually do go into the limbo of forgotten and repudiated things along, say, with many of Lord Chancellor Brougham's judgments. For there are domains of law where its perfect fruit has been gathered beyond the reach of ill-digested learning or crude or crass thinking. Of such is the English law of partnership worked out by the master minds of the English Bench in a period of hardly one hundred years and now codified in the Partnership Act. To consider that piece of workmanship and to perceive its grasp of sound and balanced principles and to realize the far-reaching provision it makes for well-nigh every conceivable case is to comprehend the claim that the Common Law is the highest product of human wisdom.

Speaking deservedly of the law in this way as lawyers are bound to do, one pauses to consider why it is that law has got into a measure of disfavour among business men. This is so despite the fact that law exists for the publi[illegible]e and convenience and is a needful and rational institution for the well-being of society, though some perplexed and simple-minded people have the notion that law was made for the lawyers. Merchants have a dread of becoming involved in litigation. They shrink from its expense, from its delay, from its vexations, from its uncertainty and even from its publicity. This attitude exists not only here but everywhere; even in England the sup-

posedly undefiled home of the Common law. One has only to compare the English law reports for the period from 1870 to 1885 with the period from the latter year down to the present time to see how remarkable has been the falling off in commercial litigation. City men in London have been especially outspoken in expressing their want of confidence in the Courts as proper tribunals for the settlement of commercial disputes. They complained that counsel as well as judges were unable by reason of their ignorance of trade usages and methods, trade terms and documents, to intelligently understand complicated business transactions submitted to them, without tedious explanation carried to unreasonable length, not only at the expense of the time but the excessive monetary expense of suitors. And they said that when even that was done, it happened that an intelligent understanding of the matters in hand had not been arrived at. They therefore preferred to make use of arbitration clauses in their trading contracts. The objection, however, to arbitration even before boards provided by such trade guilds as the Corn Exchange of London or of Liverpool is that they frequently dispose of disputes by the application of an off-hand moral view of right and wrong without giving effect to legal rights founded upon a sounder basis of morality. This defect is provided for in a provision of the Arbitration Act, 1889, prepared by the London Chamber of Commerce, under which questions of law can be referred to the Courts. Unfortunately an arbitration may be concluded before a party to it becomes aware that the question involved was one of law that the arbitrators should not have passed upon and it is then too late to take it into Court. Well, with the willingness that judges have always shown to do the right thing by the public no matter whether it suits the ideas or the convenience of the profession or not, the judges of the Queen's Bench Division determined in 1895 to set up a strictly commercial Court devoted to the despatch of business dis-

putes. They did so and they saw to it in order to invite the confidence of the commercial classes that it was presided over by a judge trained to the minute in commercial law and able without asking any stupid questions to grasp the whole situation and to thread his way through the mazes of any commercial problem no matter in what part of the world it arose. This judge was Mr. Justice Mathew, who, in addition to his reputation as a great commercial lawyer and his ability to understand and deal with commercial views, was impatient of all technicalities in legal procedure. He shaped the practice of the Court with a free hand and with highly beneficial results. See Eng. Ency. of Law, vol. III. p. 203. The work of the Court has been so satisfactory that business men of England perceive that their legal rights can be taken better care of under English law administered by a capable judge than they can be by boards of arbitration.

No grievance can be legitimately felt by commercial men in the Province of Manitoba with respect to the procedure of its Courts. I do not see how it can be advantageously made more simple than it is, or that any injustice is made possible by it. The Bar of Manitoba in this respect has been very progressive and has been in the van of many liberal reforms. So little do its members bother about the pe'lous niceties of Common Law pleading that it has become a lost art, if it ever was an art, though the old pleaders tell us that it kept law scientific. One recalls the story told of Parke, B., afterwards Lord Wensleydale, who pitying the hard lot of a man who was ruined because his pleader had supposed his remedy to be trespass instead of case added: "No doubt it is hard on him. The declaration ought to have been in case. If it had been he would have won; but if the distinction between trespass and case is abolished law as a science is gone —gone." Neither can delay be assigned in Manitoba as a reason why business disputes are not settled by litigation. The work of its Courts is not congested

and the judges dispose of cases before them with promptness. Nor can the expense of litigation unless carried to the Supreme Court of Canada or to the Judicial Committee of the Privy Council be urged as the cause. However oppressive it may be in England where counsel fees seem to be on a fabulous scale, the cost of a lawsuit in Manitoba is kept within almost parsimonious limits. Perhaps this will be believed by the public when it is told that to-day there are some lawyers who against their will and their higher nature are driven into the hazardous speculations of the wheat market in the hope of raising funds to meet pressing real estate obligations rashly assumed in order to eke out the meagre earnings of their vocation and make decent provision for their families.

One has only to think back a few years concerning the class of work that has come before the Courts of Manitoba or to glance through the Manitoba Law Reports to realize how little there has been of commercial litigation of much worth. The explanation given by business men is that they regard it as bad form and an undesirable advertisement to be mixed up in a lawsuit. They also tell lawyers something else—something that lawyers should be mindful of, and it is startling in its significance and its implications. They report that in consultation with their legal advisers they are told that the results of a lawsuit are so uncertain that no assurance can be given as to what the up-shot of an action will be. They therefore prefer to bear the ills they have than fly to others that they know not of, or to put up with a lean settlement rather than endure a fat lawsuit. And they say that because of the law's uncertainty they have been driven into forestalling controversies by exercising foresight and securing advice as to the terms and effect of contracts before making them. If despite this precaution differences do arise they regard it as good judgment to adjust them peaceably or by arbitration and they say that in this attitude they are

upheld by their expert advisers. One must admit that the better system under which business is being carried on does in some measure explain the decrease in commercial litigation.

The uncertainty of the law has been always proverbial, and it is natural that business men should be afraid of it. Perhaps what is sometimes put down for uncertainty in the general as well as in the professional mind, is nothing more than the disappointment that no defeated litigant or sanguine lawyer can bow to. Uncertainty does, however, seem to be established when a case goes from one Court to another with much variety of fortune, showing itself in hopeless disagreement among judges of equal eminence.

To restore the confidence of mercantile cla... law and to induce them to look upon the Courts ... only a sound but a well-meant device designed by the State to assist them in adjusting their disputes and presided over by judges desirous of serving them, is a task that is demanded of the profession as a plain duty and by the spirit of the times.

While it is hopeless to expect that uncertainty can be completely banished from the administration of law, there is no doubt that the feeling of insecurity can be very much diminished. The profession has noticed and been impressed by the frequency with which appeals are taken as a matter of course from the judgments of the trial Courts of Manitoba. It has been carried to such lengths that an appellate system has almost been developed based upon the idea that the decision of the trial Court is presumptively wrong. The number of reversals by the Court of Appeal has apparently created the view that the trial Court is merely a receiving house for clearing facts and that it is not until the Court of Appeal is reached that the law is expected to be applied to them. The nature of much litigation is such that ordinarily it should stop with the trial Court; just as much of it should never have

been take into Court. There is no reason why the judgment of a trial judge should not be regarded as setting forth a correct view of the facts and a sound application of the law if he is doing painstaking work. If it is to be that well-nigh every judgment is to be appealed from, it is natural that the administration of justice will suffer in public esteem. No judgment can be slightingly referred to without general distrust being created, and no condition can be satisfactory that does not regard the judgment of first instance with some of the confidence that is placed in the judgment of the Court of Appeal. If a choice is to be made as to whether the stronger men of the Bench are to be trial judges or on the Court of Appeal, I think the argument, if set forth, is incontrovertible that the stronger men should be the judges of first instance. Appeals are naturally distasteful to litigants, for in addition to the delay and expense they keep the matters in controversy in agitation and uncertainty. A man of business wants finality and he wants it quickly. The English law reformers of 1872 were fully alive to this fact. While quite agreeing that an appeal should be open and that a case should not be disposed of against the will of litigants on the same principle that a prize fight is ended, namely—by a knockout-blow though administered in the first round, they appreciated that appeals were a great source of dissatisfaction to the majority of litigants who desire to have their cases disposed of by a competent tribunal as cheaply and speedily as possible. Therefore they proposed to abolish appeals to the House of Lords by ending an appeal at the Court of Appeal and they proposed to constitute a strong Court of final appeal as one of the principal features of the Judicature Act. However, in 1874, before the Act came into operation, there was a political change, Lord Cairns succeeding Lord Selborne as Lord Chancellor, and in 1876 the appellate jurisdiction of the House of Lords was restored.

I do not agree that it is necessary to put the law in a Code in order to make the law plain, or that if the law were codified the evil spirit of uncertainty would have been exorcised from the fair figure of justice. The history of *Vagliano Bros.* v. *Bank of England* reveals that a Code has as much room to provide for sophistry and supple thinking as had the law in its original state. When one speaks of a trained profession the words should be used with a measure much broader than their ordinary content. We have been accustomed to think that if a lawyer is expert in handling law as shown in distinguishing and applying cases and advising upon the law, he can be regarded as a qualified practitioner, and even as a suitable person to be made a K.C., without being a subject for light remarks. That view is not in harmony with the needs of the day when one considers how technical and complicated much business is that lawyers are called upon to advise in. The great lawyer will know his books and the intricacies of commercial law, but he will be better equipped than that. He will be competently acquainted with commercial methods and able to instantly comprehend all the factors of a business difficulty with the same rapidity and completeness as a trained man of business could. In an age of efficiency a lawyer is not efficient in the despatch of a business dispute who is not expertly familiar with the methods of intricate business likely to come before him. The ordinary view is that it is sufficient for a lawyer to make himself acquainted with the nature of a trade transaction when it is submitted to him just as it is considered to be time enough for him to master the mechanism of a piece of machinery when patent rights are in dispute. The difference is that in a patent dispute the lawyer who is not a patent expert is supposed to have the invention explained to him, while in a business situation he is expected to know the general position. I am led to make these remarks by recalling an experience I had a few years ago in meeting a London

solicitor in connection with a dispute over a grain transaction. He, no doubt, had the advantage of being a specialist in grain trade questions as he was the adviser of many interests connected with the London Corn Exchange. He impressed one as not only being most capable and sound as a lawyer but he made it very clear that he knew the grain business on its technical side as well as his principals could know it. Much of the uncertainty that might arise in a question of law would quickly vanish under his accurate knowledge not only of law but of facts.

One likes to think of the illustration of efficiency contained in an incident Sir Francis Jeune mentioned in an address made a few years ago. He records that he once heard an argument, complete to the initiated, which consisted in the ejaculation of the title of one authority by the leading Counsel, and the response of assent by the judge, and that thereupon the judgment instantly followed, in which the judge pointed out the reasons why the authority cited by him should be followed. Sir Francis compares this competent administration of justice with the searchings of mind, sending for books, and fruitless suggestions of a judge who is not trained in his vocation. He says it reminds him of Stanley laboriously wandering nowhither, through sunless forests, with pygmies for guides.

There is a further matter in this connection upon which opinion has and may well be divided. Merchants who know something about legal methods cannot understand the need or value of precedents in the legal system, and they have the idea that cases are disposed of not on the basis of what is the right thing to be done as it stands in equity and good conscience as they think they should be, but upon an outworn precedent descended from bygone age and framed under conditions wholly different from those of to-day. The professional answer is, that the precedent is followed because it lays down a principle founded on sound reasoning and adapted to do justice in the

greatest number of cases falling within it though hardship may occasionally occur. Cases of hardship, however, should not go unregarded and law is defective when it fails to provide for them. One might hope to free the law not from uncertainty but from occasional injustice if we got away from too slavish a devotion to precedents and traditional authority and enquired whether or not they conform to the fresh and changing facts of life. It is our boast that the unfailing vitality of the Common Law lies in its flexibility and power of adaptation to new conditions no matter how various and novel they may be. A competent opinion in the profession is that much of whatever confusion and uncertainty are to-day in law is due to the failure of the judges to follow precedent and to leave reformation of the law to the action of the legislature. I have heard lawyers upbraiding strong judges for disregarding cases which apparently were on all fours with the one in hand. May it not be that that is a notion which must be left behind in this moving world as it is by some of the best judges, who decline to allow their judgments to be put in the iron framework of a Procrustean bed?

Thinking of a judge whose good sense and revolutionary ideas one admires however much one may deprecate his impatience with precedents even of his own making, one is induced to paraphrase very slightly some lines in Tennyson's "In Memoriam":

> "Our little precedents have their day;
> They have their day and cease to be;
> They are but broken lights of thee;
> And thou, my Lord, art more than they."

Moreover, the worthwhileness of a decided case or its application to modern conditions cannot be tested unless it is addressed to the facts in hand. A decision, however suitable to a business transaction in England fifty or a hundred years ago, may do complete injustice if enforced against the business man of Western Canada to-day. The occasion may demand the making of a new precedent that springs from the loins of a living

system of law. Lord Bacon in his essay on Judicature says, "The law cannot meet all cases; it is framed to suit those things which for the most part happen; but Time (as has been said by the Ancients) is the most fertile of things; every day the author and inventor of new circumstances." The modern view is that the law can meet all cases and that it has not been arrested in its growth. Particularly is this true of the law merchant which Cockburn, C.J., in *Goodwin* v. *Robarts*,[1] observes is not fixed and stereotyped and is not incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. Pointing out that commercial transactions have altered in character and increased in complexity, Bowen, L.J., in *Jacobs* v. *Crédit Lyonnais*,[2] says "there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern time we have to deal." The criticism is not well founded that the law is out of joint with the times on the supposed ground that it does not give effect to the plain morals of a case or that judges invariably dispose of cases on high and dry grounds of legal necessity. Until recent years this was no doubt true. To-day there is a recognized and appreciable tendency to enforce moral duties such as fair dealing between man and man, though they have no root in legal obligation. The tendency is remarked by Sir John Paget in his work on "Banking" in which he makes reference among other cases that illustrate it to the case of *Ewing* v. *Dominion Bank*, decided by the Supreme Court of Canada, and practically affirmed by the Judicial Committee. There is, however, no reason why this tendency should be invoked to decide a case against a suitor because his private morals are bad where the merits of the case are in his favour.

It is, therefore, evident that the frontiers of law are being advanced to new out-posts of vantage ground.

[1] L. R. 10 Ex. 346.
[2] 12 Q. B. D. 601.

and that liberalizing influences are at work bringing the law into harmony with modern needs, and making it a useful instrument for the service of the business world.

The attitude of business men towards the administration of law would also undergo considerable change if they found Counsel in Court abandoning forensic competition and over-reaching methods and engaging in an impartial effort to bring out facts and to have justice done. The idea of the public about lawyers is too often that of Tulliver in "The Mill on the Floss." Though he had full faith in the honesty of his case he proposed "to employ the best game cock with the sharpest spurs he could get to fight for his rights." We allow the spirit of partizanship to animate us too much and we allow our clients to expect it of us. A lawyer who is not zealous for his client's interests is set down as weak, particularly if the lawyer on the other side is tenacious and overbearing. This spirit has become so much second nature that instances are freshly in our minds where even Crown Attorneys were accused of a desire to secure convictions. The profession would act more in consonance with its dignity as a great calling, would be truer to itself, and would in the long run deserve better of the public if it considered that its duty in matters of commercial litigation lies not in worsting the opposite side but in helping the Court to arrive at a proper conclusion.

All that commerce has of security it derives from the law. Step by step there has been laid down for it by the great sages of the profession the stones of foundation principles that define and safeguard its rights. Upon them there has been built up the great fabric of credit and mutual confidence that has brought the vast world of commerce into being. The work which began long years before Lord Mansfield sitting in the Guildhall gave statement and cohesion to the mercantile law of England, can never end. Law penetrates every commercial transaction just as commercial needs are

the essence of mercantile law. To interpret the law, to advise upon it, to enforce it, to put it to right uses, remains the business of the lawyer. It is also for him to mould the law to meet the changing needs of commerce in order that commerce may not outstrip law and be without its protection.

The profession in the west and especially in Winnipeg is bound to keep its mind hospitable towards all ideas that make for the advancement of the profession and that commend it to general esteem. Opportunities of unusual appeal confront the profession in the west by reason of the tremendous development that is bound to take place in Western Canadian commerce. Winnipeg as the centre of the grain trade of the Country, has taken its place as a great commercial metropolis. That position is constantly becoming more established and augmented. . One cannot doubt that it is destined to be if not in population at least in importance one of the first commercial cities of the Dominion. As a railroad centre and terminus it will hold an outstanding place not only in Canada but on the Continent. It will be as it is fast becoming—one of the great banking capitals of America. These elements of great commercial activity are already in Winnipeg and to their growth there hardly seems to be any bounds. The place of the profession in a community with these potentialities and this achieved position should be an enviable and commanding one. I try to think of the part lawyers will play in the history of Western Canada. I can see the activities of the profession taking on manifold form and overflowing in fruitful channels for the enriching and confirming of the national life. But in the end, the most enduring and beneficent contribution of any the profession will have made will be in making and keeping law the great auxiliary of the Country's vast commercial interests. Fortunate will be the man, who looking at his share in the labour of it, will be able to say, "The work of my hands is there."

Winnipeg. W. H. TRUEMAN.

MEMORANDUM *RE* UNIFORMITY IN COMPANY LAW.[1]

The task of the Canadian Bar Association in relation to the subject of Company Law is to secure amongst the different laws in force in the various parts of the Dominion the greatest measure of uniformity consistent with satisfying any diversities of need or convenience. Many, perhaps most, of the differences in form and substance in the company laws of the different provinces are the result rather of accidents of draftsmanship than of any deep-seated diversity of circumstance and need. It is the removal of these accidental differences, for the greater convenience of lawyers and of business men throughout the Dominion, that will be the immediate concern; though it may be possible at the same time also to effect improvements in the law which will meet with general acceptance.

The result of recent decisions of the Judicial Committee of the Privy Council has been an increase in the proportion of companies incorporated under Dominion authority. This is more particularly true of the Province of Ontario where provincial charters for commercial and manufacturing companies were much more the vogue than in other provinces. Certain classes of companies, however, will doubtless continue to operate under provincial companies Acts. Any proposal of uniformity amongst these Acts ought to embrace the Dominion Act as well, and there appears no reason why the principles, and to a large extent the details, of the Dominion and the provincial Acts should not be the same.

The suggestion has indeed been made of dealing at once with the problem of uniformity and the constitu-

[1] A Committee of the Canadian Bar Association of the Western Provinces has had under consideration Company Law, and the following Memorandum was prepared by Mr. F. W. Wegenast as a basis for its deliberations. The reader is asked to consult a letter from Mr. Wegenast to appear in our next issue, being too late for this.

tional problems surrounding the subject, by having a common system, under concurrent legislation of the provinces and the Dominion, whereby the jurisdiction of the provinces and the Dominion would be united, charters being issued by the provincial Secretaries or other provincial officials as *persona designata* under a Dominion Act, and fees being apportioned in some equitable manner. Any such arrangement, however, if considered practicable or desirable, would follow, rather than precede, a harmonization of the provincial systems. Moreover the Canadian Bar Association will probably wish to avoid the risk of becoming involved in any contentious constitutional question.

Assuming that it will be deemed desirable to include in the proposal of harmonization both the provincial and the Dominion Companies Acts it may be observed that while the Acts of most of the provinces have undergone a large amount of revision during the past five years the Dominion Act has not been revised since 1902 and the revision at that time was not particularly thorough. All of the provincial Acts have been enriched by provisions taken from the Imperial Companies Act, but very few of these have found their way into the Dominion Act. It seems safe to assume that there must shortly be a revision of the Dominion Act and it is manifestly in order that the question of the form and content of any model for uniform legislation be considered with reference to such revision.

An effort in the direction of uniformity will require as a first step a consideration and determination of certain broad questions of principle and of form upon the disposition of which the whole framework and many of the details of the draftsmanship of an Act will largely depend. The first and most important of these questions is:—

1. *Should the method of incorporation be by letters patent or by registration of a memorandum and articles of Association?*

Two systems of incorporation are in force in this country. Under the Dominion Companies Act and under the Acts of Ontario, Quebec, New Brunswick and Manitoba the method of incorporation is by letters patent issued by the representative of the Crown or one of his Ministers. In the remainder of the provinces, that is to say, Nova Scotia, Prince Edward Island, Saskatchewan, Alberta and British Columbia and in the Yukon Territory the method of incorporation is by a system of registration of a memorandum and articles of association, as under the English Companies Act, though in all of these except British Columbia there was originally a system of letters patent.

The current disposition to regard the differences as mere differences of form has no substantial foundation. The two systems differ not only in origin and form but also fundamentally in express statutory effect, as will be found by comparing the two types of enactment. The incorporation of companies by letters patent corresponds, in form and analogy, to the ancient practice of the common law, by which the status of a body corporate and politic, or in other words a "corporation," was conferred by royal charter, accompanied usually by some form of monopoly or privilege beyond those enjoyed by natural persons. The system of registration under the English Companies Act had its origin in an effort to regulate joint-stock companies which at first were formed by deeds of settlement on the basis of partnership, not only without legal sanction, but in actual defiance of the law. By a series of enactments in the first half of the nineteenth century culminating in the consolidation of 1862, these joint-stock companies were placed under the control of the Courts and of an administrative official called the Registrar of Companies, and had gradually conceded to them most of the attributes of corporations.

The letters patent Acts in force in this country are all copied or adopted from the old Companies Act of

the Province of Canada before Confederation, which was first passed in 1864. After Confederation this Act was recognized as being a Dominion statute and similar Acts for the incorporation of companies with provincial objects were passed successively by Quebec in 1868, Ontario in 1874, Manitoba in 1875, Nova Scotia in 1883, New Brunswick in 1885, the North West Territories in 1886, and Prince Edward Island in 1888

The Dominion Act still conforms fairly closely to the original Act of 1864; but some of the provincial Acts have been considerably amplified by provisions taken from the English Act. Lack of due discrimination in some of these additions has led to certain anomalies; but the distinctive type has in every case been preserved, though in the Ontario Act, an attempt has been made to superimpose many of the features of the registration Acts. Saving some exceptional features of the Ontario Act the following characteristics are generally common to the letters patent Acts:

(a) Incorporation of companies is a function of the executive branch of the government.

(b) The function of incorporating companies is a discretionary and not a ministerial function. (There are opinions contrary to this as regards the Dominion Act. The test is whether a mandamus would lie. It may be that the Secretary of State is in this regard in a different position from the Lieutenant-Governor of a province but it is not clear. Down to 1902 the Dominion Act vested the incorporating power in the Governor-in-Council and it seems doubtful whether the amendment of that year substituting the Secretary of State was intended as a surrender of all the discretionary power of the Executive.)

(c) The incorporating provisions are in terms of positive authorization rather than of acquiescence. They embody a definite grant of power

and not a mere acquiescence in the exercise of corporate capacity.

(d) In the matter of procedure and internal management the company is left comparatively free to order its own affairs.

(e) The internal affairs of the company are governed by "by-laws" and its outward formal acts are also expressed by by-laws.

(f) Comparatively little supervision over the internal affairs of the company is exercised by the Courts. Changes in the powers, capital, etc., of companies are regulated by the executive department which issues the letters patent.

The characteristics of the registration Acts may be summarized as follows:—

(a) The administration of the Acts is committed to an administrative official and to the Courts.

(b) The registration of companies is a ministerial function and the operation of the Act when its requirements have been complied with is practically automatic.

(c) The incorporating provisions are in terms of negative acquiescence rather than of positive authority, the prototype being the unincorporated company or partnership.

(d) The provisions respecting procedure, auditing reports, etc., are generally speaking more elaborate than in the case of the letters patent Acts.

(e) The internal affairs of the company are governed by "regulations" and its corporate acts expressed in "resolutions."

(f) Companies in their constitution, powers, capital and internal arrangements generally are under comparatively strict tutelage exercised largely by the Courts.

The recent judgment of the Privy Council in the Bonanza Creek Mining Company case[2] establishes two other vitally important distinctions between companies incorporated under letters patent and those under registration systems. It was held in that case that a company incorporated by letters patent under the Ontario Companies Act was like the old common law companies established by Royal Charter in not being subject to the doctrine of *ultra vires*. Consequently it was held that such a company was not incapable of carrying on business beyond the provincial boundaries. It would appear from this decision that in the two respects of being free from the doctrine of *ultra vires* and being vested with extra-provincial capacity, a company incorporated by letters patent is in a position of superiority.

In relation to Canadian Company law the general question as between letters patent system and a registration system is attended with some highly interesting historical considerations. All the letters patent Acts were, as already stated, copied from the Act of the Union Parliament passed in 1864. Previous to that time there had been in force in Canada a form of Act, copied from an Act of the State of New York, providing for a system of registration of a memorandum of association with the registrar of deeds or other local authority, a copy being transmitted to the Provincial Secretary. This type of Act originated in the American Colonies after the revolution. The revolution having put an end to the royal prerogative, no other method of incorporation had been found available in the States except by special legislation. It was to obviate the necessity of a special act for every company that the system of registration had been devised; and at the time of its first adoption in Lower Canada in 1849 it was already in force in some twenty of the States. It would seem, however, as if some enterprising Canadian legislator or draftsman had

[2] [1916] A. C. 566.

discerned that the reason for the invention of the American system of registration did not exist in Canada and that there was no reason in Canada for getting away from the common law method of creating corporations through the medium of the royal prerogative. The Act of 1864 appears to have been an original piece of draftsmanship indigenous in Canada. The bill was first introduced in the Legislative Council by Hon. Mr. Sanborn and subjected to extensive revision in the Assembly before it was finally adopted, but it does not appear who was responsible for the conception of the draftsmanship, which was the more remarkable for its deliberate departure from the models adopted in England which had only two years previously been revised and consolidated in the Companies Act of 1862. It is not less remarkable that nearly all the other provinces, having before them the model of the English Act, and having in some cases already in force Acts based on the registration principle, should have followed the Canadian model. These considerations together with the claim of some American writers, plausible enough in view of the facts above stated, that the present system of company registration in England had its origin in America, present an interesting historical situation which, while not perhaps of paramount importance, is worth keeping in mind.

The characteristics above mentioned of the respective systems are not all inherent or essential, and some of them, at all events, could be varied by apt legislative enactment. Thus it is not essential that a chartered company should be governed by by-laws or that a registered company should be governed by regulations or that a registrar of companies should act in a ministerial capacity. Some of the features, however, would seem to be essential in the sense that they could not well be separated by legislation in this country. Thus it is difficult to see how under the recent decision in the *Bonanza Creek Mining Company Case* a provincial company incorporated by registration could claim

extra-provincial capacity even if the provincial Act expressly purported to confer such capacity. There are certain features so closely associated with the respective types of Act that the adoption of one or the other type would tend to determine *prima facie* at all events some of the most important principles of company law. For this reason it is desirable to analyze the general question above propounded and to break it up into a number of particular questions, one of which is:—

2. *Should incorporation be based primarily upon the theory of the creation of an artificial personality or upon the theory of an association of individuals analogous to a partnership?*

The reasons for and against the respective theories are a little difficult to analyze into definite counts. The emphasis in the question ought to be placed upon the word "primarily"; for doubtless incorporation must in every case involve the two ideas of an association or partnership on the one hand and of an artificial individual on the other. Some writers on company law display impatience at what they regard as the abstruseness of the theory of artificial personality but the fact remains that a large part of the principles of corporation law in all systems ancient and modern, has been based upon the theory; and the only question appears to be whether it is desirable to recognize it boldly and frankly or to preserve as far as possible the analogy of partnership or association. In itself the question which viewpoint should be emphasized may appear to be of more academic than practical importance; but from a slightly different viewpoint the same question may be stated:—

3. *Should incorporation be based primarily on an act of the Sovereign power or upon the contract of the incorporators?*

In this form a number of important questions are at once suggested which may be still further separated:—

4. *Should the functions of the incorporating authority be discretionary or should they be ministerial and incorporation an automatic process set in motion by the incorporators?*

It has been a moot question under some of the Acts whether there was any discretion in the incorporating authority to refuse to Act. Some years ago on an attempt on the part of the Opposition in the Canadian Parliament to hold the Government of the day responsible for the issuing of a charter to a racing association it was announced that the Department considered itself as acting in a merely ministerial capacity and under legal obligation to issue charters, on application, for any lawful object. From the standpoint of the incorporators the question is:—

5. *Shall incorporation be a right which any group of persons may demand, or a privilege conferred by Executive authority?*

Perhaps the chief importance of this question is in relation to the question of cancelling charters for abuses, and the general question of the control of corporate operations. The broader question may be stated as follows:—

6. *Should the administration of company law in such matters as the amendment of the company's constitution, increase of capital, change of name, etc., be for the executive branch of the government, or for some special tribunal or for the regular Courts?*

A consideration of this question must have in view not only present conditions and practices but the future developments of the subject. The course of events in this and in other countries affords ground for the expectation of closer control by government authority of various phases of corporate activity, as for instance capitalization, "holding" companies, issue of preference stock, sale of bonds, etc. The

question at once arises: shall such control be exercised by the ordinary courts of justice or through a branch of the Executive. There is no question that the method of incorporation by letters patent lends itself more readily to a system of supervision and control by the Executive branch of the Government. The tendency has of late been to create tribunals of a quasi-executive character, like the Board of Railway Commissioners for the handling of administrative problems such as those presented in the field of company organization. It is a question to be kept in view whether any such tribunal or tribunals should be established to exercise jurisdiction over corporate organization and operations.

It is a result, not perhaps inevitable, but certainly natural, of the history and theory of incorporation by registration that companies so incorporated should be more repressed so to speak in the matter of capacity and freedom to act than companies incorporated by charter. Under such cases as *Ashbury* v. *Riche*[3] and the *Sutton's Hospital*[4] case a distinction is established between registered or, as they are called "statutory" companies, on the one hand, and chartered companies on the other. Corporations incorporated by royal charter were held to have all the capacities of a natural person and not to be subject to the doctrine of *ultra vires*. As regards Canadian companies this distinction is confirmed by the recent decision of the Privy Council in the *Bonanza Creek Mining Company Case*.[5] The question for our consideration is:—

7. *Should a corporation be vested as far as possible with the capacities of a natural person or should the doctrine of ultra vires be preserved?*

The abrogation of the doctrine of *ultra vires* would not mean that a company could legally do all the things that a natural person can do. In the first place there

[3] L. R. 7 H. L. 653.
[4] 10 Co. 1.
[5] [1916] A. C. 566.

are some things a corporation could not do because of the artificiality and incorporeality of its nature. In addition to this the doing of certain things could be made *illegal* for the corporation without making them *ultra vires*. In the *Bonanza Creek Case, supra*, the Privy Council clearly distinguished between what a company was *capable* of doing and what it had the *power* or *right* to do. And it is quite elementary that a company is capable of committing torts and crimes.

A vital question with an affirmative answer to which can be assumed at once is:—

8. *Shall provincially incorporated companies be vested with extra-provincial capacity?*

Before the recent decisions in the Privy Council there was doubt whether a company incorporated by a province was inherently capable of carrying on operations or even isolated transactions outside the provincial boundaries. Though the situation is not yet entirely clear it may be considered settled that a provincial company, if it is incorporated by letters patent issued by the representative of the Crown, is at least *capable* of receiving recognition as a corporation in another jurisdiction, that is to say it cannot be urged that the company's operations outside the province are *ultra vires* of the company, though they may possibly be unauthorized or even illegal. It would appear that a necessary link in the reasoning of their Lordships was the fact that the company in question was incorporated by letters patent issued by the Lieutenant-Governor and was therefore in the same position as a company created by royal charter.

As already stated, many features of company law fall more or less readily into place according as one or the other of the two systems of incorporations is adopted,—some because they follow more or less logically and naturally, others because they are worked out in certain ways in existing Acts. Some of these phases are suggested in the questions below: which are

numbered without regard to any particular order of importance or otherwise:—

9. *Should the question of ancillary powers be dealt with exhaustively by the Act as in the Ontario Act?*

We are familiar with the extended and diffuse enumerations of corporate objects that appear in corporation notices. The purpose of these exhaustive enumerations is to avoid as far as possible the risk of falling foul of the doctrine of *ultra vires*. In the case of the chartered companies this fear would now appear to be removed by the decision of the Privy Council in the *Bonanza Creek Mining Company Case*; but apart from the principle of this decision an effort had been made in the Ontario Companies Act to obviate the long enumerations by incorporating in the Act itself a long list of the ancillary powers of companies, taken direct from Palmer's Precedents. It is possible that this device alone had the effect of wiping out in a large measure the doctrine of *ultra vires* as regards companies incorporated under the Act, for a grant of such powers by statutory enactment would probably be conclusive of all doubts. If a system of registration is adopted, and if it is considered desirable to limit the application of the doctrine of *ultra vires*, it might be considered whether the device of the Ontario Act should not be adopted.

10. *Should the Act embody provisions respecting the holding of lands by corporations?*

This is in one sense a branch of the preceding question. But there is a broader question whether and to what extent the Companies Act should embody or displace the rules of the old laws of Mortmain which in some form or other are in force in all the provinces except Quebec. Under these laws a corporation was not allowed to hold lands without a license for the purpose from the Crown.

Under this head there are some important constitutional questions to consider both as regards

Dominion Companies and Provincial Companies. It was suggested by Sir Montague Smith in *Citizens* v. *Parsons* [6] that a company incorporated by the Dominion with power to purchase and hold lands throughout Canada in Mortmain might find itself unable to do any business by reason of all the provinces having passed Mortmain Acts. The force of this suggestion is considerably weakened by the judgment of Sir Montague Smith himself two years later in the *Colonial Building Association Case* [7] in which he intimates that the suggestion was: "a hypothetic case by way of illustration only and cannot be regarded as a decision on the case there supposed"; and he further suggests more or less indirectly that the provinces may not be able absolutely, to prevent a Dominion Company from holding lands. In the *Colonial Building Association Case* the jurisdiction of the Dominion to confer power to deal in lands was directly in issue and was sustained; but it cannot be said to be clear to what lengths Dominion jurisdiction could go. On the other hand it may be gathered from recent decisions such as that of the *John Deere Plow Company Case* [8] that the provincial jurisdiction over Mortmain must be exercised *bona fide* and without discrimination; that is to say,—the provincial jurisdiction should be exercised in the form of a general Act dealing with the evil of holding land by corporations generally. If these views are correct it would seem, (1) that the provisions of Provincial law respecting the holding of lands, might possibly with greater convenience be embodied in a Mortmain Act, and (2) that the provisions of the Dominion Act with respect to holding lands should be carefully squared with the Dominion jurisdiction over the subject.

11. *Should the policy be to leave companies comparatively free to order their affairs or should it be to supply more or less strict regulation and supervision?*

[6] (1881), 7 App. Cas. 96.
[7] (1883), 9 App. Cas. 157.
[8] (1915), A. C.

The present Dominion Act is a much easier Act for companies to "live under" than some of the provincial Acts, that is to say irregularities are not so severely checked and companies are left to a large extent the arbiters of their practice. It seems possible, for example, for a company to operate for an indefinite period without holding annual meetings without any serious risk of inconvenience. And Dominion companies are not required to make annual returns to their Department.

The question is not whether looseness is to be encouraged. It is rather whether correct practice should be insisted upon and insured by adequate penalties for default. In order to be effective a penalty must necessarily be more or less onerous and the question is whether and to what extent it is advisable to prescribe company practice or whether and to what extent companies should be left to their own devices.

A prime reason for strict supervision is in order to protect the public, that is to say those members of the public who are, or might be induced to be, shareholders of a company. Thus the conduct of companies whose stock is on the public market may undoubtedly be a matter of public interest. But there is not the same reason for invoking legal supervision in the case of small private companies whose management is of no greater interest than a small partnership or an individual. A recognition of this difference has given rise to the distinction, in the Imperial Act, as also the Acts of some of the provinces, between "private" companies and "public" companies, the latter being subjected to much more stringent regulations than the former. The question ought therefore to be considered:—

12. *Should there be any such distinction as that between "public" companies and "private" companies?*

13. *What, if any, annual returns shall be required of companies, and from what companies shall such returns be required?*

As already stated the Dominion Act does not require any annual return, though it does require a return of certain particulars whenever a written request is made by the Secretary of State. Most of the provincial company laws require an annual return of some sort.

14. *Should there be public notice of the application for incorporation or of the incorporation when effected?*

It was formerly customary to require a notice of intention to apply for incorporation just as a notice is now necessary in the case of a private bill. The object of such a notice is to enable possible objections to be filed as for instance to the use of the name. As it is now under the Dominion Act a company may be incorporated and actually carrying on business before any objection can be entered; and if any alteration is to be made in its charter it must be by supplementary letters patent.

There are in most of the Acts provisions requiring a statement of the affairs of the company to be regularly laid before meetings of shareholders; and there are also provisions for giving shareholders access to certain general information about the company's capital and the position of directors and other shareholders with respect to such capital. The object of these provisions and of the provisions for publicity is to afford a check upon possible misfeasance by directors and officers. It is one of the chief concerns of company law to protect shareholders who may be in the minority with respect to any particular policy or resolution from arbitrary and oppressive action by the majority. An important question therefore is:—

15. *By what means and to what extent and in what respect should the actions of directors be controllable by the shareholders or a portion of them?*

One means of control is to require certain resolutions or transactions to be sanctioned by the share-

holders, or two-thirds of them, or three-fourths of them, or even the whole of them, and one phase of the question is to what classes of by-laws or resolutions this check should be applied.

16. *Should the company be governed by "by-laws" or by "regulations"?*

There is no particular significance in these terms themselves but there is a good deal of difference between the system of internal regulation under our letters patent Acts and that under the registration Acts. The theory under which the chartered companies operate is that each is an *imperium in imperio*, competent to make its own local laws or "by" laws in analogy to the sovereign State itself. The analogy is really that of a devolution of sovereignty. It was formerly quite well understood for instance what it meant for a town or an institution to secure a "charter" from the Sovereign. The power to make by-laws and to act under seal were of the very essence of corporate status. It was really in contra-distinction to by-laws that the internal rules of joint stock companies were first termed "regulations"; because to have called them by-laws would have been to pretend a corporate status which joint-stock companies did not at first possess. It is not unusual now for companies under the Imperial Companies (Consolidation) Act to claim in their regulations the power to make "By-laws."

There is considerable confusion and overlapping in the present Imperial Act in the use of the terms "articles," "regulation," "resolution," "special resolution," etc., and whatever terms are used, there should be a clearer definition of their respective meanings and uses than there is at present under the registration Acts.

17. *Should the Act provide a model set of by-laws or regulations?*

The Imperial Act and the provincial registration Acts provide uniform sets of regulations which in

default of the adoption of others, and to the extent they are not expressly displaced, are applicable to all companies incorporated under the Acts. A similar device has been adopted in the Ontario Act for corporations without share capital.

18. *Should a distinction be maintained between formal acts under seal, such as by-laws, on the one hand, and informal acts such as resolutions on the other?*

The use of a seal is one of the essential marks of corporate activity but convenience requires that many ordinary transactions should be competent to a corporation without the use of the seal. Thus the signature of a corporation to a bill of exchange or promissory note need not be under seal. The question whether and to what extent the use of the seal should be done away with both in respect to the company's outward acts and in respect to its internal regulations ought to be considered and determined.

19. *Should the same Act cover all classes of companies such as mining companies, loan companies, insurance companies and associations for purposes other than gain?*

This is not a vital question but is important when it comes to settling upon a scheme of draftsmanship. The older plan was to have separate Acts for each class of company requiring special treatment. A newer plan worked out in the Ontario Act is to embody in one Act the general law applicable to all companies and special provisions applicable to special classes.

20. *Should restraint be permitted upon the alienation of shares?*

The result of a recent decision in the Ontario Court of Appeal in *Re The Jacob T. Shantz & Son Company, Limited*,[9] is to render it doubtful whether a company incorporated under the Dominion Companies Act can restrain the alienation of shares in such a way as to

[9] (1911), 23 O. L. R. 544.

exclude persons considered undesirable from being shareholders. The reasoning of the decision would probably be applicable to some of the provincial Acts. The Ontario Act makes express provision allowing such restraints under certain conditions.

The question of restraints upon alienation of shares is a phase of the question to what extent a company should be regarded as being in the nature of a partnership. It is an elementary principle of partnership law that the death or retirement of a partner not only does not give any one else the right to come in as his successor but *ipso facto* dissolves the partnership. It does not seem unreasonable that a company of the small "private" type should be allowed to adopt rules under which persons considered incompatible with the rest of the shareholders, might be excluded from becoming shareholders. The argument against restraints upon alienation of shares is that shares are a form of personal property and that a man should be able to sell what he owns. But the same could be said of an interest in a partnership. Perhaps in this as in other phases the distinction between private and public companies could be invoked. Indeed the definition of "private company" in the Imperial Act recognizes a restraint upon alienation as being one of the distinguishing marks of a private company.

21. *Should there be a secondary authorization like the certificate for the commencement of business?*

Under the Imperial Act and the provincial registration Acts except in Nova Scotia incorporation, that is to say registration, merely authorizes the preliminary organization to be effected. The real authority to commence business is conferred when the certificate to commence business is issued. Under the Letters Patent Acts the power to commence business is of the essence of the grant of incorporation. The Ontario Act has anomalously engrafted upon it the provisions

of the Imperial Act for a certificate to commence business.

Upon this phase again arises the question of the expediency of recognizing two classes of companies, public and private and requiring only the former to take out the supplementary authority.

22. *Should the provisions respecting prospectus and directors' liability be included in the Act?*

The original Directors Liability Act of England was passed after the famous decision in *Peek* v. *Derry*[10] which really dealt with a point in the law relating to fraud. It was afterwards embodied in the Companies Act; and in England nothing can be said against the propriety of such a context. In Canada with sovereign jurisdiction divided between federal and local legislative bodies an interesting constitutional question arises whether and to what extent the law as to directors' liability is a subject for the Dominion and the provinces respectively.

As a prerequisite of incorporation, and viewed purely from the standpoint of company law, presumably both the Dominion and the provinces have a right to require of their companies to file prospectuses, and to prescribe the contents of such prospectuses and provide penalties for default. But the Ontario Companies Act, for instance, purports to prescribe the form and requirements of prospectuses in Ontario not only for Ontario companies but also for Dominion companies. It is a question for consideration how far it is competent and expedient for a provincial Companies Act to go in this matter; and a corresponding question arises as to Dominion legislation on the subject of prospectuses. At present there is no Dominion statute law on the subject.

23. *What, if any, provision should be made for regulating the sale of shares and securities either of local or of foreign companies?*

Like the previous one, this question is susceptible of being viewed from a standpoint broader than that

[10] (1889), 14 A. C. 337.

of company law, viz.: that of the protection of the general public from exploitation. The subject is a new one for Canada, there being no Dominion legislation upon the subject and only one province, Manitoba, having ventured to deal with it. The Manitoba Act is a copy or adoption of the so-called "Blue-Sky" legislation in force in some of the western American States. Its practicability has not been fully established and in Canada difficult questions arise as to the relative jurisdictions of the Dominion and the provinces in the matter.

24. *Should corporate securities such as debentures, bonds, preference stock, etc., be registered, and if so, where?*

An effort is made in some of the Acts to provide a means of giving notice of securities upon corporate assets by registering such securities in manner similar to the registration of conveyances of land. This branch of the subject may be said, however, to be still in its infancy. Many questions will arise as to the relation between the registration of corporation securities on the one hand and conveyances of land, bills of sale, chattel mortgages, conditional sale agreements and the like on the other. And some questions will also arise as to the respective jurisdictions of the Dominion and the provinces over the subject.

The above are only some, of many, questions of various degrees of importance that ought to be considered in framing an Act that can be recommended for uniform adoption. It is no secret to the legal profession that such matters are frequently left to be determined by pure accidents of draftsmanship or by immature or ill-considered decisions of persons happening to be in positions to influence the course of legislation.

This memorandum is intended to serve one purpose, and one only, viz.: that of inviting for the questions suggested and for others that may suggest themselves, full and careful consideration and an inter-

change of opinion. In a multitude of counsellors (which is not necessarily synonymous with draftsmen or legislators) there is safety.

History of Incorporated Companies.

It is necessary in order to understand some features of the law relating to the incorporation of companies to have some knowledge of its history. For this purpose it is necessary to trace the beginnings of this branch of law in England; for not only has the legislation of this country been largely affected by the legislation of the British Parliament, but in several of the provinces the English law of companies has been more or less faithfully reproduced, and in all, even Quebec, the basic principles of the law are the same as in England.

In England.

The creation of such artificial persons was formerly in England one of the prerogatives of the Sovereign, who could confer the artificial personality upon a group of persons, or even one person, by a "charter," which was an instrument in the form of Letters Patent under the great seal, constituting the persons a corporation and setting forth the objects and powers of the artificial personality thus called into being. This method of creating a corporation by letters patent is still largely followed in Canada, though not in England.

With the beginning of Canal construction in England in the eighteenth century, companies began to be created by special Act of Parliament. The first appears to have been that authorizing the construction of the Bridgewater Canal by Brindley in 1759. The movement was facilitated by the rapid extension of railway construction in the first part of the eighteenth century, and from that time to within comparatively recent years this method of incorporating

companies has been largely employed; and for the formation of certain classes of corporations such as banks, railroad companies, insurance companies and the like, a special Act of the legislature is still the regular procedure.

But the lineal predecessors of our present numerous trading and manufacturing companies were the unincorporated companies which sprang up in connection with the commercial activity of the seventeenth century. Charters from the Crown were too costly and special Acts of Parliament too difficult to obtain. Trading associations had, therefore, to content themselves to exist as mere partnerships. For a time indeed they were absolutely prohibited by law.[11] So late as 1811, in Birmingham, members of an association to raise £20,000 in small shares: "for the purpose of buying corn, grinding the same, making bread, and dealing in or distributing flour or bread" was indicted as a public nuisance.[12] In spite of the discouragement of the law unincorporated companies continued to flourish. The law was reluctantly compelled to recognize in such associations certain features distinguishing them from ordinary small partnerships. These were (a) the transferability of the shares into which their capital was divided; (b) the continued existence of the association, notwithstanding the death or bankruptcy of any of its members; and (c) the vesting of the management of the affairs of the association in a small body of "directors" to the exclusion of the rest of the members. The law, however, rigidly adhered to the rule that all the members of the association were liable for all the debts and obligations of the association.

After the repeal of the "Bubble Act" in 1825, an Act was passed giving to associations complying with certain formalities the privilege of suing and being sued in the name of a public officer. In 1844 another

[11] The "Bubble Act," passed in 1819, was not repealed until 1825.
[12] *R.* v. *Webb and others*, 14 East, 406.

Act was passed enabling companies to obtain from a Government officer a certificate of incorporation without applying either for a Charter or for an Act of Parliament.[13] Under none of these Acts, however, was any difference made in the real character of the Associations as regards the liability for debts. Every member remained liable to the fullest extent for all obligations of the company. It was not until 1855 that an Act was passed enabling companies incorporated under the Act of 1844 to obtain a certificate of incorporation limiting the liability of the members. These Acts, with numerous others affecting corporations, were superseded by, or incorporated in, the Companies Act of 1862, a masterly and comprehensive piece of legislation which has served largely as a model for the Company law of Canada and other British Dominions and to some extent the United States. The English Act with its numerous amendments has since been consolidated in the "Companies (Consolidated) Act, 1908."

In Canada.

The course of legislation in this country has followed more or less closely that in England. In 1850 an Act of the united provinces[14] provided for a method of incorporating joint-stock companies for manufacturing, ship-building, mining, &c., by a system of registration similar to that under the English Acts. A memorandum of association was signed in duplicate and acknowledged, and deposited with the County Registrar who transmitted one copy to the Provincial Secretary. This constituted the persons signing the memorandum a body corporate. The Act was re-cast in the consolidation of 1859, and in 1864 was replaced by an Act[15] which reverted to the older method of incorporation by letters patent controlled and regulated, however, by general statutory provisions. For

[13] See Lindley, 6th ed., p. 5.
[14] 13 and 14 Victoria, c. 28.
[15] 27 and 28 Victoria, c. 23.

the formation of certain kinds of companies the Governor-in-Council was empowered to grant charters of incorporation by letters patent under the great seal to any number of persons not less than five who should petition therefor. The petition was to set out the names of the applicants, the proposed name of the Company, its objects, amount of capital, etc., and the charter was issued pursuant to the petition. The mode of incorporation laid down in this statute has since been followed in the Dominion and by the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island and Manitoba. In Nova Scotia companies were incorporated by letters patent from 1844 to 1900, when that province adopted the automatic plan of incorporation by registration of a memorandum of association.

Under the distribution of powers in the British North America Act, the Act of 1864, being common to Upper and Lower Canada, fell under the jurisdiction of the Parliament of Canada [16] and was revised and amended by that body in 1869.[17]

Ontario.

It would appear that after confederation the government of the province of Ontario undertook to incorporate companies under the Act of 1864 of the Union Parliament which covered both Upper and Lower Canada, and the Provincial Legislature even went so far as to pass an amending Act.[18] After some remonstrance from the Dominion authorities [19] a provincial Companies Act was passed in 1874.[20] This Act while copied almost verbatim from the federal Act did not purport to be in perpetuation of it or to have any connection with it, and may be taken to be the first statute in Ontario for the incorporation of

[16] *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136.
[17] 32-33 Vict. c. 13.
[18] 33 Vict. c. 40.
[19] This included a significant letter from Sir John A. Macdonald to Mr. John Sanfield Macdonald.
[20] 37 Vict. c. 35.

companies with provincial objects. This statute has been revised and amended from time to time, the most extensive amendment being in 1908, when many provisions were introduced from the English Act.[21]

Manitoba.

Until the 15th of July, 1870, the company law of the district which is now Manitoba was the law of England as it stood at the date of the charter of the Hudson's Bay Company, 2nd May, 1670.[22] On the date first mentioned the Companies Act of Canada, which had been passed in 1869, became effective in Manitoba as regards companies with objects other than provincial[23]; and by a subsequent statute of the Dominion[24] the laws of England "relating to matters within the jurisdiction of the Parliament of Canada" as they existed on the 15th July, 1870, were made operative in Manitoba. The law of England as it stood on that date was also operative as regards companies with provincial objects by a provincial statute[25] passed in 1874; and in the following year was passed "An Act respecting the Incorporation of Joint-Stock Companies by Letters Patent[26] copied from the Ontario Act of the preceding year. This Act, revised and amended from time to time, has remained the general authority for the incorporation of companies with provincial objects.[27]

British Columbia.

By proclamation of the Governor, Sir James Douglas, dated December 10th, 1859, the statutes of England relating to joint-stock companies as they

[21] See now R. S. O. c. 178.
[22] *Sinclair* v. *Mulligan* (1888), 5 Man. Rep. 17; and see Art. in *Western Law Times*, June, 1890.
[23] Stats. Can. 34 Vict. c. 13, s. 1.
[24] 51 Vict. c. 33, s. 1; now R. S. C. c. 99, s. 6.
[25] 38 Vict. c. 12, s. 1; R. S. M. c. 46, s. 11.
[26] 38 Vict. c. 28, s. 3.
[27] See now R. S. M. (1914), c.

stood on that day, were declared to be in force in the Colony of British Columbia. In 1866 a Companies Ordinance was passed by the Legislative Council of the Colony, and on the union of Vancouver Island with the mainland Colony in 1869 this ordinance was extended to the Island and its dependencies. The ordinance provided that the English Act of 1862 should be in force in British Columbia with certain modifications. On July 20th, 1871, this statute was displaced, except as to purely local companies, by the operation of the British North America Act which came into force on that date and brought with it the Dominion Joint-Stock Companies Act[28] which had been passed in 1869.

In 1878 another local statute[29] was passed providing a method of incorporation apart from the method of the English Act as introduced by the Ordinance of 1866, and 1890 a third method for the incorporation of local companies was provided by an Act known as the Companies Act, 1890.[30] The three methods of incorporation ran side by side until 1897 when they were consolidated,[31] and included in the Revised Statutes of that year.[32] The Act was again revised and consolidated in 1910;[33] and in 1911 after consolidation with the amendments of that year was included in the Revised Statutes, 1911.[34]

F. W. WEGENAST.

Toronto.

[28] 32-33 Vict. c. 13.
[29] 41 Vict. c. 5.
[30] 53 Vict. c. 6.
[31] 60 Vict. c. 2.
[32] R. S. C. 1897 c. 44.
[33] 10 Ed. VII. c. 7.
[34] R. S. B. C. 1911, c. 39.

A LAWYER'S DESCENT INTO HADES.

Of the twelve books of the Æneid none possessed such charms for me, during my college days, as did the sixth, in which Virgil describes so graphically the visit of Æneas to the gloomy shades of Erebus to see his father Anchises. With scarcely less interest did I regard the beautiful legend of Euripides, wherein the great tragic poet tells, in flowing numbers, the sacred devotion of Alcestis, who, dying for the sake of prolonging her husband's life, was rescued from the Plutonic shore and restored to the light of day by Hercules; also the story of how Orpheus with the ravishing strains of his lyre had power to recall his beloved Eurydice from beyond the drowsy waters of Lethe. There was something so weird in all these fanciful descriptions that they seized upon my imagination and haunted it like a nightmare. When in after years I visited the far-famed City of Naples, it became possible to gratify the wishes of my youth, to attempt the daring exploit of committing myself to Charon's boat; of crossing the Stygian Lake; of wandering, not as an airy, unbodied phantom, but within the walls of my fleshly tabernacle, along the rueful shores of Cocytus; of gazing upon fiery flowing Phlegethon and seeing, in imagination, the horrid sights which Æneas long ages ago was permitted to look upon. So full was I of my anticipated visit, you can hardly wonder that the night before I scarcely closed my eyes in sleep. And what foreigner from our stern latitudes can spend many hours in sleep, during the witching days of early spring, in lovely Naples with its wealth of marvellous beauty? For under all the bending heavens there is no spot I ever visited to be compared with this charming City and its superb environs. "See Naples and die," has grown into an aphorism. And it may be, because one is invited after seeing it to die, that here the vivid imagination of the ancients

placed the gateway into Hades as well as the portals of Elysium.

Carriages were ordered for our party at an early hour in the morning. After a hurried breakfast we left our hotel and skirted our way along the northern shore of the Bay of Naples in the direction of the Grotto of Pausilipo. The view was grand beyond description. The early sun was throwing lengthy shadows far down the western slopes of Vesuvius, and mantling bay, shore, valley, mountain and sea in a sheen of transporting splendour. As the eye swept around the circling bay, past the site of buried Herculanæum and the ruins of Pompeii, beyond Castellamare and the orange groves of Sorrento, it could faintly trace the dim outline of the shore with its vineyards and charming villas until it melted into the distant horizon. Near the entrance of the narrow passageway, cut through the high ridge, that separates the Bay of Naples from the Bay of Baiæ, is Virgil's tomb. This is the coigne of vantage from which to see Naples, enshrined in all the charms of its marvellous beauty. I suppose it matters little where we lie down to sleep after life's fitful fever; and yet the soul yearns for a spot of attractive and restful repose;—it may be on some shady knoll, some breezy height, where the whispering trees chant their sad dirges; or some quiet sylvan retreat, where nature shrinks from the work-a-day world. "Bury me in the sunshine," — was the dying request of Archbishop Hughes. From the lips of many has escaped the last prayer of "Little Nell,"— "When I die, put near me something that has loved the light, and had the sky above it always." Of all spots none on earth so suitable for the tomb of the great Latin poet, although far from Mantua, the place of his birth, as this, over-looking the city he loved so well; the classic bay he never wearied of extolling in lofty verse and within short distance of the charming Bay of Baiæ, which he has immortalized in song. His tomb, two miles north of Naples, is a square, flat-

roofed building near the brow of a steep precipice overlooking the Bay. Amid such earthly beauty did Virgil place the entrance to Hades. And we cease to wonder when we consider it was a region for ages rocked by earthquakes; where subterranean heat escaped from vast fissures in the solid rock and where its people were constantly disturbed by fearful internal convulsions. Beyond the passage-way is the City of Pozzuolo, the ancient Puteoli, once a place of considerable importance and wealth. Its environs were once covered with magnificent villas; now all is stamped with ruin and decay. Few cities have been subjected to greater vicissitudes. Not only has it been laid waste by earthquakes and overthrown by volcanic eruptions, but it has successively been destroyed by Goths, Vandals, Lombards, Normans and Turks. It was here the great Apostle of the Gentiles landed, when on his way to Rome to lay his appeal before Caesar. And here is to be seen the site of the villa of the great Roman lawyer and orator, Cicero. After leaving Pozzuolo, on the right rises Monte Barbaro, where was cultivated the ancient Falernian wine so highly extolled by Horace. Still farther on we passed Monte Nuova, which suddenly sprang into existence one night, during the volcanic eruptions of 1538. It is 1,500 feet high and three miles in circuit. Its sides are covered with vineyards and olive trees. At the base of Monte Nuova, is the Lucrine lake, once forming with Lake Avernus the celebrated Julian port. During the reign of Augustus it communicated with the sea by the means of a canal, which was destroyed by the eruption of Monte Nuova. The Julian port was one of the grandest and most useful of Roman works.

And now we stand upon the shores of Lake Avernus, on whose margin was the entrance to the regions of the lower world. Through its forbidding portals all must pass; be ferried over the Styx in Charon's boat; wander along the desolate shores of Cocytus; cross fierce Phlegethon with its streams of

liquid fire, before entering the abodes of the happy in the enchanting fields of Elysium beyond. As I gazed down the dark passage-way that led to these fabled regions, I appreciated in its full significance the well known line of Virgil:—

"Facilis descensus Averni."

And the scarcely less expressive one of Dante:—

"All hope abandon, ye, who enter here."

Lake Avernus presents every appearance of an extinct volcano. It is a mile and a half in circumference and two hundred and fifty feet deep. Its margin was once covered with a dense forest, and here Homer placed the abode of the Cimmerii shrouded in eternal gloom. They were said to live in grottoes, into which the light of the sun never penetrated and where perpetual darkness reigned.

It is true I did not perform the initiatory rites prescribed by the Prophetess before commencing the descent. Nor did I see the sights which greeted the vision of the Trojan hero. Nor did I make my exit to earth through the ivory gate. This, however, I did see—At the entrance to the Grotto of the Cumaean Sibyl, the visitor is taken in charge by a guide and conducted down a steep, slippery incline, torch in hand. At the bottom spreads a ghastly sheet of water now made lurid by the flickering torches. Here you mount the back of your guide, who, staff in hand, gropes his way with his burden to the opposite side. The guide, I suppose, you may call, Charon, minus the boat. There is pointed out the spot, the cleft in the side of a rock, where the Sibyl had her seat, and from which she delivered her mysterious oracles. Right glad was I to beat a hasty retreat to the upper world. Pursuing our way and passing a spur of the jutting headland there burst on my view in all its beauty the charming Bay of Baiæ, once the fashionable watering place of Rome in the days of her Imperial splendour, when

Augustus Caesar here sought relief from the cares of State, and drew around him the greatest generals, poets and orators of the age. It has nothing now to indicate its former magnificence save two or three dilapidated structures, a few broken, scattered columns. What a melancholy illustration of the instability of human grandeur. What a commentary on the folly of mere earthly splendour! Here are the remains of the Temples of Mercury, Venus, Diana and Hercules. A short distance from Baiæ is Lake Acheron, over which all must pass before reaching the Elysian fields.

On the shores of the Acheron, foolishly, I nearly met my fate. A long cavern extends far under a steep incline not far from the ruins of the palace of Nero. To explore it is part of the tourist's programme. Stripped of all my garments save trousers and shoes, I took the hand of the guide and passed within its dark and forbidding passage-way. From every cleft in the rock issued forth intense heat. I had not proceeded far when overcome by the stifling heated vapour, in good well-spoken English, carefully emphasized so he could not possibly mistake the meaning, I asked the guide to return. He replied in as good well-spoken Italian, at least I judge so. We kept up the conversation some time, neither having the remotest idea what the other said or wanted. I can't say it was an interesting tete-a-tete. I suppose he thought I was giving vent to intense admiration of the surrounding objects of interest. I know I thought him the most stupid of the sons of men, who could not understand pure English carefully phrased and distinctly enunciated. I, however, made up my mind not to suffocate in this horrid place, without one desperate effort for life. Although the way was dark as Erebus and as crooked as the policy of a time-serving politician, I wrenched my hand from his firm grasp and bolted back with might and main, stumbling along the uneven passage, occasionally dashing my head against

a projecting rock, and happily, almost by a miracle, succeeded in gaining the light of day. It was not a moment too soon. I could barely stand. Speak I could not. So ghastly pale was I, my companions were scarcely able to recognize me. I was the only one who had ventured into the grotto. I was plied with a number of questions,—such as—"What in the world is the matter?" "Did Pluto unchain Cerberus and let him loose upon you?" "What has become of the guide?" "Were you pursued by the furies?" "And don't you think you will have occasion to remember your visit to Hades?" I gave no sign. I wanted to go back to Naples. I had seen enough of the nether world. I was quite willing at once to turn my back upon it forever. My curiosity had been filled to repletion. Like Mark Twain, after his experience on the Mexican plug, I never appreciated until now, in all its import, the poverty of the human mechanism. And, like him, after the most judicious use of both hands, first in one place and then in another, I found there were several other spots on my head, face and body where two or three more hands might have been satisfactorily employed. Limp and exhausted, with the blood oozing freely from severe scratches on my head and face and the perspiration flowing from every pore, I sat down on a broken column, amid the ruins of some once famous temple, Marius-like, not, it is true, to weep over the downfall of so much earthly magnificence, but to imprecate the folly that had so nearly cost me my life for the sake of gratifying a morbid curiosity. Before, I had been the most active and adventurous of the party. Now I was as docile as a lamb. Subsequent events did not seem to have much interest for me. Being somewhat refreshed by a bathe in the Bay of Baiæ I was strongly urged to accompany the party to the fabled abodes of the happy in the Elysian fields beyond. I didn't much care to go even there. After long persuasion, however, I consented to join them. Leaving Baiæ and making a short turn

near a high bluff opposite the island of Ischia, we came in full view of the regions of the blest, the delightful resting place of all who had passed the muddy and bitter waters of the Acheron. No earthly spot could have been more fitly chosen, commanding a fine view of the Bay on one side, and on the other looking out upon the waters of the Mediterranean. Under an Italian sky, in the mellow light of that sunny day, it seemed an earthly paradise. Ages ago these grounds were used as a cemetery. The vaults in which the ashes of the dead were placed in urns are yet to be seen, rising above each other in tiers, for you will bear in mind they practised cremation in these times. In one of the best preserved vaults the altar may be seen upon which the body was burned, the ashes being sealed up in small urns and placed in niches. On these fair fields the olive and vine are now cultivated in many places.

As the shades of evening began to gather we wended our way back to Naples, passing the ruins of imperial palaces and lordly villas, the prostrate columns of great temples, the sites of flourishing cities tenanted long ages ago by the elite of Rome's greatest and proudest families. Over all had swept the wasting storms of time, and this was what remained of so much magnificence and glory. The grandeur which had made Baiæ famous, throughout the Roman world, had passed like the baseless fabric of a vision, and here was the end of the whole matter. Are the generations of men to come and go and be scattered like the leaves of autumn before the blast? Is this the sum total of man's highest earthly good? May we not hope that on some brighter shore, in some fairer abode than the fanciful regions of the Hesperides and more beautiful than the enchanting plains of Elysium, he may one day find rest, eternal rest, in "that still country where the hail-storms and fire-showers do not reach, and the heaviest laden wayfarer at length lays down his burden!"

Late at night we passed through the Grotto of Pausilipo. From its darkness and gloom we were suddenly ushered into the splendour of the full moon riding gloriously in the heavens and shedding its silver beams upon the placid bosom of the Bay. In the distance, like some grand sentinel, rose the majestic form of Vesuvius. A thousand lights dotted the circling shore. The sights and sounds of its thronging streets soon roused us from the reverie into which all had fallen. With hasty steps I sought the quiet of my room to ponder alone over the strange incidents of the day, wiser and sadder if not better, after my descent into Hades.

SILAS ALWARD.

St. John, N.B.

CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.[1]

English Decisions.

There is no case reported in the number of [1917] 1 K. B. for January which requires notice here, but it may be mentioned that the report in *Rex* v. *Casement*[2] is contained in it with a very extended report of the arguments and long judgments discussing the law of treason under the *Treason Act, 1351*, 25 Edw. 3, stat. 5, c. 2, and subsequent statutes. In his judgment in the Court of Criminal Appeal (p. 142), the authority of Lord Coke having been called in question, Darling, J., does the very unusual thing of introducing a poetical citation, namely, the following words from Milton's Sonnet to Cyriack Skinner, where he alludes to Lord Coke, as one who—

> "On the Royal Bench
> Of British Themis, with no mean applause,
> Pronounced, and in his volumes taught our laws,
> Which others at their Bar too often wrench."

There are no cases requiring notice in the January number of [1917] P.

Life Assurance Policy — Assignment — Validity. In the January, [1917] 1 Ch. we have first to notice *In re Williams, Williams* v. *Ball*,[4] which Lord Cozens-Hardy, M.R., calls "a rather curious case." Mr. Williams had a policy of insurance for £1,000 on his own life granted by the Mutual Life Insurance Co. of New York. Soon after taking it out he handed it to

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it from month to month may rely on no case important for them to be advised of, escaping their notice. Cases under the English Workmen's Compensation Act, 1906, are not considered as coming under this category.

[2] [1917] 1 K. B. 98.

[4] [1917] 1 Ch. 1.

his housekeeper, Miss A. M. Ball, and indorsed on the policy itself this memorandum:—

> "I authorise Ada Maud Ball, my housekeeper, and no other person to draw this insurance in the event of my predeceasing her this being my sole desire and intention at time of taking this policy out and this is my signature." . . .

To this Mr. Williams signed his name, with date, and gave the policy to Miss Ball. No notice was given to the insurance company. Mr. Williams paid the premiums until his death. The Court of Appeal held the above inoperative as an assignment of the policy, on the ground that it was an incomplete gift, being either (1) a revocable mandate or authority which was revoked by the death of Mr. Williams, or (2) if taking effect on his death, a testamentary document not duly executed.

As to the first ground Lord Cozens-Hardy, says (p. 7):—

> "What is the effect of the memorandum here? It seems to me to be of the nature of a mere power of attorney, though not under seal, authorizing the person named to receive the money. A power of attorney, however, becomes inoperative on the death of the person conferring it, and the recipient cannot claim to exercise the power after that person's death."

Conversion of realty into personalty — Lease — Option to Tenant to purchase reversion — Notice to exercise option. *In re Blake, Cawthorne* v. *Blake*[a] illustrates the principle of *Lawes* v. *Bennett*[b] that where notice has been given by a lessee of land, under the terms of a building agreement, to exercise an option to purchase the reversion, conversion of the realty into personalty takes place as from the date of the notice and the property will be treated as personalty in the distribution of the vendor's or lessor's estate: and further decides that neither the fact that the exercise of the option was not followed by completion of the purchase, the lessee having meanwhile died

[a] [1917] 1 Ch. 18.
[b] 1 Cox 167.

insolvent, nor the fact that the trustees of the will of the vendor, he having also died, had exercised a right of re-entry which they had before actual completion under the building agreement, undid the conversion, and worked a reconversion into realty. Eve, J., says (p. 23):—

> "In my opinion it is now well settled by the authorities cited to-day, that the giving of the notice exercising the option operated as a conversion once for all, and I cannot, in face of those authorities, hold that the mere fact that the exercise of the option was not followed by completion of the purchase prevented the conversion which had actually taken place from continuing to subsist. . . . I do not see how that proviso" (*sc.* the proviso for re-entry in certain events) "can be construed as undoing that which has already been done, as restoring the same conditions as would have subsisted if no notice had been given and no contract to purchase had been thereby set on foot. All I think it means is that, if between the exercise of the option and the actual completion of the purchase the vendor re-enters, it shall not be obligatory on the vendor to complete. In other words, the proviso recognizes the existence of the contract but relieves the vendor from the obligation to carry it out. The property, in my opinion, is personalty and has been so since September 28th, 1899" (the date when the notice of exercising the option was given).

The question naturally suggests itself how soon after the notice of exercising the option was given, would the lessor-vendor have to die, under such circumstances as the above, for the conversion into personalty to operate. Surely if he had lived for five years and then died, the property would have descended as realty and not as personalty?

Will — Bequests to children — Direction in codicil to bring into Hotchpot "advances appearing in books of account"—Entries in books before and after date of codicil. The point decided by Neville, J., in *In re Deprez, Henriques* v. *Deprez* is a short but interesting one. A testator by his will settled his residuary estate upon trusts in equal thirds for his three surviving children, one of whom was a son. By a codicil he directed that all sums of money appearing in his books of account to have been advanced by him to his son should be brought into hotchpot. Neville, J.,

holds that entries of advances made in the account books before the date of the codicil were incorporated in the will, but that entries made after that date were not receivable either as part of the will or as evidence, and an enquiry was directed. The judgment includes also the following point not noticed in the head note, (p. 29):—

"The question remains whether the failure of the declaration as to future entries lets in the doctrine of the Court with regard to advances subsequent to the will. In my opinion it does not. The testator having expressed an intention in his codicil with regard to such advances which has failed, I do not think that a different intention can be attributed to him by implication: see on this point *In re Coyte*.[7]"

CANADIAN DECISIONS.[8]

Constitutional law—Jurisdiction of Commissioner under Manitoba Public Utilities Act, 1913—Appointment of Superior Court judges—B. N. A. Act 1867, s. 96. The current number of the Manitoba Reports (Vol. 26, No. 6), is largely occupied with *Re The Public Utilities Act, City of Winnipeg* v. *Winnipeg Electric Ry. Co.*,[9] an important constitutional decision of the Court of Appeal in that two of the four judges (Perdue and Haggart, JJ.A.), hold that the above provincial Act is *ultra vires* in so far as it purports to confer powers transcending those of a Superior Court judge upon a provincial officer, called a "Commissioner," appointed by the Lieutenant-Governor in Council, although sec. 96 of the Federation Act enacts that—

'The Governor-General shall appoint the judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.'

[7] 56 L. T. 510, 514.

[8] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[9] 26 Man. 584.

The other two judges did not consider it necessary to deal with the point. The importance in the public interest that those possessed of the jurisdiction proper to Superior Court judges, whether so named or not, should be appointed and paid by the Dominion Government, so as to be as little as possible subservient to local and provincial influences, is quite obvious; yet it must be admitted that there has been considerable laxity in applying the provisions to that effect of the Federation Act up to the present time, notwithstanding the late Sir John Thompson's famous report, as Minister of Justice, on the Quebec District Magistrates Act, 1888. The Manitoba *Public Utilities Act* provides that the Commissioner shall be 'a Court of record'; and, to quote words of Perdue, J.A. (p. 617):—

> "The numerous and extensive powers conferred upon the Commission" (whose judicial functions were to be performed by the Commissioner) "show that the intention was to make it a Court with exclusive and absolute jurisdiction over interests of the very highest importance involving the rights of corporations, shareholders, and bondholders. It is superior to the Superior Courts."

Perdue and Haggart, JJ.A., the only judges of the Court who pass upon the matter, have no hesitation in holding such legislation to be *ultra vires*. Doubtless the case will go to the Supreme Court, if not to the Privy Council, and we may hope to see the wholesome policy and provisions of the Federation Act clearly and finally vindicated.

Habeas corpus—Enlisting during minority. The current number of the reports of the Quebec Superior Court has two interesting cases of *habeas corpus*. The first, *Fournier* v. *Price*,[10] is one in which Sir Francis-Xavier Lemieux, C.J., decides that *habeas corpus* does not lie to annul the enlistment of a minor in the Canadian Expeditionary Force. The minor in question was seventeen years and ten months old.

[10] R. J. O. 60 S. C. 489.

Lemieux, C.J., holds, in the first place, that *habeas corpus* is a procedure to secure the liberty of the individual, and that it is not a procedure to determine the validity of contracts, nor to try rights of guardianship or rights of property, and—

> "It would be indeed a curious anomaly to hold that a soldier, whether officer or private, more or less eighteen years of age, defender of the peace and of the freedom of his country, is not a free man, because after his entering the service, and in accordance with military regulation, he has submitted to a certain discipline required in the interests of the service."

He makes short work of the contention of the applicant that the enlistment of a soldier in the Expeditionary Force in order that he may be incorporated in the English troops, is null and void, in that the Dominion parliament had no power or jurisdiction to organize such an Expeditionary Force, but only to organize forces for the defence of Canada.

Habeas Corpus—Paternal Authority—Daughter of Fourteen. In the other case, *Roy* v. *Roy*,[11] McCorkill, J., holds that the object of the writ of *habeas corpus* being to remove illegal restraint upon liberty, it could not be used by a father to enforce his right to have the custody of a minor daughter of fourteen years of age staying with relatives of her own free will. Under the English cases the Court may decline to issue a writ of *habeas corpus* where the parent has abandoned or deserted his child, or has otherwise misconducted himself;—but the parents may in other cases enforce their right to the custody of children under minority by *habeas corpus* subject to this, that the Court will not order the child to be returned into the custody of the parent, if the child has reached years of discretion, (which, apparently, means fourteen in the case of boys, and sixteen in the case of girls), and, in the exercise of such discretion, elects not to return to the parent.

A. H. F. L.

[11] R. J. O. 60 S. C. 501.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The *Juridical Review* for December commences with a long and learned Article on the *Early History of Commercial Societies*, by W. S. Holdsworth, D.C.L., a subject which he treats under the following heads:—(1) Early forms of commercial association, to wit, (*a*) the gild, and (*b*) the medieval contract of partnership in its two forms of the *Commenda* (an arrangement by which a merchant who stayed at home—the *commendator*—lent capital to a partner—the *commendatarius*—to employ in trade, the latter being entitled to his expenses and, generally, to one-fourth of the profit, while if the capital was lost, by no fault of the *commendatarius* the *commendator* bore the loss); (2) the application of the corporate idea to commercial societies; as to which, we are told, that before the 16th century English law had acquired some knowledge of the ideas involved in corporate personality, and during that and the following century considerable progress was made in the development of the law on this topic; and (3) The commercial companies and partnerships of the 17th century, in connection with which Mr. Holdsworth deals with (*a*) the rise of the joint stock company; (*b*) its commercial and legal consequences; (*c*) and the Bubble Act, 6 Geo. I. c. 18, and its effect on the development of Company and Partnership law. As to the Bubble Act he says:—

'What was needed was an Act which made it easy for joint stock societies to adopt a corporate form, and, at the same time, safeguarded both the shareholders in such societies and the public against frauds and negligence in their promotion and management. What was passed was an Act which deliberately made it difficult

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Numerous exchanges from different parts of the Empire and from the United States are examined, and attention is called to whatever seems most striking and important in them.

for joint stock societies to assume a corporate form and contained no rules at all for the conduct of such societies if, and when, they assumed it. . . . Therefore, for upwards of a contury' (the Act was repealed in 1825) 'industry was deprived of the advantages of a certain amount of capital which would otherwise have been available?

This is followed by the story of the murder of Murdoch Grant, the pedlar, by Hugh Macleod, in Scotland, in 1830, the circumstantial evidence on which the murderer was convicted, and incidentally how one Kenneth Fraser was informed in a dream where the pedlar's pack would be, but as a matter of fact was not, found. It is rather a thin story, which Mr. Wm. Roughead, W.S., makes much of under the title *The Pack of the Travelling Merchant*. The most noticeable thing in it are the words of Lord Moncreiff in his charge:—

"Cases of this occult and secret nature are often proved more satisfactorily hy the evidence of circumstances than by the direct testimony of those who might have seen the deed done, for the testimony of circumstances hrings conviction to the mind, while a more direct proof might possibly he the result of perjury."

There follows an Article entitled *Facts and Fictions about Divorce*, by Mr. F. P. Walton, formerly professor of Roman law at McGill University, but now a legal adviser, we believe, of the Egyptian Government. Mr. Walton discusses the frequency and facility of divorce in the United States as compared with other countries especially Canada, and the causes of that frequency; also the idealism of those like Professor Lichtenberger of Pennsylvania, who regard the prevalence of divorce without apprehension, taking it as a sign of progress indicative of the striving of the people to remould the whole institution of the family, and to make marriage itself a higher and better thing in America than it has been in Europe, and who look forward with confidence and hope to the time when marriage can be terminated at will by either party, (as, indeed, it could at one period of Roman law) on the ground that spiritual ties are stronger than legal. In

the course of his Article Mr. Walton observes with much force and some humour:—

'Of the facts which emerge in this controversy none is to me more puzzling than to find among women themselves, the most impassioned advocates of marriage dissoluble at will. . . . We men acknowledge with gratitude that to these strange beings we owe most of the savour of living. But the secret of their mental processes continues to elude us. To us it would seem that the transition from promiscuity, through polygamy to monogamy, indicated a steady progress in the recognition of the independent rights of women.'

The number concludes with an Article on *The Ministerial Function of Government*, by W. W. Lucas. The value of the Article would be very much greater, if Mr. Lucas had stated at the commencement exactly what he was setting out to establish, or to illustrate, or at the end, what he considers that he has established, or illustrated.

A good deal has been heard lately about there being too much of the lawyer in public life, and it is interesting to read in the *Law Times* (English) of December 2nd last, that upon Dr. Fisher, the Vice-Chancellor of the University of Sheffield, so contending:—

'Lord Milner, in answer to this contention, said that nobody could regard a great jurist—a man who had made a real study of the principles of law—as anything but a most valuable member of any Parliament. In the Parliament which assembled in 1404, Lord Campbell tells us that the recklessness of the House of Commons may have arisen from their not having had a single lawyer among them. Lord Chancellor Beaufort, in framing the writs of summons, illegally inserted a prohibition that any apprentice, or other man of the law, should be elected. In return for this slight our law books and historians have branded this Parliament with the name of *Parliamentum Indoctum*, or the "Unlearned Parliament." The careers of Sir Edward Coke, Sergeant Maynard, Lord Somers, of Lords Hardwicke, Mansfield, Camden, and Erskine, alone prove what our liberties in framing of the Petition of Right and the Bill of Right and in the elucidation and settlement of the great questions involving the liberty of the subject in the 18th century owe to lawyers . . . Lord Milner's remark . . . is abundantly verified in the careers of Blackstone, Lawrence, Lushington, Phillimore, and, in our days, of Westlake, Anson, and Dilke.'

It is interesting to read in what the *Law Journal* (English) of December 2nd last terms its *Law Society Symposium*, an outspoken attack by an English solicitor, Mr. James J. Dodd, upon law and the legal profession:—

"I have lived long enough in it," he says, "to hate the injustice of it. When I was young I read 'Bleak House.' When I came into the law I found to my astonishment that 'Bleak House' was true. . . . Is there no escape from all this pettifogging waste of the best brains our country can produce? Not long since in the middle of the war, Sir Edward Carson was occupied day after day in pleading the cause of the Slingsby baby—Sir Edward Carson of all men . . . wasting his intellect over a sordid story that mattered little to anybody, and nothing at all to the community. . . . Another *cause celebre* about the same time—also in the middle of the war—was concerned with whether or not a cook served up a caterpillar in the soup."

Enough of Mr. Dodd's complaints: now let us see what remedies he suggests. It is interesting to see that he begins by saying that the fusion of the two branches of the legal profession is essential, although as every law student, of the type of Lord Macaulay's schoolboy, knows, they have been separate in England ever since, in the time of Edward I., the "Countors" on the one hand, and professional attorneys on the other began to appear on the scene. Next "to simplify things" Mr. Dodd would cut away quite a number of causes of action.

"Actions for breach of promise, libel, slander, and the like ought never to be permitted except for grave reason—certainly not for money-making or blackmailing purposes."

But, perhaps, the most interesting line of reform suggested is with a view to prevent cases from coming into Court at all, in which the principal suggestion appears to be the following:—

"As to facts or law in dispute, these could be considered in the privacy of the Master's room, with the parties and their solicitors before him, and in nine cases out of ten the Master would be able to arrive at a decision that both parties could accept as correct. It is by no means certain that this mode of administering justice would seriously diminish the incomes of solicitors, as the volume of litigation would be greatly increased if litigants could

have their disputes settled inexpensively, and without the horrible publicity that people quite justifiably shrink from."

Mr. Dodd gives no indication of being aware that something very like what he here indicates has been for a long while operative in Switzerland, when, before any civil suit is allowed by law to go before the Court for judgment, the would-be litigants are bound to put in an appearance before an official called the *Juge de Paix*, whose mission it is to endeavour to reconcile the parties; and if he is a man of energy and tact, success very often attends his efforts, especially in the more remote parts of the Canton.

In the *Law Journal* (English) for December 16th, in an obituary notice of Sir Roland Vaughan Williams, ex-Lord Justice, we read:—

"Stop, Mr. ——, my receptivity is exhausted," was his delightful reproof to a voluble and too persistent advocate.

Well, we can produce a reproof even more "delightful" in Chief Justice John Beverley Robinson's gentle question addressed to a very long-winded counsel in an action concerning the title to certain lands: "By the way, Mr.——, are you arguing for a fee, or only for a term of years."

The *Solicitors' Journal* (English) of December 2nd repeats from a recent issue of the *Times* a strange story of a man, to whom a certain Dr. Keegan, who died on August 10th, last, had, some time before his death, given a book, having occasion to refer to it a little while ago, and finding that two of the pages were fastened together, and outside one of them was an instruction, in Dr. Keegan's writing, that the pages were not to be opened until after his death. On opening them, he found between them Dr. Keegan's will, containing legacies to certain friends and relatives, and the residue to the man to whom he had given the book. The will has been pronounced by solicitors to be quite in order. The issue of the

same periodical for December 9th contains an *Article on Injuries occasioned by the Contributory Wrong of a Stranger*, suggested by the recent cases of *Wheeler* v. *Morris*,[2] in which a passer-by was injured by a person in front of him jumping up and catching hold of the projecting rods outside the defendant's shop, causing the canvas to fall and the rods to drop. As one might expect, the precedents, according to the writer, who is anonymous, show the proper *ratio decidendi* in such cases to be as follows:—

'A person of common sense and of ordinary intelligence is to be first taken as a model. To him is to be attributed a knowledge of the history of the case, of the actual physical conditions, and of the habits, capacities, and propensities of the persons frequenting the place. And, thereupon, it has to be determined whether such a person would, or would not, have perceived that there was likelihood of some injury happening, and would, or would not, have considered it to be his plain duty to take ordinary precautions to prevent the occurrence of such an unfortunate accident as did occur in the particular case under consideration.'

The issue of the *Law Journal* (English) for December 16th contains, under the title *The War Cabinet*, a very interesting, and not to be lightly disregarded, comparison between recent changes in Great Britain and the evolution of the institutions of ancient Rome from a dictatorship, through a Triumvirate, to the Principate. The present War Council,—which the writer likens to the Roman Triumvirate of Caesar, Crassus, and Pompey, seems largely due, says he, like the latter, to fears of a food famine:—

'The new War Council is practically independent of Parliament, and His Majesty might, if he were so advised, dissolve both Houses for the duration of the war. We do not suggest that this is likely to be done. We hope it will not be done. But so many unexpected changes in our constitutional rights and liberties have taken place in the stress of two and a half years of war, that even revolution of the kind we have outlined is not impossible. In times of national danger a saviour of society is the natural hero to whom men turn for civic salvation; and unless Parliament looks closely to the maintenance of its traditional prestige and power, it may find itself gradually drifting into impotence, followed up by a Cromwellian dissolution. For in England, as in

[2] (1915), L. J. K. B. 269, 1435.

Rome, the question of corn supply is all-important. Like Rome, we depend on foreign corn; and like the Romans, we must in the last resort submit to the rule of him who commands our food supply.'

Meanwhile some wag informs us, Lord Northcliffe has sent for the King.

The *Irish Law Times* for Decr. 9th commences, and that for Decr. 16th continues, an Article suggested by some recent cases, on *Accidents caused by Domestic Animals on the Public Highway — Liability of Owner.*

The *Central Law Journal* (St. Louis, Mo.), for December 22nd, contains an Article by Thomas B. Gay, of Richmond, Va., discussing American decisions upon the somewhat strange subject of the *Degree of Care required of Railroads for safety of Passengers with reference to dangers arising from Objects falling from Baggage Racks.*

The courageously vigorous and aggressive language which is not unfrequently used by American officials, and which, in the right place and at the right time, is much to be admired, is well illustrated by Judge Gibbs of the Bronx County Court, when, as *Law Notes* (Northport, N.Y.), informs us, in a recent address to the *Women Lawyers Association,* he undertook to give a little good advice to the fair practitioners, and 'is now learning,' says our contemporary, 'that a woman advised is second only to her scorned sister in point of fury.' The judge's precepts were as follows:—

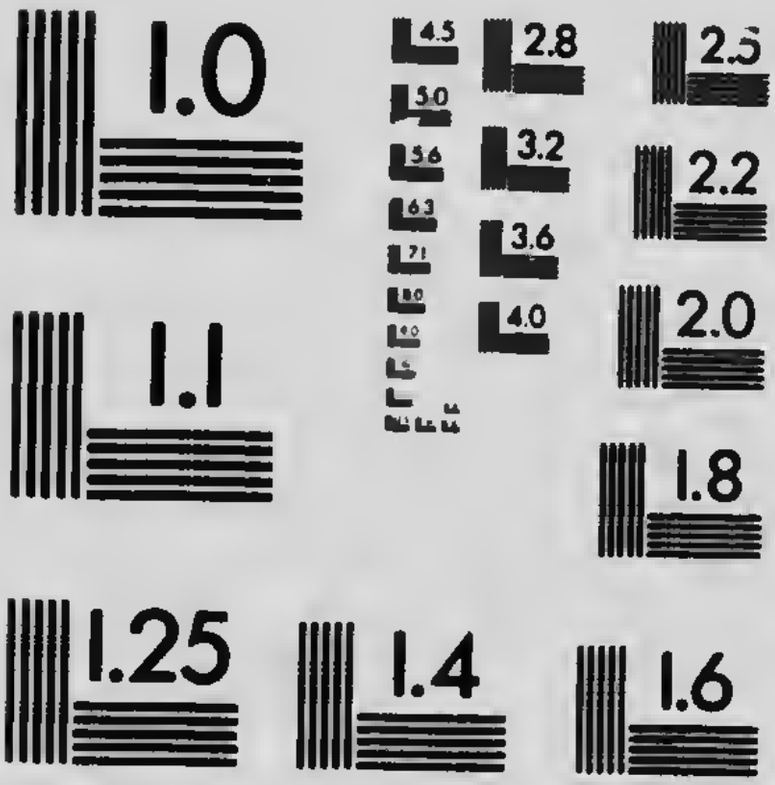
"Don't ogle the Court; don't dress as though for a ping-pong party; don't giggle; don't flirt with the jurors; don't talk too much; don't try to look handsome."

Well may *Law Notes* ask—

'Is it any wonder that the vials of wrath have been emptied upon him? It should be sufficient answer to say that the judge's reference to "ping-pong" shows him to be hopelessly out of date.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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The ladies ought not to take good advice too seriously. Volumes of it are handed out every spring to the male graduates of the law schools, and it has never done them any harm.'

The same issue contains a very long Article by Walter F. Meier, of Seattle, Wash., on *Legality of Municipal Zone Ordinances*, as *e.g.*, to permit the establishment and growth of residential districts, protected from the invasion of industrial or commercial enterprises. The cases referred to are all American. Our Ontario *Municipal Act* (R. S. O. 1914, c. 192, s. 10), especially authorises Municipal by-laws declaring any highway to be a residential street.

The *American Law Review* for November—December contains an Article to which we naturally turn with interest, on *German Law and Lawyers*, by James Harris Vickery of London, who, we gather, has had fifteen years' experience of dealing with questions of private international law arising in Germany. We soon see that the boasted German "efficiency" has produced very poor results in the administration of law and justice. Arbitrary, tyrannical, official-ridden the whole system appears to be, as we might expect. To begin with we are told—

'Judges are not appointed from among the most eminent members of the Bar. The careers of judge and lawyer run parallel from the beginning; they are in substance co-ordinate but separate careers. The young jurist decides for himself whether he will adopt the career of lawyer or become a judge';

and whereas seventy-five per cent. of lawyers are Jews; the judges are mainly Christian. Then the practice of the German judges is peculiarly inquisitorial:—

'Long years of observation,' says our writer, 'have convinced me that this system of examination by the judge, and especially by delegated judges, renders the German Courts an El Dorado for the plausible liar.'

Next we read—

'The first impression one gets on reading a German pleading is that it is the report of counsel's opening address to the Court. It will usually be found to abound in argument and innuendo, in gibes and sallies, in sarcasm and imputations, and of other products of a free and fertile imagination.'

We note a useful word of warning to those who may have to litigate in Germany, that a lawyer there is not entitled *ex officio* to appear and act on behalf of a client in any litigation unless he produces to the Court a special power of attorney, quite different from the ordinary English "Letters of Attorney," and known as a *Prozess vollmact*, or "authority to litigate."

Other Articles are *Some Remedies for Judicial Recall*, by Thomas G. Frost, *American Law and the Desuetudo, i.e.*, the right to plead that a law, or statute, or custom having the effect of law, has become obsolete, by Appelton Morgan, who quotes an interesting account from the *Memoranda of a Residence at the Court of London*, by Richard Lush, United States Minister to the Court of St. James, of what took place in the Court of King's Bench on April 16th, 1818, on the argument in *Ashford* v. *Thornton*, when Thornton claimed trial by battle, which parliament had omitted to abolish, but did so the following year. There is much that is interesting, also, about "benefit of clergy." Then there are Articles in this well-packed number, on *Police Power: Proper* and *Improper Meanings*, by L. Dee Mallonee; on *The Basic Principle* of the American Constitution, *viz.*, that all men are endowed by inalienable rights to life, liberty and the pursuit of happiness, by Oliver H. Dean, and on *Federal Power of Legislation as to the Development of Water Power*, by Roger Howell; while the ever-interesting "Docket" comments at length on President Wilson and his late campaign, pronouncing his "neutral in thought," "too proud to fight," and " not any concern of ours who brought on the great war," as 'platitudes utterly abhorrent to a self-respecting citizen.' It also contains many quaint and witty sayings of Richard Peters, United States judge for the Pennsylvania District from 1792 to 1828. The same number also contains a long review of Mr. Justice

Riddell's 'interesting historical study' on *The Legal Profession in Upper Canada in its Early Periods.*

In the *Michigan Law Review* for December we find a long and unusually painstaking Article by Harold M. Bowman of Boston, upon *Martial Law in England,* who discusses very thoroughly what the common law, and the prerogative as part of the common law, admit in respect of overriding private rights of property and personal freedom on occasions when the safety of the country is threatened with invasion. Admirable notes support the text. The main purpose, however, appears to be to establish that in the *Defence of the Realm Acts* which have been enacted during this present war, Parliament has broken with the traditions of the Constitution of Great Britain, and so has changed it; for that the necessity which would alone justify under the prerogative or common right like action by the Executive or by individuals as is authorized by that legislation, did not exist; and Parliament hitherto has never in England, or perhaps out of it, where the Constitution extends, granted comparable authority to the executive or assumed it itself. However Mr. Bowman admits the wisdom of the course taken by Parliament, and that it has met with popular acceptance, and that—

'though martial law and arbitrary power have been authorized through a wide range of action they have probably affected the normal administration of justice in no very marked degree. The Courts have been in general operation.'

This is followed by Mr. John M. Zane, of Chicago, who completes his treatment of the *Attaint* commenced in the November number. He treats the subject with a lucidity and precision very welcome to the practical lawyer, and not always found in such discussions. How the attainting of juries passed away and was succeeded by motions for new trials, as juries lost their character as witnesses, and were no longer sworn *dicere veritatem,* but to a true verdict find according to the evidence, is very clearly shewn. Mr. Zane is

very severe on the confusion between the two theories of a jury shewn by Chief Justice Vaughan in the famous *Bushell's* case; and draws the following moral from his long and interesting story:—

> 'To-day the greatest evil in the administration of the law is, first, that the judge, during the trial, has not enough control over the jury; and, second, after the verdict, has not power to correct it, by entering the proper verdict and thus ending the litigation, with power in the Appellate Court to review the ruling and to make the proper judgment in the case.'

As to this, however, the question naturally suggests itself, why not, if the verdict of a jury is to be so indecisive as all this, do away with jury trial altogether?

We have also received the *University of Pennsylvania Law Review* for December, containing three Articles by members of the Philadelphia Bar, *viz.*, by Graham C. Woodward on *Collateral Attack upon Judgments on the Ground of Fraud;* by Carroll Brewster Rhoads on *Personal Liability of Directors for Mismanagement;* and by Roland R. Faulke on *Consequential Damages in Eminent Domain in Pennsylvania: Law Notes* (English) for January, with an *"Interview with Clients"* on *Capering Calves,* suggested by the recent case of *Turner* v. *Coates*[3]: the *University of Pennsylvania Law Review* for January with Articles on the *Interpretation of Statutes,* by Ernst Freund; the *Criminal Code of Pennsylvania,* by Wm. E. Mikell; and *Consequential Damages in Eminent Domain in Pennsylvania,* by Roland R. Foulke: the *Virginia Law Review* for December with, *inter alia,* an Article on *Conveyances by Third Persons to the Wife of an Insolvent,* by Bolling H. Handy of Bristol, Va.; the *Yale Law Journal* for December, with Articles on *Offer and Acceptance, and Some of the Resulting Legal Relations,* by Arthur L. Corbin, of the Yale University Law School; *Legal Possibilities of Federal Railroad Incorporation,* by Wm. W. Cook,

[3] 142 L. T. 77.

of the New York Bar; and *The Dangerous Instrument Doctrine, (viz.,* that 'whenever the master having under his control some specially dangerous agency or instrumentality, and which he is therefore under special obligation to keep with care, confides this duty to his servant or agent, he will be responsible if the duty be not performed, whether through the negligence, or the wantonness, or the malice of his servant or agent'), by H. C. Horack of the University of Iowa Law School; we regret that space does not permit a longer notice of the contents of these Articles; the *Columbia Law Review* for January, with (*inter alia*) a long Article by H. D. Hazeltine, of Cambridge, Eng., on *The Influence of Magna Charta on American Constitutional Development; Case and Comment* (Rochester, N.Y.), with its usual store of Short Articles on interesting subjects, and a well written legal story by His Honour T. M. Jones, Probate judge of Woodstock, N.B., entitled the *Four Corners of the Statute;* and recent issues of our other exchanges from the United States, and British dominions.

CORRESPONDENCE.

LINCOLN'S INN,
LONDON,
19 JAN., 1917.

To the Editor,
Canadian Law Times.

SIR,—

In your December issue (p. 935), Mr. Shannon quotes from a paper read by me before the British Imperial Council of Commerce last summer. In commenting on the passage quoted Mr. Shannon attributes to me views that I do not hold, as the quotation itself shews. My suggestion of "passing an imperial statute to be operative throughout the empire"—to use Mr. Shannon's description of it—would not require any "self-governing body" to "voluntarily surrender its powers"—Mr. Shannon's words again. On the contrary, I expressly pointed out that such Imperial legislation was only to be enacted with the assent, previously obtained, of the self-governing dominions. The enactment of a single statute instead of (say) fifty would be merely a matter of machinery as a measure of financial, intellectual, and time economy. The framing of the draft Imperial statute would be—in the concluding words of the passage quoted by Mr. Shannon—"a matter of negotiation between the different parts of the Empire."

I am, sir, &c.,

JAMES EDWARD HOGG.

NEW BOOKS AND NEW EDITIONS.

A Brief Introduction to Austin's Theory of Positive Law and Sovereignty, by R. A. Eastwood, Sometime Dauntesey Legal Scholar and Graduate Scholar in Law in the Victoria University of Manchester: Sweet and Maxwell, Limited, 3 Chancery Lane: Toronto, Carswell & Co. Ltd.: 1916: Pp. 72: $1 net.

This is an excellent little book; the pity of it is that it is so little. It certainly seems to say the last word on the contention between Austin and Sir Henry Maine regarding the former's definition of law which has worried the brains of students in law schools for more than half a century. Austin, the author tells us—'confuses legal and political sovereignty, and, in the second place, he is reluctant to admit that legal sovereignty can ever be in abeyance"; and he quotes with much effect, Mr. Salmond's observation in his *Jurisprudence* that — 'There may have been a time in the far past when a man was not distinguishable from an anthropoid ape, but that is not reason for now defining a man in such wise as to include an ape.'

Ophthalmic Jurisprudence, a Reprint from the American Encyclopedia of Ophthalmology, by Thomas Hall Shasted, A.B., etc. Superior, Wisconsin. For private distribution only. Chicago: Cleveland Press, 1916: Pp. 147.

This book after a short introduction on Court Systems and basic legal principles in the United States, England, France, Germany, and Italy, goes on to discuss the laws relating to ophthalmic expert testimony in those countries, including surgical considerations regarding such testimony, the laws relating to medical and surgical malpractice, ophthalmic sanitary legislation, and, finally, the laws relating to medical and surgical malpractice, in the above countries. It is a book the existence of which lawyers should bear in mind in case they run up against matters involving these subjects; and is an example of an

Encyclopædia republishing one of its more importa.. Articles in separate form, which we wish was more common than it is.

The Growth of Nationalism in the British Empire, by George M. Wrong: reprinted from the American Historical Review, October, 1916.

Professor Wrong here almost, but not quite, commits himself to supporting Mr. Curtis' scheme of a "real Imperial parliament" to conduct the foreign affairs and control and direct the armed forces of the Empire, and to govern the dependent Empire, now governed solely by the United Kingdom, and even to have the power to levy taxes for national defence. But he says his mind is still open on the main issues; and admits there are grave difficulties in regard both to taxation and to the non-self-governing parts of the Empire. Two excellent points he makes. One is where he says—

'We know now and we are proud that no one part of the British Empire can be quite like any other part. When we ask why, the answer is that this is the fruit of liberty. Nature herself is infinitely varied, and, when men are free, when they adjust themselves to the varieties of Nature, they evolve differences.'

The other is where he says—

'The union of the British Empire is best assured by building up various centres of strength, one, 'f you will, in each continent, rejoicing in its independence and perfect freedom. No State, really free, is going to cut itself off from the supporting brotherhood of other free states.'

We have also received:—

The Canadian Association for the Prevention of Tuberculosis: 16th Annual Report: with the Transactions of the Annual Meeting held in Quebec City, September 12th and 13th, 1916.

International Review of Agricultural Economics (Monthly Bulletin of Economi s and Social Intelligence): November, 1916. Rome: Printing Offic of the Institute.

This number deals amongst other things with the always interesting subject of co-operation and association in various countries.

Digest of Workmen's Compensation Laws in the United States and Territories, with Annotations: 1916 Supplement: Workmen's Compensation Publicity Bureau: 80 Maiden Lane: New York City.

Ninth Report of the Registrar of Boards of Conciliation and Investigation of Proceedings under The Industrial Disputes Investigation Act, 1907, for the Fiscal Year ending March 31st, 1916. Printed by order of Parliament: Ottawa: King's Printer: 1916.

THE GAZETTES.

The *Canada Gazette* of January 27th, contains the Consolidated Orders and Regulations respecting Censorship, under date January 17th, 1917.

The *Canada Gazette* of February 3rd, contains a Proclamation of the Governor-General in Council, declaring the port of Nanaimo in British Columbia a public harbour.

The *British Columbia Gazette* for January 11th, contains a proclamation postponing the meeting of the Legislative Assembly to February 22nd.

LOCAL AND PERSONAL.

Charles Albert Duclos, K.C., of the firm of Atwater, Duclos and Baird, Montreal, has been appointed a Judge of the Superior Court of the province of Quebec.

John Arthur Grierson, barrister of Weymouth, N.S., has been appointed County Court Judge for the counties of Digby, Yarmouth, and Annapolis, in that province.

Mrs. R. R. Jamieson has been appointed a Police Magistrate for the City of Calgary. She will have charge of the women's cases that would otherwise come up in the city police Court.

The following lawyers have been created King's Counsel by authority of the Quebec Government:—Mr. Archie Laurie, Quebec; Mr. Louis Tache, Rimouski; Mr. J. A. Dubeau, Joliette; Mr. W. Laliberte, Victoriaville; Mr. Louis Morin, St. Joseph de Beauce; Messrs. J. L. Jacques, Edgar N. Armstrong, W. F. Chipman, Antonio Perrault and W. A. Handfield, Montreal.

The firm of Whitla, Bury, and McCormick has covered itself with glory. They have announced to their clients that having all entered upon active service they will not re-open their office until hostilities cease in Europe. They state that owing to the press of business in Europe the firm is devoting all its time to the prosecution of the biggest case in history. Twelve men who have been affiliated with the firm are now in khaki.

Major Newton Manly Young, of Barrie, called to the Bar on the 18th ult., and who was wounded at the second battle of Ypres, will now return to the trenches.

Stanley M. Scott, barrister, Lindsay, and G. Jackson, barrister, Parry Sound, have enlisted in the Royal Canadian Volunteer Naval Reserve.

Gregory Barrett, of Carberry, Man., has been appointed Judge of the County Court of the central judicial district of Merkle.

Mr. Justice F. S. Maclennan, of the Montreal Superior Court has been appointed Deputy Judge in Admiralty for the Montreal district.

Lance-Corporal Cyril A. March, formerly a law student with Tingley and Curtin, at Regina, is now a prisoner in the war camp at Stendal, Germany, and employed on the teaching staff.

We have received and are glad to publish the following letter from the librarian of the Hamilton Law Association:—

Jan. 11th, 1917.

"The annual meeting of the Trustees of the Hamilton Law Association was held on January 9th. Mr. William Bell, K.C., was elected President of the Association in the place of the late Mr. S. F. Lazier, K.C. Mr. T. C. Haslett, K.C., was elected vice-president. We have a membership of 85. Three members of the Association have died for their King and Country, namely, Thomas Crosthwaite, Ernest Appleby, and Herbert Daw. Thinking you might care to put a note of this in the CANADIAN LAW TIMES.

"I remain, etc."

George S. Lynch-Staunton, K.C., of Hamilton, has been appointed to the Dominion Senate.

Prior to the ontbreak of war the Calgary Bar Association had a membership of 126 qualified lawyers practising in Calgary. Of these the following enlisted for active service, 29 in number: — Robert Traven Donaldson Aitken, Major A. S. C.; Frederick Stanley Albright, 191st Batt.; William Edward Lee Broad; Richard Bate, Private 89th Batt.; John Montgomerie Bell, Lieut. 191st Batt.; Isaac Foster Fitch; Claude Frederick Gifford, Capt. 50th Batt.; Adam Henry Goodall, Lieut. E. Yorks Yeomanry; Eric

Lafferty Harvey, Lieut. 56th Batt., Dugald McColl Hardie, University Batt.; William Frederick Ingpen, Capt. R. C. A.; William Jermy Jephson, Sergt Maj. 61st Batt., C. A. C. E. F.; Stanley Livingstone Jones, K.C., Maj. P. P. C. L. I. Died of wounds.; Geoffrey Grant Lafferty, Lieut. Lincolnshires; Clarence Hardisty Longheed, C. A. S. C.; Gordon Davis McLean; William Shewell Morris; Ward H. Patterson, University Batt.; Daniel Lee Redman, Maj. 10th Batt. Returned Veteran; Clifford Bernard Reilly, 56th Batt.; William Harper Seliar, University Batt.; Joseph Tweed Shaw, University Batt.; Frederick Lowry Shouldice, Capt. 89th Batt.; Duncan Stuart, Maj. 135th Batt.; Cecil Cameron Trevanion, University Corps; William Charles Warner, Pte. 113t Batt.; Herbert Stewart Wilson, 1st Somerset Ligl Infantry; John Douglas Reginald Stewart, Maj. 31st Batt.; Milton Howard Staples, 2nd University Corps, P. P. C. L. I.; E. F. Pinkham.

In addition the war has called to service the following students of Calgary lawyers: — E. C. Bridges, Percy Broad, S. Budd, C. Darling, H. Dawson, N. Dingle, H. H. Dinning, J. Eaton, J. J. Emery, R. English, Jas. Harvey, Major A. G. Lincoln, J. J. McCafferey, R. S. McKay, Gordon McLean, J. W. McLeod, W. McLaws, A. C. McWilliams, Dalton McWilliams, L. Miller, F. Proctor, L. H. Roberts, W. Riley, W. R. Sandercock, W. J. Solton, C. Smith, John Stairs, H. Strange, Lieut. Leigh Walsh, Ed. Wilson.

We regret to see the following deaths reported since our last issue[1]:—

His Honour Moses McFadden, Junior Judge, Sault Ste. Marie, on January 10th, at Sault Ste. Marie.

[1] It is almost impossible to prevent occasional inaccuracies in this obituary column. Corrections will be always gratefully received and duly recorded in our next issue.—Ed. C. L. T.

Honourable T. Chase Casgrain, Postmaster-General of Canada, at Quebec, on December 29th last.

His Honour Allan W. Bray, Judge of Probates and Clerk of the Peace, St. John, N.B., at St. John, on January 3rd, at Albert, N.B.

John Loughrin, formerly Judge of the District of Nipissing, on January 2nd, at Mattawa, Ont.

His Honour Fred. St. John Bliss, Judge of the York County Probate Court, N.B., on December 28th, at Fredericton, N.B.

Ulric Tessier, advocate, Montreal, on December 25th, at Quebec.

Stuart C. Johnstone, formerly of the firm of Ross, Killam, and Haggart, Winnipeg, on December 29th, at Cornwall.

Ward Hamilton Bowlby, K.C., of Kitchener, Ont., the oldest Crown Attorney and Clerk of the Peace in Ontario, on January 8th, at Kitchener, in his 83rd year.

L. H. Archambault, K.C., of Montreal, at Montreal, on or about January 5th last.

Richard V. Clement, of Vernon, B.C., on January 4th, at Vancouver, B.C.

C. E. Armstrong, of Moose Jaw, Sask., on December 25th, at Moose Jaw.

The Canadian Law Times.

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BY THE WAY.

We are very glad to be able to publish in this issue an Article upon *Uniformity in Registration of Title Law*, by Mr. James Edward Hogg, of Oxford and of Lincoln's Inn, first, because it embodies an admirable comparative study of the law respecting registration of title in our different provinces, and such comparative studies are of great value as a necessary step towards uniformity of the laws respecting property and civil rights throughout Canada, an ideal which the British North America Act held up before us, but towards the realisation of which but little has been done. In the second place we are glad to publish his Article, because Mr. Hogg is not only a frequent contributor to the leading English legal periodicals, but also an author of repute of several books on conveyancing law and the law of land registration, not only in Australia where he practised for several years, in New South Wales, but also in England where he practises, as we understand, chiefly in the Privy Council, and as an adviser on questions of overseas law arising abroad or in England. We find him figuring as one of the contributors to the new edition of Burge's *Colonial and Foreign Law*. Perhaps, however, he is best known as the author of a work on the *Australian Torrens System*. We hope the present Article is by no means the last of his contributions to the Canadian Law Times.

The Article in our last issue upon the matter of the *Ship Leonor* and Mr. Justice Martin's Prize jurisdiction, omitted one important consideration explanatory of the action of the Lord Commissioners of the Admiralty and Sir Walter Cassels. If at the trial Judge Martin had released the vessel and the English Court had condemned it, or, rather, the companion ship whose status was before the latter Court, the one adjudication would, we take it, have nullified the other; and that would have left Great Britain in no position before an International tribunal to say that the legality of the capture had been determined by a municipal tribunal as required by international practice. It was essential that only one of these tribunals should decide, and the only way to achieve this object and prevent a conflict was to revoke Judge Martin's commission, who might not improbably have discharged the ship.

It is much to be hoped that the recent decision of the Manitoba Court of Appeal in *Re The Initiative and Referendum Act* to which we referred *supra*, pp. 234-5, will be carried to the Privy Council. Shortly, the decision is that the said provincial Act, enacting that certain preliminaries being fulfilled, laws may be made or repealed by direct vote of the people, instead of by the Legislature itself, is *ultra vires*. Now if this decision holds, it simply means that even in respect to its own internal affairs Canada has not yet reached its majority. Before this decision one might claim that it was the transcendent achievement of the framers of the *British North America Act, 1867*, that they had given this Dominion a Constitution of which the foundations are so well and truly laid, and which is yet so flexible and adaptable to the changing needs of changing times, that, so far as their internal affairs are concerned, Canadians could live and work under it, within the Empire, until the crack of doom. That is not so, however, if this decision holds, for it is certain

the Dominion parliament could not have passed the Act, and no free men of British strain are going to submit forever to a system under which *no* legislature in their country can pass a statute relating as this does to a merely local and private matter in the province.

We humbly believe the decision of the Manitoba Court in the above case is mistaken. We are not referring to any mere questions of draughtsmanship of the Act, as, for example, whether the words 'subject to the same powers of veto and disallowance as are provided in *The British North America Act,*' are sufficient to preserve intact the position of the Lieutenant-Governor. We refer to the real vital constitutional question involved, and in its decision upon that we submit, with great deference, the Court has erred. We submit it has erred because it has placed too narrow a construction upon the words of the written Constitution—or the written part of the Constitution—of a great nation in the making. We submit it has placed too narrow a construction on the word "Legislature" in section 92 of the Federation Act, by holding that a "Legislature" within that section, entitled to claim the powers conferred by that section, must necessarily comprise an elected representative assembly. We submit a "legislature" is simply a body of people empowered to make laws, and if, in any country, the voters as a whole are empowered to make laws on a referendum, then, in that country, the voters as a whole are the "legislature."

We submit, yet more confidently, that the Court has erred in placing too narrow a construction on the words "amendment of the Constitution" in sub-section 1 of section 92, and that Cameron, J.A., is right where he says — in this dissenting from the other judges:—

"The wording of sub-section 1 being apparently clear and explicit why should it be assumed that the provincial Constitution,

if and when and as amended by the Legislature, must still conform to the general constitutional provisions of the British North America Act, or to the general scheme of parliamentary or representative institutions existing in Great Britain at the time of its passage? I confess I see great difficulty in answering in favour of such assumption."

Above all we submit the Court has erred because, so far as the judgments show, it has quite ignored and passed over the principle, most vital to Canada's self-government, formulated by the Privy Council in the *Supreme Court References case* and many previous cases, that—

"There can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand, and the provinces on the other hand, cover the whole area of self-government within the whole area of Canada."

Now the *Initiative and Referendum Act* most certainly could not be passed by the Dominion Parliament. The fact is the Judicial Committee keep on holding out to us, with both hands, the fullest measure of self-government, and some of our judges persistently decline to accept it.

In his recently published *Imperial Unity and the Dominions,* Sir A. B. Keith says of the Saskatchewan *Initiative and Referendum Act* passed in 1912-13, and the Alberta *Initiative and Referendum Act* passed in 1913—

'The referendum cannot be considered as seriously open to question: the effect of the referendum is simply to decide whether a measure the exact terms of which are contained in the Act as passed shall take effect: it is, viewed in essence, nothing more than a local veto Bill applied to the whole community: it is conditional legislation, which had always been regarded as perfectly valid. It is more difficult to feel assured as to the case of the initiative in the form in which the Alberta and Saskatchewan Acts enacted it.'

This last he considers—

'clearly reduces to farce the proceedings of Parliament, and it seems therefore that its validity may be called in question on that account. It would be a very different thing if the measure as petitioned for were merely to be debated by Parliament, or even accepted in principle by Parliament, when it could fairly be said that Parliament still retained some useful function.'

But Sir A. B. Keith does not mention, much less discuss No 1 of section 92 of the *British North America Act.*

The Minister of Finance for Canada has been appointed Public Custodian of enemy property in Canada, under the provisions of the consolidated orders in Council respecting trading with the enemy, assented to May 2nd, 1916. In view of such Orders in Council and of the Proclamation of His Excellency the Governor-General, published in the Canada Gazette on February 17th last, it is important that full information should be obtained with regard to all property, real and personal in Canadian Territory belonging to enemy subjects, and also with regard to all property, real and personal in enemy territory belonging to British subjects, together with claims British subjects may have against enemy governments. In order to comply with the directions contained in these orders, returns are required from all British subjects, firms or corporations resident or carrying on business in Canada, who are directly or indirectly interested in any matters coming within the classes of subjects following:—

(1) Property, real or personal, in Canadian territory, belonging to enemy subjects.

(2) Debts, including bank deposits and bank balances, due to, or held on behalf of enemy subjects resident or carrying on business in enemy territory, or due to or held on behalf of enemy subjects resident in Canada.

(3) Property, real or personal, in enemy territory, belonging to British subjects resident or carrying on business in Canada.

(4) Claims of British subjects resident or carrying on business in Canada against enemy governments.

Those directly or indirectly interested in any of the classes of information above set forth should advise the Department of Finance, Ottawa, under which of the classes they desire to make a return when the necessary form will be sent.

OUR LONDON LETTER.

44 BEDFORD ROW,
LONDON,
APRIL 6TH, 1917.

The Editor,
"Canadian Law Times,"
Toronto.

SIR.—The outstanding event in the legal world during the past month has been the assembling of the Imperial War Cabinet, which held its first sitting at Downing Street on March 20th. This event marks an epoch in the history of the British Empire. The meetings of this body are attended not only by the War Cabinet of this country but also by representatives from all the Dominions and India, with the exception of Australia, whose members are absent owing to the difficulties of domestic politics. For the first time in the history of the Empire, an Imperial Conference is meeting to consider with full executive powers and responsibilities the policy of the Empire to be followed in the war and in the future peace. This Conference was summoned to meet a definite need. The summoning of the Imperial War Cabinet is a far closer approach towards realising the principle of the self-government which has been bestowed on the Dominions than anything which has hitherto been done by postal or cable consultation or by the occasional presence of single Dominion Ministers at the meetings of the Cabinet, or even by the Imperial Conferences before the war. Not only are representatives of the Dominions and of India now gathered together at the same time, but they have come, as Mr. Lloyd George has said, "not to a formal Imperial Conference, but to sit in the Executive Cabinet of the Empire." It is this which makes the session of the Imperial War Cabinet an historic event. For, often as the representatives from the overseas Dominions

have taken counsel together with the members of the Government of the Mother Country, never before have they shared with them in the actual administration of the affairs of the whole Empire.

The Government have announced that they will introduce a Bill dealing with Electoral Reform on the lines of the Report of the Speaker's Conference. Apparently, one particular section of the compromise is likely to be jettisoned, that is, the limited application of the principle of proportional representation. But even without it, we have the prospect of a bill, or a series of bills, dealing with (1) Franchise and registration. Only two qualifications—six months' residence or six months' occupation of business premises; (2) Plural voting. But no one to have more than two votes, and all the polls to be held on one day; (3) Registration and election expenses. The cost to be shared equally by the State and the localities, and the State to pay the returning officer's expenses; (4) Redistribution. One vote, one value, on a basis of 70,000 electors to each constituency. When the subject of Electoral Reform was discussed in the House of Commons recently on Mr. Asquith's motion that legislation should be introduced embodying the Resolutions passed at the Speaker's Conference, the Prime Minister said that the Government had determined to leave the decision on women's suffrage to the House of Commons. There cannot be much doubt that the decision will be in favour of the principle, whatever may be the precise form it may assume. One of the most interesting passages in Mr. Asquith's speech was that in which he proclaimed his conversion to the cause of women's suffrage. He said that his opposition had always been based on public expediency, but women had worked out their own salvation, and, short of bearing arms in the war, there was not a service in which they had not been as active as men. It is much to be hoped that the proposals of the Speaker's Conference will be passed into law without

delay, for, as Mr. Asquith said "in no other way can we make the next House of Commons an authentic and authoritative exponent of the national will" in facing and solving the problems which will arise when the war is ended.

The Government have announced that the consideration of the Bill dealing with the extension of the life of Parliament will not be proceeded with until after the Easter recess. The present Parliament met on January 31st, 1911, and its legal term under the Septennial Act would have expired on January 31st, 1918. Early in its history it passed the Parliament Act, 1911, which reduced the maximum life of Parliament from seven years to five. Accordingly, at the beginning of the war, Parliament was due to come to an end, and a fresh House of Commons to be elected, at latest on January 31st, 1916. In January, 1916, the life of Parliament was extended for another eight months. Later in the same year, its life was further extended to April 30th of this year. It is now proposed that it should be extended for another seven months until November 30th. It is curious that the first Parliament to be subject to the provisions of the Parliament Act, 1911, should have so far exceeded its allotted span of life as to rank as the longest of the thirty Parliaments which have assembled since the Union with Scotland in 1707.

After much pressure from Members of Parliament, the Government have at last introduced into the House of Lords a Bill entitled, the Titles, &c., held by Enemies Bill. Almost from the commencement of the war, the attention of the public has been attracted to certain highly-placed Royalties who were traitors to their country and one of whom openly congratulated the Kaiser after the Jutland Battle. The purpose of the Bill at present before the House of Lords is to set up a committee of the Privy Council to enquire into and report on persons bearing or entitled to use any title or dignity as a peer or a British

prince who have during the present war borne arms against His Majesty or against his Allies, or who are of enemy nationality or domicil. The committee is to be given a free hand to act on any reasonable information without being bound by the strict laws of evidence, and their report is to be final and conclusive. Such report will be gazetted, and, if the name of the person under consideration is that of a peer, it is to be communicated to the Clerk of the Parliaments. The title or dignity so reported, together with any rights or privileges appertaining thereto, will cease and determine as from the date of the report, and all letters patent, rights or other instruments comprising or creating the same will be deemed to be revoked. This deprivation includes any duty or right in a peer to sit in the House of Lords or to take part in the election of a peer, and, in the case of an hereditary title or dignity, the rights of the issue are affected. It is, however, expressly provided that there is no interference with titles or successions to estates or property.

Lord Buckmaster's Bill to enable women to practise as solicitors has been read a third time in the House of Lords, but has not yet been dealt with in the Commons, and there is little likelihood of the proposal becoming law. While not proposing by his Bill to enable women to become barristers, Lord Buckmaster recognises that the admission of women as solicitors could not fail to affect the attitude of the Benchers towards their claim to join the Bar. "I am not disposed," says the ex-Lord Chancellor in an Article contributed to a daily paper, "to believe that the Benchers of the four Inns of Court would be constrained to adopt a different attitude to the woman candidate for membership of the Bar if Parliament provided for her admission to the other branch of the profession."

An important decision on the right of the Home Secretary to deport aliens has been given by the

Court of Appeal in the case of *R.* v. *Home Secretary, Ex parte Duke de Chateau Thierry*. In this case the alien was a French Royalist who for many years before the war had been resident in England. There was no complaint against him except that he had declined military service in his own country. He was ordered to leave England and placed upon a ship bound for France. It was conceded by the Crown that once on board the ship he could not, in fact, have left it until he reached the jurisdiction of the French Government. In substance, therefore, though not in form, the deportation order relegated him to France. The Divisional Court (presided over by Lord Reading, C.J.), held that while the Home Secretary has a discretion to make a deportation order against a friendly alien under sec. 1 (1) (b) and (c) of the *Aliens Restriction Act, 1914* and clause 12 of the Order in Council made thereunder, he has no power to select the country to which the deported alien must go; he can order the alien to leave England, but that is all. The Court of Appeal have, however, reversed this decision and held (1) that the powers conferred by the *Aliens Restriction Act, 1914*, are, in the interests of the Defence of the Realm, much wider than that of the *Aliens Act, 1905*, and that restrictions in favour of the liberty of the subject in the earlier statute cannot be read by implication into the later statute; (2) that an Order in Council which enables the Home Secretary to select the ship on which a deported alien must leave is valid, even though, in practice, it amounts to handing him over to some particular foreign power; and (3) that the Home Secretary can make a valid deportation order compelling the alien to go upon a selected ship, although the alien is at liberty to leave the ship, if he can, so soon as it gets beyond territorial waters. "Although the Executive Government has no power," said Lord Justice Swinfen Eady, J., "to order a deported alien to go to any particular place, yet, by the authority

given to it to detain the alien and place him on board a ship (which I construe as meaning a ship which the Government select) and keep him the . until the ship finally leaves the United Kingdom, the result will be that the alien will be deported to the country to which that ship shall directly sail."

The Judicial Committee of the Privy Council is not a Court of Criminal Appeal—it does not advise His Majesty to review criminal verdicts as it reviews other verdicts. This has been decided again and again and once more in the recent case of *Dal Singh v. King-Emperor*. The King in Council will, however, in certain cases interfere to over-ride verdicts in criminal trials given in the non-self-governing parts of the Empire where the Crown in Council, and not the Crown in Parliament, is the final depository of sovereignty. The Judicial Committee will interfere if there has been some great and manifest departure from the settled principles of justice or the fundamental rules of criminal procedure. In other words, it is the public mischief caused by a precedent which violates natural justice and disturbs public confidence in the fairness of the Courts, and not any wrong done to an individual or any mistaken interpretation of a rule of law, which alone will cause the Committee to advise an interference. A mere mistake of fact is not enough, still less is a mere departure from the technicalities of procedure — there must be something more, namely, a violation of natural justice.

A decision of some importance has recently been given by the Divisional Court (and affirmed by the Court of Appeal) in the case of *Rex* v. *Officer Commanding, Tenth Battalion Middlesex Regiment; Ex parte Freyberger*. Both at Common Law and by Statute every person born "within His Majesty's Dominions and allegiance" is a British subject even although his parents are aliens. Under sec. 14 of the *British Nationality and Status of Aliens Act, 1914*, (replacing a similar provision in the *Naturalization*

Act, 1870), however, if the law of another country claims such a person as its subject, then on attaining the age of 21 years and at any time after, he can elect for his foreign nationality by a special proc pro-vided by the Act called a declaration of alienage; and upon m[illegible]ing such declaration the person ceases to be a Britis[illegible]ubject. In the case in question it was held by the Divisional Court applying the doctrine of *Rex* v. *Lynch*,[1] that a British subject cannot thus divest himself of his British nationality and become the subject of an enemy State during the continuance of war between Great Britain and that State.

Maître Labori, the distinguished French advocate, whose defence of Dreyfus gave him a world-wide reputation, died in Paris last month at the comparatively early age of fifty-six. No member of the French Bar was better known to English-speaking lawyers or more highly esteemed by them. When he came to England in 1901, he was the chief guest at the banquet of the Hardwicke Society when nearly all the High Court judges and the leaders of the Bar assembled to do him honour. Amongst the speakers on this occasion were Lord Halsbury, Lord Morris, Lord Dunedin, Lord Finlay, Sir Francis Jeune, Sir Edward Carson, Sir J. Lawson Walton and Sir Edward Clarke. As Bâtonnier of the French Bar he attended the meeting of the American Bar Association at Montreal in 1913 when Lord Haldane, then Lord Chancellor, was also present and delivered a notable address.

At the Annual meeting of the Selden Society Lord Parker said that a most interesting problem arising out of the war was the future of International Law. The evidence of the last two years might lead in future, in the case of an attack by one Power, to all the other Powers joining in exacting retribution. The next development of the society of nations may be,

[1] [1903] 1 Q. B. 444.

and perhaps ought to be in the direction of the abolition of neutrality. That might be a hard saying for those neutrals who had devoted their efforts towards the improvement and codification of the laws or rules of conduct affecting neutrals in time of war, but none the less he thought that that was the direction which the development of International Law should take.

W. E. Wilkinson.

SOME SUGGESTIONS REGARDING COMPANY LEGISLATION.[1]

The Dominion Parliament has power to enact and has enacted a statute under which the Secretary of State may issue charters of incorporation for all manner of commercial companies with authority to transact business throughout Canada, and it has been lately held that Companies so incorporated may carry on their operations in all or any of the Provinces. Each of the nine Provinces has its statutes, under which it undertakes to incorporate Companies with power to carry on their operations in the Province and elsewhere at their discretion.

The Provinces generally require Companies incorporated by the Dominion or by another Province to obtain licenses and to file elaborate statements of their affairs with officers designated by the respective Acts.

Some of the Provinces deny the right of extra-Provincial Corporations and Dominion Corporations to do business or to enforce contracts within the Province unless and until they have paid the fees, registered, and complied with the other conditions laid down by the Provincial legislation. We need not consider whether the Provinces have any jurisdiction over Dominion or extra-Provincial Corporations or whether they can insist as a prerequisite to doing business within the limits of the Province on such Companies complying with their requirements. It is enough to know that they insist they have these powers and that Companies disputing their validity must ascertain their own rights by tedious processes of litigation ending in the Privy Council.

[1] Paper read by the Honourable Senator Lynch Staunton, K.C., at the meeting of the Ontario Bar Association upon February 23rd, last.

Lawyers can readily understand how desirable it is that all Company law or indeed all law should in so far as possible be the same throughout the Dominion of Canada so that a man of business educated in the law of one Province may not be in a foreign land when he crosses its borders into another or that Companies, like individuals, may not be thwarted or embarrassed in business by unnecessary and irritating Acts of the various legislatures. The chief reason why, I think, the Provincial Governments are so industriously building up barriers against Dominion and extra-Provincial Corporations is because they need the money paid for charters by those who wish to take advantage of the Companies' Act. These fees are in the aggregate large and are of much more importance to the Province than they are to the Dominion, and if one can overcome this objection it seems to me that the Provinces would readily acquiesce in the passing of the Dominion Companies' Act and repeal their Acts if they found that no Provincial interest would be affected.

I propose therefore that the Dominion Government should amend the Companies' Act, as follows:

1. Enact that the Provincial Secretary or some other member of the Provincial Government should have authority to issue charters for the Secretary of State at the capital of the Province.

2. That all applications for charters should be made to the Provincial Secretary of the Province in which the head office of the proposed Company was intended to be situated.

3. That the schedule of fees named in the Act should be paid to the Provincial Secretary, and that he should account for twenty per cent. to the Secretary of State and apply the remainder for the use of the Province.

4. That the Provincial Secretary should forward a copy of the application and the charter to the Secre-

tary of State immediately after the granting of the charter.

5. That all returns required to be made by the Act should be made to the Provincial Secretary in the Province in which the head office is situated, and that the Provincial Secretary should forward copies of these returns to the Secretary of State immediately after their receipt.

6. That all Companies theretofore incorporated under any Provincial Companies Act would *ipso facto* on filing an application in a simple form to be made a schedule to the Act and on paying a nominal fee, become incorporated to the same extent and with the same powers, privileges and rights as they had under their Provincial charters, under this Act, and providing that their incorporation under the Provincial charter should continue to exist.

The Provinces then should repeal all legislation requiring Companies to make returns or to take out licenses together with all other legislation inconsistent with or rendered unnecessary by the Dominion Companies Act, and declare the Dominion Act to be the law of the Province regarding Companies.

If some such course as above indicated were taken we would in the end have uniform Company legislation throughout the Dominion which as the years go on and the population and the business of the country increases will be found to be most desirable.

Common and Mining Stock.

Whether or not the above recommendations are ever acted upon all the Company law of the Dominion of Canada should be amended so as to provide that only one class of stock should be issued by any Company. The enormous capitalization of common or of what is called "watered" stock of Canadian Corporations is most lamentable. No sound, commercial or financial reason can be urged for the issue of more

than one class of stock and both the interests of the public and of the Companies themselves would be better served if only one kind of stock was allowed to be issued. To illustrate:— Persons having a commercial undertaking whose assets as a going concern are reasonably worth $5,000,000 wish to become incorporated. The usual course in Canada is under a trust deed to issue as large an amount at 5 or 6% mortgage bonds as can be disposed of in the market, assume in this case, $2,500,000, then to issue $2,500,000 of cumulative preferred stock. Then the directors value the goodwill at another $5,000,000 and issue $5,000,000 of common stock which everybody knows is "blue sky." The Company commences business with $2,500,000 bonds and $5,000,000 common stock and $2,500,000 preferred stock. The common stock is usually given as a bonus to purchasers of bonds or preferred or sold to the speculating public in boom times at from 30 to 70 cents on the dollar of its face value and in dull times at from 10 to 20 cents on the dollar. The holders of these shares have sometimes the control of the election of directors, in many others have half the voting power, in many others with a small amount of preferred they can control the Company. They soon become hungry for dividends and commence a campaign on the directorate for their payment, with the result that all the profits or a greater portion of the profits which should go to a reserve for the payment of dividends on stock which was issued for value is paid out to people who never gave the Company any value for the stock and when dull times come along the Company is compelled to pass its dividend on its preferred stock because it has been unable to build up a proper reserve against lean years, and when it wishes to make additions to its business it is compelled for the same reason to make a further issue of bonds. In a great many cases besides these evil results the

common stock prevents the Company from accumulating a proper working capital so that it is always at the mercy of the bank. Prudent investors will hesitate and wise solicitors will refuse to advise their clients to purchase the preferred stock of Companies no matter how flourishing which have a large quantity of outstanding water securities. The only persons who desire or who derive any benefit from watered stock are the speculating public and the promoters. It is not the law's business to encourage stock speculation. Its duty ceases when it provides the machinery for creating Companies and affording to them power and means of carrying on the business on sound financial principles for which they are incorporated. No stock should be issued excepting for an equivalent in cash or in property or as it is expressed in some of the English cases "an equivalent in meal or in malt."

Common stock is used by promoters as a lure to induce the public to purchase preferred shares. If an equal amount of common is given to every buyer of the same amount of preferred clearly no benefit accrues to any; if an unequal proportion is given to various purchasers of the same amount of preferred then an injustice is done to those who receive the lesser amount; and if a large amount of common is given to promoters and underwriters for services or risk as is the common case, an injustice is done to the purchasers of the preferred who came in because of the bonus of common. If no bonus of common is given, true no injustice is done the preferred holders who know that the common goes to the promoters and underwriters but the value of the preferred is affected by reason of the inability of the Company to build up a reserve and the Company may be crippled for want of capital which goes to pay dividends on the common for which little, if any, value is given. The issue of Common stock is contrary to the intention of the limited Company legislation which is that

all issued stock shall represent an equal amount of capital paid into the coffers of the Company and it is only by taking advantage of the decisions which hold that where there is any consideration given for the issued stock the Courts will not inquire into its adequacy that watered stocks other than mining shares are legally issued.

Another reason why common stock issued without adequate consideration should be forbidden is because it affords an excellent opportunity to defraud the people the great majority of whom, including the legal profession, are quite ignorant of Company Law and promoters' practices and believe that things are what they seem. They do not know or understand that when they buy a hundred shares of the par value of $10,000 that the real value of such shares is usually nothing. There are hundreds of millions of dollars of of mining and common stocks roaming about Canada seeking a resting place in the pockets of the innocent stock gamblers which are worth perhaps the paper they are printed on and have no other intrinsic value. Even if it is true that it is impossible to prevent shares being issued for less than the full equivalent of their face value because of the difficulty of appraising at its true value property taken in exchange, it only makes it more desirable that only one class of stock should be permitted because where all the shares rank equally for all purposes, those who understand, among persons who pay the money or give the property, would see that they were not swept away in a flood of stock given to persons who give nothing but services for their allotments.

Mr. Thomas Mulvey, K.C., Under Secretary for State in his interesting Article "Certified Securities," American Economic Review, September, 1914, thinks two kinds of stocks not undesirable and that the legislature cannot protect the public against its own stupidity. My reply is that, true, the legislature cannot be expected to shepherd the lambs through

life, but still the legislature should not set traps for them.

The most glaring cases of encouraging gambling and unwise and improper speculation by the Legislature are those Acts of the various Provinces for the incorporation of Mining Companies. There is no reason why dollar stocks selling at two cents on the dollar should be issued excepting that they are tempting betting propositions. To incorporate a Company for mining purposes and allow it to issue stocks with no personal responsibility at any price it chooses to the public is no more and no less than a great lottery scheme authorized and fathered by the State. In countries where people profess an abhorrence for the most innocent kind of gambling it is very curious to see their tolerance for perhaps the most pernicious form of gambling, that is, stock speculation. A perusal of the mining promoter's literature fabricated to extract the dollars from the simple-minded should satisfy anybody that it were much better to allow unrestricted betting on horse races, when one at least gets a run for his money, than continue the legislation under which these Companies carry on their business. It is said that if we did not allow their incorporation, incorporation for any scheme which man can devise is authorized in one or other of the neighbouring States, and that the Provincial Government would lose the fees while there would be no diminution of these Companies. Appropriate legislation might easily be passed forbidding under very severe penalties sales of the stock of any foreign Company within this Province which issued its stock for less than its par value, and providing that no Company which did not comply with the laws of the Province should operate within its limits. It is said that unless money can be raised by these methods there would be no mining development. I emphatically dispute this statement. People will pay, if they wish to do anything more than speculate, a dollar a share for

100 shares as quickly as ten cents a share for 1000 shares. Further, in most cases the shares are sold for a nominal sum which is used to mine the public not to develop the mining country.

Equitable Relief.

The case of *Foss* v. *Harbottle*,[2] is the foundation of what to my mind is an unwise rule of law, namely, that the Courts will not interfere with the domestic affairs of a Company excepting to prevent or to give relief against fraud, where the acts complained of are confirmed by or are capable of being confirmed by a majority of the members of the Company. It ought to be a law that neither the directors nor a majority should be entitled to do anything which is inequitable with regard to the minority and the Courts should have power to give relief in said inequitable conduct. Corporations only exist for the convenience of business and not in order to allow a majority to tyrannize over a minority. Where two or more persons are in partnership no partner has in the eye of the law any more control or right over the undertaking in which they are embarked in common than the other, and there is to my mind no sound reason why the law of partnership in that respect should not apply to Companies. It is not here suggested that the Court should interfere excepting in cases of injustice. Where the majority in the exercise of its judgment adopts a course which reasonable people might well consider for the interest of the Company, the Court certainly should have no right to interfere but where the only justification for the action which injuriously affects the interests of the minority is that it is the act of the majority or the act of the directors who control the majority, then it is a denial of justice to deny that relief on the doctrine laid down in *Foss* v. *Harbottle*.

[2] 2 Hare 461.

Director Officials.

The provision in the Companies Act with regard to the payment of directors who are officers of the Company which requires that no remuneration shall be paid to them unless under a by-law passed by the shareholders is nearly universally evaded.

A general by-law on the incorporation of a Company is passed authorizing the directors to pay to a director officer such amount as they in their discretion may think proper and the matter never comes before the shareholders again. In large corporations this evasion of the Act seldom if ever occasions injustice but in small Companies it constantly does as men who control such Companies usually are the directors and can increase and do increase their own salaries keeping equal step with the prosperity and operations of the Company, so that many investors in these semi-private companies are starved out.

SIR MATTHEW HALE: THE GREAT JUDGE.

Acknowledged Truths in Politics and Jurisprudence Can Never be Too Often Repeated.

It is a co-incidence worthy of mention, that it was during the troublous times of the Civil War, when was waged that fierce and bitter contest between the Stuarts and the people of England, whether the Nation was to be governed by Kingly prerogative, under the absurd assumption of Divine Right, or by the people through a Parliament, that four of the greatest Lords Chief Justices flourished, — Coke, Holt, Hale and Mansfield, all of famous memory;— and also during the like period, there existed four of the basest and most disreputable Chief Justices that ever wore the Collar of Saint Sulpicius,—Kelynge (Keeling), Jeffreys, Scroggs and Wright, all of infamous memory. Lord Chancellor Campbell, in commenting upon the virtues, integrity and ability of Sir Matthew Hale, remarks,—" We pass from one of the most worthless of Chief Justices to one of the most pure, the most pious, the most independent, and the most learned—from Kelynge to Sir Matthew Hale. Imperfections will mark every human character; but I have now to exhibit a rare combination of good qualities, and a steady perseverance in good conduct, which raised an individual to be an object of admiration and love to all his contemporaries, and have made him be regarded by succeeding generations as a model of public and private virtue."

Matthew Hale was born on the first of November, 1609, at Alderley, in the County of Gloucester. He was the only son of Robert Hale, a member of the Bar, who had been trained at Lincoln's Inn. Before young Matthew had attained his fifth year both of his parents were removed by death. He was committed

to the care of Anthony Kingscot, one of his near kinsmen. Mr. Kingscot was a Puritan, and intended his young charge for a Divine. Under the tuition of teachers holding the doctrines of the Puritans, he acquired those habits of strictness and truth for which he was so distinguished in after life. He early acquired the reputation of great diligence and extraordinary proficiency in learning. At the age of seventeen he was removed to Magdalen College, Oxford. His college tutor was the Rev. Obadiah Sedgwick, a noted Puritan. He there studied with a view to Holy Orders. For a time he sedulously devoted his attention to his studies and rapidly acquired a great reputation for zeal and exemplary conduct. At length the youthful Puritan, unable to resist the temptations which the University presented, almost wholly abandoned his studies and rushed into dissipation. His thoughts turned to military affairs and he subsequently decided to accompany his tutor to the Low Countries and "trail a pike in the army of the Prince of Orange." From such a purpose he was happily diverted by the advice of an eminent Counsel, Serjeant Glanville, whom he had occasion to consult in some matter connected with his estate. On the advice of this learned Serjeant he decided to abandon military service and enter upon the profession of the law. Accordingly, on the 8th of November, 1629, when twenty years of age, he was admitted a student of Lincoln's Inn. The ardour which he had displayed in the pursuit of pleasure and convivial society was at once applied to severe and unremitting application and zealous industry which could not fail to ensure success. To a young man, who sought his advice on the study of the law he subsequently imparted his experience in the following terms. He said:—"his father did order in his will, that he should follow the law; that he came from the University with some aversion for lawyers, and that he thought them a barbarous sort of people, unfit for anything but their

business; but having occasion to speak with Serjeant Glanville about some business connected with his estate, he found him of such prudence and candour, that he at once entered upon its study; that when he became a member of Lincoln's Inn, he studied sixteen hours a day for the first two years, but almost brought himself to his grave, and afterwards reduced it to eight hours; but that he would not advise anybody to do so much; that he thought six hours a day, with attention and constancy, was sufficient. He further said:—That the law would admit of no rival, nor anything to go even with it; that he made a resolution, which he had punctually observed ever since, that he would never more see a play, having spent all his money at Oxford and having experienced that it was a great alienation of his mind from his studies; that having seen the evil effects of the intemperate use of strong drinks, he had made a solemn vow never again to indulge in its use, which vow he had faithfully observed."

Hale, while a law student, read over and over, the year books, the oldest reports on the English law, consisting of eleven volumes, extending from the reign of Edward I., to the reign of Henry VIII., a period of about two hundred years; also Coke's Reports, consisting of 13 volumes, confined to the reign of Elizabeth and James I., containing over five hundred leading cases; also all the treatises on the Common Law, by Glanvil, Bracton, Britton, Fleta and Littleton, and also the Institutes of Coke. He studied with care and greatly admired the Code, the Institutes and Pandects of Justinian. He said the true grounds and reasons of law were so well delivered in the Digest, that a man could never well understand law as a science without first resorting to the Roman Law for information, and he lamented that it was so little studied in England. Lord Holt admitted, that the laws of all nations were raised out of the ruins of the Civil Law, and that the principles

of the English law were borrowed from that system, and grounded upon the same reason.

Having pursued his studies with unremitting industry for seven years, Hale was called to the Bar in 1637, in the 28th year of his age. He frequently expressed his sentiments in matters of religion. He inclined to the doctrines of the Presbyterian faith. He signed the Solemn League and Covenant, and served as a member of the famous Assembly of Divines at Westminster, who formed the standards of the true Presbyterian faith. He adhered to the doctrine, that no form of Church Government was essential to the enjoyment of the blessings of the Gospel.

Upon his admission he devoted his attention principally to consulting or Chamber practice. He acknowledged he was unfit for jury trials or Star Chamber practice, saying,—"If the judge or jury had a right understanding, it signified nothing but a waste of time or loss of words; and if they were weak and easily wrought on, it was a more decent way of corrupting them by bribing their fancies and biassing their affections."

His uprightness and great knowledge of the law enabled him, in a very short time, to place himself at the head of his profession.

One of the great questions then agitating the public mind was the doctrine of "Divine Right," in reference to any form of government. Upon this question he had no scruples. "It is incumbent," he remarks, "upon him that affirms a Divine right, to prove these two things,—that some determinate form of government is of divine institution, and, that the form for which he contends, is that form which is so. For, if he doth only the former, and not the latter, his second assertion contradicts and destroys his first assertion; for it were ridiculous to say there is a form of government of divine institution, and yet he knows not what it is."

Hale was now called upon to act a difficult part. The times were ominous. Civil dissension was rife and the public questions so conflicting, that it became the duty of every patriotic man to array himself on the side of the party which had at heart, as he conceived, the best interests of the nation.

The early prepossessions of Hale evidently were favourable to the Country party. He, however, at this trying period of his life, resolved to take no part in the political contests with which the country was agitated, saying,—"He proposed to himself as a model the character of Atticus," the noble Roman, who was the friend of all parties in the State when Civil War rent the Republic at the closing hours of its existence. Lord Campbell, in commenting upon his conduct at this trying period of life, remarks.—"His conduct at this crisis has been much commended, but I must say that I think it was cowardly and selfish. If he had approved of the government by prerogative, which had prevailed for eleven years since parliaments had been discontinued, it was his duty to have allowed himself to be returned for a Treasury borough, and gallantly to have defended the levying of benevolences, the legality of ship-money, and the atrocities of the Star Chamber and Court of High Commission. In his heart he was a lover of liberty and of the constitution: therefore he ought to have accepted the offer of a seat made to him by Pym, Hampden and Whitelock, and to have assisted them in correcting abuses and bringing delinquents to justice."

To the like effect are the following words of Henry Roscoe, Esq.,—"The strict neutrality thus professed by Hale, at a period when so much was at stake on both sides, is not a subject for applause. When the violent and the indiscreet of all parties are roused to action, it does not become the moderate and sensible portion of society to remain unmoved, and to preserve their individual repose at the expense of the

tranquility of the State. At a later period of his life Hale appears to have been sensible of this error, and exerted the influence which his high character gave him in endeavouring to place the liberties of his country upon a sure foundation."

At a time fruitful of eminent men, how readily the mind turns to those true and fearless champions of right, Pym, Hampden, and Cromwell, who with stout hearts and iron resolution preserved the ancient laws and liberties of England and handed them on as a heritage forever.

Hale greatly added to his reputation by the ability and profound knowledge of law displayed in several State trials. He appeared as Counsel for the Earl of Strafford and for Archbishop Laud. He was also Counsel for Lord Craven. On the trial of the latter nobleman, he was threatened by the Attorney-General, when he made the following reply,—"That he was pleading in defence of those laws which they declared they would maintain and preserve, and he was doing his duty to his client, so that he was not to be daunted with threatenings."

He won great distinction as Counsel for Lord Macguire, one of the leaders of the Irish Massacre. With great depth of learning he argued the question, whether an Irish Peer was liable to be tried by a jury in England for high treason committed in Ireland. Subsequently he was employed in every State prosecution while he remained at the Bar. It is said, Hale offered to plead for Charles I., when brought to trial; but on his refusal to submit to the Court, no one could be admitted to speak for him.

Hale was now generally admitted as the ablest advocate in Westminster Hall. With great force and ability he defended those who were prosecuted by Cromwell for political offences.

On the death of the King and the establishment of the Commonwealth, Hale took the engagement "to be true and faithful to the Commonwealth of Eng-

land, without a King or House of Lords," an act which was required before Counsel would be permitted to appear and act in a Court of Justice. He was subsequently created a Serjeant under the Commonwealth.

On the death of the King, six of the twelve judges immediately resigned their offices. The others signified their readiness to continue to act, provided the Commonwealth made a declaration of maintaining the fundamental laws of the realm, and at the same time repealing the oaths of allegiance and supremacy. The six vacant seats were forthwith filled. A vacancy having occurred in the Common Pleas, the position was offered to Hale.

Whitelock and other leading lawyers of the Long Parliament, desirous of law reform, invited Hale with certain members of the Long Parliament, and enlightened jurists outside the House, constituting a mixed Commission, to draft and submit a Bill for consideration. Hale as Chairman of this Commission drew up and prepared the outlines of great legal improvements. Among which may here be mentioned: A general registration of Deeds affecting real property; Ordinances for carrying on legal proceedings in the English language; the abolishing of tenure in Chivalry, with its burdensome incidents, and Rules for simplifying the practice of the Court of Chancery.

At first Hale hesitated to accept the proffered dignity of a judgeship under Cromwell. Pressed to state his reason, he frankly told him, he was not satisfied with the lawfulness of his authority. Cromwell replied,—"that since he had possession of the government, he was resolved to keep it, and would not be argued out of it; that it was his desire to rule according to the laws of the land, for which purpose he had selected him; and that if not permitted to govern by red gowns, he would do it by red coats."

Finally his scruples were overcome, largely upon

the advice of certain friends upon whose judgment he placed implicit reliance. Consequently on the 20th day of December, 1653, Hale was sworn into office as a judge in the Court of Common Pleas. The writ appointing him ran in the name of,—"The Keepers of the Liberties of the People of England." This position was filled with great dignity and ability by Hale until the death of Cromwell, on the 3rd day of September, 1658, a period of more than four years and a half.

Edmund Burke, in alluding to Cromwell's wisdom in selecting his justices, referred to the case of Lord Hale, saying,—"in this appointment, he gave to that age, and to all posterity, the most brilliant example of sincere and fervent piety, exact justice, and profound jurisprudence."

The Protector having decided to call another Parliament, Hale was elected a Member of the House of Commons, in Cromwell's second Parliament. To this Parliament by ordinance the Protector summoned representatives from England, Ireland and Scotland. He was the first to reform the House of Commons, anticipating the reform bill of the nineteenth century, by disfranchising rotten boroughs and granting representation according to the population and wealth of the constituent bodies.

Five members were given to Gloucestershire. Hale was invited to sit for his native county. He absolutely refused to solicit votes or be at any expense; but if elected he would serve. He stood at the head of the Poll, all his expenses having been defrayed by the Earl of Berkeley. As there was no House of Lords, there could be no objection to judges sitting in the House of Commons. This Parliament was as impracticable as the Rump or Barebone's Parliament, and having sat more than three months, and before it had passed a single act, it was abruptly dissolved by the Protector.

Hale declined to act as judge under Richard Cromwell; but served as a member for the University of Oxford in Richard's Parliament until it was dissolved, on the 29th day of April, 1659.

Hale was elected for Gloucester to serve in the Convention Parliament, called on the suggestion of General Monk, without solicitation or cost to himself, at the head of the Poll. The majority of the elected members were Presbyterians. When it met, on the 25th of April, 1660, the Liturgy of the Church of England was not allowed to be used, the speaker reading a Litany for the occasion. Among the important acts passed by this Parliament may be mentioned the following,—1, Abolition of Military Tenures, with its incidents of relief, wardships and marriages, which had brought great profit and patronage to the Crown, but were most oppressive and burdensome to the landed aristocracy. 2. The abolition of Purveyance. 3. The disbanding of Cromwell's soldiers, all of whom quietly settled down to their former occupations.

On the first of May, 1660, Sir John Granville, who had negotiated between Monk and the King, presented himself with despatches from the King; one to the Lords; one to the Commons; and one to Monk. The letter to the Commons contained the famous "Declaration of Breda," offering indemnity for the past and liberty of conscience for the future.

Although Hale was attached both to Monarchy and his Sovereign he was opposed to receive him back without reasonable restrictions, and consequently, when the Letter to the Commons was read, he moved that a committee be appointed to consider the propositions that had been made by the "Declaration of Breda," that from them they might digest such stipulations as they should think fit to be sent over to the King. This motion, although seconded, was met with such an outburst of loyalty, that the Convention decided to invite him over without any

conditions whatever, and to surrender the rights and liberties of the people into his hands. Early in May, 1660, Charles II., was proclaimed King at the gates of Westminster Hall.

All the errors of his reign may be imputed to the supreme folly of inviting him over without exacting stipulated terms or properly guarded conditions. Charles was accordingly invited over and on the 29th day of May, 1660, entered London with great demonstrations of joy.

The first act of the King on entering Whitehall was to invest Monk, to whom he was indebted for his crown, with the order of the garter and make him a member of the Privy Council. He was further rewarded with the title of the Duke of Albemarle. Baxter, the noted nonconformist, with several Presbyterian Divines, were, with an equal number of Episcopalians, made Court Chaplains, conducting service in the Royal Chapel by turns. This gave colour to the promise that the King would adhere to the terms contained in the letter from Breda.

The most difficult question, with which the Convention Parliament had to deal, was that of Church government. Monk was a Presbyterian. As the restoration was effected principally by the Presbyterians, they had strong hopes from the promises of the King, that a modified form of Church government would obtain. A modified Episcopacy had been formulated by Archbishop Usher, to which the Presbyterians had agreed; and it was said the King had agreed to it, stating that such a union might be effected between the Episcopalians and Presbyterians, not by bringing over one party to the other, but by abating something on both sides. He further said, that he was inclined to see it brought to pass, and that he would draw them together himself. A conference now took place between Divines on both sides and a basis of settlement agreed upon. Among other things it was stipulated, that subscription to

the thirty-nine articles was not to be required for ordination, institution or induction, or for degrees at the Universities. The Presbyterian leaders procured a select committee to be appointed to frame a Bill. The committee met and appointed Sir Matthew Hale chairman, who framed and introduced in the Convention Parliament one in conformity with the stipulated terms. Before the Bill had reached the committee stage, Lord Chancellor Clarendon proposed, and the King readily consented, that the author of the "Comprehension Bill" so called, should be promoted to the position (a vacancy having occurred) of Chief Baron of the Court of Exchequer. Such an appointment would disqualify him to sit in the House of Commons. On intimation to Hale of the purpose of the King by Clarendon, he said,—"That if the King could have found an honester and fitter man for the employment of presiding in the Court of Exchequer, he would not have advanced him to it; and that he had, therefore, preferred him because he knew none that deserved it so well."

After some slight demur Hale accepted the honour thrust upon him. It was generally admitted a more laudable appointment had never taken place in Westminster Hall. At the same time it was suspected that the appointment was promoted by the adroit Lord Chancellor to remove from the Convention Parliament the framer and supporter of the "Comprehension Bill." The influence of Hale was so great, he would doubtless have carried it, had he not been removed by such an artifice. The dependants of the Court, under the direction of the Secretary of State, Morrice, made a strong speech against it, when committed, saying it was inconsistent with the true doctrines of Apostolic succession. It was defeated on the second reading by a majority of 26 in a House of 340 members. The Convention Parliament was

shortly after dissolved, in the month of November, 1660, having sat about eight months.

Hyde, the Lord Chancellor, whose daughter Anne Hyde, had been married to the Duke of York, the brother of the King, had made up his mind to crush the Presbyterians, and re-establish the Church of England on the most exclusive principles, after the manner of Archbishop Laud. In the first Parliament of Charles II., known as the Cavalier Parliament or the Long Parliament of the Restoration, which lasted from May 8th, 1661, to January 24th, 1679, was passed the odious Act of Non-conformity, called the Corporation Act, which, among other things, renounced the Solemn League and Covenant, ordering it to be burned by the hangman. Four Acts, all equally odious, called the Clarendon Code, were passed through the influence of the Lord Chancellor, the King's Prime Minister—The Corporation Act of 1661; the Act of Uniformity of 1662; the Conventicle Act of 1664; and the Five Mile Act of 1665. After the downfall of Clarendon and under the rule of the notorious Cabal was passed the no less odious Test Act. So the word of promise had been kept neither to the ear nor to the hope.

Hale continued to hold the position of Lord Chief Baron of the Exchequer Court for eleven years, when on the 18th of May, 1671, he was promoted to the office of Chief Justice of the Court of King's Bench. This high position he graced with consummate ability and dignity until his resignation, on the 21st of February, 1676, a period of nearly five years.

The great Chief Justice wrote the following 18 Rules for his judicial guidance.

Things Necessary to be Continually had in Remembrance.

1. That in the administration of justice I am entrusted for God, the King and Country; and therefore,

2. That it be done, first, uprightly; secondly, deliberately; thirdly, resolutely.

3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

4. That in the execution of justice I carefully lay aside my own passions, and do not give way to them, however provoked.

5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions.

6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard.

7. That I never engage myself in the beginning of a cause, but reserve myself unprejudiced till the whole be heard.

8. That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country.

9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

10. That I be not biassed with compassion to the poor or favour to the rich, in point of justice.

11. That popular or Court applause, or distaste have no influence upon anything I do in point of distribution of justice.

12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice.

13. If in criminals it be a measuring cast, to incline to mercy and acquittal.

14. In criminals that consist merely in words when no more harm ensues, moderation is no injustice.

15. In criminals of blood, if the fact be evident, severity is justice.

16. To abhor all private solicitations of what kind soever, and by whomsoever, in matters depending.

17. To charge my servants; 1st, not to interpose in any business whatsoever; 2nd, not to take more than their known fees; 3rd, not to give any under precedence to causes; 4th, not to recommend counsel.

18. To be short and sparing at meals, that I may be fitter for business.

These Rules, written in letters of gold, should be placed over the portals of every temple of justice in all the land.

Hale's reputation as a jurist rested not merely in Courts of law, but his authority was equally great in Courts of Equity. He was often called upon to advise and assist the Lord Chancellor, or the Lord Keepers for the time being, in the Court of Chancery in intricate and difficult cases. He rigidly adhered to the doctrine, that Chancery was ordained to supply, and not to subvert, the law. It is said, where the proceedings of Chancery seemed injuriously to effect the subject, he never failed to reprove and suggest remedial measures. And it is further said, owing to his observations and discussions the Court of Chancery took occasion to establish many of those wholesome rules by which it is governed at this day. In fact he looked upon Equity as a part of the Common law and consequently did all he could to reduce it to certain established principles, which became precedents in all future cases. By him the stricture of the law was never allowed to prevail against conscience.

The trial by Sir Matthew Hale of two wretched women in 1665, at Bury St. Edmund's, who were indicted for the crime of witchcraft, has been sharply commented upon, much to the discredit of his reputation. During the course of the trial some experiments were instituted with regard to the evidence of the witnesses, the result of which induced some reliable and impartial bystanders to declare that they

believed the whole transaction a mere imposture. At the conclusion of the trial, Hale did not sum up the evidence, but left the case to the jury with the bare direction of his belief in witchcraft. The prisoners were found guilty. The judge, after expatiating upon the enormity of the crime, declared his entire satisfaction with the verdict and admonished them to repent and sentenced them to be hung. It is said the bewitched children immediately recovered and slept soundly the night after the trial.

Lord Campbell, although a great admirer of Hale, comments thus severely upon his conduct in this case, —"I wish to God that I could successfully defend the conduct of Sir Matthew Hale. I fostered a hope that I should have been able, by strict inquiry, to contradict or mitigate the hallucination under which he is generally supposed to have then laboured, and which has clouded his fame,—even in some degree impairing the usefulness of that bright example of Christian piety which he left for the edification of mankind. But I am much concerned to say, that a careful perusal of the proceedings and of the evidence shews that upon this occasion he was not only under the influence of the most vulgar credulity, but that he violated the plainest rules of justice, and that he really was the murderer of two innocent women." . . . How much more should we honour the memory of Hale, if, retaining all his ardent piety, he had anticipated the discovery of Lord Chief Justice Holt, who put an end to witchcraft, by directing prosecutions against the parties who pretended to be bewitched and punishing them as cheats and impostors."

It would seem, his conduct in the case of John Bunyan, the Author of The Pilgrim's Progress, is, likewise, open to criticism. Bunyan had been arrested while preaching at a meeting in a private house, and imprisoned under a charge as " a person who devilishly and perniciously abstained from coming to church to hear divine service, and a common

upholder of unlawful meetings and conventicles, to the great disturbance of the good subjects of this realm." The justices of the sessions, before whom he was tried, upon insufficient evidence, found him guilty and the Chairman pronounced the following judgment:—"You must be had back to prison, and there lie for three months following; and at three months' end, if you do not submit to go to church to hear divine service, and leave your preaching, you must be banished the realm. And if, after such a day as shall be appointed you to be gone, you shall be found in this realm, or be found to come over again without special license from the King, you must stretch by the neck for it; I tell you plainly." There was no clause in the statute that would support this sentence. His wife applied to the House of Lords for his release. She was told they could do nothing, but that his releasement was committed to the judges at the next Assizes, at Bedford, where he was imprisoned. The judges were Sir Matthew Hale and Mr. Justice Twisden. Hale, it is said, made enquiries about him, and was told that he was "a hot spirited fellow" and actually found that there would be no use in supplying the means of prosecuting a Writ of Error, as, if set at liberty, he would soon get into worse durance.

Lord Campbell, in referring to this phase of Bunyan's case, remarks:—"Little do we know what is for our permanent good. Had Bunyan then been discharged and allowed to enjoy liberty, he no doubt would have returned to his trade, filling up his intervals of leisure with field-preaching; his name would not have survived his own generation, and he could have done little for the religious improvement of mankind. The prison-doors were shut upon him for twelve years. Being cut off from the external world, he communed with his own soul; and inspired by Him who touched Elijah's hallowed lips with fire, he composed the noblest of allegories, the merit of which was

first discovered by the lowly, but which is now lauded by the most refined critics; and which has done much to awaken piety, and to enforce the precepts of Christian morality."

Lord Macaulay, in referring to the saying of Cowper, that he dared not name John Bunyan in his verse, for fear of moving a sneer, said:—"We live in better times; and we are not afraid to say, though there were many clever men in England, during the latter half of the seventeenth century, there were only two great creative minds; one of these minds produced the Paradise Lost, the other the Pilgrim's Progress." Macaulay further said:—"For magnificence, for pathos, for vehement exhortation, for subtle disquisition, for every purpose of the poet, the orator and the divine, there was not a book which shews so well how rich its language is in its own proper wealth as the immortal work of Bunyan."

Sir Matthew Hale possessed a highly sensitive conscience, tinged with a certain degree of superstition. His father, a member of the Bar, it is said, abandoned his profession on the ground that its practice was not consistent with a strict adherence to truth and justice; he could not understand the reason of giving colour in pleading, which, as he thought, was to tell a lie. When admitted, Sir Matthew Hale made a resolve of never appearing as counsel except on the right side. This he must have found impracticable, for he was counsel for the Earl of Strafford, in 1640, and also for Archbishop Laud, both zealots of the doctrine of the Divine rights of Kings, which Hale repudiated. An entry made in his Diary, on the Sunday following his sentence in the witchcraft case, gives colour to the charge of superstition. He thanked God for his mercy in preserving us from the malice and power of Evil Angels, in which he refers with extreme complacency to the trial over which he had just presided at Bury St. Edmund's.

Hale was a most incorruptible judge. His hatred of bribery often exposed him to ridicule. It is said, —"When he bought any article after he became a judge, he not only would not try to beat down the price, but insisted on giving more than the vendors demanded, lest, if they should afterwards have suits before him, they should expect favour because they had dealt handsomely by him.

Hale's published professional works will ever remain as monuments of his diligence and profound learning. His history of the Pleas of the Crown is a complete digest of the Criminal law as it existed in his day. His history of the Common law of England, in twelve chapters, is worthy of the highest admiration.

Sir Matthew Hale, as a lawyer, and especially as a Constitutional lawyer, stands unrivalled.

Lord Keeper Henley pronounced Sir Matthew Hale,—"One of the ablest, and most learned judges that ever adorned the Profession."

Lord Chancellor Kenyon entitled him as,—"One of the grandest and best men who ever sat in judgment."

Lord Ellenborough spoke of him as,—"One of the greatest judges that ever sat in Westminster Hall, as venerable as well for the sanctity of his character, as for the profundity of his learning."

Sir Matthew Hale's qualifications, as a judge, were thus happily expressed by Lord Chancellor Campbell:—"While Hale sat in the Court of Common Pleas, in the Court of Exchequer, or in the Court of King's Bench, his qualifications as a judge always shone with lustre in proportion as the occasion called forth their display. He was equally familiar with every branch of English jurisprudence,—the criminal code and the civil code,—the law of real property and the law of personal property,—antiquarian lore and modern practice. He likewise had the advantage, so

rare in England, of having studied the Institutes, Pandects, and Code of Justinian, with the best commentaries on those immortal compilations. While free from every other passion, he was constantly actuated by a passion to do justice to all suitors who came before him. He was not only above the suspicion of corruption or undue influence, but he was never led astray by ill-temper, impatience, haste, or a desire to excite admiration."

St. John, N.B.

SILAS ALWARD.

UNIFORMITY IN REGISTRATION OF TITLE LAW.

Much has been said and written recently on the subject of uniformity of law in the Empire. The advantages of uniformity and the means of bringing it about have usually been discussed with particular reference to commercial law. It is intended here to give some consideration to the question of uniformity in property law as typified by the law relating to registration of title in Canada.

There are two reasons why uniformity in commercial law has been thought desirable. The first is because it is the business intercourse between different parts of the Empire—each legislatively independent of the other—that has drawn attention to the inconvenience of having to consider a commercial transaction in the light of two or more systems of law. The second reason is that commercial law for the most part consists of statute law, and so far as it does consist of case law is readily reducible to the form of statutory enactments. Case law is already, for practical purposes, uniform throughout those parts of the Empire in which the common law is in force so far as it has not been altered by statute; by making statute law uniform the case law that grows round this statute law becomes uniform also.

Now the law relating to property outside commercial law, and particularly the law relating to property in land, does not call so urgently for what may be described as standardization for the first of the above reasons; transactions with land that require a knowledge of more than one system of law—territorially considered—are the exception. The other reason for standardization—as to the rules of law being in statutory form—is also of less importance in regard to property law, since this branch of law is, as a whole, to a much greater extent based on case law, and also

is not so readily reduced to statutory form as is commercial law. There are, however, circumstances which considerably impair the value of this distinction between commercial and property law, and tend to make reasons for standardizing the former operative in favour of standardizing the latter.

Where a number of legislatively independent jurisdictions are in close geographical proximity—as the Provinces of the Dominion of Canada, or the States of the Commonwealth of Australia—transactions with land and other property between persons residing in different jurisdictions become matters of frequent occurrence. Such transactions will often necessitate the consideration of the rules of law by which a particular transaction is governed in more than one jurisdiction; an illustration in the case of a resident in one jurisdiction seeking specific performance of a contract entered into with respect to land situated in another jurisdiction.

Again, when an extensive alteration in the law of property is carried out by statute in more than one jurisdiction the argument for standardizing commercial law applies; by making the statute law uniform the case law growing round it automatically becomes uniform also. The importance of this uniformity in statute and case law is illustrated by the rise and growth of registration of title in Canada and Australia.

So far as commercial law is concerned a higher ideal than uniformity is unification, and in some branches—notably as regards bills of exchange law—this ideal of unification has been in some degree attained both in Canada and in Australia by means of federal legislation. Property law so far differs from commercial law, intrinsically and constitutionally, as to make any such unification extremely difficult. The different legislative parts of the Empire will in all probability continue to legislate independently, on the subject of property law and especially land law. This,

however, is no reason why the advantages of a uniform statute law—automatically securing a uniform case law—should not be had with respect to such branches as can be suitably dealt with; registration of title is a typical instance of such a suitable branch.

The position of registration of title in Canada affords the best possible illustration of the way in which the advantages of a uniform law might have been secured. A great opportunity has been lost, and the disadvantages of legislation being carried out in a haphazard manner by different legislatures, though the principles underlying it and the objects to be attained are substantially the same, will be clearly seen by some observations on the different systems of registration of title now in force in Canada.

The above criticism also applies to the differences in the Australasian systems, but in a less degree. The very fact, however, that the statutes in the Australasian jurisdiction differ *inter se* less than those of Canada would make the task of obtaining uniformity by means of suitable amendment much easier than in Canada.

In only two of the Canadian Provinces—Quebec and Prince Edward Island— is there no system of registration of titles. The eight separate systems—those of British Columbia, Ontario, Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta, and North-West Territories (including the Yukon District)—represent developments from three different models. The British Columbia system is developed from an original model, in which, however, "what is "now known as the Torrens principle is a leading "feature."[1] The Ontario system is based on the English *Land Transfer Act, 1875*, with some of the amendments introduced by the Act of 1897, and the system of Nova Scotia and New Brunswick are modifications of the Ontario system. The systems of Manitoba,

[1] *In re Shotbolt* (1888), 1 B. C. R. Pt. II. 337. Some account of this case and the British Columbia system is given in Thom's Canadian Torrens System, 24.

Saskatchewan, Alberta, and North-West Territories (including the Yukon) are taken direct from Australasian models and resemble them closely for the most part.

British Columbia.—The statutes now in force are the *Land Registry Act* (R. S. 1911, c. 127), and five amending Acts. The system is a combination of title and assurance registry, and registration of every instrument (whatever the owner's title) is essential to give it any conveyancing effect. Two kinds of title are provided for: "indefeasible," under which the title is warranted as in the Australian systems, and "absolute," under which a merely *prima facie* title is conferred by registration.[2] A separate register is set up for "charges," which word has the special meaning of any estate or equitable interest less than the fee simple. Losses incurred through registration of the wrong owner with "indefeasible" title are made good as under the Australian systems. Transfers of land and charges (which include mortgages) need not be under seal, but no special form of mortgage is prescribed or authorized. Trusts are to some extent recognized on the register, but may also be protected by caveat. Title to land registered with "indefeasible" title cannot be acquired by length of possession.

Ontario.—The statutes in force are the *Land Titles Act* (R. S. 1914, c. 34), and an amending Act of 1914, as amended by a section in the *Statute Law Amendment Act, 1915.* Portions of general statutes, such as the *Registry Act* (R. S. 1914, c. 124), and *Short Forms of Mortgages Act* (R. S. 1914, c. 117), are also incorporated in the registration statutes. The principal act is an adaptation of the English *Land Transfer Act,* 1875, with some of the provisions relating to indemnity for loss through wrongful registration, taken from the English *Land Transfer Act, 1897.* The Australian

[2] See *Howard* v. *Miller,* [1915] A. C. 318, 324; *Heron* v. *Lalonde* (1916), 53 Can. S. C. R. 503, 512.

Acts have also been laid under contribution to some extent. The English Act has been followed in setting up three kinds of registered title—"absolute," "qualified," and "possessory," in expressly allowing transactions off the register, and in requiring "notice" only of leases to be placed on the register. But statutory instruments are not required (as they are by the English rules) to be under seal, whilst the rules that have been made are not nearly so elaborate as in England. One source of confusion in comparing the British Columbia and Ontario systems is that an "absolute" title in Ontario is equivalent to the "indefeasible" title of British Columbia, while the British Columbia "absolute" title is merely the equivalent of the Ontario "possessory" title. Trusts are not recognized on the register, but may be protected by restrictive entries. Mortgages are effected by charging the land instead of conveying it to the mortgagee. Title to land registered with "absolute" title cannot be acquired by length of possession.

Nova Scotia.—The *Land Titles Act* (1904, 3 & 4 Edw. 7, c. 47), is adapted from the Ontario Act, but is altogether much slighter, containing little more than half the number of sections. Trusts are expressly recognized, but no provision is made for cautions or caveats. Although statutory forms of transfer and mortgage (not under seal) are provided, the use of these is not obligatory, and ordinary deeds may be registered. But registration is essential, and an instrument only operates as a contract until registered. Down to the end of the year 1916 the Act had only been put in force in three counties, and seems to have found little favour.

New Brunswick.—This *Land Titles Act* (1914, 4 Geo. 5, c. 22) is even slighter than that of Nova Scotia, from which it is adapted, consisting of less than half the number of sections. The registered title may be either absolute or qualified. No provision is made for

the registration of transactions with land after it has been placed on the register, and no provision is made for indemnifying persons suffering loss from wrongful registration.

Manitoba.—The statutes in force are the *Real Property Act* (R. S. 1913, c. 171), and amending Acts of 1914 and 1915. The principal Act is to a considerable extent adopted from the Victorian "Torrens" statute, but that statute has not been altogether followed, and frequently the principles rather than the actual language of the Australian Acts have been made use of. Some of the main features of this statutory system are: The registered owner obtains a warranted title, and only one kind of registered title is recognized; transfers, mortgages, and leases are effected by means of instruments in prescribed form (not under seal) duly registered; trusts and other equitable interests are not recognized on the register, but may be protected by caveat; losses through wrongful registration are made good to the persons losing their property; mortgages are effected by a charge on, instead of a conveyance of, the land, and a special method of foreclosure is provided for; one difference between the Australian models and the Manitoba system is that a mortgagee's power of realizing his security are more subject to judicial control and not entirely a matter of contract between the parties; title to registered land cannot be acquired by length of possession.

Saskatchewan.—The statutes in force are the *Land Titles Act* (R. S. 1909, c. 41), and five amending Acts, with a section in the *Statute Law Amendment Act*, 1914. This system differs in a considerable number of details from that of Manitoba, and the language and arrangement of the statutes is different, being a closer adaptation of Australian models than are the Manitoba Acts. Nevertheless the provisions of both sets of statutes are substantially much to the same effect. An exception, however, occurs with respect to title by

length of possession. The Saskatchewan statutes do not contain the Manitoba enactment on this point, and the effect of length of possession has to be determined by judicial decision, which (if cases in other jurisdictions are followed) would be in favour of the occupier or against the registered owner.[3]

Alberta.—The statutes in force are the *Land Titles Act* (Statutes of 1906, c. 24), and an amending Act of 1915, with a section in each of ten *Statute Law Amendment Acts* (1907 to 1916). Though drafted and arranged differently, these statutes differ little in substance from those of Saskatchewan. The question of title by long possession as against the registered owner has been the subject of decision in the Alberta Courts.[4]

North-West Territories (*including Yukon*).—The statutes in force are from statutes of the Dominion of Canada—the *Land Titles Act* (R. S. 1906, c. 110), and those amending Acts of 1908 and 1910. These statutes are substantially similar to those of Saskatchewan and Alberta, though not identical in drafting or arrangement. They also differ in including provisions as to real property law generally—*e.g.*, interests of married women, descent of land, &c. One difference with respect to registered land is that no provision is made for the realization of his security by a mortgagee except by proceedings in the Courts.

The points of likeness and difference in the various statutes above referred to are, of course, merely illustrative; but they are fairly typical, and suggest some general reflections.

The differences between British Columbia and Ontario, and between these two and the group constituted by Manitoba, Saskatchewan, Alberta, and North-West Territories, seem to have little justification. The double title—warranted and unwarranted—in

[3] *Belize Estate Co.* v. *Quilter*, [1897] A. C. 367; *Harris* v. *Keith* (1911), 16 W. L. R. 433.

[4] *Harris* v. *Keith*, *supra*.

Ontario and British Columbia is based on the model of the English system and under that system has been found troublesome and unsatisfactory. The placing of leases in a special position seems unnecessary, and the express recognition of transactions off the register has given rise to great practical difficulties under the English system. These features might well be given up and omitted from the Ontario system. Two alterations in the British Columbia system could be made without affecting its efficacy, viz., provision for mortgages in statutory form, and the separation of the register of ordinary assurance from the register of title proper. If the Ontario and British Columbia statutes were amended on these points there would remain little but difference in drafting and arrangement to distinguish them from the other group of four—Manitoba, &c. Of the two models represented by the systems of Ontario and Manitoba it can hardly be doubted that Manitoba is the preferable as representing the Australian (of proved practical success), whilst Ontario represents the English model, which has proved to be very far from practically successful.

Turning to the group of Manitoba, Saskatchewan, Alberta, and North-West Territories, the only important differences *inter se* of those above referred to are the question of title by length of possession—as to which Manitoba is at variance with the other three—and proceedings for realizing mortgage securities, as to which North-West Territories is singular. If such differences as these were adjusted, the statutes in all four jurisdictions would be so far alike in substance that they might easily be re-drafted so as to be uniform. With respect to mortgage procedure, there can hardly be a doubt as to the advisability of amending the North-West Territories statute by giving a mortgagee the powers he has in the other three jurisdictions. The Manitoba enactment preventing acquisition of title by possession might well be sacrificed in

the interests of uniformity. It is an enactment that in the long run will probably be found unworkable, and it is opposed to sound principle to abrogate the effect of statutes of limitation.

Assuming that a uniform model could then be drafted for all the eight jurisdictions except Nova Scotia and New Brunswick, so little has been done in these two Provinces in the way of registration of title that the adoption of a new model of statute should not be difficult.

As already stated, a uniform statute could only be adopted by agreement among the Provinces. The best and speediest results would probably be obtained by a joint commission, each Province binding itself to adopt the model draft when settled by the Commission and enact it as a statute.

Perhaps an even greater difficulty than agreeing on a uniform draft statute would be encountered when the question of amending the new statute arose. This question need not necessarily be settled in the first instance, but it would be very desirable to do so. In order to retain the benefits arising from the adoption of a uniform statute, all amendments should if possible, be treated in the same way and not enacted by any one Province until agreed to by all—represented, preferably by the joint Commission. If any such scheme of uniform amendment were found to be impracticable, the alternative would be for each Province to pass amending statutes independently and trust to a general revision in the interests of uniformity later on. In the meantime, the practice of amending the registration statutes regularly once a year, a practice which at present prevails in five of the Provinces and has been judicially criticised, might with advantage be abandoned.

The subject of registration of title is, for the reasons already stated, a suitable one for an experiment in uniform legislation. The success of the experiment

would not only be intrinsically valuable as achieving a much needed reform, but would also be valuable in demonstrating the possibility and utility of similar uniformity in other branches of property law. If the uniformity could be carried out to a really considerable extent, the result would be an enormous saving in the litigation and reporting of cases which are now only fought out in the Courts because of the doubts raised on the construction of statutes that differ slightly from other statutes already judicially interpreted. The saving in general intellectual and economic effort would in fact be comparable to the saving effected in the field of commercial law by codification.

Lincoln's Inn. JAMES EDWARD HOGG.

CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.[1]

Banker—Duty to advise Customer as to Investment—Lord Tenterden's Act. *Banbury* v. *Bank of Montreal*,[2] the first case in the April K. B. Reports, is of interest. The plaintiff in 1911 went to Canada on pleasure and stayed at Montreal with the general manager of the defendant bank, who, as the result of a conversation as to the investment of money in Canada (p. 427), gave him the following letter of introduction to branch managers of the bank:—

'Dear Sirs,—I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal.'

Subsequently the plaintiff went to Victoria, B.C., and called upon the defendants' branch manager, presenting the above letter, and on his advice, honestly given, invested $25,000 upon a mortgage to secure a loan to a Canadian company, customers and debtors of the bank. The advice was in the form of oral representations as to the credit of the company, and the merits of the investment. The company having failed to pay either interest or principal, the plaintiff brought this action, claiming damages for negligence and breach of duty while acting as his bankers and advisers. Counsel for the plaintiff admitted (p. 436) that it was no part of the normal duty of the managers of branches to advise about investments, and that they had no general instructions on the subject; and the Court of Appeal held unanimously that

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it from month to month may rely on no case important for them to be advised of, escaping their notice. Cases under the English Workmen's Compensation Act, 1906, are not considered as coming under this category.

[2] [1917] 1 K. B. 409; 86 L. J. (K.B.) 380.

the above letter of introduction did not give any special authority to advise the plaintiff, and that, in Lord Cozens-Hardy's words—"it is no more than a letter of introduction given to a stranger who was visiting Canada on pleasure." The defendants, moreover, invoked Lord Tenterden's Act (R. S. O. 1914, ch. 102, sec. 8), which enacts:—

'No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (sic) unless such representation or assurance be made in writing signed by the party to be charged therewith.'

The Court hold unanimously that the above section is not confined to fraudulent representations, or such as would support an action of deceit; and that, inasmuch as this action was brought by reason of a representation or assurance as to the credit of the company, which was not in writing signed by the party to be charged therewith, as required by the above section, it was not maintainable.

Adjoining owners of farms under same landlord—Horses straying from one to the other — Liability. In *Holgate* v. *Bleazard*[3] the plaintiff and defendant held adjoining farms under the same landlord. Defendant's horses strayed on to plaintiff's farm through the fence being out of repair, and injured plaintiff's colt. Both plaintiff and defendant were bound as between themselves and their landlord under the terms of their respective leases, to keep the fence in repair. It was held by the Court, (Ridley, and Avory, JJ.), that the defendant was liable upon the grounds thus expressed by Ridley, J., at p. 446-7:

'In my judgment the rule is correctly stated not only in *Fletcher* v. *Rylands*,[4] but also in Bullen and Leake on Pleading, 3rd ed., p. 329, where it is laid down that—'The general rule of law is that the owner of cattle is bound to take care that they

[4] L. R. 1 Ex. 265.
[3] [1917] 1 K. B. 443; 86 L. J. (K.B.) 270.

do not trespass on the land of others.' In other words, that it is his duty as a general rule of law to keep his fences in such a condition as will prevent them from trespassing. The passage continues: 'But the owner of the land'—that is, the other owner upon whose land the trespass is committed—'may be bound by prescription or otherwise to maintain and repair a fence for the benefit of the owner of the adjoining land who may have a corresponding right to have the fence so maintained and repaired.' In other words, the owner of cattle, who is bound to take care that they do not trespass, may escape his liability by showing that the liability to maintain the fence is upon another person. I agree; but the question is, does that proposition include the case where the adjoining tenant has merely covenanted with his landlord that he will repair it? With great respect to the learned county court judge it seems to me that it does not. . . . The obligation upon the plaintiff in the present case is a secondary one and is an obligation as between himself and the landlord, but there is an obligation upon the defendant if he brings cattle upon his land to keep them from straying, and he cannot take advantage of the plaintiff's breach of contract with the landlord by claiming a right to let his cattle escape through the gaps in the fences and trespass on the plaintiff's land."

Lease — Covenant not to assign without leave — Breach—Damages. *Cohen* v. *Popular Restaurants Ltd.*[5] is an interesting judgment of Rowlatt, J.'s on these subjects, especially the matter of damages. A company were *assignees* of a lease containing a covenant not to assign without the lessors' consent in writing. The company went into voluntary liquidation, in which the liquidator, without the lessors' consent, assigned the lease to an insolvent person. Rowlatt, J., held this to constitute a breach of the covenant not to assign; and as to damages says:—

"Mr. Cunliffe has contended that I cannot consider rent accruing or covenants falling due to be performed in the future, but only rent now in arrear and damages already sustained for breaches of covenant. . . . In order to apply Mr. Cunliffe's contention I must treat the lease as subsisting, whereas this claim is upon the basis that the lease has ceased and determined. The action is for damages for breaches of covenant in a lease which has come to an end. The plaintiffs must assess their damages once for all in a single sum such as will put them in the same position as if they had still the defendants' liability instead of the liability of another of inferior pecuniary ability. . . . The measure of damages so stated involves a consideration of the financial

[5] [1917] 1 K. B. 480.

position of the defendants and their assignee respectively. Assuming the assignee to be insolvent according as the defendants have more or less means there will be more or less damage; *if they are without means there will be no damage.* Unless the parties can come to some agreement the liquidator must attend and give evidence as to the position of the defendant company."

Obstruction on highway by act of God—Liability of adjoining occupant. It is probably right to mention shortly *Hudson* v. *Bray*[6] as a decision by Ridley and Avory, JJ., that where a tree, blown down in a violent gale, amounting to an act of God, has fallen across a highway so as to cause an obstruction thereto, the occupier of the land upon which the tree was growing, is, apart from statute, under no obligation to light the tree or warn persons passing along the highway of the existence of the obstruction.

Merger — Intention — Evidence of. In *In re Fletcher, Reading* v. *Fletcher*[7] in the number of 1 Ch. for April, we have an interesting decision of the Court of Appeal upon evidence of intention of parties that a merger shall take place. To state the facts concisely, but sufficiently, Emily died in 1915 intestate. The plaintiff was her heir at law. The defendant was her legal personal representative. At the time of her death she and her sister Edith were entitled to the property in question in fee simple in equal shares as tenants in common. The plaintiff claimed it as heir at law. The defendant asserted that at Emily's death there was subsisting a term of years in the premises which was also vested in Emily and Edith in equal shares as tenants in common, and that he was entitled to one moiety of the premises for the remainder of the term. The plaintiff, on the other hand, contended that the term had merged in the inheritance, and the question to be determined was whether it had. Now the Judicature Act (see now R. S. O. 1914, ch. 109, sec. 36) enacts that:—

[6] [1917] 1 K. B. 520.
[7] [1917] 1 Ch. 339.

'There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity;'

and Courts of Equity had regard, in the matter, to the intention of the parties and to the duty of the parties. But it was not the law of the Courts of Equity that merger took place only if an intention could be established that it should take place. The common law doctrines prevailed if nothing more was known, and there was merger. At the same time Courts of Equity presumed that merger was not intended, if it was to the interest of the party, or, even, if it was consistent with the duty of the party, that merger should not take place. Now in the case before the Court the reversion in fee simple of the premises had in January, 1914, been conveyed to Emily and Edith as tenants in common; and in December, 1914, the leasehold interest referred to had also been assigned to Emily and Edith as tenants in common for the residue of the term. This, of course, effected at law a merger. But in 1915 Emily and Edith purported to assign and convey both the leasehold premises and the fee simple by way of mortgage, therein reciting that the leasehold premises were vested in them as tenants in common for the residue of the term. Astbury, J., from whom this appeal was, held that, in the absence of any proof that it was Emily and Edith's interest or duty to keep the term alive at the date when it had been assigned to them, there must be held to have been a merger, for that the subsequent mortgage was irrelevant as to their intention at that previous date. The Court of Appeal unanimously over-rule him on this last point, taking the view thus expressed by Lawrence, J. (p. 350):—

"The substantial point upon which I think the learned judge has allowed himself to be misled is that he did not give due weight to the mortgage of 1915. He seems to have thought that because this mortgage was made ten months after the leasehold was acquired it could not show the intention of the parties as to merger at the date when it was acquired. This, I think, is a mistake.

The statement by the ladies in the mortgage deed that the leasehold interest in the premises was then vested in them for the residue of the term would have been inaccurate if there had been a merger, and would have been inexcusably untrue if they had themselves intended that a merger should take place only ten months before. In fact, of course, they knew nothing about merger; but this only places the blame on to the shoulders of their legal adviser. I think the true inference to be drawn from the evidence is that the parties by their legal advisers did intend that there should be no merger of the lease."

Vendor and Purchaser — Open Contract — Purchaser's Knowledge of Incurable Defects. Open contracts for the sale of land probably do not very often occur in these days of almost universal resort to simple printed forms, but it does not seem right to altogether pass by *Alderdale's Estate Company* v. *McGrory*[8] in this *Current Commentary*. The short point there decided by the Court of Appeal is that upon an inquiry as to title under an ordinary decree for specific performance of an open contract to purchase land, the vendor is entitled to adduce evidence to show that the purchaser, when he entered into the contract, knew of the existence of incurable defects in the title. All the judges were of the same opinion. Lord Cozens-Hardy, M.R., puts the matter in this way (p. 417):—

"It is, I think, taken to be settled in accordance with the opinion of Sir Edward Fry and other authorities that it is an implied term of an open contract that a good title shall be furnished. But it being an implied term, and not an express term, evidence may be admitted to show that the implied term ought not to be relied upon if it can be shown that to the knowledge of both parties there were certain incumbrances—such as restrictive covenants, or a right of way, or that sort of thing—known to both parties to exist, and it was also known that these incumbrances were from their nature and other circumstances irremovable, or practically irremovable. I confess I thought, and I still think, that the law has been so settled for a long time."

[8] [1917] 1 Ch. 414.

CANADIAN DECISIONS.

Copyright—Berne Convention—Applicability to Canada. The only full Canadian reports of cases which have reached us since our last issue, are from Quebec. *M. Joubert* v. *Geracinco*[10] the appellant, the owner of the performing right of certain dramatic pieces composed in France, sued the respondent for damages for giving representations of these pieces in the province of Quebec, without his consent. The judges of the K. B. hold that the Berne Convention of 1886 relating to the rights of foreign authors, and all the Imperial Acts relating to that subject, apply to Canada. The decision is of importance for we have no constitutional provision such as that in the United States declaring treaties to be the supreme law of the land. Yet Cross, J., says (p. 111):—

> "By the Berne Convention, it became a treaty obligation of Great Britain to give to the subjects of the other parties to the convention the same remedies for violation of copyright and right of dramatic representation as were available to her own subjects. Such convention is to be treated by the Courts as statutory law" (citing American authority).

And after referring to the statutes, comes to the following conclusion:—

> "I take it to be clear that the sections of the Imperial Copyright Acts which relate to dramatic representation are in force in Canada."

As Carroll, J., points out (p. 105), Canada has not accepted the Imperial *Copyright Act, 1911*, which has certain provisions as to previously existing statutes which Pelletier, J., refers to (p. 120) in his dissenting judgment.

[9] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[10] R. J. Q. 26 K. B. 97.

Roads running alongside precipices—Responsibility of municipalities to protect against accidents. *Dame Fafard* v. *La Cité de Quebec*[11] may be noticed very shortly. The Court holds that municipal corporations are not responsible for risks naturally inherent to the fact that highways border upon precipices; and are not bound to erect solid walls capable of resisting an automobile swerving from the right path.

Automobile—Responsibility of owner for driver. There appears to be no case in the Quebec Superior Court for April requiring mention here except perhaps *Lebeau* v. *Colas*,[12] which, like the last case, may be briefly referred to for the benefit of that dangerous section of the community which owns and runs automobiles. It is a decision that a man who allows his brother to habitually use his automobile, though not competent, nor possessed of the necessary experience, nor duly licensed, is responsible jointly and equally with him for damage resulting from a collision caused by his negligence as driver. We are not able to say that this would be the law in Ontario, though we much wish we could.

A. H. F. L.

[11] R. J. Q. 26 K. B. 139.
[12] (1917), R. J. Q. 51 S. C. 335.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The *Harvard Law Review* for April commences with the first part of an Article by Edwin R. Keedy, of the University of Pennsylvania Law School, upon the perennial subject of *Insanity and Criminal Responsibility*, being a reply to the criticisms levied against section 1 of a bill providing a test for determining criminal responsibility when the defence of insanity is raised, which has been approved by the Institute of Criminal Law and Criminology. We cannot do more than set out the section criticized.

> Sec. 1. *When mental disease a defence.* No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.

This is followed by a characteristically clever Article by Professor Harold Laski, of Harvard Law School on the *Early History of the Corporation in England* and the development of corporatedness in counties, boroughs, townships, and churches, with valuable references to the writings of Maitland, Vinogradoff, Stubbs and other labourers in this medieval field. Then, after *Federal Incorporation of Railway Companies* by Charles W. Bunn, of St. Paul, Minn., we have a long Article on the *Judicial Interpretation of the Constitution Act of the Commonwealth of Australia*, by Charles Grove Haines of the University of Texas. The writer has much to say about sec. 74 of the *Commonwealth* Act which prevents appeals from the High Court of Australia to the Judicial Committee on constitutional questions,

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Numerous exchanges from different parts of the Empire and from the United States are examined, and attention is called to whatever seems most striking and important in them.

unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council; and shews that the High Court is definitely committing itself to the principles and construction of constitutional law adopted in the United States, the Commonwealth Constitution being 'a distinct effort to combine the salient features of English parliamentary government with some of the notable principles of federal government as developed in the United States.'

The *Law Times* (English) of March 10th, says:—

'The prompt removal by the gaoler of the cap from the head of an old man who, when placed in the dock at the Guildhall, refused to take off his hat for anyone but the King, may render it of interest to recall the fact that the Lord Advocate for Scotland has the privilege of being covered in Scottish Courts, a privilege obtained in the days of Charles 1st by Lord Advocate Hope, who had two sons members of the Scottish Judiciary, before whom he himself pleaded. . . . In the seventies of the last century a Quaker gentleman used to attend the opening of the assizes in Limerick and to occupy a prominent position in Court with his hat on, refusing to be uncovered. The direction to the police to remove his hat, or the ordering of him out of Court by the judge, or a threat of imprisonment for contempt, were quite the usual incidents of an opening of an assize Court in Limerick. At length a well-known Irish judge with a great sense of humour and knowledge of human nature refused to see the gentleman with the hat on, and told the police constables to take no notice of him. He seemed surprised and disappointed at not creating a sensation, and, after a few moments, left the Court crestfallen, and never appeared in it afterwards.'

We are glad to reproduce a paragraph in favour of the grand jury system from the *Law Times* of March 17th:—

'Practically all the Irish judges have now ranged themselves on the side of non-interference with the grand jury system in Ireland. They entertain this view whether there is criminal business to be disposed of or not; it is their opinion that the county and city gentlemen should be brought before the assize judge twice a year, receive an address from the learned judge, discharge duties if there are duties to be discharged, and return to their homes if there be none. It is an open secret that many of the judges enjoy "opening of the commission" and addressing "Mr. Foreman and gentlemen of the grand jury." Twenty years ago,

when there was an acute controversy in the newspapers here in reference to these addresses and a demand for their discontinuance, the late Lord Justice Fitzgibbon wittily remarked, "but the newspapers have the remedy in their own hands; if they cease to publish these addresses they will very soon be stopped."'

Speaking of the recent Wheeldon trial in England arising out of a conspiracy to poison Mr. Lloyd George, the *Law Journal* (English) of March 17th says:—

'Nothing at the Wheeldon trial, startling as was much of the evidence, was more astonishing than the suggestion of the counsel for the defence' (an Oriental gentleman, if we remember right,) 'that the prisoners should be afforded an opportunity of proving their innocence by a trial by ordeal. What particular form of the ancient mode of defence the prisoners should submit themselves to the learned gentleman refrained, unfortunately, from specifying. He accepted, however, Mr. Justice Low's suggestion that walking over red-hot ploughshares would serve the purpose he had in view. As a matter of fact—if, indeed, anything relating to these ancient customs can be regarded as a matter of fact—the red-hot iron test was allowed only to persons of high rank. Walking with bare feet over red-hot ploughshares was the ordeal by which Emma, mother of Edward the Confessor, is said to have proved that she was innocent of a too intimate acquaintance with Alwyn, Bishop of Winchester. Fixing her eyes on heaven—so runs the monkish chronicle—she took nine steps for herself and five for the Bishop. "When shall we reach these ploughshares?" she enquired, her promenade being ended even before she thought it had begun, and her feet—according to the same authority—being unmarked by the red-hot iron. . . . Probably the last occasion on which a trial by ordeal was suggested at the Old Bailey was in 1679, when John Govan, a Jesuit priest, who was accused of having taken part in the Popish plot, claimed it as an ecclesiastical privilege. "We have no such law now," summarily remarked North, who presided, with Scroggs, at the trial. The counsel for the defence in the Wheeldon case must indeed have imposed upon his own credulity if he imagined that a law which was abolished nearly seven centuries ago, and which North and Scroggs declared to be non-existent, would be likely to be approved and revived at the Old Bailey in these days.'

The claim by Govan in 1679 was certainly a strange one, seeing that by the Lateran Council of 1215, the clergy were forbidden to take any further part in ordeals, which had the effect to stopping the ordeal, excepting trial by battle, which was unaccompanied by ecclesiastical ceremonies.

The *Illinois Law Review* for April begins with a very long paper by William V. Rowe entitled *Legal Clinics and Better trained lawyers — A Necessity.* The idea of a legal clinic is entirely new to us, but Mr. Rowe evidently addresses his words to those to whom it is familiar. The conditions which have given rise to the movement in the United States are evidently very similar to those which exist with us, for we read—

'The general introduction, since 1880, of telephones, stenographers, typewriters, dictating and copying devices, and improvements in printing, in connection with these changes in practice already noted, has made students not only unnecessary but actually undesirable in most of the active law offices. Plainly speaking they are considered to be a nuisance. The fully-qualified lawyer, able to participate in the responsible conduct of business and to meet clients, is alone needed and sought for.'

And it appears—

'Training in a legal clinic is not a startling novelty. It has been in use for years at Copenhagen, and has recently been adopted, officially or unofficially, as the case may be, by the University of Minnesota, Northwestern, Harvard, Yale, Tennessee, George Washington, and perhaps elsewhere.'

We wish, in our ignorance, Mr. Rowe had, in a clear, simple way, explained exactly what the scheme of legal clinics is, for though we have devoted considerable time to his Article, we cannot conceive how it can be made to work. But to put our readers on enquiry so to speak, we will devote space for two further extracts.

'The real need, and especially is this true in New York, in Chicago, and in other legal centres, is education, training and discipline in the conduct of professional life—the development of what may be called the professional character, spirit, and *savoir faire*, in the only possible way, that is to say, by placing the student in a proper law office, which we will call *a clinic* under systematic instruction and training, and in constant touch with reputable practitioners of high character, who, in a *general* practice, are applying the law in the concrete, as a living force, to the living problems of our people. The student thus *lives* in an atmosphere of the law, and absorbs the spirit of its practice, day by day, in the course of actual dealings between lawyer and client.'

And again—

'We must, if it be practicable, establish relations with some prominent down-town office, preferably one already having sympa-

thetic ties with the school, which can be induced to transfer a part of its business and staff, perhaps the whole, to an office to be devoted to the purposes of the clinic and as a nucleus for other business which will be attracted to the clinic's office.'

It seems to us, in our present uninformed condition, that there is really no analogy between the practice of medicine or surgery, and the practice of law.

Next comes a long Article by Mr. Frederick Thulin of the Illinois Bar, which we wish we could notice at greater length, entitled *Formal Creation of a Trust inter vivos*, the *causa causans* of which is that—

'In the various commonwealths of the United States, the state of the trust law is not nearly as clean-cut or as well developed as the English rules.'

That excellent feature of the *Illinois Law Review*, "*Law from Lay Classics*" consists in this April issue of gleanings, rich with amusement, from John Hill Burton, born at Aberdeen in 1809, who became an advocate of the Scottish Bar in 1831, but soon abandoned the profession for that of letters.

We have received *International Law Notes, a Monthly Bulletin of Matters of Interest to International Lawyers and Practitioners* (London), for February and March, with, *inter alia*, valuable Articles on *Marriage in Private International Law* by our able London correspondent Mr. W. E. Wilkinson.

The *Indian Law Quarterly* (Madras) contains an interesting Article by the editor, P. R. Ganapattri Aiyar, B.A., B.L., Vakil, High Court, Madras, upon *The History of the Press Law in England*, in which he shows that there is in early English law a curious and striking resemblance to the law as now obtaining in India as regards restrictions on the press.

The *Michigan Law Review* for April commences with a paper entitled *Mild Punishments*, by Robert McMurdy, Chicago, which treats of the theory of criminal punishment, quoting from many famous writers on the subject, and anticipating that the great

deterrent of chronic offenders may prove to be amelioration of treatment and mild punishments. He tells a story, new to us, of Edward Livingston, the author of the Louisiana Code of Civil Procedure, so highly lauded by Sir Henry Maine, and also of a Penal Code, which, however, failed of adoption:—

'He was obliged to prepare his draft of the Penal Code in French as well as English, and there is in literary annals no more dramatic picture than this prodigy, in the evening of life, an exile from the land of his triumphs, sitting at his lamp, re-writing the entire work, for the manuscript had met the well-known fate of Carlyle's first manuscript of "The French Revolution"—just as it was completed and ready for the printer, it was destroyed by fire.'

All readers of Froude's *Life of Carlyle* will remember how a careless housemaid lit the fire with the first manuscript of his greatest work.

This is followed by an Article by LeRoy G. Pilling, of Providence, Rhode Island, entitled—*'An Interpretation of the Eleventh Amendment,'* which upholds the doctrine of State sovereignty and State immunity from suit, by providing—

'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'

There is also an Article on *Reasonable Rates*, by Henry Hull of Washington, D.C.

The *Law Notes* (Northport, N.Y.), has the following remarks on criminal punishment which afford food for thought:—

'In most if not all the States wherein capital punishment has been abolished imprisonment for life has been substituted as a penalty for murder. Such a substitution loses sight of the main objection to the death penalty. The latter is usually assailed on grounds of humanity. It is barbaric enough, but as between hanging and life imprisonment the choice is largely a matter of individual taste. The really vital objection to both is that they are based wholly on the idea of punishment and exclude absolutely that of reformation. Any sentence which releases a man from prison before there is a reasonable probability that he will become a law-abiding citizen is too short. Any sentence which holds him in confinement after that time is too long. The crime which he

has committed is no unfailing index to the time requisite to reformation. There are many crimes which indicate a moral depravity far deeper than the average homicide, and between the perpetrators of homicides of the same technical degree there are great moral differences. Borrowing an illustration from a distinguished penologist, take two murderers whom fiction has made familiar to all,—Bill Sikes and Don José. The former, if released after twenty years in prison, would have been ready for another murder at the first opportunity. The latter, his mad passion for Carmen burned out, could with perfect safety to society have been set at large at once. Between the universal death penalty and the universal indeterminate sentence of the future, there is no logical stopping place.'

The *Columbia Law Review* for April has Articles upon *The Nature of the Rights of the Cestui Que Trust*, Austin Wakeman Scott of Harvard Law School; *The Arrangement of the Law* (*1*), by Henry P. Perry of New York City; and *Jurisdiction of Causes of Action Arising under the Act to regulate Commerce*, by Henry Hull, of Washington, D.C.; *The University of Pennsylvania Law Review* for April has Articles on *Compensation for Industrial Diseases*, by P. Tecumseh Sherman, of the New York Bar; *Control of Property of the Dead* (*1*), by Austin Wakeman Scott, of Harvard Law School; and *The Danish Judicial Code*, by Axel Teisen, of the Philadelphia Bar; *The Yale Law Journal* for April has Articles on *Social Insurance and Constitutional Limitations*, by Edward S. Corwin of Princeton University; *Capacity and Form of Marriage in the Conflict of Laws*, by Thomas Baty, Inner Temple, London; *Comment on Failure of Accused to Testify*, by Walter T. Dunmore, Law School, Western Reserve University; *Legal and Historical Aspects of the Militia*, by S. T. Ansell, Mayor and Judge Advocate, U.S.A.; *The American Law Review* for March-April has, *inter alia*, Articles on *Discrimination Under the Act to Regulate Commerce*, by Henry Hull, of Washington, D.C.; *"Police Regulations"—Essentials of Unconstitutionality*, by L. Dee Mallonee, of University of Wisconsin, Madison; and *Future Mental Suffering as an element of Damages*, by James M. Kerr of Los Angeles, Cal.

NEW BOOKS AND NEW EDITIONS.

Rescission of Contracts: A Treatise on the Principles governing the Rescission, Discharge, Avoidance and Dissolution of Contracts: by Charles Bruce Morrison, one of His Majesty's Council in New Zealand: author of 'The Law of Limited Liability Companies in New Zealand.' London: Stevens and Haynes, Bell Yard, Temple Bar, London: 1916. Pp. xxvi. + 261, and Index.

We have here a contribution from one of the self-governing Dominions to the long roll of English legal text books. Mr. Morison, K.C., resides in Wellington, N.Z. He has here sought to derive from the decided cases a definite and satisfactory set of principles to guide the legal adviser upon the topics above mentioned. He deals with the authorities in, as it seems to us, a very thorough and lucid manner; and covers rescission proper by act of both parties; discharge by breach; rescission by new agreement; resolutive conditions; repudiation; avoidance for misrepresentation; mistake; dissolution by operation of law; restitution and rescission. In an Appendix he prints the judgments in the more important cases referred to on the question of discharge by breach.

The Rush-Bagot Agreement: An Address delivered by the Rt. Hon. Sir Charles Fitzpatrick, Chief Justice of Canada: At the Lawyers' Club in the City of New York.

A very interesting account of the circumstances under which the Rush-Bagot Agreement was entered into governing the maintenance by the United States and great Britain respectively of armed vessels on the Great Lakes. But the effect of the opening words which describe it as "an agreement which has not been broken, but has been faithfully kept for a hundred years," is somewhat marred by the concluding paragraphs:—

"Time and occasion will not permit of any but the briefest discussion of the inadequacy of the Agreement to meet the exigencies of the changed conditions of modern days. I suppose the prohibition of construction of vessels of war is the principle

source of trouble, due to the very natural desire of the ship-building establishments, which have grown up in the lake shores, to share in the construction of the United States Navy. Is it possible to satisfy this wish without incurring the same dangers as were foreseen, and intended to be guarded against, by the treaty made in 1917? The difficulties to be met will be great, and I cannot attempt to offer any satisfactory solution of them."

We have also received:—

Review of the Work of the Dominion Commission of Conservation by Sir Clifford Sifton, K.C.M.G., P.C., Chairman: Reprinted from the 8th Annual Report of the Commission: Montreal: Federated Press, Limited: 1917.

Dominion of Canada: The Labour Gazette issued by The Department of Labour by Order of Parliament: April, 1917: Ottawa: King's Printer.

The University Magazine: Montreal: . February and April, 1917.

Although the contents of these two issues of this excellent magazine are none of them connected with law, we cannot refrain from specially mentioning the excellence of the brief comments upon *Topics of the Day* with which each commences; and of the "War Elegiacs," by Professor Maurice Hutton, in the April number.

THE GAZETTES.

The *Canada Gazette* for March 31st, contains the message from the Secretary of State for the Colonies to the Governor-General, the " fine spirit " of which our government has duly acknowledged that—

'H. M.'s Government have decided that all Dominion officers and men dying in this country should be buried at expense of the Imperial Government in single graves. Land required for that purpose will be acquired in perpetuity at cost of Imperial Army funds and all possible care taken of graves. Am confident that it will be unanimous wish of every one in this country that H. M.'s Government should be privileged to undertake this charge and ensure that the last resting place of those Dominion soldiers may not be unworthy of their sacrifice and of the cause for which they gave their lives.'

In the course of our Government's reply, which is also given, it is said—

'No act could more deeply touch the heart of Canada, and the knowledge that the graves of our overseas soldiers are under the perpetual care of the Motherland will constitute an enduring bond of intimate family relationship between us.'

The *British Columbia Gazette* of April 26th contains a provincial Order-in-Council that—

(1) All acknowledgments, proof of execution of instruments, affidavits, oaths, and declarations necessary for the purposes of the said Act, made or taken without the Dominion of Canada, may be taken by and made before the officer commanding any battalion or military unit of the Canadian Expeditionary Forces engaged or serving in the country where the same are so taken or made; and

(2) This order shall remain in force during the continuance of the present war, and for a period of six months thereafter.

The Supplement to *The Manitoba Gazette* of April 7th, contains the provincial statutes of last session. They comprise *The Agricultural Societies Act*, R. S M. 1913, c. 2, being repealed; an *Act respecting the Capacity of Companies*, which, stimulated by the

"*Bonanza Creek*" judgment of the Privy Council, enacts that every provincial corporation—

'shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed to have had from its creation, the capacity of a natural person to exercise its powers beyond the boundaries of the province to the extent to which the laws in force, where such powers are sought to be exercised, permit, and to accept extra-provincial powers and rights, and shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed to have had, from its creation, the general capacity which the common law ordinarily attaches to corporations incorporated by royal charter under the great seal.'

There is also an *Act to amend "The Devolution of Estates Act,"* giving Surrogate Court Judges power to make vesting orders of land devolving at any time after the expiration of one year from the date of letters probate or administration, as the case may be, if the personal representative has failed, on request of the person or persons entitled, to convey such lands; or in the case of administration, to have such land sold and the proceeds distributed. There is also a lengthy *Act to foster and encourage agricultural development by providing for loans upon farm mortgages at reduced rates of interest.* Also a *Fire Prevention Act*, R. S. M. 1913, c. 72, and all amendments thereto being repealed. Many amendments are made to the *Game Protection Act*, and several other statutes. There is also an interesting *Hotel Act*, to be administered by the Department of the Attorney-General, which establishes a "Director of public accommodation" with an advisory council, and jurisdiction *inter alia*—

'(a) to give municipal councils such advice and assistance as he may think fit regarding any matter pertaining to the providing of suitable public accommodation;

(b) to promulgate and establish rules and regulations . . . respecting the conduct, management, appointments and inspection of all public hotels and other places of public accommodation.'

LOCAL AND PERSONAL.

Sergeant T. P. Elder, formerly practising as a barrister in Nanaimo, B.C., has been awarded the military medal.

We are glad to read in connection with the appointment as King's Counsel of Mr. J. P. Byrne, of Bathurst, N.B., that the call to the inner bar is more coveted than heretofore in New Brnnswick, as politics now play no part in its donation, but members of the profession secure the hononr on the recommendation of the Chief Justice of New Brunswick and of the Chief Jnstice of the King's Bench Division.

Mr. T. O. Townley, of Vanconver, B.C., has been appointed district registrar of titles at New Westminster.

Lientenant B. W. Russell, son of Mr. Justice Russell, who took part in the battles of Ypres and the Somme, and whose wounds incapacitate him for further military dnty, has resnmed the practice of his profession in Halifax as a member of the firm of Mnrray and MacKinnon.

Jesse Bradford, barrister, Sturgeon Falls, Ont., has been appointed Police Magistrate of the town.

George Edmonds, barrister, Midland, Ont., has enlisted for overseas service.

The bill to admit women to the study and practice of law in Nova Scotia passed its third reading in the Honse of Assembly recently without a dissenting voice. The bill extending the franchise to women is still in the hands of the committee and its further advancement is said to be doubtful.

Colin Fraser, who formerly practised law in Toronto, as a member of the firm of Robinson, O'Brien and Gibson, has been appointed head of the Farm Loans Department of the Saskatchewan Government.

Leslie Boyd, barrister of Montreal, has been appointed chairman of the Dominion Grain Commission.

Pte. T. E. Smith, formerly a law student in the office of Sharpe, Stackpoole, Elliott, and Montague, of Winnipeg, has been wounded in the right arm.

We regret to see the following deaths reported since our last issue[1]:—

His Honour Judge Philip Holt, Junior County Court Judge, Huron County, on April 18th last at Goderich.

Joseph Ulric Emard, K.C., of Montreal, on March 30th last, at Montreal.

Fletcher Cameron Snider, D.C.L., barrister, Toronto, on April 2nd last, at Toronto.

Charles Darveau, K.C., of Levis, Que., on March 23rd last, at Levis, Que.

John H. Brown, barrister, late deputy district registrar and deputy registrar general of Manitoba Land Titles, on April 10th last, at Winnipeg.

Thomas Goodair, member of the City of Winnipeg law department, on April 15th last, at Winnipeg.

'Those that leave their valiant bones in France,
Dying like men.'

Major John Hales Sweet, of the Canadian Highlanders, son of Archdeacon Sweet, of Victoria, B.C., and who formerly practised law in Vancouver, killed in action on April 9th last.

Captain W. F. Guild, formerly practising law in Winnipeg, died on April 10th last, from wounds received on April 8th, when leading his men into action in the attack on Vimy Ridge.

[1] It is almost impossible to prevent occasional inaccuracies in the obituary column of the C. L. T. Corrections will be always gratefully received and duly recorded in our next issue.—Ed. C. L. T.

Canada Law Journal.

VOL. XXXVI. NOVEMBER 1, 1900. NO. 21.

The vacancy in the Ontario Bench is still unfilled, to the inconvenience of litigants and thereby throwing an undue pressure of work on the other judges. It is high time that an appointment was made. We have been told that it may be expected shortly, as the Dominion elections will soon be over, which remark to some would seem to convey more than meets the ear. From a political standpoint there may be a good reason for the delay; but that is not a satisfactory excuse from other points of view.

Some of our contemporaries amuse themselves with foreshadowing appointments of this or that man, based on conjectures as to his religious proclivities. We are sorry to see such ideas prevalent inasmuch as they tend to create the impression that those in authority are justified in making appointments on such grounds, instead of those of personal and professional fitness for the office. To appoint a man a judge because he happens to belong to a particular creed, apart from the question of his personal and professional fitness for the office, is an abuse of power, a prostitution of the office, and a gross injustice to the community.

A valued correspondent from Hamilton, in a letter which we publish in this number (post p. 630), calls attention to a very important matter, and one which we have already referred to in these columns. He very properly characterizes sec. 606, sub-s. 3, of the Municipal Act, as a most iniquitous provision. How it ever came on the statute books is a marvel. It should at once be amended. We are glad to know that the attention of the Municipal Committee was called to this matter last session, and it was very nearly struck out on that occasion, but coming up at the close, there was not time to give it sufficient consideration. We trust that some member will make a point of seeing to this next session; though very possibly after what was said about it in committee, the Government may have a clause drafted to make necessary amendments, possibly in the direction suggested by Mr. Farmer.

We have much pleasure in publishing in another place a letter from the Police Magistrate of the city of Toronto in answer to our remarks on page 517 ante. The personal matters referred to in the discussion are of no special interest. If we have, as we are told, made some mistakes in unimportant matters, we are glad to be corrected. Many of our readers know the facts and can be the judges. Our object was to repudiate as most unfair and injurious wholesale charges of wrongdoing against the profession. We now understand, from the letter, that the strictures we referred to were not meant to convey the meaning that we, with other members of the profession, took from them.

Preliminaries having been thus disposed of entirely to his satisfaction the gallant Colonel proceeds to draw a vivid picture, (with poetic licenses) of the long drawn out agonies of a law suit, from the time when the reckless, not to say wicked, lawyer sets the machinery of the Courts in motion until the time when the paupered client dies of a broken heart. He also very properly gives his views as to the best way of reforming the abuses in the administration of justice which lead to such unhappy results, and speaks of two possibilities in that connection. One is, that the State should look after all litigation, hiring lawyers at fixed salaries to assist the judges. As an alternative proposition, he throws out a hint as to the propriety of deciding disputes by the tossing of a copper. The first suggestion is not original, and reads like a chapter intended for a revised edition of Bellamy's "Looking backward." The idea, however, of organizing a "Copper-tossing Bureau" is quite novel, and worthy of consideration as being both simple and economical. It would, moreover, appeal to the gambling spirit of the age. We should be glad if our correspondent would elaborate this idea a little. Parliament will soon meet, and the matter might be introduced. It would at least produce a discussion quite as interesting and useful as many of those which now occupy the time of our law-makers.

The *Albany Law Journal* notes a recent decision of the Supreme Court of Minnesota in *Cunningham* v. *Cunningham*, as to the meaning of the words "in the presence of the testator" in connection with the execution of a will. It appears after the paper had been signed it was taken into an adjoining room where the witnesses affixed their signatures at a table about ten feet from the testator.

The door was open, and he could have seen the table had he stepped forward two or three feet, but he did not do so. The will was immediately taken back to the testator, the signatures of the witnesses were pointed out to him, and he looked over the paper and pronounced it correct. The Supreme Court, in holding that there had been substantial and satisfactory compliance with the statute, took occasion to say that the courts have often placed themselves in absurd and inconsistent positions in construing the words referred to; that in the case at bar the signing took place within the sound of the testator's voice; that he knew what was being done, and that when the signatures of the attesting witnesses were pointed out to him he took the instrument in his own hands, looked over it and pronounced it satisfactory, which made the whole proceeding a single and entire transaction, and formed a sufficient compliance with the statute.

THE HOME-COMING.

Oh! may that day with whitest stone be marked,
When at their country's call her sons came forth,
And at her feet their lives and fortunes laid,
Her honor to defend; that debt to pay
Which every faithful man to country owes.
Alas! by some that debt is fully paid
Who their devotion, with their life-blood, sealed.
Oh! gallant hearts, oh! brave and faithful sons!
Your death is not in vain but shall inspire,
In ages yet to come, the martial fire,
And deeds of valour oft again incite.
And ye who from the toil and stress of war
Have safe returned, we welcome to your homes,
And to our hearts we take you with delight.

CONTRACTS IN RESTRAINT OF TRADE.

The elasticity of the common law to adapt itself to the altered circumstances of commercial expansion finds striking illustration in cases of what are technically known as contracts in restraint of trade.

In the reign of Henry V., in the early part of the fifteenth century, it will be seen by reference to the Year Books, it was even then old and settled law, founded upon public policy for the good of the realm, that contracts which had the effect of limiting the skill or handicraft of the industrial classes, or which tended to favour monopolies and exclusive privileges, were void. The reason of the rule was, such contracts were inimical to the public weal, in consequence of depriving the public of the services of such as were skilled in employments beneficial to the state. The tendency of such contracts, likewise, was to prevent competition and enhance prices. A case occurred in the 2nd Henry V., found in the Year Book of that date, in which damages were sought for breach of a bond with a condition that a man should not exercise his craft of a dyer for the period of six months, within a certain town. Mr. Justice Hall, who tried the case, angered at such a violation of the law, with an oath announced, "If the plaintiff were present in court, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of the subject." Two principles from the first seemed to antagonize each other. One holding the state should not be deprived of the talent, skill and labour of any of its members by any contract he might enter into. The other, that courts should not lightly interfere with freedom of contract, which when freely entered into should, as far as possible, be held sacred. It has justly been said, freedom of trade and inviolability of contract are alike favourites of public policy. There has long been a constant effort to harmonize those conflicting principles. The hard and fast rule of earlier cases of contract in restraint of trade has gradually relaxed with the ever changing phases of commercial intercourse, and seeks, while protecting the rights of the contracting parties, to conform to modern views and ideas of public policy.

In 1621 an exception was grafted upon this old established maxim of the common law. The defendant in *Broad* v. *Jollyfe*, Croke, 17 Jac. p. 596, was a mercer, who kept shop at Newport, Isle of Wight. In consideration plaintiff would buy all the wares

in his shop, he agreed he would not any longer keep a shop in Newport. Plaintiff recovered damages on breach of his agreement. The court held, on motion in arrest of judgment, that one upon a valuable consideration might restrain himself from using his trade in a particular place.

In 1711, the great leading case of *Mitchell* v. *Reynolds*, 1 William Peare Williams, p. 181, re-affirmed this principle of distinction between limited and general restraint, and settled the further question, which had long been a subject of controversy in the courts, that it mattered not whether the agreement was or was not under seal. In this case the defendant bound himself by his bond under the penalty of £50 not to exercise the trade of a baker in the parish of St. Andrews, Holborn, for the term of five years. The judgment of the court was, the plaintiff ought to have judgment for breach of the bond. In an exhaustive judgment, in which all the cases were carefully weighed and considered, the Chief Justice, Lord Macclesfield, decided, that all restraints of trade, if nothing more appeared, were bad; but if the restraint were only particular in respect to the time or place, and sufficient consideration was given to the party restrained, such contract was good and valid in law. From this time forward, for more than a century, the courts with great uniformity held that contracts in general restraint of trade were void; while those in partial restraint thereof were valid, provided they were supported by a sufficient consideration.

Chief Justice Best, in *Homer* v. *Ashford* (1825), 3 Bingham, p. 322, thus clearly defines the old rule and the first leading exception: "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person imposing such a restraint on himself. But it may often happen (and the present case is a strong instance of it) that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place proper. . . . For partial restraints, however, there must be some consideration, otherwise they are impolitic and oppressive. What amounts to an adequate consideration is to be decided by the courts of justice."

Just here it may not be amiss to indicate the meaning of these

terms as defined by the judges. According to Bowen, L.J.:—"Contracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade." According to C. J. Parker:—"A partial restraint of trade is one in which there is some limitation in respect of person, place or of the mode or manner in which a trade is carried on."

The year 1837 marked another important exception to the old common law rule, for in this year it was held by the Court of Exchequer Chambers, on error from the Court of King's Bench, in the case of *Hitchcock* v. *Coker*, 6 A. & E. p. 438, that the court would not enter into the question whether the consideration was equal in value to the restraint agreed to by the defendant. Up to this time courts had been astute in enquiry as to the adequacy of the consideration, holding the covenant or agreement void, if a sufficient consideration had not been established. This case has justly been called a landmark in the law. The following extract from the considered judgment of Tindal, C.J., which contains a valuable epitome of general principles on the question, is well worthy of careful perusal: "But, if by adequacy of consideration, more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court, in every particular case, which it has no means whatever to execute. . . . It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value." This case, in addition to deciding that adequacy of consideration was not essential to support a contract in restraint of trade, also decided that the covenant or agreement would not be void, merely on the ground it was unlimited as to time.

Public policy, it would seem, for some time, had been setting in the direction of the utmost possible limit of freedom of contract. While many judges favoured this view, others were disposed to hasten slowly, and from time to time did not fail to put up a cautionary signal, and in a warning way refer to the well-known dictum of Mr Justice Burrough:—"That public policy is a very

unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law": *Richerason* v. *Mellish*, 2 Bing. 229.

From 1711, the time of the decision of *Mitchel* v. *Reynolds*, down to 1840, it was uniformly held, that contracts in restraint of trade generally were void; while those limited as to place or persons were regarded as valid and duly enforced. In 1840 by a decision in the Court of Chancery, *Whittaker* v. *Howe*, 3 Beavan, p. 383, the old rule was subjected to further exceptions. In this case, Lord Langdale, Master of the Rolls, entirely ignored the rule as to the necessity for a limit of space and held an agreement of a solicitor, for valuable consideration, not to practice as a solicitor in any part of Great Britain for twenty years valid, and granted an interlocutory injunction to restrain a breach of the agreement. According to the definition already given such a restraint would be general. Lord Langdale held the question turned upon the fact whether the restraint intended to be imposed on the defendant was reasonable. This judgment, however, was subjected to criticism by Lord Justice Bowen in *The Maxim Nordenfelt case* hereafter referred to. His Lordship thus referred to it:—"The covenant was not a covenant in partial but in general restraint of trade; and the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction."

Notwithstanding this decision of Lord Langdale, some judges still held tenaciously to a hard and fast rule as to the necessity of a limit of space for the validity of the contract. While others as firmly contended, that in every such case, the crucial test was, whether the restraint imposed was larger than was reasonably required for the protection of the covenantee or contractee. In other words, that the validity or invalidity of the contract turned upon the reasonableness of the restraint and its sufficiency to protect the rights of the contractee.

Leather Cloth Co. v. *Lorsont* (1869) 9 Equity, p. 345, is the leading authority on restraint as to a limit of space in the case of a sale of a trade secret. The facts briefly summarized were as follows: Defendant sold to plaintiffs certain patent rights and secret processes for the manufacture of leather cloth, and in consideration of said purchase covenanted that he would not carry on in any part of Europe any manufactory having for its object the sale of products which were the subjects of such patent rights, and would

not communicate the processes of such manufacture. The defendant having violated his agreement a bill was filed against him for an injunction. Notwithstanding there was no limit, either of time or space, (the limit of Europe being equivalent to an unlimited covenant) it was held the restriction imposed was not greater than was necessary for the protection of the covenantees, and the contract was therefore valid.

Ten years later this decision was followed and approved by Mr. Justice Fry, in his able judgment, in the celebrated case of *Rousillon* v. *Rousillon* (1880) 14 Ch. D. p. 351. Lindley, L.J., thus refers to this judgment, in *The Maxim Nordenfelt case*. "In *Rousillon* v. *Rousillon*, Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord Justice James in *Leather Cloth Co.* v. *Lorsont*, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating." The following extract from the judgment of Mr. Justice Fry, in the case referred to, will indicate its scope and purport:—"But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable, and also where it was reasonable. Now in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the

universality of the prohibition was reasonable, that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority."

The judgment of Fry, L.J., was subjected to criticism by L. J. Cotton in *Davies* v. *Davies* (1887) L.R. 37 C.D. p. 359. At page 386 he thus refers to it:—"I refer to the case which was decided by Lord Justice Fry. I think undoubtedly he used expressions which shewed that he took a somewhat wider view than I do of the law—a lower view perhaps I may say without disrespect. In that case of *Rousillon* v. *Rousillon* there was the limit of time which might have made the covenant a limited one and not a general covenant in absolute restraint of trade; and if so, it comes within what I think is now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is a reasonable one. About that case I say no more after what I have said on the cases generally."

Mr. Justice Chitty, in *Badische Anilin* and *Soda Fabrik* v. *Schott* (1892) 3 C.D. p. 447, when granting an injunction restraining the defendants from entering into any business similar to that carried on by the plaintiff, and from starting any business of that kind themselves, said, he considered the decision in *Rousillon* v. *Rousillon* to be a binding one, and also that he thought that decision was right. On the next question of the reasonableness or unreasonableness of the restraint as to the limit of space, regarding which so many "jarring opinions" prevail, his lordship made the following pertinent remarks:—"The improvements in the means of communication which have taken place in recent times by reason of railways, steamships, postal facilities, the telegraph and the telephone, are, I think, within the scope of the enquiry, and bear particularly on the question of space; they are almost more or less in proportion to the greater or lesser area within which the trade sought to be protected is carried on and to the varying nature of the trade itself. . . . What might in former ages have been considered an unreasonable restriction would not necessarily be so held in the altered circumstances of the present time."

From the great leading case of *Mitchell* v. *Reynolds* down to 1894 there had been jarring and divided opinions among the judges; some holding with Bowen, Lord Justice, to a hard and fast rule, that if the covenant or agreement of restraint were unlimited as to

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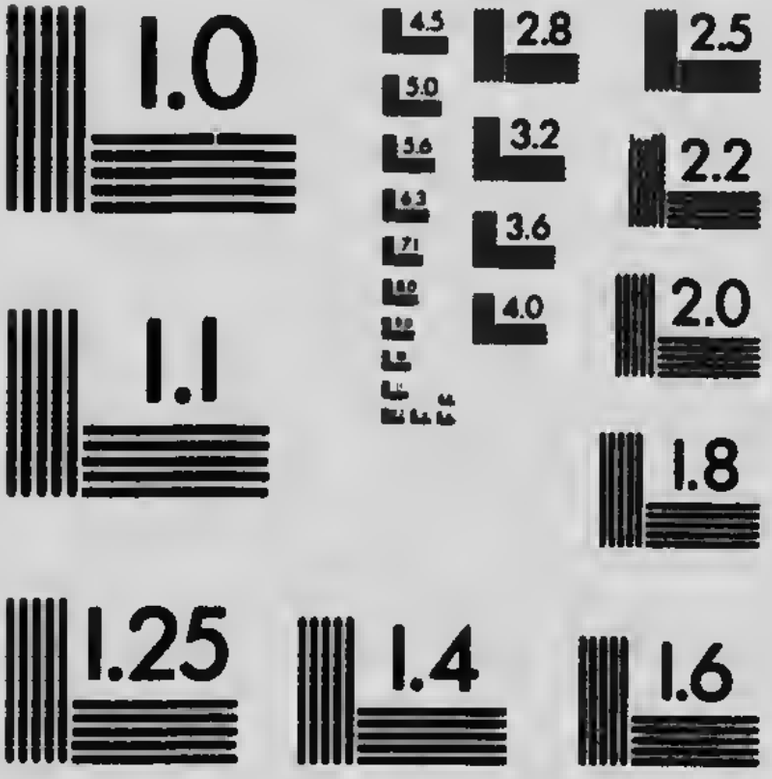

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space, it was, apart from its reasonableness, invalid ; others holding with Lord Justice Fry, that the only test by which to determine the validity or invalidity of the covenant or agreement in restraint of trade, given for valuable consideration, was its reasonableness for the protection of the trade or business of the covenanter or contractor. Finally the question was set at rest by the decision of the House of Lords, on appeal, in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894) L.R.; A.C. p. 535. This case affirmed the decision of the Court of Appeal (1893) 1 Ch. p. 630, that the covenant, though unrestricted as to space, was not wider than necessary for the protection of the company, and that it was therefore valid and might be enforced by injunction.

Lord Watson, in the course of his able judgment, said :—"When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the courts. I do not think that, between the courts of common law and equity, there has been much, if any real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law courts. I purposely say some of the dicta, because I find in the opinions of many common law judges of the highest eminence a clear and liberal recognition of the wider views of policy, which have influenced your lordships in the decision of this appeal."

Lord Morris thus succinctly epitomizes the findings of the Court of Appeal in this important case :—"My lords, I entirely concur in the judgment and the reason for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your lordships, the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether

in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered prima facie void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time and space must always be a most important factor in the consideration of reasonableness though not per se a decisive test."

It would seem the crucial test, in each case, has been reduced to this, whether the restraint is greater than necessary for the reasonable protection of the contractee. The reasonableness or unreasonableness of the contract and its sufficiency to protect the rights of the contractor is a question of law, and is decided by the court and not by the jury. See *Mallon* v. *May*, 11 M. & W. p. 652.

It is by tracing back to its source we are enabled to see how progressive has been the science of the law, and by what slow, yet constant progress, it has evolved the admirable system it now presents, and justifies the truth of the maxim—that what is not reason is not law. Such a research also exemplifies the force of the aphorism—Melius est petere fontes quam sectari rivulos.

SILAS ALWARD.

St. John, N.B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

APPROPRIATION OF PAYMENTS—BANKING ACCOUNT—FOLLOWING FUND—RULE IN CLAYTON'S CASE—CLIENT'S SECURITIES DEPOSITED TO SECURE BROKER'S INDEBTEDNESS.

In *Mutton* v. *Peat* (1900) 2 Ch. 79, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Byrne, J., (1899) 2 Ch. 556 (noted ante p. 51), but they do so because they arrived at a different conclusion as to the facts. The facts as found by the Court of Appeal were that the stock brokers had two accounts with their bankers, a current and a loan account. They failed, and at the time of their failure there was a balance of £1362 10s. to their credit on the current account, and a debit of £7500 on the loan account. The brokers had deposited with the bankers, as security for their general indebtedness, bonds and securities of their clients, without their knowledge or consent, but the bankers received them believing them to be the property of the brokers and without notice of the true owners' rights. Byrne, J., held that the deposit was made merely as security for the loan account, but the Court of Appeal found that it was made to secure the general indebtedness. Two days before the failure, one Parker, who was a client of the brokers, had sent them £790 4s. 6d. for investment, which was paid into the brokers' current account and formed part of the £1362 10s. standing to their credit on that account. The securities realized sufficient to pay off the £7500 and left a balance over, out of which Parker claimed to be paid the £790 4s. 6d. Byrne, J., held, that, owing to the way the accounts had been kept by the bankers, there had been no appropriation of the £1362 10s., to the payment of the balance due on the loan account and there was consequently a balance due to the credit of the current account applicable to recouping Parker the sum of £790 4s. 6d., but the Court of Appeal differed from this, and held that the two accounts must be treated as one account, and that it was the duty of the bank to apply the £1362 10s.

in reduction of the loan account, and that the balance of the proceeds of the securities which remained in their hands belonged to the owners of the deposited securities, and that Parker had no equity as against them to be repaid the amount of his cheque out of the £1362 10s.

MARRIAGE SETTLEMENT—AGREEMENT FOR SETTLEMENT BY INFANT—REPUDIATION—RATIFICATION—MARRIAGE WITH FOREIGNER—CHANGE OF DOMICIL BY MARRIAGE.

Viditz v. *O'Hagan* (1900) 2 Ch. 87, is also a decision of the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) reversing the judgment of Cozens-Hardy, J., (1899) 2 Ch. 569 (noted ante p. 52). It will be seen by reference to that note that the judgment of the Court below proceeded on the ground that according to English law the settlement in question, although made by an infant, was voidable only on her repudiating it within a reasonable time after attaining her majority. The Court of Appeal, however, have come to the conclusion that the settlor having acquired an Austrian domicil by her marriage, the settlement was governed by Austrian law, under which a husband and wife have the right to revoke their marriage settlement notwithstanding the birth of issue and acts of ratification, and that therefore the wife never could ratify the settlement so as to deprive herself of the right of revoking it. The Court of Appeal therefore held that the wife was not bound by the marriage articles, or the settlement made in pursuance thereof, having validly revoked the same under Austrian law by a notarial act.

TENANT FOR LIFE—REMAINDERMAN—TRUST FOR CONVERSION—DISCRETION TO POSTPONE CONVERSION—OMMISSION TO CONVERT—INCOME.

Rowlls v. *Bebb* (1900) 2 Ch. 107, was a contest between a tenant for life and a remainderman. Property was given by will in trust for conversion and investment and to hold the investments on trust for a tenant for life and remainderman, with a discretionary power to the trustees to postpone the conversion, and a provision that until conversion the income was to go to the tenant for life. The trustees, as a matter of fact, postpored the conversion of a certain reversionary interest, but not, as the Court of Appeal found, in the exercise of the discretion. This reversionar interest having fallen into possession and, having been realized, in

adjusting the rights of the tenant for life and remainderman in the proceeds, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) held that the fund must be apportioned between the tenant for life and remainderman on the principle laid down *In re Chesterfield* (1883) 24 Ch. D. 643.

UNDUE INFLUENCE—HUSBAND AND WIFE—SOLICITOR AND CLIENT—INDEPENDENT ADVICE.

In *Barron* v. *Willis* (1900) 2 Ch. 121, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Cozens-Hardy, J. (1899), 2 Ch. 578 (noted ante p. 54) That learned Judge held that the relation of husband and wife is not one to which the doctrine of *Huguenin* v *Basely*, 14 Ves. 273, applies, and he upheld a deed made by a married woman to her prejudice, varying a settlement, without any independent advice. and acting only on the advice of the husband's solicitor. The Court of Appeal, without discussing that point, held that there was a confidential relationship between the wife and the husband's solicitor, and that, notwithstanding that he fairly explained the effect of the deed to her, and recommended her to obtain the advice of an independent solicitor, she was, nevertheless, entitled to have it set aside as obtained by undue influence, on the ground that it had not been explained to her that she was under no obligation to execute it, and that it was adverse to her interests, and that she ought not to execute it without independent advice; and the Court of Appeal further held that it was the duty of the solicitor not only to explain the deed to the wife, but to take care that she did not execute it without having independent advice as to her position and rights.

LIGHT—OBSTRUCTION—INJUNCTION—REBUILDING—USER—INTERRUPTION—ABANDONMENT.

Smith v. *Baxter* (1900) 2 Ch. 138, deals with a question as to ancient lights, and is deserving of notice notwithstanding that such rights can no longer be acquired, inasmuch as rights already acquired are not affected by R.S.O. c. 133, s. 36. The plaintiffs in the action claimed to have acquired the rights in question under a lease for 21 years, dated Sept. 29, 1892. On the site of the demised premises formerly stood five small houses which were in existence more than 20 years before the commencement of the

action. They were pulled down in 1891 and new buildings erected, and the plaintiffs claimed the light in question in respect of windows in the new buildings, which corresponded to windows in the old ones. None of the lights had been preserved in entirety in the same place in the new buildings but substantial portions of all the new windows coincided with the windows of the old building. It, however, appeared that as to two windows in the new building the plaintiffs had boarded them up for more than twelve months before action, and as to a third, shelving had been placed before it, but that, notwithstanding the shelving, a substantial quantity of useful light passed into the building. It was contended by the defendants that the erection of the boarding and shelving against these windows constituted an "interruption," but Sterling, J., who tried the action, negatived that contention, and held that an "interruption" of enjoyment of an easement of light to be within the Act must be an adverse obstruction and not a mere discontinuance of user: but he held that the question of whether the alleged right had been enjoyed for a period of twenty years was one of fact to be determined on the circumstances of each case; and he held that, although non user would not be sufficient to establish an abandonment of a right actually acquired, it might nevertheless be sufficient to prevent the acquisition of the right, and, as to the windows boarded over, he held that there had not been an enjoyment for a sufficient period to give the plaintiff a prescriptive right to the light to those windows, although admitting that the use of shutters or other temporary obstructions would not have that effect. He, however, held that the erection of the shelving did not entirely exclude the light and as to that window the plaintiff had made out his case.

COMPANY—DEBENTURE—ASSIGNEE OF DEBENTURE TRANSFER—CROSS CLAIM BY COMPANY AGAINST TRANSFEROR—REGISTRATION OF TRANSFER.

In re Goy, Farmer v. *Goy* (1900) 149, is a decision of Stirling, J. The facts were that after a joint stock company had entered upon a voluntary winding up, and a liquidator had been appointed, and a judgment given in a debenture holders' action against the company, one, Robey, became transferee of certain debentures by way of security for a loan to one Chandler who had been a director of the company, and the conditions of the debentures provided that transfers of debentures would be registered on

production and proof of identity and payment of a fee, and that the principal and interest of the debentures would then be paid to the transferee without regard to any equities between the company and the original or any intermediate holder. After Robey had taken his transfer it was discovered that Chandler had been guilty of misfeasance, and he was ordered to pay the liquidator a sum of money in respect thereof. Robey, who had no notice of any cross claim by the company against Chandler, sent in his transfer for registration, but the liquidator declined to register it and claimed to deduct Chandler's debt to the company from the amount due on the debenture. Stirling, J., held that he had no such right, and that Robey was entitled to be registered as transferee and that such right was not affected by the winding up, or by the judgment, and that consequently Robey must be paid, without deduction, any dividend payable in respect of the debentures so transferred to him.

LANDLORD AND TENANT—LEASE—FORFEITURE—NOTICE OF BREACH—COVENANT TO BUILD—COVENANT TO REPAIR—CONTINUING BREACH—CONVEYANCING AND LAW OF PROPERTY ACT, 1881, (44 & 45 VICT. c. 41) s. 14—(R.S.O. c. 170 s. 13).

In *Jacob* v. *Down* (1900) 2 Ch. 156, the plaintiff sought to recover possession of certain demised premises on the ground of forfeiture for breach of covenant to build. The lease contained a covenant to build within twelve months, and also to keep in repair the buildings so to be erected. After the expiry of the twelve months the plaintiff accepted a quarter's rent, and subsequently gave notice of forfeiture by reason of the breach of covenant to build, but the notice made no reference to the covenant to repair. Stirling, J., tried the action and held that the covenant to build was broken once for all at the expiration of the twelve months, and was not a continuing covenant, and that the subsequent acceptance of rent was a waiver of the breach; that the covenant to repair was a continuing covenant, and implied an obligation to erect the buildings, and there was a continuing breach of it, but inasmuch as the notice under the Conveyancing Act, (see R.S.O. c. 170, s. 14) omitted to refer to any breach of the covenant to repair, the notice was insufficient and the action could not be maintained. How a covenant to repair can be broken when there is nothing in existence to repair, is hard to understand.

TRUSTEE—RETAINER OF TRUST PROPERTY TILL ARREARS DUE BY SETTLOR PAID —ASSIGNEE OF SETTLOR—COVENANT BY SETTLOR.

In re Weston, Davies v. *Tagart* (1900) 2 Ch. 164, is a case in which the rights of trustees under a deed of separation were in question. By the deed certain leaseholds were vested in the trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds for the husband. The husband covenanted with the trustees to make up the wife's income to £300 a year. The deed contained a proviso for its determination in the event of the wife seeking to resume cohabitation, but it contained no covenant on her part to live separate. The husband paid nothing under the covenant and in 1898 was adjudicated bankrupt, and the trustees proved against his estate for the arrears then due, but there were further arrears since that date. On the wife's death the husband's assignee in bankruptcy claimed the leaseholds. The trustees contended that they were entitled to retain them until the arrears due under the husband's covenant were paid, and Stirling, J., upheld the contention and gave judgment in their favour.

WILL—"TESTAMENTARY EXPENSES," WHAT INCLUDED IN.

In re Clemow, Yeo v. *Clemow* (1900) 2 Ch. 182. The short point here determined by Kekewich, J, is the meaning of a direction contained in a will to pay "the testamentary expenses" of some third person. He held that it extended to (1) the costs and expenses of obtaining the letters of administration to, and administering the estate of such third person; (2) the costs of one of the next of kin who had brought an action in the Probate Division contesting an alleged will in which the Court, though pronouncing against the alleged will, made no order as to costs; and, (3) the estate duty payable in respect of the personal property of such third person.

WILL—CONSTRUCTION—SPECIFIC DEVISE—RESIDUARY GIFT—GIFT OF "ALL OTHER MY FREEHOLD MESSUAGES AND TENEMENTS"—LAPSED DEVISE—WILLS ACT (1 VICT. C. 26) S. 25 (R.S.O. C. 128, S. 27).

In *Re Mason, Ogden* v. *Mason* (1900) 2 Ch. 196, a question was raised which depended on the construction of a will, whereby the testator devised his freehold shop at Wimbledon to his son, and then devised to the plaintiffs "all other my freehold messuages

and tenements at Wimbledon and elsewhere." The devise to the son having failed by reason of his being a witness to the will, the plaintiffs claimed that the freehold shop passed to them under the gift to them. Kekewich, J., was at first inclined to hold in favour of the plaintiffs, but on examination of the authorities he came to the conclusion that, according to *Springett* v. *Jennings* (1871) L.R. 6 Ch. 333, the devise to the plaintiffs could not be construed as a residuary devise under the Wills Act (1 Vict. c. 26) s. 25, (R.S.O. c. 128, s. 27), so as to entitle the plaintiffs to the property, which was the subject of the lapsed devise to the son, on the ground that the word "freehold," even though in fact there were no copyholds belonging to the testator, restricted the devise and prevented it being a universal residuary devise, and he therefore held that the heir was entitled.

VENDOR AND PURCHASER—UNWILLING PURCHASER—QUALIFIED COVENANT AGAINST ASSIGNMENT—LESSOR'S CONSENT—UNREASONABLE REFUSAL OF CONSENT TO ASSIGN.

In re Marshall & Salt (1900) 2 Ch. 203, was an application, by purchasers, under the Vendors' and Purchasers' Act, asking for a declaration that a marketable title to the property contracted to be sold had not been made out. The property sold was a leasehold public house; the lease contained a covenant against assigning without the consent of the lessor, but such consent was not to be unreasonably withheld in the case of a respectable and responsible tenant. The lease contained a clause empowering the lessor to re-enter in default of the observance and performance of any of the covenants in the lease. The purchasers were brewers and the lessor refused to consent to an assignment on the ground that he wished the house to remain a free house. The vendor contended that the refusal of the lessor to consent was unreasonable and that, in consequence, the assignment could be validly made without his consent. He refused, however, to indemnify the purchasers. Under these circumstances Byrne, J., held that the purchasers could not be required to accept the title and he ordered the deposit to be returned with interest, and the vendor to pay the purchasers' costs of investigating the title.

MORTGAGEE—POWER OF SALE—INJUNCTION—CO-DEFENDANTS—INDEMNITY.

In *Born* v. *Turner* (1900) 2 Ch. 211, the plaintiff claimed an injunction to restrain interference with his light. The plaintiff

was a purchaser from a mortgagee at a sale under a power of sale contained in the mortgage, of part of the mortgaged property, and the question was whether a mortgagee could, in the exercise of his power, give to the purchaser an implied easement of light over the unsold portion, and Byrne, J., held that he could. The action was against an adjoining owner and his builder, and the builder severed in his defence from his employer and appeared separately at the trial, when an injunction was granted with costs against the adjoining owner, and Byrne, J., held that the builder was entitled to complete indemnity from his co-defendant, and to an order for the payment of his solicitor and client costs by his co-defendant. Although R.S.O. c. 133, s. 36 abolishes the right to acquire in Ontario a right to the use of light by prescription, it probably will be found not to interfere with its acquisition by implied grant as in this case.

PARTNERSHIP—GOODWILL—SALE OF BUSINESS—SOLICITING CUSTOMERS.

In *Gillingham* v. *Beddow* (1900) 2 Ch. 242, the plaintiff and defendant had formerly been in partnership. Under the articles the plaintiff had bought out the defendant; the articles provided that the outgoing partner might set up a similar business in the neighbourhood. The defendant had not only set up a similar business, but had also solicited the customers of the former partnership to deal with him, and it was to restrain this solicitation that the action was brought. Cozens-Hardy, J., granted the injunction asked, holding the case to be governed by *Trego* v. *Hunt* (1896) A.C. 7 (noted ante vol. 32, p. 315)

PATENT—INFRINGMENT—INJUNCTION—DAMAGES—ALTERNATIVE RELIEF.

Saccharin Corporation v. *Quincey* (1900) 2 Ch. 246, was an action to restrain the infringement of three patents for inventions, and, in the alternative, for damages. The article in question was exclusively manufactured abroad, and the only evidence of infringment adduced was that of an expert who testified that the plaintiff's patents related to three separate and distinct modes of producing the article in question, and that it was not possible to tell, from an examination of any parcel, under which particular patent process it was produced, but that it must have been produced under one or other of the three covered by the plaintiff's patents. Cozens-Hardy, J., held that this evidence was insufficient

to found an injunction, inasmuch as it failed to establish which patent had been infringed, but he held that as the plaintiff's patents covered every possible mode of producing the article in question, they are entitled to the alternative relief of damages, as the nature and extent of the wrong done to the plaintiffs did not depend upon the particular patent infringed; and an inquiry was directed, without mentioning either of the patents, to ascertain what damages the plaintiffs had sustained by the defendant's use of the patented article.

COSTS—TRANSLATIONS OF FOREIGN DOCUMENTS.

In re Bowes, Strathmore v. *Vane* (1900) 2 Ch. 251, Cozens-Hardy, J., here held that a solicitor was entitled to be allowed, in an administration proceeding, for the costs of translations of foreign documents, required in the course of the litigation, made by a clerk in his office, by himself, and by a lady under his supervision, although no payment had been made by the solicitor for the same—overruling the taxing officer to whom the matter was referred back to fix the quantum.

CONFLICT OF LAWS—FOREIGN MARRIAGE OF FRENCHMAN AND ENGLISHWOMAN—VALIDITY OF MARRIAGE—CONSULAR MARRIAGE ACT, 1849 (12 & 13 VICT. c. 68)—FOREIGN MARRIAGE ACT, 1892 (55 & 56 VICT. c. 23).

In *Hay* v *Northcote* (1900) 2 Ch. 262, the validity of a foreign marriage between a Frenchman and Englishwoman was in question. The marriage had been performed before the British Consul at Bordeaux and was in accordance with the Consular Marriage Act, 1849, which is re-enacted by the Foreign Marriage Act, 1892. A French tribunal had, in the lifetime of both parties, declared the marriage a nullity, and the parties had therefore lived apart. The husband having died, the representatives of the wife's father, who had made a post-nuptial settlement on his daughter, claimed to have it declared that the settlement was void by reason of the alleged nullity of the marriage; but Farwell, J., was of opinion that notwithstanding the decision of the French Court the marriage was valid and binding on the parties under English law.

PRINCIPAL AN AGENT—INSTRUCTIONS TO SELL REALTY—AUTHORITY TO SIGN CONTRACT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

In *Rosenbaum* v. *Belson* (1900) 2 Ch. 267, Buckley, J., determined that where one gives another written authority to sell real

estate and agrees to pay a commission on the sale, there is an implied authority also given the agent to sign the contract of sale on behalf of the vendor.

COMPANY—DIRECTORS—QUORUM—ARTICLES OF ASSOCIATION.

In re Bank of Syria (1900) 2 Ch. 272, was a winding-up proceeding in which the validity of a security given by the directors of the company was in question. By the articles of association it was provided, inter alia, that the number of the members of the council of administration (which was invested with power to conduct the affairs of the company) should not be less than three, also, that the continuing council might act notwithstanding any vacancy, and also, that the council might determine the quorum necessary for the transaction of business. The number of the council became reduced to two. It was alleged, but not proved, that the quorum had been fixed at three. The transaction whereby the security in question was given was entered into by two of the directors only. Wright, J., held that even if the quorum had been fixed at three, yet under the article empowering the continuing council to act notwithstanding any vacancy, the transaction was binding on the company, the transferee having no notice of any irregularity.

Mr. Edward Dicey in an interesting article contributed to the *Fortnightly Review* on the late Lord Russell, refers to an incident which may be repeated for the comfort of any of the younger members of the profession, who may be placed in similar circumstances. He says, the Chief once told him that the keenest disappointment of his life was his failure to obtain a post in the gift of the Liverpool municipality, to which he felt he had a strong claim on his own merits. He added, however, what he thought a calamity at the time was really the greatest stroke of luck which had ever happened to him. "If," he said, "I had been elected, I should have lived and died an obscure stipendiary official in a provincial city; as it is——" and here he left the sentence unfinished. Others besides the eminent Chief Justice have been thankful that they have been disappointed in obtaining some position which would not have given them an opportunity to shew the stuff that was in them.

Correspondence.

MUNICIPAL LAW AMENDMENT.

To the Editor of the CANADA LAW JOURNAL.

SIR,—Is it not time that some united action were taken by the profession to have an amendment made to sub.-s. 3 of s. 606 of the Municipal Act regarding the giving of notice of accident? In my humble opinion it is a most iniquitous provision and very often bears very hardly in deserving cases.

When a person is badly injured through the want of repair of a public street or road it is generally several weeks and sometimes months before he is out of the doctor's care. He is ignorant of the seven or thirty days' notice, as the case may be, and does not think of consulting a lawyer until he is able to be about again. The consequence is that though the accident happened through no fault of his own but owing entirely to the gross negligence of the corporation he has no redress. Would it not be infinitely more fair to have a provision such as that in the Workman's Compensation for Injuries Act, viz.: that the notice of injury must be given within twelve weeks, and the action commenced within six months from the occurrence of the accident or in case of death within twelve months from the time of death, and that in case of death the want of such notice shall be no bar if the judge shall be of the opinion that there was reasonable excuse for such want of notice. In my limited experience a number of cases have come to my notice where no compensation for severe injuries could be obtained simply because no notice as required by the Act had been given.

I believe that the solicitor for a municipal corporation not more than 100 miles from Hamilton was instrumental in getting the Act limiting the time for giving the notice of accident as it now stands through the Legislature, and it might be interesting to hear his views from the corporation standpoint.

Could not the County Law Association co-operate in having an amendment of this unjust provision made? I would like to hear from other readers of your journal.

Yours truly,

JOHN G. FARMER.

Hamilton, October 25.

[We concur. See remarks on p. 609 ante.—ED. C.L.J.]

LAW REFORM.

To the Editor of the CANADA LAW JOURNAL.

SIR,—I find in your issue of the 1st inst., an article commenting on some remarks made by me in reference to our system of administering law. I have taken no notice of abusive letters from one or two lawyers, but when your journal, the organ of the profession, has taken up the matter, I ask permission in your columns to correct some errors into which you have fallen, and to place my views clearly, so that there may be no misunderstanding. I will deal first with the errors.

You say that I accused the solicitor of misappropriating money; that I made wholesale charges of wrong-doing against the profession as a class, and that I charged it with being a degraded thing. In reply I say that I did not make charges against the profession, but against the system of the administration of civil justice. This system has been in use, with constant attempts to amend it, for hundreds of years, so that the present members of the profession only follow the practice and traditions of centuries. I hold that the system is wrong, and that it should be reformed. Slavery was a wrong handed down for many generations, yet a man might have denounced the institution, without being charged with reflecting upon the character of the slave owners, who were born under it. Slavery has been reformed out of existence in all civilized countries, and when the public fully appreciate the wrong of the present method of administering law, a change may be made to remedy it, and this could be done without injustice to the present members of the profession. That I attacked the profession instead of the system is your first error.

The next is your statement that the costs in the Police Court are enormously greater in proportion than in any civil court. This statement cannot be true. There are practically no costs in the Police Court except when put on as a punishment. When a fine of one dollar and costs is inflicted it is done to make the punishment, the payment of the four dollars. I could just as well make the fine four dollars without costs, for when the circumstances require a less severe punishment the fine is usually two dollars without costs. In wages cases there are practically no costs unless I impose them simply as a punishment. The majority are settled without any costs, and poor employees are never asked to deposit

one cent to have their cases tried. I am positive that there is no court in Canada where the citizens can have their difficulties settled at less expense than in the Toronto Police Court.

You intimate that I am highly paid, and do less work than any other judge, and that my assistant does half the work. These are also errors. I did not ask for the position of Police Magistrate. An offer was cabled to me to England. I accepted it at the request of Sir Oliver Mowat. My salary was to be $4,000 a year. That was twenty-three years ago. The work has increased enormously since then, but my salary is still $4,000. My assistant sits three afternoons a week to try the by-law cases. I try more cases than any judge in Canada. I have to hold court to try indictable and other serious offences every day except Sundays and public holidays. The judges, who do not sit every day, get two months' holidays every summer, and ten or fifteen days at Christmas. I never get a day without having to pay an assistant to do my work, whether I am well or ill. I know of no official in Canada who, in this respect is treated as I am, who has no holidays, and who can never be absent one day, even through illness, without paying out of his own pocket for some one to do his work. About 1,400 indictable cases come before me each year. About ninety-five per cent. elect to be tried by me; each case that goes to the higher court costs the country from $50 to $100.

Having now corrected these errors, I will state my views in reference to the administration of civil justice. The State has taken upon itself the duty of settling disputes between citizens. This is an absolute necessity unless we relapse into barbarism, where no man would have any rights unless he was able to defend them by force. The State having taken upon itself this duty, and having the power of organized government to enforce anything it undertakes, it follows that the individual citizen is at the mercy of the system which the State devises, and is helpless in its hands. I hold therefore that when a man is a peaceable citizen, obeying the laws, paying his taxes, and conforming to the rules of organized society, that he is entitled if he gets into any difficulty or dispute with a neighbour, which they cannot settle between themselves, to be able to appeal to the State to see that justice is done, and I feel that this duty should be performed at the least possible expense to the individual.

Now what is the usual course under the present system? Two

neighbours in a business transaction have a dispute or a misunderstanding. It often happens that there is a good deal to be said on both sides. The differences, however, are irreconcilable, and the citizens have to appeal to the State to decide. One citizen goes to his lawyer, lays the whole case before him naturally with his own colouring, and gets an opinion on the law. The counsel knows well that no one can positively tell what is the law, but probably gives an opinion that his client has a good case, and one that is worth fighting in the courts. A letter is written to the other side or a writ is served, and the defendant goes to his lawyer for advice. The lawyer hears the defendant's statement, looks up precedents, and advises him to defend the case, although he also knows that there is no certainty as to the law. The case is now fairly started and the costs begin to roll up. Motions of all kinds can be made—to set aside appearance, for security for costs, for particulars of statement of claim, or defence, to strike out statement of claim or defence, for better and further affidavit on production, to compel attendance of witnesses, and so on; then the examination for discovery, and other examinations, conducted at great length, and with tiresome reiteration and repetition all taken down in shorthand, all extended in full, all rolling up heavy expense. Then after all these motions and filings of affidavits, and examinations upon them, and attendance, and drafts and engrossings, etc., the case at last comes before a jury. Technicalities of law are brought up, and discussed and overruled and reserved. Then witnesses are examined again with the same reiteration and repetition all again taken down in shorthand. Objections are raised to questions. These are also argued, and the objection sustained or overruled, with points again reserved. These things all tending to confuse the minds of the jury as to the real merits of the case, which are often to be found on both sides. Then follow long arguments of counsel, then the judge's charge, then the objections to the judge's charge, the reserving of more points, with the result that the jury will probably give the verdict one way, while the judge has reserved law points to settle whether the decision should not be the other.

The case may then come up before the full court, and the points of law concerning which (if the law is the great science our profession claim it to be) there should be no question, have to be decided. Three judges, supposed to be experts, impartial, upright men, who have devoted their lives to the study of the law, sit for hours and

listen to the same arguments on the same evidence, with the same precedents quoted, under the same magnetic influence and ability of the counsel on both sides, without the slightest reason apparent why they should differ, if there is anything in our boasted science of law, and at the end of it all two of the judges will decide one way and one the other.

Then an appeal is taken to the Court of Appeal, and the same thing happens, only the judges of this court are supposed to be still more highly trained experts, and here also two may decide one way and three the other on exactly the same facts and arguments. Then follows an appeal to the Supreme Court, where the same old story is told with the result possibly that three will decide one way, and two the other. Lastly comes the Judicial Committee of the Privy Council, and then a final decision is made one way or the other, but apt to be the nearest right, because they have no appeal above them, and do not trouble themselves nearly so much about precedents, as about justice.

Then what happens? One man wins and the other loses, neither being altogether in the right, neither altogether in the wrong, but one gets everything, the other loses everything, his own costs and his opponent's taxable costs, while the successful man is heavily punished in his solicitor and client costs, and in the mental worry, loss of time etc. The total costs in a case like this would probably amount to thousands of dollars, if not tens of thousands, and might have been as satisfactorily settled without expense, and with just as much certainty if the parties had tossed a copper to decide it at the start. It must be remembered that a man once in the law cannot avoid this. If a poor man is fighting a rich man or a rich corporation, he must absolutely give up his right to have the case decided or run the risk of ruin.

It was against this system that I based my remarks, and expressed my hope that some day the people through their Parliament would be able to reform it. I think that the State should legislate so that the judges should decide disputes quickly and simply, without formalities, and without regard to anything except the absolute justice in each case, that there should be only one appeal which should be final, that musty precedents, perhaps the mistakes of men gone by, should not be worshipped or followed to create injustice. If the State did this, did away with all fees of every kind, and hired the lawyers at fixed salaries to assist the judges in bringing forward

evidence, there is no occasion why disputes could not be settled in one tenth of the time and at one twentieth the expense now incurred.

Yours etc.,

Toronto. GEORGE T. DENISON.

[As our readers are lawyers as well as ourselves, we do not propose further to discuss the matter except in the few remarks made on a previous page, ante p. 610.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

Sullivan, Local Judge.] [May 18.

BRINE v. STEAMSHIP "TIBER."

Collision—Steamer and sailing vessel—Arts. 20, 22, 23 and 25.

The J.M., a sailing vessel, was proceeding in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The T., a steamship, was on her way into the harbour. When the T. was first seen by the J. M. the latter was on a course of W. S. W., standing across the harbour, towards, and to the northward and eastward of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the J. M. was under way on the starboard tack and going about three knots an hour, the T. was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the J. M. The bow of the T. struck the J. M. on the starboard side aft of the forerigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck.

Held, that the T. had infringed the provisions of Arts. 20, 22, 23 and 25 of the rules for preventing collisions at sea and was responsible for the collision.

A. Peters, Q.C., and *McLean*, Q.C., for plaintiff. *Hazard*, Q.C., and *Morson*, Q.C., for defendant.

Burbidge, J.] BRIGHAM v. THE QUEEN. [June 7.

Grant of ferry — Breach of — Subsequent lease to railway companies— Damages—Liability of crown.

The Crown having granted to the suppliant certain ferry rights over the Ottawa River between the cities of Ottawa and Hull, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the said river between the said cities and also gave permission or license to the Ottawa Electric Railway Company to extend its track over certain property belonging to the Dominion Government on the Hull side of the river to enable the latter to make closer connection with the Hull Electric Company. The suppliant claimed that such leases and license enabled the said companies to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable.

Held, that the granting of said leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. *Windsor and Annapolis Railway Co.* v. *The Queen*, 10 S.C.R. 335; 11 App. Cas. 607 and *Hopkins* v. *Great Northern Railway Co.*, 2 Q.B.D. 224, referred to.

Semble, that if the said leases and license prejudiced the rights acquired by the suppliant under his ferry grant he would be entitled to a writ of scire facias to repeal them.

H. Aylen, Q.C., for suppliant. *Solicitor-General* and *E. L. Newcombe*, Q.C., for respondent.

Burbidge, J.] THE QUEEN v. HARWOOD. [June 11.

Expropriation of land for canal purposes—Damage to remaining lands—Access—Undertaking to give right of way—52 Vict. c. 38, s. 3—Effect of in estimating damages — Future damages — Agreement as to—Increased value by reason of public work.

Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purpose of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. c. 38, s. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed damages for past deprivation only.

2. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present

action, the Court took cognizance of such agreement in pronouncing judgment.

3. In respect to the lands taken the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. *Stebbing* v. *The Metropolitan Board of Works*, L.R. 6 Q.B. 37, and *Paint* v. *The Queen*, 2 Ex. C.R. 149; 18 S.C.R. 718, followed.

A. Globensky, for plaintiff. *C. A. Harwood*, for defendants.

Burbidge, J.] LAROSE v. THE QUEEN. [June 11.

Exchequer Court Act, s. 16 (c)—Rifle range—"Public work"—Injury to person.

The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Cote St. Luc in the District of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained.

Held, that the rifle range was not a "public work" within the meaning of clause (c) of s. 16 of The Exchequer Court Act (50-51 Vict. c. 16), and that the Crown was not liable. *City of Quebec* v. *The Queen*, 24 S.C.R. 448 referred to.

Charbonneau and *Pettier*, for suppliant. *E. L. Newcombe*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] BOGARDUS *v.* WELLINGTON. [Sept. 22.

Statute of Limitations—Sale of goods—Warranty—Fraud.

The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, giving a warranty that they were "No. 1 peaches, warranted true to name":

Held, that this was a warranty that the trees were of the varieties contracted for, not that the fruit would be of those varieties; that the trees not being of the varieties contracted for the warranty was broken at the time of sale; and that in the absence of fraud an action for damages for its breach brought more than six years after the sale was barred, although until the trees came into bearing shortly before the action it was impossible to tell that they were not of the varieties contracted for.

Judgment of ROBERTSON, J., reversed.

Ritchie, Q.C., and *E. C. Ryckman*, for appellant. *Lynch-Staunton*, Q.C., and *J. H. Ingersoll*, for respondent.

From Armour, C.J.] STROUD *v.* WILEY. [Sept. 29.

Partnership—Purchase of partner's interest by co-partners—Errors in statements—Fraud.

In order to avoid a dissolution of partnership and a winding up of the business the interest of a partner in the partnerships' assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shown in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction the plaintiffs brought this action alleging that part of the stock-in-trade had been over-valued in the statement and claiming repayment of part of the purchase money:—

Held, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items, but that apart from this as the statements had been prepared in good faith and in accordance with the uniform usage of the business the defendant was not liable.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *L. F. Stephens*, for appellant. *Robinson*, Q.C., for respondents.

From Divisional Court.] [Sept. 29.

FERGUSON *v.* GALT PUBLIC SCHOOL BOARD.

Master and servant—Negligence—Common employment—Workmen's compensation for Injuries Act—Superintendence—Defects in ways.

The plaintiff was a laborer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendance of a foreman who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to the adjacent building and thence to the ground, and while the plaintiff was walking on the gangway with a load of mortar an insecurely fastened plank gave way and he was injured:—

Held, that the defendants were not liable at common law, the mason and the plaintiff being fellow-workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened.

Held, also, that there was no liability under the Workmen's Compensation Act for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the

Act, or constructed by a person having, in regard to it, s perintendence entrusted to him.

Judgment of a Divisional Court reversed.

Lount, Q.C., and *W. D. Card*, for appellants.

A. Munro Grier, for respondent.

From Boyd, C.] IN RE ALLEN AND NASMITH. [Oct. 10.

Landlord and Tenant—Lease—Covenant—Renewal—Rent.

A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant at the expiration of the term if requested "another lease" to the lessee "for the further term of twenty-one years" at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal":—

Held, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term. *Van Brocklin* v. *Brantford* (1861), 20 U.C.R. 347; affirmed in appeal, 26th June, 1862 followed.

Judgment of BOYD, C., 31 O.R. 335, affirmed.

Aylesworth, Q.C., for appellant. *A. J. Russell-Snow*, for respondent.

HIGH COURT OF JUSTICE.

Boyd. C., Ferguson, J., Meredith, J.] [Oct. 8.

HILL *v.* INGERSOLL AND PORT BURWELL GRAVEL ROAD CO.

Contract—Road company—Implied covenant—Corporate seal.

An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows,—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same in the centre of the road bed . . . and the company agree to pay me at the rate of $2.40 per cord . . . And it is further agreed that my tolls . . shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of $1 . . I do . . discharge all claims I hold against the company . . . . And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good. . . ."

Held, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to

supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

Held, also, per FERGUSON, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal.

Judgment of ARMOUR, C.J., affirmed.

F. A. Anglin, for plaintiff. *Riddell*, Q.C., and *V. Sinclair*, for defendants.

Boyd, C., Ferguson, J., Meredith, J.] [Oct. 8.

FOSTER *v.* IVEY.

Mortgage—Covenant of mortgagor—Enforcement—Dealings between mortgagee and assignee of equity.

The relations which exist among mortgagee, mortgagor and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety and principal debtor.

Aldous v. *Hicks*, 21 O. R. 95, approved.

Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen.

So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights.

Mathers v. *Helliwell*, 10 Gr. 173, explained.

Dictum of MACLENNAN, J. A., in *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167, dissented from.

Barber v. *McCuaig*, 24 A. R. 492, 29 S.C.R. 126, followed.

D. W. Saunders and *Cattanach*, for plaintiff. *Hellmuth*, for defendant.

Boyd, C.] [Oct 8.

IN RE RYAN.

Administration order—Discretion to refuse—Rules 946, 954—Fund—Savings deposit—Survivorship.

There is now a discretion under Rules 946 and 954, in dealing with applications for administration orders, and the judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.

Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute.

Where a husband deposited money with a savings company and caused an account to be opened in the names of himself and his w . jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately :—

Held, that she was entitled as survivor to the whole fund.

W. T. J. Lee, for appli ants. *Home Smith*, for widow.

Meredith, C. J.] GIBSON *v.* NELSON. [Oct. 10.

Notice of trial—Close of pleadings—Rule 262

A reply delivered by the plaintiff joining issue upon the statement of defence and further alleging that the facts set forth in the defence were no answer to the claim :—

Held, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of Rule 262 ; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular.

D. L. McCarthy, for plaintiff. *J. H. Moss*, for defendant.

Boyd, C.] LANGLEY *v.* VANALLEN. [Oct. 24.

Assignments and preferences—Secret agreement—Onus—Voluntary payments—Attack on—Assignee for creditor—Particular creditors—Privity.

In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement :

Held, that the onus of proof was on the plaintiffs.

Held, also, that the payments not being procured by unjust oppression or extortion on the part of the plaintiff, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of cred recover, even when using the name of the assignee as plaintiff by virtu an order under R.S.O. c. 147 ; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, prior to the alleged secret agreement.

George Kerr, for plaintiffs. *Staunton*, Q.C., for defendants.

Boyd, C.] JONES *v.* LINDE BRITISH REFRIGERATION CO. [Oct. 24.

Master and servant—Secret profits in service—Costs—Jus tertii.

Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal.

The manager of a cold storage company, at the request of the company, undertook to advise meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company.

Held, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants.

The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs.

Riddell, Q.C., for plaintiff. *H. S. Osler*, for defendants.

FIFTH DIVISION COURT, STORMONT, DUNDAS AND GLENGARRY.

TUTTLE *v.* MCDONALD.

Justice of the peace—Fees of—R.S.O. 1897, c. 95, s. 2.

Held, that there is no provision for fees to a magistrate or a constable under the tariffs in R.S.O. 1897, c. 95 or s. 81 of Crim. Code for any proceedings which do not come within the summary jurisdiction of justices.

[Cornwall, Aug. 18. O'REILLY, Co.J.

The defendant, a justice of the peace for the above united counties, demanded and received from the plaintiff $9.50 alleged to be due as his own costs and the costs of his constable acting in the matter of a search warrant issued under s. 569 of the Criminal Code, to recover stolen goods, and of a search warrant issued under the same sec., sub-s. *b*, to recover a case of dynamite, in relation to which an indictable offence was sworn to have been committed, contrary to the provisions of s. 101 of the Criminal Code, and also of an unsuccessful prosecution under said s. 101.

The plaintiff now sought to recover the said sum of $9.50 from the defendant, who retained same on the plea that he was entitled to $3.00 of said amount to his own use for services as justice of the peace, in above matters, and to $6.50 alleged to have been paid by him to said constable as the latter's fees in the same matter, and the plaintiff asked to recover said sum of $9.50 as money had and received for his use and benefit by the defendant. Notice of action was delivered to the defendant, under R.S.O.

1897, c. 88, s. 14, and he consented, in writing, to have the action tried at the ensuing sittings of said court to be held at Morrisburg, on 21st June, last. At the hearing the particulars required to be proved by R.S.O. 1897, c. 88, s. 19, were all admitted. The above statement of facts was also admitted.

R. F. Lyle, for plaintiff. *C. F. Bradfield*, for defendant.

O'REILLY, Co. J., held that the defendant had no right to the $9.50 or to any part of it. The defendant could only justify charging fees for himself or the constable in either of these proceedings, under the tariff given in R.S.O. 1897, c. 95 or under the tariff in s. 871 of the Criminal Code, 1892, as amended. These tariffs apply strictly to offences coming within the summary jurisdiction of justices. There is in neither tariff any provision for fees in connection with the issuing or executing of search warrants. Petit larceny was a felony and simple larceny was a felony (after the distinction between grand and petit larceny was abolished) and it so remained until the distinction between felony and misdemeanor was abolished. The offence under s. 101 of the Code was a felony prior to the passing of the Criminal Code (see R.S. 105, s. 5). In England the expenses in connection with prosecutions for felony were made payable out of county rates by 25 Geo. II., c. 36. In this province the costs of the prosecution in cases of felony, when not otherwise provided by law, are to be paid out of the county funds: R.S.O. 1897, c. 102, s. 2, and the fees for serving and executing search warrants are given in the tariff for constables in the schedule to R.S.O. c. 101 as amended. [The learned judge concluded his judgment as follows:] It can hardly be argued that a man who swears to an information to lead a search warrant for the recovery of stolen property, is securing services in the nature of a civil remedy for his own benefit. He is taking a necessary step, if he is acting in a bona fide manner (as we must presume he is) to convict a man whom he believes to have committed a crime, which until recently was a felony. I am not aware of any decision to the effect that the prosecution of a felon or any necessary step or proceeding in the prosecution of a felon, has been held to be a service in the nature of a civil remedy for the benefit of a private individual, and I cannot here so find. By the ancient common law of England, it was an offence for justices of the peace to accept anything "for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute." I cannot find that the $3.00 taken by the defendant for his own use, were fees accustomed, i.e. sanctioned by ancient usage, or costs limited by statute, and I am afraid that if the ancient common law in this regard were still in force in Canada, that the taking of the $3.00 in this case, might bring defendant within its provisions. The amount taken for the constable is said to have been paid over to him, and I have no doubt has been, but I consider that the defendant was acting unlawfully in taking the $9.50, and I consider that it would be highly improper for me, by joining the constable as a defendant, to recognize in any way the alleged bargain between the

plaintiff and defendant, by which the plaintiff is said to have agreed to pay costs not lawfully chargeable before the defendant would consent to put the machinery of the criminal law in motion. It is contrary to the policy of the law that justices of peace should be allowed to make such bargains, and it would be a very shocking thing to allow them to prevail in a court of law. The defendant must as best he can, deal with the constable, but the plaintiff cannot be here considered as having any privity with the constable, and I give judgment against the defendant for $9.50 and costs to be paid in fifteen days.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] QUEEN *v.* QUINN. [Feb. 14.

Theft—Conviction of minor under age of 16—Form of convictions—Not necessary to state age or religion—Cr. Code s. 820—Words "shall be good and effective to all intents and purposes."

Defendant was convicted before the Stipendiary Magistrate of the City of Halifax of the offence of stealing the sum of $30 and was sentenced to be imprisoned for the term of three years in the Halifax Industrial School, a reformatory for boys of the Protestant faith.

His discharge was sought upon habeas corpus on the grounds that the conviction did not shew that defendant was a Protestant or that he was under the age of 16 years.

Held, dismissing the application, that neither the age nor the religion of defendant had anything to do with the offence of which he was convicted, and that it was not necessary that they should be stated in the conviction.

The Code, s. 820, provides that "the justices before whom any party is summarily convicted of any offence hereinbefore mentioned may cause the conviction to be drawn up in the form U.U. in schedule one hereto, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes."

Held, that the intention no doubt was to dispense with recitals and averments in the particulars mentioned, and that the words "shall be good and effectual to all intents and purposes" might be regarded as the equivalent of a legislative declaration that it should not be necessary to refer in the conviction to the age of the party, or to the justice's opinion on that subject.

Held, that the power of determining the age or apparent age of the

party before him was given exclusively to the justices, and following *Rex* v. *Simpson*, 1 Str. 46, that it must be assumed that he exercised it.

Full Court.] WILSON *v.* WINDSOR FOUNDRY CO. [March 14.

Contract in writing—Receipt of parol evidence to vary or supplement—Burden of proof—Concluded agreement.

Plaintiffs who carried on business in Montreal as co-partners under the name of A. R. W. & Co. brought an action against defendants to recover $350; price of an engine which defendants had ordered from them in writing, through plaintiff's agent W.

The order addressed to plaintiffs, and signed by defendants was in the following form:

"Please furnish one fifty horse power engine for which we agree to pay you $350, delivered in Halifax. Shipment to be made as soon as possible." The main defence set up to the action was that at the time defendants ordered the engine they supposed and were led to believe that they were dealing with a company carrying on business in Toronto under the name of A. R. W. & Co., Ltd., with which they had had previous dealings, and which at the time had in its possession a crusher belonging to defendants of the value of $780, which it was agreed was to be accepted in payment for machinery to be ordered by defendants. The learned trial judge found as a fact that the business carried on in Montreal was distinct from that carried on in Toronto, but that at the time the defendants gave the order in question they did so under the belief that they were contracting with the Toronto concern, and that there was everything in the surrounding circumstances to lead to the belief that the businesses carried on in Montreal and Toronto were one and the same, particularly the letter heads of the Toronto company which described the Montreal business as one of their branches. For these reasons the learned trial judge held that plaintiffs were bound by the bargain made by their agent W., and on the ground that it was not inconsistent with the written agreement to prove that payment was to be made in some other way than by cash, received evidence of the agreement relied upon by defendants as to the receipt of the crusher in the possession of the Toronto company in payment for the machine ordered.

Per MCDONALD, C.J., RITCHIE, J. concurring.

Held, that the evidence fully supported the finding of the trial judge that the acceptance of the crusher in payment for the engine ordered was a term of the contract between the parties.

Held, also, that the evidence of the agreement was properly received on the grounds stated by the learned trial judge in his judgment.

Per WEATHERBE, J., MEAGHER, J. concurring.

Held, that the order delivered by defendants to plaintiffs' agent being on its face a complete agreement, parol evidence was inadmissable to vary

its terms either as to the mode of payment or as to the parties with whom it was made.

Per WEATHERBE, J.

Held, that the proof of the written instrument signed by defendants threw the burden upon them of establishing their defence.

Per MEAGHER, J.

Held, that in the absence of evidence of the acceptance by defendants of the offer said to have been made by the Toronto company to accept the crusher in payment for machinery to be ordered, or the amount to be allowed therefor, there was no agreement concluded between the Toronto company and defendants which could be assumed by the plaintiffs.

W. E. Roscoe, Q.C., and *W. M. Christie* in support of appeal. *B. Russell*, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Killam, C.J.] ROGERS *v.* CLARK. [Oct. 9.

Pleading—Action for malicious prosecution——Striking out paragraphs of defence as embarrassing—Queen's Bench Act, 1895, rules 280, 283, 293, 298, 301 and 318.

Application to strike out paragraphs of the defence in an action for malicious prosecution. The paragraphs objected to set up certain alleged facts and information given to the defendant tending to justify his belief in the plaintiff's guilt, and that the defendant had laid all the information received by him before the magistrate who issued the warrant, and before counsel who advised the commencement of the prosecution complained of, also that the plaintiff had been in possession of animals which he was accused of stealing, without shewing that it was recent possession. It was further alleged that certain facts were shewn by evidence taken upon the first charge without information from other sources had been received, without specifying these sources.

The objections relied on were that these facts and information and the advice of counsel and magistrate were only evidence of reasonable and probable cause which should not, under rule 298 of The Queen's Bench Act, 1895, be set out in detail; and that sufficient was not stated to shew reasonable and probable cause absolutely, as the information and inquiry may not have been sufficient to warrant belief of guilt, and the sources of the information were not stated.

Held, 1. That a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient in the statement of

defence without alleging the facts constituting reasonable and probable cause.

2. That the paragraphs objected to were calculated to make it doubtful whether the plaintiff could safely go to trial leaving the allegations contained in them upon the record, as the defendant had left it open for himself to prove other and distinct facts for the purposes of this defence, and that the plaintiff might be misled into asuming the allegations therein to be all that he had to meet, and for that reason they ought, under rule 318, to be struck out.

Application granted, costs to be costs in the cause to the plaintiff.

T. H. Metcalf, for plaintiff. *C. H. Campbell*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] KING *v.* BOULTBEE. [Sept. 10.

Practice—Garnishee proceedings—Order that money remain in court until new action commenced—Whether nullity or not.

Appeal from order of FORIN, Co. J. The action was commenced in the County Court of Rossland on 28th Oct., 1899, to recover $171, and a garnishing summons was also issued and served on the garnishee who, on 30th Oct., paid into court $173.70. On 17th Nov. an order was made setting aside all the proceedings but ordering that the moneys in court remain to abide the result of an action to be commenced forthwith in respect to the same cause of action. The order also provided that the question as to whether the moneys were attachable should be determined as of the date of the issue of the garnishing summons so set aside. The new action was commenced on 18th November.

On 21st Nov., the defendant assigned the moneys then in court, and on 14th Feb., 1900, a summons was taken out in the first action on behalf of the defendant and the assignee for the payment out of court of the moneys to the assignee. This summons was dismissed, and the defendant and the assignee appealed. The order of 17th November was not appealed.

Held, per MCCOLL, C.J., and WALKEM, J., dismissing the appeal, that the order of 17th Nov. was not a nullity, and as it was not appealed against it was valid. IRVING and MARTIN, JJ., dissenting. Appeal dismissed.

Duff, for appellants. *MacNeill*, Q.C., for respondent.

COUNTY COURT.

Martin, J.] DILLON *v.* SINCLAIR. [Oct. 13.

Small debts court—Jurisdiction of—Debt—Mechanics' lien.

Appeal to the County Court of Atlin from a decision of a magistrate of the small debts court in favour of the plaintiff in an action to enforce a mechanic's lien under ss. 26 and 27 of the Mechanics' Lien Act.

Held, that an action to enforce a mechanic's lien is not one of debt within the meaning of s. 2 of the Small Debts Act. Appeal allowed.

Sawers, for appellant. *Jenns* and *W. P. Grant*, for respondent.

Book Reviews.

Attachment of Debts; Receivers by way of Equitable Execution and Charging Orders on Stocks and Shares, by MICHAEL CABABE, of the Inner Temple, barrister-at-law. Third edition. London: Sweet & Maxwell, Ltd., 3 Chancery Lane, Law Publishers, 1900.

Mr. Cababe has evidently a practical and analytical turn of mind. He does his work well and gives to the profession a very useful little book. Practitioners in this country will find it an excellent summary of the law in England in connection with the matters above referred to. The appendix contains a number of forms of summonses, orders, affidavits, etc., some of which may well be adopted for use here.

The Living Age.—Boston. U.S.: This old friend comes with pleasant and continuous regularity. The number for October 27, is of especial interest. Japan and the new far East from the *National Review*, is very timely. Italian Anarchism; The old Golf and the new; Fishes and their meals, and the Employment of women will appeal to various classes of readers, whilst those who desire lighter literature in the way of fiction are also well supplied. We strongly recommend this publication to our readers as the best value for their money ($6 per annum) that we know of.

Flotsam and Jetsam.

U. S. DECISIONS.

COMMON CARRIERS.—The right of passengers to carry with them small packages of merchandise is held, in *Runyan* v. *Central R. Co.* (N.J.), 48 L.R.A. 744, to be one that is not given by the common-law contract of carriage and for which usage must not only be clear and explicit, but also something more than mere accommodation acquiesced in for a time by the carrier.

Canada Law Journal.

VOL. XXXVIII. NOVEMBER, 1, 1902. NO. 20.

Lord Halsbury entered on his 78th year on the 3rd ult. It is seventeen years since he became Lord Chancellor. It is said that he is as alert and erect as ever, with apparently no idea of taking a rest, which after half a century of hard work might seem to be a reasonable proposition. It was thought that he would have retired with his old friend and confidant Lord Salisbury, but he seems good for several years work yet.

A burglar was recently identified by means of the impression of his thumb on wet paint, of which a photograph was taken on June 27, immediately after the burglary was discovered, though he was not actually caught until August 14 following, when he was found attempting to commit another burglary. Enterprising detectives will, no doubt, take note of this, and remember to look out for finger impressions.

A writer in the *Central Law Journal* in a recent number contributes an interesting article as to the extent, and in what cases, damages may be recovered for mental suffering. There have been several cases reported lately on this subject, and the trend of the decisions incline to the view that the law affords no redress for mental suffering as a basis for an independent action. Those interested will find this article at page 202 of the current volume of that excellent periodical. The *Bombay Law Reporter* also recently discussed the same subject.

Dispensaries for the purpose of giving medical advice gratis are common, but we believe it is an entirely new departure which the city of Edinburgh has taken in establishing a dispensary for the purpose of enabling poor people to obtain good legal advice free of charge. This dispensary is open for two hours one night a week, and is carried on by men of standing in the legal profession,

so that the advice is not only free but reliable. It has, we learn, been worked for two years at a cost of about £30. During the last year the dispensary had 310 clients, representing 480 consultations, and the questions involved were all of sufficient importance to merit attention. More than a third of the applicants sought advice in matters concerning family relations—difficulties between husbands and wives, and parents and children ; and one gentleman wrote as many as fifty letters during his two months' attendance. In some of our larger towns and cities in Ontario similar charitable work might possibly be done. The work should, however, be committed to reliable practitioners duly accredited and approved of by, say, the County Judge, and not left to pettifoggers and mere busybodies. It seems that litigation is not undertaken by the Edinburgh dispensary, controversial matters being handed over to an accredited agent of the poor.

EXPERT EVIDENCE.

At the last sessions of the Dominion and Ontario Legislatures statutes were passed on the subject of expert evidence.

We assume that the Dominion Act, 2 Edw. 7, c. 9, can only be invoked in criminal proceedings or civil proceedings within the jurisdiction of the Dominion Parliament and would not be applicable in ordinary actions respecting property and civil rights within the jurisdiction of the Provincial Legislatures. The Ontario statute, 2 Edw. 7, c. 15, is somewhat similar to the Dominion Act, but limits the number to three experts on each side who may be called without leave, and it applies to actions, arbitrations and other proceedings.

The wisdom of the English law of evidence in excluding as a rule anything but testimony as to facts appears to be vindicated when we contemplate the extraordinary and sometimes ridiculous results due to the departure from the ordinary rule. As soon as witnesses are permitted to leave the beaten path of fact and to indulge in opinions the truth of the maxim, quot homines tot sententiæ, is manifested. Each expert witness generally seems to conceive himself called upon to support a theory favourable to the party who calls him, and the value of his opinion is guaged accordingly.

These legislative efforts to remedy what has practically become a farcical scandal may possibly be successful, but we are inclined

to think the German law deals more adequately with the difficulty. In Germany neither party can as of right give expert evidence. The Court first of all determines whether experts should be called at all; and, if it decides that they should be called, itself appoints them and regulates their number. By this means there seems more probability of obtaining a really valuable and impartial opinion. That is what is wanted and not merely a plausible theory to support the view of a particular litigant.

CLIENTS AND COUNSEL.

On the 24th of September last the Court of Appeal prematurely brought its sittings to a close not because all the cases set down to be heard had been disposed of, but because counsel engaged to argue several of them were absent elsewhere on circuit.

There are something over 800 practising barristers in Toronto and it seems strange that any Court in Toronto should have to adjourn its sittings because counsel could not be found to argue cases. The remedy of course is very much in the hands of solicitors, who seem to be content that their clients' cases shall thus be indefinitely postponed in order that they may have the services of some particular counsel who has really more work to do than he can properly attend to. Counsel of eminence will of course always command a large amount of business, and no one would reasonably grudge them all they can properly do, but we think both they and solicitors do themselves and their clients injustice when they try to put on one man's shoulders more than he can bear.

It would be far better for a counsel to raise his fees and confine himself to one Court than keep up a constant rush from one end of the Province to another in the endeavour, like Sir Boyle Roche's bird, to be in two places at once. There are some features in the English bar system which might be adopted here with advantage. The English rule is that a practising barrister should adopt a particular circuit and not go out of it except for a very extra large fee. Other leading counsel who do not go circuit confine their practice to particular Courts, thus in England each of the Courts of the Chancery Division Judges has, we believe, a separate bar, who practise in that Court only, unless specially retained for extra fees to plead elsewhere. Then again the English practice

of King's Counsel refusing cases in which a junior is not also retained is very greatly to the advantage of the junior bar, and incidentally to the advantage of the public. The circuit bar perhaps is no longer possible here because the arrangement of the circuits on the old plan of dividing the Province into districts and including all places within a district in the same circuit has long since been abandoned.

The Courts, of course, might prevent cases being postponed for non-attendance of counsel by refusing adjournments on that ground and insisting on cases being proceeded with when called in due course.

It is well known at Osgoode Hall that counsel who make sacrifices in order to be present in Court when their cases are called do not meet with much encouragement. We have heard of a learned K.C. who received a brief for a trial in the country which he returned when he found that it interfered with a case in which he was retained in the Court of Appeal; which latter case when called on in its order was obligingly adjourned by the Court because counsel on the other side had unfortunately been unexpectedly obliged to leave town—as it afterwards turned out, to hold the brief which his opponent had returned!

JUDGES v. JURIES.

The case of *McGann* v. *Railroad Company*, 76 N.Y.S. 684, brings up an old but interesting question as to how far a Court should go in setting aside verdicts as being against the weight of evidence The case in question was an action for damages for personal injuries. At the first trial a verdict was rendered for the plaintiff with $6,000 damages. The Court set it aside as being against the weight of evidence and a new trial was had. On the second trial the verdict was the same, and was again set aside. The third jury, possibly feeling that an affront had been put upon their brethren, sought to revenge themselves by giving a verdict for double the amount, viz., $12,000. This was also promptly disposed of as before. On the fourth trial the jury gave the plaintiff $5,500. This slight reduction did not affect the Court which still held to the opinion that the damages were still excessive and again set the verdict aside. On appeal, however, from this trial Court to the Supreme Court of the State it was held that in

view of there having been four trials and the various juries agreeing to the large damages above referred to, the last verdict should stand. One of the judges expressing himself as follows: "Where the right to a jury trial exists, it is intended that the verdict of the jury shall be conclusive upon the facts in the absence of legal error or bias, passion, prejudice, or corruption. Verdicts are set aside as against the weight of evidence, and new trials are granted on the theory that the jury have been influenced by bias, passion, prejudice, or corruption. While the trial court and the appellate division should not hesitate to set aside a verdict as against the weight of evidence where the ends of justice appear to require a new trial, yet, when it comes to setting aside a third verdict rendered in an ordinary action possessing no extraordinary features, the Court should hesitate lest it usurp the functions of the jury. A sufficient number of trials has now been granted to remove any suspicion of the existence of bias, passion, prejudice, or corruption, and it becomes a mere matter of judgment on questions of fact."

Two of the judges dissented on the ground that two wrongs (in this case four) did not make a right. In their opinion if the verdicts were wrong, as being the result of misconception, prejudice or partiality, they should not be allowed to stand—the law imposed a duty upon the Courts to review verdicts, and this duty should be done whensoever and as often as might be necessary in furtherance of justice.

It is difficult to get over such reasoning as this. If an injustice was done to the defendants by the first verdict it was equally so by the others, and if the first should not stand neither should the last. In the United States the decision arrived at by the Supreme Court would appear to be in accordance with the authorities. Each case must of course depend upon its own merits; but we are neither so enamoured of juries in this country nor in a general way so doubtful about our judges that we care to favour a rule that would make their wisdom and sense of right bow to the pertinacity of jurymen. On the other hand it may safely be said that the jury system would have a more limited operation in this Dominion were it not for the somewhat autocratic methods of an occasional occupant of the Bench or the peculiarity of view which is inherent in human nature, and which sometimes becomes a too marked feature in an individual judge.

INFORMAL BILLS AND NOTES.

The case of *Robinson* v. *Mann*, recently decided in the Supreme Court of Canada, vol. 31, page 484, has elicited more than usual interest in view of the conflicting decisions in several of the Courts of the Dominion, and from the fact that it is not in accord with the views of the judges in the likewise recently decided case of *Jenkins* v. *Coomber* (1898) 2 Q.B. 168. The question in each case was as to the proper construction of sec. 56 of the Bills of Exchange Act, 1890, of Canada, and of the like section of the English Bills of Exchange Act, 1882. In the Canadian case, one of the questions to be decided was: Did the party incur any liability by indorsing a note not made payable to him but to Molsons Bank and not indorsed by the payee.

The note in question was in form as follows:

London, Sept. 25th, 1899.

$1,200.00.

Three months after date I promise to pay to the order of the Molsons Bank at the Molson Bank here twelve hundred dollars for value received.

W. Mann & Co.

Indorsed on the back was the name "George T. Mann."

Chief Justice Strong, in delivering the judgment of the Court, said: "Next, what was the legal effect of this indorsement? Sec. 56 of the Bills of Exchange Act, 1890, provides that, 'where a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liability of an indorser to a holder in due course and is subject to all the provisions of this Act respecting indorsers.' Then when the bank took the note was it not entitled to the benefit of the respondent's liability as an indorser? Certainly it was, for by force of the statute the indorsement operated as what has long been known in the French Commercial Law as an 'aval,' a form of liability which is now by the statute adopted in English law."

The Chief Justice adhered to the law as laid down by him in the case of *The Ayr American Plough Company* v. *Wallace*, decided in 1892, 21 S.C.R. 256. The last named case was on all fours with that of *Robinson* v. *Mann*. Wallace, who indorsed the note, which was made by one Clark to the plaintiff company, was sued in the Court below as maker. On the trial the plaintiff company was nonsuited. The Supreme Court of New Brunswick on appeal

refused a motion to set aside a nonsuit (N.B.R. vol. 30, p. 429); the Court being equally divided.

On appeal to the Supreme Court of Canada, the judgment of the Court below was sustained and the appeal dismissed. Chief Justice Strong, then Mr. Justice Strong, is thus reported: "As the law now stands since the Dominion Bills of Exchange Act, 1890, it is clear that under sec. 56 the respondent would have been liable as indorser, but only as indorser. It has been frequently said as regards the English Act (Bills of Exchange Act, 1882), that it was not intended by it to enact new law, but merely to declare and codify the law as it stood when the Act was passed. Sec. 56 of the English Act is identical in words with the same section of our Act. This seems to be conclusive."

In *Robinson* v. *Mann*, Mr. Justice Sedgewick, who was present when judgment was delivered by the Chief Justice, failed to stand by his obiter dictum in *Robinson* v. *Davis*, 27 S.C.R. at p. 574, in which he said: "Under no circumstances can the payee of a promissory note or the drawer of a bill of exchange maintain an action against an indorser where the action is founded upon the instrument itself."

In *Jenkins* v. *Coomber*, L.R. (1898) 2 Q.B. 168, it was held that the principles enunciated in *Steele* v. *McKinlay* (1880) 5 Appeal Cases, 754, were not affected by the provisions of the Bills of Exchange Act, 1882. The bill sued on in *Jenkins* v. *Coomber* was irregular. The plaintiffs drew upon Arthur Coomber for fifty-seven pounds and the draft was accepted by him. It was indorsed by Alfred Coomber, the defendant, under an agreement to indorse for the purpose of guaranteeing payment.

The judgment of Wills, J., is explicit and deserves careful perusual. The following are its salient points: "I do not think that the Bills of Exchange Act, 1882, was intended to effect such an important alteration in the law as to override the decision of the House of Lords in *Steele* v. *McKinlay*, 5 App. Cas., 754. That decision seems to me to be in force at the present time. It is clear that, in the present case, when the defendant wrote his name upon the bill it was not complete and regular on the face of it. Nor, indeed, did it become so at any time. Sec. 56 of the Bills of Exchange Act, 1882, provides that a person who signs a bill otherwise than as drawer or acceptor incurs the liabilities of an indorser to a holder in due course. But by s. 29 a holder in due course is a holder who has taken a bill complete and regular on the face of

it. Sec. 56 therefore does not apply. This was not on the face of it a regular and complete bill of exchange, since when the defendant indorsed it the bill had not been indorsed by the plaintiffs, to whose order it was payable. But then it is said that the defendant is liable under s. 55, sub-s. 2, as an indorser because his name was on the back of the bill. The Bills of Exchange Act certainly does not give much assistance as to the meaning to be attached to the word 'indorsement.' It says (s. 2): 'indorsement means an indorsement completed by delivery;' but it nowhere says what constitutes an indorsement. . . . . The cases which have been cited by Mr. Attenborough to establish the liability of the defendant as indorser are all cases where the bill was a complete and perfect instrument. Here, as I have already said, the bill was not a complete and negotiable instrument until it had received the indorsement of the drawers. . . . . The general principle since the Act of 1882 seems to me to be exactly as it was laid down in *Steele* v. *McKinlay*, and the contract of indemnity on which the plaintiff relies is one which is not recognized by the law merchant, but which arises solely from an agreement between the parties. It is, however, here relied upon as giving a primary liability against the defendant upon this bill of exchange. That, as Lord Watson points out in *Steele* v. *McKinlay*, will not do. If the agreement exists at all, it must exist as a contract of suretyship, and for that purpose it must satisfy the requirements of the Statute of Frauds."

The judgment of Kennedy, J., is no less explicit: "I am of the same opinion, and for the same reasons. I do not think that the doctrines laid down in *Steele* v. *McKinlay*, 5 App. Cas. 754, have been varied by the Bills of Exchange Act, 1882. In the edition of that Act by Mr. Chalmers, he expressly gives *Steele* v. *McKinlay* as an illustration to s. 56, without a suggestion that the law laid down in that case has in any way been altered. This document was, according to the law merchant, irregular, and therefore the defendant is not liable upon it to the plaintiffs. If it is sought to use it as an agreement of suretyship, it is insufficient to satisfy the provisions of the Statute of Frauds."

Sec. 56 of the Canadian Code is an exact transcript of s. 56 of the English Code, save and except the Canadian Code has the following additional words: "and is subject to all the provisions of this Act respecting indorsers." These words were added in

order that a person who signs a bill as a warrantor, or aval as he was called in the Civil Code of Quebec, should be entitled to notice of dishonour or protest.

The indorsement called an aval, signifying "underwriting," was adopted in the Quebec Code from the Civil Code of France. The term was not exclusively applied to indorsement. The aval might be made by one who gave his name as a guarantor for the acceptor by placing his name under that of the acceptor, and likewise as a guarantor for the drawer by placing his name under that of the drawer. If the aval were made for an indorser according to the Civil Code of France it was not necessary in order to hold him liable for the default of the one for whom he had become the guarantor to give him notice of dishonour. Now by the Canadian Code one who indorses pour aval is entitled to notice of dishonour the same as any other indorser. The liability of such an indorser is clearly stated by Lord Blackburn in *Steele* v. *McKinlay*, L.R. 5 App. Cas., at p. 772, in these words: "An aval for the honour of the acceptor, even if on the bill, is not effectual in English law, as appears by *Jackson* v. *Hudson*, 2 Camp., at p. 448. That case cannot now be questioned after the lapse of so many years, even if it could have been successfully impugned at the time, which I do not think it could. But the indorsement by a stranger to the bill on it to one who is about to take is efficacious in English law, and has the same effect as an aval. The effect according to English law, of such an indorsement, is recognized by Lord Holt in *Hill* v. *Lewis*, 1 Salk., at p. 133, and again in *Penny* v. *Innes*, 1 C. M. & R. 439; such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently."

It is clear, if one indorse a bill or note for the purpose of becoming a guarantor for its payment on the part of any other person to it, a liability exists; but it is a liability or contract of suretyship, which must be specially declared on and otherwise meet the requirements of the Statute of Frauds.

These observations are presented with the utmost diffidence, considering the ability and eminence of the judges whose decision is brought under review. But free and open discussion of legal principles, apart from all considerations save a desire to reach just conclusions, is of course the surest way of attaining that fixity of

decision in our juridical system, which is the best guarantee of a people's liberty under a free government.

St. John, N.B. SILAS ALWARD.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

TRADE MARK—INVENTED WORD—NAME OF INVENTED ARTICLE—EXCLUSIVE USER.

In re Chesebrough's trade mark "Vaseline" (1902) 2 Ch. 1, was an application to remove the respondent's registered trade mark "Vaseline" from the registry, on the ground that they were not entitled to the exclusive use of the word. It appeared that one Chesebrough through whom the respondents claimed, was the inventor of the process for making a jelly from petroleum, and had patented the process in the United States, and had termed the product "Vaseline." No patent was taken out for the process in England, and it was used by many persons and the product called by various names, but that made by the respondents was always called "Vaseline," and in 1877 the word was registered by them as a trade mark. The applicant who sought its removal from the register, sought to bring the case within *Linoleum Manufacturing Co.* v. *Nairn* (1878) 7 Ch. D. 734, where it was held that a name given to a newly invented patented article cannot be the subject of a trade mark, and that after the expiration of the patent anyone is at liberty to use the name to designate the article; but the majority of the Court of Appeal (Williams and Stirling, L.JJ.) distinguished that from the present case, because here there was no patent, and the respondents were never at any time the sole makers in England of the substance which they called "Vaseline"; but that word was used and known as indicative of the article made by them. The judgment of Buckley, J. ordering the removal of the name from the register was therefore reversed; Cozens-Hardy, L.J. however dissented.

LIMITED COMPANY—SURRENDER OF SHARE—RELEASE OF SHAREHOLDERS FROM LIABILITY.

In *Bellerby* v. *Rowland & M.S.S. Co.* (1902) 2 Ch. 14, the Court of Appeal (Collins, M.R., Stirling and Cozens-Hardy, L.JJ.) have been unable to agree altogether with the judgment of Kekewich, J. (1901) 2 Ch. 265, (noted ante vol. 37 p. 773). The action it may be remembered was brought to rectify the register of shareholders of a limited company, so as in effect to cancel the surrender of certain shares which had been made to the company and to declare the surrenderers still entitled thereto. The shares in question were for £11 each on which only £10 had been paid, and the company's articles empowered the directors to accept a surrender of any member's shares on such terms as might be agreed, and in pursuance of this provision certain of the directors surrendered some of the shares held by them, with a view of making good to the company a loss which had been incurred. The company had since become prosperous and the directors desired to be restored to their former position. Kekewich, J., though of opinion that the surrender was illegal, yet refused to rectify the register on the ground that the justice of the case did not require it. The Court of Appeal agreed that the surrender was bad, but they overruled Kekewich, J. in so far as he refused to order a rectification of the register, on the ground that the surrender was invalid and the surrenderers had never ceased to be the holders of the shares. It may be noted that they waived all claim to past dividends.

COMPANY—WINDING UP—PRIVATE EXAMINATION—SOLICITOR OF WITNESS—UNDERTAKING OF SOLICITOR NOT TO DISCLOSE EXAMINATION OF CLIENT—COMPANIES ACT 1862 (25 & 26 VICT. C. 89) S. 115—(R.S.C. C. 129, S. 81).

In re London & Northern Bank (1902) 2 Ch. 73, this was a winding up proceeding in which an examination of a witness was taken by the liquidator under the Companies Act (25 & 26 Vict. c. 89) s. 115. (R.S.C. c. 129, s. 81). The witness was attended by his solicitor who was himself summoned as a witness and who was also solicitor for third parties with whom the liquidator was in litigation, and for the purposes of which litigation the examination was taken. The liquidator objected to the solicitor being present at all, and also to his managing clerk attending, except on the terms of undertaking not to disclose the information obtained on the examination. Byrne, J. held that the examination was of a

private character, and that the solicitor was not entitled to be present thereat, and that the managing clerk could only attend on giving the required undertaking, and the Court of Appeal (Collins, M.R. and Stirling and Cozens-Hardy, L.JJ.) upheld his decision.

COMPANY—WINDING UP—LOSS OF CAPITAL — PROFITS EARNED BEFORE WINDING UP—DIVIDEND NOT DECLARED "SURPLUS ASSETS"—PREFERENCE AND ORDINARY SHAREHOLDERS.

In re Crichton's Oil Co. (1902) 2 Ch. 86, a point arising in a winding up proceeding is decided. The capital of the company consisted of ordinary and preference shares of £10, paid in full. The preference shares were entitled to a cumulative preferential dividend. The articles of association empowered the directors to set aside profits for a reserve fund. For three years the business was carried on at a loss, and £4,346 of capital was lost. In the next year a profit of £1,675 was made, but no dividend was declared, or any appropriation made of that sum. The company went into liquidation, and upon the winding up the debts were all paid, and £7 per share was returned to the shareholders. The above-mentioned sum of £1,675 remained in the hands of the liquidators, and the question was, how it was to be distributed. The preference shareholders who had received no dividend for the three years the business was carried on at a loss, or for the following year, claimed that it should be distributed among them. The ordinary shareholders on the other hand claimed that it should be divided rateably among all the shareholders, and Wright, J., gave effect to the latter contention, and the Court of Appeal (Collins, M. R., and Stirling and Cozens-Hardy, L. JJ.) affirmed his order. The articles provided that in the event of a winding up "the surplus assets" were to be divided equally between all the shareholders, and it was held that the fund in question must be regarded as "surplus assets," all moneys remaining after payment of outside claims coming under that head.

PRACTICE—JURISDICTION—ENGLISH CONTRACT—FOREIGN DEFENDANT—ACTION TO ENFORCE CHARGE ON ASSETS IN FOREIGN COUNTRY—SERVICE OUT OF JURISDICTION—FOREIGN DEFENDANT NECESSARY OR PROPER PARTY TO ACTION AGAINST DEFENDANT WITHIN JURISDICTION—RULE 64 (g)—(ONT. RULE 162 (g).)

Duder v. *Amsterdamsch Trustees* (1902) 2 Ch. 133, was an action brought to enforce an alleged equitable charge on property and assets of an equitable company in Brazil. The action was

brought against the company, and also against the trustees of a debenture deed made by the company, such trustees being resident in Holland—and also a receiver appointed under the deed who was resident in England. The Dutch trustees moved to set aside the service of the writ of summons on them but Byrne, J. held that they were proper and necessary parties to the action against the other defendants and he therefore refused the motion—and on the application of the plaintiff a receiver was appointed in the action.

PRINCIPAL AND AGENT—FRAUD OF AGENT - BONA-FIDE PURCHASER FROM AGENT WITHOUT NOTICE—RECEIPT CLAUSE — AGENT APPARENT OWNER — ESTOPPEL.

Rimmer v. *Webster* (1902) 2 Ch. 163, was a contest between two innocent persons as to which should bear a loss occasioned by the fraud of another. The plaintiff was a trustee, and as such held a mortgage bond which he plac[illegible] the hands of a broker for sale, and, induced by false repre[illegible]ons of the broker, he executed in his favour two deeds of tra[illegible]fer of the mortgage bond in two portions of £1,500 and £500 respectively, which sums in the transfers he acknowledged to have received from the transferee. The broker then borrowed £1,000 from the defendant and executed a formal sub-mortgage of the bond to him, producing the transfers as proof of title. The broker misappropriated the money and absconded. The plaintiff claimed a re-transfer of the bond free from defendant's mortgage, but Farwell, J., held that the plaintiff having clothed the broker with the apparent ownership of the bond and acknowledged the receipt from him of the purchase money, was estopped from disputing the title of the defendant.

SOLICITOR—TRUST—BREACH OF TRUST—MONEY LENT BY TRUSTEE TO SOLICITOR WITHOUT SECURITY — SUMMARY ORDER ON SOLICITOR TO REFUND MONEY RECEIVED IN BREACH OF TRUST—PRACTICE.

In re Carroll, Brice v. *Carroll* (1902) 2 Ch. 175, is an instance of the summary jurisdiction exercised by the court over solicitors. This was an administration action and in the taking of the accounts it appeared that the executor had lent the trust funds to his solicitor without security; the plaintiff thereupon applied upon notice of motion entitled in the action and also "in the matter of" the solicitor for an order to pay the amount so lent to him into court, and Farwell, J. made the order as asked.

MUNICIPAL LAW—By-law regulating building—Breach of by-law—Injunction—Jurisdiction.

Mayor of Devonport v. *Tozer* (1902) 2 Ch. 182, was an action brought by a municipal body claiming an injunction to restrain the defendants from erecting buildings in breach of a by-law regulating the width of streets, and also to obtain a declaration that the plaintiffs were entitled to remove or pull down buildings already erected in breach of the by-law. Joyce J., dismissed the action holding that the plaintiffs could only enforce the by-law in the manner provided by the statute in pursuance of which it was made, viz., in this a case by a proceeding for penalties and the removing of the work done contrary to the by-laws as provided by the by-laws and statute, or by way of information on the part of the Attorney-General.

WILL—Devise of real estate—Condition that devisee should take and use testator's name—Death of devisee before estate falls into possession—Non-performance of condition.

In re Greenwood, Goodhart v. *Woodhead* (1902) 2 Ch. 198, was a summary application to determine the rights of parties under a will. The testator had devised his real estate to his daughter for life, and after her death to her children, and in case she should have no children then to one Newsome on condition of his taking the testator's name only. The testator died in 1853. His daughter was still living and married, but in her fifty-ninth year, and had no issue. Newsome died in 1855 without ever having taken the testator's name. He had been insane for eighteen months before he died. It became necessary for the purpose of administering his estate to determine whether or not he took any interest under the devise. Joyce, J., held that whether the condition were precedent or subsequent, its performance had not been rendered impossible by the act of God, and that Newsome never having complied with it, the devise to him could not take effect.

VENDOR AND PURCHASER—Leasehold house—Breach of covenant to repair—Receipt for rent—Evidence of performance of covenant.

In re Highett and Bird (1902) 2 Ch. 214, was an application under the Vendors and Purchasers Act. The subject of the sale was a leasehold house, the lessee being bound by a covenant to repair. The time fixed for completion was the 6th November. On 27th September previously the vendor had been served with

notice by a municipal body requiring him to pull down or render secure part of the buildings on the premises as being a dangerous structure. On November 9th the vendor was served with an order of the Police Court requiring him to do the repairs within fourteen days. The vendor then made the present application for a declaration that the purchaser was bound to bear the expense of complying with the order. Eady, J. held that as under the contract the purchaser had the right to call for proof that all of the covenants under the lease had been performed up to the 6th November, the vendor was therefore bound to bear the expense; and he also held that a receipt for the last payment of rent was not evidence of performance of the covenants under the Conveyancing Act, where, as in this case, "the contrary appeared."

EASEMENT — LIGHT — DEROGATION FROM GRANT—BUILDING AGREEMENT — PLACE—CONVEYANCING AND LAW OF PROPERTY ACT 1881 (44 & 45 VICT. c. 41) s. 6—(R.S.O. c. 119, s. 12)

Godwin v. *Schweppes* (1902) 1 Ch. 926, is an illustration of the rule that though as laid down by Tindal, C.J. in *Swansborough* v. *Coventry* (1832) 2 Moo. & S. 362, 369; 35 R.R. 660, where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot nor can anyone claiming under him build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights, yet this rule does not entitle a grantee of a house with the lights under words imported into the grant by the Conveyancing Act 1881, s. 6, (R.S.O. c. 119, s. 12) to any easement or light inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee, as was determined in *Birmingham* v. *Ross*, 38 Ch. D. 295. In the present case a block of houses was erected on the land of Oxby by one Sage under an agreement made in 1884, which also contemplated the erection of other buildings on the adjoining land of Oxby. In 1886 Oxby conveyed the block of houses to Sage, the foundations for the buildings on the adjoining land were then laid, and the wall of the house adjoining it was built as a party wall with apertures for chimneys, etc. In the conveyance of the houses to Sage a plan was embodied indicating the party wall and the proposed buildings on the adjoining land. The buildings on the adjoining land were

not erected, but the site of them was afterwards in 1887 conveyed by Oxby to Sage. The plaintiffs were Sage's successors in title of the houses, and the defendant his successors in title of the adjoining plot of land. The plaintiffs claimed to restrain the defendants from building on the adjoining land so as to obstruct the light to the houses as it existed at the date of the grant to Sage under which they claimed, but Joyce, J. held that they were not entitled to succeed, because it was in the contemplation of Sage under whom the plaintiffs claimed title at the time he took his deed, that the adjoining land was to be built upon, and therefore it was not a case of derogating from the grant.

WILL—CONSTRUCTION—MISDESCRIPTION OF LEGATEE—"WIFE."

Anderson v. *Berkley* (1902) 1 Ch. 936, is an instance of a misdescription of a legatee in a will, being cured by the Court of construction. In this case the testator had bequeathed a fund upon trust for his son's "wife Letitia" if she should survive him. The son died in New Zealand, and had written to the testator from thence stating that he had married Letitia Lilian Cumberland. It turned out after his death that though he had cohabited with her as his wife, they were never in fact married. Joyce, J. held, nevertheless, that Letitia Lilian Cumberland was entitled to the bequest, and that the words "my son's wife" might be rejected, if they had stood alone the result as the learned judge points out would have been different, so also if the gift had been conditional on the legatee remaining the widow of the testator's son.

TENANT FOR LIFE—REMAINDERMAN—CAPITAL OR INCOME—FINE ON SURRENDER OF LEASE.

In re Hunloke Fitzroy v. *Hunloke* (1902) 1 Ch. 941, decides (Eady, J.) the short point that as between a tenant for life and remainderman a fine paid in pursuance of an option contained in a lease as the consideration for a tenant for life accepting a surrender thereof, belongs absolutely to the tenant for life as a casual profit.

WILL—CONSTRUCTION GIFT OF RESIDUE TO INDIVIDUALS IN SHARES—GIFT OF INCOME FOR MAINTENANCE OF ALL—VESTED OR CONTINGENT.

In re Gossling Gossling v. *Elcock* (1902) 1 Ch. 945, brought up a question upon the construction of a will as to whether a share of residue bequeathed to several individuals on their attaining twenty-one was vested or contingent, one of them having died under

twenty-one. The will directed the income to be applied for the maintenance of all the legatees indiscriminately, and Eady, J. therefore held that the share of the deceased was not vested though semble, it would have been vested, if the direction had been to apply the income of the respective shares of each legatee for his or her maintenance.

RESTRAINT OF TRADE--COVENANT—"INTERESTED" IN SIMILAR BUSINESS—SERVANT.

Gophir Diamond Co. v. *Wood* (1902) 1 Ch. 950, was an action to restrain the defendant from committing a breach of covenant whereby he bound himself not to be interested directly or indirectly in a similar business to that of the plaintiffs within twenty miles of Regent Street. The alleged breach consisted in the defendant having accepted employment as a servant at a fixed salary in a similar business. Eady, J. held that this was not being "interested" within the meaning of the covenant, and he refused an injunction.

FRAUDULENT CONVEYANCE—ASSIGNMENT FOR BENEFIT OF CERTAIN CREDITORS—13 ELIZ. C. 5—(R.S.O. C. 334, S. 4).

Maskelyne v. *Smith* (1902) 2 K.B. 158, was an appeal by a claimant in interpleader proceedings from the deputy judge of a County Court. The defendant Smith had made an assignment for the benefit of such of his creditors as executed the schedule thereto. The plaintiffs were execution creditors who had not executed the schedule, and they seized under their execution goods assigned which were claimed by the assignee. The question was whether the deed was void as against the execution creditor under 13 Eliz. c. 5 (R.S.O. c. 334). The deputy judge held that it was, owing to the plaintiffs being omitted from the schedule, but the Divisional Court (Lord Alverstone, C.J., and Darling and Channell, J.J.) overruled his decision and held that the assignment was not void under the statute of Elizabeth.

ASSIGNMENT OF CHOSE IN ACTION—"ABSOLUTE ASSIGNMENT (NOT PURPORTING TO BE BY WAY OF CHARGE ONLY)"—SECURITY FOR DEBT—INSTRUMENT PASSING WHOLE RIGHT OF ASSIGNOR—JUDICATURE ACT, 1873 (36 & 37 VICT. C. 66) S. 2, SUB-S. 6 (R.S.O. C. 51 S. 58, SUB-S. 5).

In *Hughes* v. *Pump House Hotel Co.* (1902) 2 K.B. 190, the defendants appealed from the decision of Wright, J., on a preliminary point of law as to the plaintiffs' right to sue in their own

names as assignee of a chose in action. The plaintiffs were contractors for certain building work, under which contract they claimed to recover from the defendants £2,788. It appeared that in order to secure their current indebtedness to a bank, the plaintiffs by an instrument in writing had assigned to the bank all moneys due or to become due under the contract in question and empowered the bank to sue for the recovery thereof in the plaintiffs' name and to give effectual receipts and discharges for the moneys assigned. Notice in writing of this assignment had been given by the bank to the defendants. The question therefore was whether this was an absolute assignment or one purporting to be by way of charge only. Wright, J., considered it was to be by way of charge only, and held that the plaintiffs might proceed with the action, but the Court of Appeal (Matthew, and Cozens-Hardy, L.JJ.) reversed his decision, holding that as the effect of the instrument was to pass the whole right and interest of the assignors payable under the contract by way of security it was "an absolute assignment not purporting to be by way of charge only" within the meaning of the Judicature Act, s. 25, sub-s. 6 (Ont. Jud. Act, s. 58, sub-s. 5).

CRIMINAL LAW—SEAMAN—OFFENCE—DESERTION—ABSENCE WITHOUT LEAVE—WILFUL DISOBEDIENCE—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT. C. 60) S. 376, SUB-S. 1.

Edgill v. *Alward* (1902) 2 K.B. 239. Upon a case stated by magistrates, the Divisional Court (Lord Alverstone, C.J., and Darling, and Channell, JJ.) held that under the Merchants Shipping Act, 1894 (57 & 58 Vict. c. 60) s. 376, sub-s. 1 (*d*), a seaman may be convicted of wilfully disobeying a lawful command of the master of the ship, although the act of disobedience amounts to the offence of desertion or absence without leave under clauses (*a*) or (*b*) of sub-s. 1.

EXECUTION—SEIZURE BY SHERIFF AND SUBSEQUENT WITHDRAWAL—NO RETURN TO WRIT.

Re a Debtor (1902) 2 K.B. 260, although a bankruptcy case, is deserving of notice because it turns on a principle of practice of general application. The question at issue was whether a notice of bankruptcy had been validly given, and this depended on whether the creditor giving the notice was in a position to do so, before obtaining a return to a fi. fa. which he had placed in the

sheriff's hands and under which goods had been seized, but which, being claimed by the debtor's wife and her trustees, were subsequently abandoned; on the abandonment of the seizure notice of bankruptcy was served on the debtor, no return to the fi-fa having been made by the sheriff. The Court of Appeal (Williams, Romer, and Stirling, L.JJ.) held that although under *Miller* v. *Parnell*, 6 Taunt. 370, if a judgment creditor causes a fi-fa to be executed by seizure of the debtor's goods he cannot have a writ of capias, or another fi-fa to another county till the fi-fa under which the seizure is made is completely executed and returned, even though he abandon the seizure of the goods; yet this is not so when the abandonment takes place in consequence of the goods seized being claimed by a third party, consequently the creditor had the right to give the bankruptcy notice.

PROBATE—EXECUTORS ACCORDING TO THE TENOR—TRUSTEES—DIRECTION FOR ADVANCEMENT AND MAINTENANCE OF CHILDREN.

In the goods of Kirby (1902) P. 188, a testator by his will directed the payment of his debts and testamentary expenses by his "executors hereinafter named." No executors were in fact named, but the will contained an expression of the testator's wishes as to the education and advancement of certain of his children, the cost of which was to be deducted from their respective shares and the remainder of the shares invested. The will appointed the widow and two of the testator's sons "trustees," gave them certain bequests "for their services," and disposed of the residue of the testator's property. Jeune, P.P.D., held that the trustees were "executors according to the tenor" and entitled to probate.

WILL—BENEFICIARY GIVING INSTRUCTIONS FOR WILL—PROBATE—PROBATE SUIT—COSTS.

Aylwin v. *Aylwin* (1902) P. 203, deals only with a question of costs. The plaintiff propounded a will for probate, the defendant, an adopted daughter of the testator, filed a caveat, and in her statement of defence and counter-claim pleaded undue execution, unsoundness of mind and memory, and want of knowledge and approval by the testator, and she counter-claimed probate of a prior will. It appeared that the principal beneficiary named in the will propounded by the plaintiff had taken instructions for the

will and communicated them to the solicitor who drew it up, and that the solicitor did not himself see the testator. The will was upheld, but the circumstances under which it was drawn were held by Jeune, P.P.D., to be such as to invite inquiry, and to justify the Court in refusing to award costs against the defendant.

WILL—PROBATE—INFORMAL DOCUMENT—WITNESSES DEAD—NO ATTESTATION CLAUSE—NO EVIDENCE OF HANDWRITING OF ONE WITNESS—"OMNIA PRÆSUMNUTER RITE ESSE ACTA.

In the goods of Peverett (1902) P. 205, a holograph document was propounded for probate. The instrument was informal, it purported to have been executed by the testatrix in the presence of two witnesses, both of whom were dead; there was proof of the signature of one but not of the other. There was no attestation clause. Jeune, P.P.D., held that on the principle of Omnia præsumnuter rite esse acta, it must be presumed that the document had been duly executed as a will, and administration with the will annexed was accordingly granted.

ADMINISTRATION OF ASSETS—INSUFFICIENCY OF GENERAL ASSETS—RESIDUARY ESTATE—TRUST DECLARED BY SEPARATE INSTRUMENT AFFECTING RESIDUE.

In re Maddock, Llewelyn v. *Washington* (1902) 2 Ch. 220, the judgment of Kekewich, J., (1901) 2 Ch 372 (noted ante vol. 37, p. 781), has failed to meet with the approval of the Court of Appeal. A testatrix by her will devised her residuary estate to her executor, and by a separate instrument which the executor admitted created a binding trust had directed a portion of the residue to be held in trust for certain named persons. The residuary personal estate, other than that comprised in the memorandum, was insufficient for the payment of debts. Kekewich, J., held that the debts were payable rateably out of the portion of the residue affected by the trust, and the portion not so affected. The Court of Appeal (Collins, M.R., and Cozens-Hardy and Stirling, L.JJ.) however was of the opinion that the memorandum declaring the trust must be treated as if its contents had been contained in the will so that the trust of the specified portion of the residue stood in the same position as a specific bequest, and consequently that the debts were payable first out of that part of the residue not affected by the trust, and the deficiency must be borne rateably by the part affected by the trust, and the real estate.

WILL—CONSTRUCTION—GIFT TO A CLASS—GIFT OVER ON DEATH "WITHOUT LEAVING ISSUE."

In re Schnadhorst, Sandkuh v. *Schnadhorst* (1902) 2 Ch. 234, the judgment of Joyce, J., (1801) 2 Ch. 338 (noted ante vol. 37, p. 776) was affirmed by the Court of Appeal (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) The case arises on the construction of a will whereby the testator gave his residuary estate to his widow for life and on her death to apply the income in the maintenance and education of his children until the youngest who should be living, who being a son, should attain 21, or being a daughter, should attain 21, or marry, and subject thereto the trust fund was to be held in trust for all his sons attaining 21, and his daughters attaining 21, or marrying, in equal shares, and the testator directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common. The question was whether the children took defeasible or indefeasible estates. In other words, whether the gift over on their "dying without issue" took effect merely on their dying before attaining 21, or marrying, or whether it took effect in case of their so dying at any time. Joyce, J., held that it took effect on their so dying at any time, and the Court of Appeal agreed with that view, and consequently that the children only took vested indefeasible interests if and when they should die without leaving issue, no matter when such death might happen.

VENDOR AND PURCHASER—PROPERTY PURCHASED FOR BUILDING—LATENT DEFECT—MISDESCRIPTION—UNDERGROUND CULVERT—CONDITION OF SALE.

In re Puckett & Smith (1902) 2 Ch. 258, land was offered for sale on the specific statement by the vendors that it was suitable for building purposes, whereas in fact it was materially unfitted therefor, owing to the existence of an underground culvert on the property unknown to the vendors. A condition of sale provided that "the property being open for inspection, the purchaser shall be deemed to buy with full knowledge of the actual qualities and condition thereof. If any error shall be proved in the particulars the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The purchaser inspected the property before the sale, but failed to discover the culvert until after the contract had been entered into, and in the opinion of the Court no

reasonable inspection would have enabled the purchaser to discover the culvert. It was in evidence that it would cost £500 to deal with the culvert in such a way as to make the land suitable for such a building as was contemplated by both parties. Under these circumstances the Court of Appeal (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) affirming, Kekewich, J., held that the condition of sale above referred to did not apply as the defect was latent, and that the vendors had failed to make a good title.

Correspondence.

AUDI ALTERAM PARTEM.

To the Editor CANADA LAW JOURNAL:

Your editorial in the September number of the JOURNAL on Mr. Justice Meagher's connection with the Sydney incident is unjust to that judge. Newspaper reporters in their desire to make copy had sent exaggerated reports in the first instance, and comments on the judge's conduct have been based on the facts set out in these reports.

On the second day of a special term of the Court at Sydney, with more than sixty-five cases for trial on the docket, an adjournment for forty-five minutes for lunch was taken. The Court was then engaged in the trial of an ejectment suit, with a large number of witnesses present on both sides from a distant part of the county. When the judge, accompanied by the sheriff, reached the steps of the court house he found the door completely blocked, and counsel, solicitors and witnesses vainly trying to get out. The members of the Maritime Board of Trade were arranged on the steps to have a photograph taken. The judge had no knowledge of who the persons were, or what they were doing there, and considered that the steps were blocked by idlers who were watching some exhibition. The sheriff vainly attempted to make a way through the crowd for the judge, and the judge ordered the crowd to stand aside, not because his exit was blocked, but because persons having business in the Court were detained. Unfortunately the members of the Board of Trade who were nearest the door did not know the sheriff, nor did they recognize the judge, and the judge was hissed after he had made his way through. He

had the courage to characterize the conduct of the men who hissed him as was deserved, and there is a dispute about the words he used.

In the afternoon the matter was discussed by the Board of Trade. A few of the members thought that the whole Board had been insulted, and made inflammatory speeches. Very many of the members of the Board of Trade conceived that they had a grievance against the judge, and one of the Halifax delegates, who is a very respectable man, spoke to the judge as he was descending to the ground floor of the court house from the court room that afternoon. Unfortunately this member of the Board in speaking to the judge used too strong language, and which he afterwards regretted. The judge at the time was going down the same stairs among solicitors, litigants and witnesses who were leaving the court house, and he pointed out to this member that he was holding a term of the Court, and that no person ought to use such insulting language to a judge in the court house. The member at once said: "I will go out on the street and repeat it," and followed the judge from the court house to the sidewalk where the language previously objected to was repeated. The judge then ordered the sheriff to arrest this gentleman. As soon as the full effect of the expressions used to the judge became apparent to the member in question, he himself regretted that he had used the objectionable words to the judge, and went and told him so. The incident then ended.

A committee of the Board of Trade was appointed to enquire into the matter, and their report was briefly that when Mr. Justice Meagher was leaving the court house the member in question had used language which the judge considered to be an insult, and the judge ordered his arrest, and that on apologizing the member was discharged. No comment was made upon the judge's conduct. The judge was placed in this position, that he was told on the staircase crowded with solicitors, litigants, witnesses, and officers of his court that the language used by him at noon was disgraceful, and his conduct was a disgrace to the city he came from, and he had to protect himself.

I cannot comprehend how the last paragraph of your editorial could have appeared in a legal journal: "The authorities in Ottawa should take notice of the matter, and prevent the occurrence of any such unseemly, and so far as the arrest was concerned,

illegal conduct in the future." It is scarcely necessary to say that the authorities in Ottawa have nothing to do with the matter, and it is trite learning that if a judge "is assaulted, libelled or abused within what may fairly be called the precincts of his court, this is a contempt, and the judge may summarily order the arrest of the person committing the contempt." It is true that this power is seldom exercised, and the books say that it is better for a judge to proceed in the usual way by attachment, but, until your article was written, no legal journal or authority had ever called in question a judge's power to protect himself from insult in the precincts of his court.

Had your article appeared in any other than a legal journal, I would not write this note, as the public know how prone reporters are to colour incidents to make sprightly paragraphs, but in a legal journal the members of the profession expect a fair discussion of their conduct if any comment upon it is considered necessary.

AN OFFICER OF THE COURT.

Halifax.

[We have pleasure in publishing the above letter, and shall be glad to give reasonable space to any other explanation or statement of facts submitted either by Judge Meagher or his friends. What appeared in this journal was published in good faith and without any desire to injure the Judge; we having, as we conceived, a duty in the premises. If the facts are true, as submitted to this journal, the right of comment certainly existed, and we did not seek to go beyond such right. If by any mistake or incorrectness of fact we have done Judge Meagher an injustice, we shall be only too glad to set the matter right, and every opportunity will be given in these columns to have the truth appear before the public.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] TOUSSIGNANT *v.* NICOLET. [May 14.

Appeal—Jurisdiction—Annulment of proces-verbal—Matter in controversy.

The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a proces-verbal establishing a public highway notwithstanding that the effect of the proces-verbal in question might be to involve an expenditure of over $2,000 for which the appellants' lands would be liable for assessment by the municipal corporation. *Dubois* v. *Village of Ste. Rose*, 21 Can. S.C.R. 65; *The City of Sherbrooke* v. *McManamy*, 18 Can. S.C.R. 594; *County of Vercheres* v. *Village of Verennes*, 19 Can. S.C.R. 365, and *Bell Telephone Co.* v. *City of Quebec*, 20 Can. S.C.R. 230 followed. *Webster* v. *City of Sherbrooke*, 24 Can. S.C.R. 52, 268, and *McKay* v. *Township of Hinchinbrooke*, 24 Can. S.C.R. 55, referred to. *Reburn* v. *Parish of Ste. Anne*, 15 Can. S.C.R. 92, overruled. Appeal quashed with costs.

Lafleur, K.C., for the motion. *Atwater*, K.C., contra.

N.S.] GRANT *v.* ACADIA COAL CO. [May 27.

Negligence—Working of mines—Statutory mining regulations—R.S.N.S. (5 ser.) c. 18—Fault of fellow-workmen.

The defendant company employed competent officials for the superintendence of their mines, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected and an explosion of gas occurred from the effects of which he died. In an action for damages by his widow,

Held, reversing the judgment appealed from (TASCHEREAU and SEDGEWICK, JJ., dissenting) that as the company had failed to maintain the mine

in a condition suitable for carrying on their works with reasonable safety they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen. Appeal allowed with costs.

Mellish, for appellant. *Newcombe*, K.C., and *Drysdale*, K.C., for respondents.

N.B.] CORNWALL *v.* HALIFAX BANKING CO. [May 27.

Insurance—Application—Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.

Where, through error, and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy, he is nevertheless entitled to the benefit of the insurance. DAVIES and MILLS, JJ., dissenting.

Per SEDGEWICK, J.—The New Brunswick Act for securing to wives and children the benefits of life insurance (55 Vict. c. 25) applies to accident insurance as well as to straight life. Appeal allowed with costs.

C. J. Coster, for appellant. *Armstrong*, K.C., for respondent.

Ont.] CLERGUE *v.* MURRAY. [May 27.

Principal and agent—Sale of land—Authority to agent—Price of sale.

M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place "sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for $600 and the solicitor telegraphed M. "Will you sell three-quarter interest, sixty-seven acre parcel, Korah, for six hundred, hard cash, balance year? Wire stating commission." M. replied "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor: "Telegram received. I will accept $600; $300 cash and $300 with interest at one year. This payment I may say must be a marked cheque at par for $300 minus your commission, $15; and balance, $300, secured." The property was encumbered to the extent of over $300, and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner, paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell:

Held, affirming the judgment of the Court of Appeal that the only authority the solicitor had from M. was to sell her interest for $585 net, and the attempted sale for a less sum was of no effect.

Held, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. Appeal dismissed with costs.

Ritchie, K.C., and *Marsh*, K.C., for appellant. *Aylesworth*, K.C., for respondent.

Ont.] G.T.R.W. Co. *v.* MILLER. [May 27.

Negligence — Railway train — Collision — Duty of engineer — Rules — Contributory negligence.

By rule 232 of the G.T.R. Co. "Conductors and enginemen will be held equally responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains even if not provided for by the rules." By rule 52 enginemen must obey the conductor's orders as to starting their trains unless such orders involve violation of the rules or endanger the train's safety, and rule 65 forbids them to leave the engine except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track and when the time for starting arrived he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start and did so. After proceeding about two miles his train collided with the regular train and he was injured. In an action against the company for damages in consequence of such injury:

Held, affirming the judgment of the Court of Appeal that M. was not obliged before starting to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone; that he was bound to obey the conductor's order to start the train, having no reason to question its propriety; and he was, therefore, not guilty of contributory negligence in starting as he did. Appeal dismissed with costs.

Walter Cassels, K.C., and *Rose*, for appellant. *Clark*, K.C., and *Campbell*, for respondent.

Ont.] TOWN OF AURORA *v.* VILLAGE OF MARKHAM. [June 9.

Appeal—Quashing by-law—Appeal de plano—Special leave.

The appeals to the Supreme Court from judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60-61 Vict. c. 34, and no appeal lies as of right unless given by that Act. Therefore there is no appeal de plano from a judgment quashing a by-law (3 Ont. L.R. 609) though an appeal is given in such case by the Supreme and Exchequer Courts Act.

The Supreme Court will not entertain an application of special leave to appeal under the above Act after a similar application has been made to the Court of Appeal and leave has been refused.

Application for leave to appeal refused.

Aylesworth, K.C., for motion. *Raney*, contra.

Que.] ROYAL ELECTRIC CO. *v.* HEVE. [June 9.

Negligence—Operations of a dangerous nature—Supplying electric light—Insulation of electric wires.

The defendants are a company engaged in supplying electric light to consumers in the city of Montreal under special charter for that purpose. They placed a secondary wire, by which electric light was supplied to G.'s premises in close proximity to a guy wire used to brace primary wires of another electric company which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy wire. While attempting to turn on the light of an incandescent electric lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury,

Held, affirming the judgment appealed from, that the defendants were liable for actionable negligence as they had failed to exercise the high degree of skill, care and foresight required of persons engaging in operations of a dangerous nature. Appeal dismissed with costs.

Atwater, K.C,, and *Champagne*, K.C., for appellants. *Brodeur*, K.C., and *Bissonet*, for respondent.

Ont.] RICE *v.* THE KING. [June 11.

Appeal—Criminal case.

The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court (60 & 61 Vict. c. 34) applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code. Motion dismissed.

Robinette, K.C., for motion. *Cartwright*, K.C., and *H. Guthrie*, K.C., contra.

Province of Ontario.

COURT OF APPEAL.

Moss, J.A.] [July 4.

TRUSTEES OF SCHOOL SECTION 5, CARTWRIGHT *v.* TOWNSHIP OF CARTWRIGHT.

Leave to appeal—Public schools—Selection of site.

This was an application for leave to appeal from the order of a Divisional Court (ante p. 548) allowing an appeal from an order of a judge in Chambers, and granting a mandamus to the municipality requiring it to

pass a by-law to issue debentures for the purpose of a school site and erection of a school house.

Held, that as the first order had been made in Chambers, and as the applicants were the respondents in the Divisional Court, and would have been entitled to appeal as of course if the motion had been heard in the first instance by a judge sitting in court, and as there were reasons of a substantial kind for questioning the judgment complained of and affecting the discretion to be exercised; and as there were questions as to the construction of a statute and the matter was of public interest, leave should be granted. Order made.

Aylesworth, K.C., for township. *Riddell*, K.C., for school trustees.

Osler, J.A.] [Sept. 5.

IN RE EQUITABLE SAVINGS L. & B. ASSOCIATION.

Companies—Ontario Winding up Act—Appeal to Court of Appeal—Practice on appeal—Final order.

Ontario Joint Stock Companies Winding Up Act, R.S.O. 1897, c. 222, s. 27, contains the Code of proceedings on an appeal from any order or decision of the Court under that Act, no provision being made in the consolidated rules or elsewhere. There is no provision that reasons pro and con the appeal are required, or any delivery or settlement of the proposed case. The practice when the case has come before a single judge has been to send up the original papers and hear the appeal upon them.

Semble, an order of a County Judge rescinding an order previously made by him under s. 41 of the above Act for the dissolution of a company is a final order, and therefore an appealable one.

C. D. Scott, for the respondent. *Aylesworth*, K.C., for the appellant.

From Meredith, C.J.] [Sept. 9.

PROVIDENT CHEMICAL WORKS *v.* CANADA CHEMICAL MANUFACTURING CO.

Trade mark—Fancy name—Descriptive letters—Forum—Exchequer Court.

The letters C.A.P., standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trade mark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates."

Judgment of MEREDITH, C.J., 2 O.L.R. 182; 37 C.L.J. 668, reversed.

The amendments to the Exchequer Court Act since the decision in *Partlo* v. *Todd* (1877), 14 A.R. 444 (1888), 17 S.C.R. 196, have not had

the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trade mark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trade mark, its invalidity may be shewn.

Betts, and *Hume Cronyn*, for appellants. *Shepley*, K.C., and *Flock*, for respondents.

From Boyd, C.] SAWERS *v.* CITY OF TORONTO. [Sept. 9.

Assessment and taxes—Distress—Owner—Agreement to purchase—Local improvement rates.

The judgment of BOYD, C., 2 O.L.R. 717; ante p. 27, was affirmed.

McCullough, and *McKeown*, for appellant. *Fullerton*, K.C., and *Chisholm*, for respondents.

From Ferguson, J.] BEAM *v.* BEATTY (No. 2). [Sept. 9.

Infant—Bond—Ratification.

A bond, with a penalty, of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant is void and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority.

Judgment of FERGUSON, J., 3 O.L.R. 345, reversed.

McBurney, for appellant. *Lynch-Staunton*, K.C., and *Marquis*, for respondent.

From Street, J.] [Sept. 9.

RITCHIE *v.* VERMILLION MINING COMPANY.

Company—Mining company—Purchase and sale of land—Irregularities in proceedings.

A mining company subject to the provisions of the Ontario Companies Act, R.S.O. 1897, c. 191, and the Ontario Mining Companies Incorporation Act, R.S.O. 1897, c. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, for there is nothing to prevent the business of the company being continued by the purchase of other land.

Nor can such sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company and are in carrying out the sale furthering the interests of that rival company.

Judgment of STREET, J., 1 O.L.R. 654; 37 C.L.J. 347, affirmed.

Aylesworth, K.C., and *N. F. Davidson*, for the appellants. *Wallace Nesbitt*, K.C., *Riddell*, K.C., and *Robert McKay*, for the respondents.

From Macwatt, Co.J.] REX *v.* TREVANNE. [Sept. 18.

Depositions of witness—Criminal law—Inability of witness to attend trial—Preliminary enquiry—Opportunity to cross-examine—Crim. Code, s. 687.

At a preliminary enquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, the prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. Meanwhile, after consulting the County Crown Attorney, the magistrate determined to send the case to Sarnia, and so telegraphed to prisoner's counsel asking a reply whether he would come up or not. Counsel replied that if the magistrate intended to send the prisoner to trial at any rate, it would be no use of his coming, and accordingly he did not further attend the proceedings. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the enquiry at h: own office, the prisoner being present, but not the witness, and on the evidence already taken the prisoner was committed to trial. At the trial the witness was proved to be too ill to attend and her depositions taken as above were tendered by the Crown and admitted.

Held, that, in view of s. 687 of the Criminal Code, the depositions were improperly received in evidence, the prisoner's counsel not ever having had a full opportunity of cross-examining the witness, and not having waived that right as contended by the Crown.

Ford, for the Crown. *Tremeear*, for the prisoner.

From Lount, J.] [Sept. 19.

NELSON COKE AND GAS CO. *v.* PELLATT.

Company—Preference shares—Creation of—Validity—Memorandum and articles of association—Subscription for shares—Contract by deed—Delivery to agent of company—"Issue" and "allotment" of shares—Calls—Resolutions and letters—"Offer"—Withdrawal—Formal allotment.

In an action by a company against an alleged subscriber for shares to recover the subscription price, the defendant contended that preference shares of the company had not been lawfully created, there not having been any special resolution of the company for that purpose, as provided by s. 55 of the Companies Act of British Columbia, R.S.B.C. c. 44, under which the company was incorporated.

Held, that provisions for preference shares in the memorandum and articles of association were legal and valid features of the constitution of the company. *Ashbury* v. *Riche*, L.R. 7 H.L. 653, and *In re South Durham Brewery Co.*, 31 Ch. D. 261, followed.

The defendant signed and sealed a document in the form of a covenant or agreement with five named persons, described as the applicants for the company's charter, and with the company when incorporated, to become a shareholder in the company to the amount of 200 shares of common and 200 shares of preference stock, when the same should be issued and allotted to him, and to accept the stock when allotted to him, and to pay for the same when a call or calls should be made upon him by the directors.

The defendant afterwards signed and sealed a document contained in a stock subscription book, reading: "We, the undersigned, do hereby severally subscribe for, and agree to take, the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof, set opposite to our respective names as hereunder and hereinafter written, and to become shareholders in said company, to the said amounts, when and as the said stock so subscribed for by us, severally, shall be issued and allotted to us; and we do hereby severally covenant, each with the other and others, with the said company and the directors thereof, to accept the said stock when the same shall be allotted to us, severally, and to pay for the same, to the said company, at par, when and as a call or calls for payment shall be made upon us severally by the directors." The amounts were the same as in the first instrument. The defendant and two other persons who had executed the first instrument, executed the new one a few days after the first. The other two struck their names out of the first instrument, but the defendant did not do so. He said that in executing the second document he did not intend it as a subscription for 400 shares in addition to the former.

Semble, that the appellant's execution of the second document did not supersede the first; but nothing turned upon that question, the legal effect of both being the same.

When the defendant executed the agreement he was in constant communication with a director of the company, and they were associated together in obtaining subscriptions for shares on behalf of the company.

Held, that the contract was one entered into by the appellant with the company, at the request of one of its directors, acting for and on behalf of the company; that it was to be treated as an ordinary contract between individuals; that it was something more than an application or request for shares: it had all the elements of a completed contract, by deed, for valuable consideration; the deed was not delivered in escrow, but was delivered to the company through its agent; the contract, being by deed, was not revocable, but was at once operative without the company's acceptance, and, not having been repudiated by the company, was valid and binding on both parties. *Xenos* v. *Wickham*, L.R. 2 H.L. 296, followed.

The appellant's subscription was made in September, 1899, and on the 4th December following the board passed a resolution that the subscribed

for preferred stock be called up in full, and that the treasurer notify all subscribers to pay the amount of their subscriptions on or before the 18th January, 1900. On the 16th December the treasurer wrote to the defendant notifying him that the directors had made a call upon the preference shareholders for the whole amount of the stock subscribed by them, and mentioning the date and place for payment and the number of shares and amount required. On the 13th March, 1900, the board passed a similar resolution with respect to the shares of common stock, and calling for payment in full on or before the 12th April, and the treasurer wrote to the defendant notifying him in the same way.

Held, that the defendant's contract being to take the shares when and as they were "issued" and "allotted," these words, taken together, meant no more than some signification by the company of its assent that the defendant was or had become the owner of the number of shares which he had agreed to take, and that the resolutions and letters were a sufficient issue and allotment of the shares, and the defendant thereupon became bound to accept and pay for them.

The defendant, being repeatedly pressed for payment, asked for time. In November, 1900, he assumed to withdraw his offer, and the company then made a formal allotment of the shares to him, and notified him thereof.

Semble, that the formal allotment, if necessary, was in time; the appellant could not get rid of the obligation of his deed by any mere notice of repudiation and withdrawal. *Nasmith* v. *Manning*, 5 A.R. 126, 5 S.C.R. 440, distinguished.

Judgment of LOUNT, J., 2 O.L.R. 390; 37 C.L.J. 698, reversed.

Watson, K.C., for plaintiffs (appellants). *H. J. Scott*, K.C., and *Macrae*, for defendant.

Maclennan, J.A.] [Oct. 2.

CENTAUR CYCLE CO. *v.* HILL

Court of Appeal—Joint appeal of two parties—Security furnished by one—Payment into Court—Abandonment of appeal—Motion for payment out—Costs—Set off—Increased security—Limitation of amount—Rule 830.

Two defendants appealed to the Court of Appeal from a judgment of the High Court; the notice of appeal was a joint one; and $200 was paid into Court, as security for the respondents' (plaintiffs') costs of appeal, by one of the appellants, but in the name of both and for the joint benefit.

Held, that the appellant who had paid the money in was not entitled, upon abandoning his appeal, to have the money paid out to him, the other appellant desiring and intending to avail himself of the deposit and to proceed with the appeal.

The first appellant's notion for payment out being dismissed with costs to the other appellant, and it appearing that by the judgment appealed against the first appellant was entitled to be indemnified by the other against all amounts payable by the first under the judgment, and to recover from the other any amount so paid and his costs of the action, etc.

Held, that the costs of the motion should be set off against anything the first appellant might already have paid, or might ultimately have to pay under the provisions of the judgment referred to, as the result of the appeal.

Held, under the circumstances of the case, that the appeal would be more expensive than usual, and that the security should be increased to $400; but that upon the true construction of Rule 830, sub.-ss. 1, 4, 8, where security is given by payment into Court, it cannot be increased to more than $400.

Middleton, for plaintiffs. *W. H. Blake*, K.C., and *C. W. Kerr*, for defendant Hill. *Raney*, for defendant Love.

HIGH COURT OF JUSTICE.

Divisional Court]. REX *v.* JAMES. [July 18.

Fruit Marks Act, 1891, 1 Edw. VII., c. 27 D.—Fraudulent packing—Possession for sale—Faced or shewn surface—Meaning of.

The mere having in possession packages of fruit fraudulently packed, such possession being for the purpose of sale, is an offence under s. 7 of the Dominion Fruit Marks Act, 1891, 1 Ed. VII., c. 27, it being immaterial that no one was imposed on, and no fraud intended by the person charged with the offence.

"The faced or shewn surface" of the package is not limited to the branded end, but applies to any shewn surface thereof.

J. D. Montgomery, for defendant. *R. B. Beaumont*, contra.

Street, J., Britton, J.] [Sept. 17.

MERCHANTS BANK *v.* SUSSEX.

Ca. sa.—Issue of concurrent after expiry of original—Con. Rule 874—Motion for discharge from custody—Appeal from discretion of Judge—Discretion of Divisional Court.

A concurrent writ of ca. sa. should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 874, and will be set aside as having been improperly issued.

The right to make a motion to be discharged from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon the application founded upon Con. Rule 1047 is confined to the case of an order for arrest made before judgment and does not extend to a ca. sa.

The defendant had been arrested under an invalid concurrent writ of ca. sa. and was in the custody of a sheriff to the knowledge of the plaintiff's solicitor who prepared an affidavit entirely suppressing the fact of the arrest and upon which he obtained an order for and issued a new writ of ca. sa. Upon an appeal to a Divisional Court from a judgment of a Judge in Chambers refusing to set aside the latter order and writ and motion to be discharged,

Held, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application having for its object the setting aside of the order and writ must upon the authorities have failed: *Damer* v. *Busby* (1871) 5 P. R. 356, at p. 389, but was really one to the undoubted jurisdiction of the Court to set aside in its discretion orders which had been made by the wilful concealment or perversion of material facts and that a clear case had been made out and the order and writ should be set aside and prisoner discharged from custody.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

J. F. Jones, for appeal. *J. H. Moss*, contra.

Street, J.] REX EX REL. MCFARLANE *v.* COULTER. [Sept. 26.

Quo warranto—Election of Reeve—Fiat of County Judge and Proceedings in County Court—Order of County Judge setting aside—Appeal to Judge in Chambers.

In a quo warranto proceeding in which the fiat giving leave to serve a notice of motion to set aside the election of a township reeve had been granted by a County Court Judge and the proceedings entitled in his County Court, a motion was made before him to set aside all the proceedings in the relation, and he made an order setting them aside and quashing them with costs. On an appeal to a Judge in Chambers,

Held, that no appeal from such an order lies to a Judge in Chambers, as appeals from the County Courts in ordinary cases are given to a Divisional Court, and the appeal from the decision of a County Court Judge to a Judge of the High Court given by 55 Vict., c. 42, s. 187, sub-s. 3 (O.) "under this section" is from the decision of the County Court Judge upon the merits on the trial of the contested election, and not the quashing without a trial of the fiat upon which the proceedings were founded.

Quere whether the County Court Judge had power to make such an order.

Reg. ex rel. Grant v. *Coleman* (1882) 7 A.R. 619, referred to.

Douglas, K.C., for appellant. *Rodd*, contra.

Boyd C.] QUIRK *v.* DUDLEY. [Sept. 26.

Injunction—Oral slander—Mind-reading.

Injunction granted until the trial to restrain the defendants who profess to be mind-readers, pretending to give information at their public entertainments as to the cause of the death of the plaintiff's husband, intimating as they had done at such entertainments, that he had met with his death at the hands of a supposed friend, and thereby suggesting the idea that his late partner and the plaintiff were concerned in the matter.

Couch, for plaintiff. *Muir*, for defendant.

Boyd, C.] RE TURNER, TURNER *v.* TURNER. [Sept. 26.

Will—Construction—Devise to wife subject to condition of making a will in favour of children.

A testator devised his estate to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will providing for two of his children "and if she should fail or neglect to make the will it's my will that instead of my said estate being so devised and bequeathed to her, the same shall be equally divided share and share alike, between my said two children, their heir and assigns forever. All residue of my estate not herein-before disposed of I give and devise and bequeath unto my said wife."

Held, that under the above devise, the widow, who had complied with the conditions by making the will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and the judgment should so declare.

Proudfoot, K.C., for motion. *Harcourt*, for official guardian.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.] KINSMAN *v.* ONDERDONK. [May 23.

Attachment of debts—Bank official—Service—Priority—Order IX., rule 8.

A garnishing summons had been served on the Bank of Nova Scotia by two creditors of an absconding debtor. One was served on the president

and secretary of the bank at the head office; the other had previously served a summons on the manager of the branch of the bank in which the money of the absconding debtor was deposited, and he subsequently served the president.

Held, that the first service on the president at the head office must have priority.

Roscoe, K.C., and *Fullerton*, for the respective creditors. *Webster*, K.C., for Bank of Nova Scotia.

Province of New Brunswick.

SUPREME COURT.

McLeod, J.] STEWART *v.* FREEMAN (No. 2). [Oct. 9.

Bill—Demurrer.

A bill is not demurrable unless it absolutely appears that on the facts disclosed in the bill being established at the hearing the bill must be dismissed; and where the case for relief contained in the bill depends upon facts admitting of variation in their proof from their statement in the bill demurrer will not lie, though no relief, or relief in modified form, may be granted at the hearing.

A. B. Connell, K.C., in support of demurrer. *D. McLeod Vince* and *J. C. Hartley*, contra.

Province of Manitoba.

KING'S BENCH.

Full Court.] LEWIS *v.* BARRE. [July 12.

Sale of goods—Delivery in accordance with contract—Acceptance and rejection—Quality of goods.

This was an action for butter sold and delivered. The plaintiff's contention was that the defendants had contracted for all the butter they had on hand and such as they might manufacture during 1899 without any warranty as to quality. The defendant accepted part and subsequently rejected the remainder. At the trial it was held by RICHARDS, J., that the defendant contracted for "fine" butter only, that it was not proved to

have been of that quality and the property had not passed. Upon appeal to the Full Court,

Held, that the quality was a condition of the contract and the acceptance of part of the butter as "fine" did not bind the defendant to accept that which was not in that condition. See *Dyment* v. *Thompson*, 13 S.C.R. 303. Appeal dismissed with costs.

Howell, K.C., and *Mathers*, for plaintiff. *Ewart*, K.C., and *Robson*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] BOYLE *v.* VICTORIA YUKON TRADING COMPANY. [July 29.

Foreign judgment, action on—Proof of — Exemplification — Judgment founded on void contract—Right to question—Final and unalterable—Company — Extra-territorial contracts of carriage—Ultra vires—B.N.A. Act, ss. 91 and 92.

Appeal from judgment of DRAKE, J., giving judgment for plaintiff on a judgment recovered in the Yukon Territory. The company was incorporated in British Columbia and was sued for damages on a contract to carry goods from Bennett in British Columbia to Dawson in the Yukon Territory.

Held, a default judgment obtained in a foreign jurisdiction though liable to be set aside so long as it stands, is "final and conclusive" within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this province.

In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous such as being founded on an ex facie void contract.

The province may create a company with power to undertake extra-territorial contracts of carriage and so it is not ultra vires of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory.

Per MARTIN, J.: An exemplification of judgment under the seal of the court in which the judgment was pronounced is equivalent to the original judgment exemplified and notice under the Evidence Act of intention to produce it in evidence is unnecessary.

L. P. Duff, K.C., for appellant. *F. Peters*, K.C. (*W. M. Griffin*, with him), for respondent.

Book Reviews.

Conveyancing and other Forms. A collection of precedents adapted to meet the present law; comprising forms in common use, with clauses applicable to special cases. Second edition, revised and enlarged, by A. H. O'Brien, M.A., of Osgoode Hall, Barrister-at-Law, author of "Chattel Mortgages and Bills of Sale," "A Digest of the Game and Fishing Laws of Ontario;" Assistant Law Clerk of the House of Commons: Canada Law Book Company, Toronto, 1902.

For many years the Ontario practitioner was obliged, with more or less labour and thought, to draft any document required in his practice, or else was driven to adapt forms taken from English and American books on conveyancing, often unsuitable and inappropriate to the conveyancing usages of Ontario.

The first edition of Mr. O'Brien's book appeared in 1893. It was carefully and accurately compiled, and the forms given in it were such as most lawyers needed in the demands of their business; but this and all other books of conveyancing forms may now be said to be superseded by the work before us, which is a revised and enlarged edition of Mr. O'Brien's first book, yet so changed and so comprehensive as to be in fact a new work rather than a second edition.

A number of forms which had ceased to be of practical use are now omitted, and the forms remaining have been revised or re-written with care. The additions are numerous, and, as stated in the preface, are chiefly in relation to companies, banking, copyright, Crown lands, mining, bills and notes, and maritime law, many of which forms have become more necessary within the last few years. In addition to those of Manitoba, there have been added forms from British Columbia, North-West Territories and Nova Scotia, also an interesting sketch of the conveyancing practice of Quebec.

The company forms include those for by-laws, syndicate agreements for purchase and expropriation of property and many others. With the forms relating to copyrights and patents appear useful extracts from the statutes and Orders-in-Council giving the rules and regulations in regard to these matters. This information has not before been given in any book of forms or conveyancing, and will save the necessity of corresponding with officials, or a study of the Revised Statutes of the Dominion from the last, and now antiquated, revision of 1886 to the present date, to ascertain what, if any, amendments were made, and whether Orders-in-Council have been from time to time passed dealing with the subject.

Throughout the book appear notes of cases and extracts from statutes, where these are valuable to explain the necessity of any particular clause in

the text, or to call attention to some danger of error, and in the appendix is a concise exposition on the law of dower as it now stands in the various provinces.

The convenience and utility of a good, accurate and practical book of legal forms can hardly be over-estimated, and the profession is indebted to Mr. O'Brien for a work which can not, we think, fail to meet its requirements in this regard. The work of the printer is excellent, resulting in the production of a book which is perhaps the best in style and arrangement that has as yet been issued by any law publisher in this country.

A treatise on the law of Fraud and Mistake, by WILLIAM WILLIAMSON KERR; third edition by SIDNEY E. WILLIAMS, of Lincolns Inn, Barrister at Law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, Law Publishers, 1902.

This is a new addition of a standard work and will be gladly received by the profession. It brings the cases down to the end of November, 1901. The last edition was published in 1883. Since then many important alterations have taken place both in the law of fraud and in the law of mistake. This has rendered necessary a thorough reconsideration of the whole subject. This Mr. Williams appears to have carefully attended to. Too much praise cannot be bestowed upon these well-known publishers for the material part of the work.

Accidents to Workmen, by R. M. MINTON-SENHOUSE. Second edition, London: Sweet & Maxwell, 3 Chancery Lane, W.C., Law publishers, 1902.

This is a treatise on the English Employers' Liability Act, Lord Campbell's Acts, and The Workmen's Compensation Acts and matters relating thereto.

One is not surprised to be told in the preface that much of the first edition (by Messrs. Minton-Senhouse and Emery) has required to be re-written and remodelled, for no branch of the law has given a greater amount of work to courts and text writers. The treatise is excellent in itself, and the author has arranged a convenient system of references whereby the reader is enabled to ascertain with ease that part of any of the Acts treated of to which he may desire to refer. The work cannot be said to be in any way exhaustive; but it will, nevertheless, be a very useful addition to any lawyer's library. It would be much more so, at least in this country, if references had been made to the leading Canadian authorities. It is surprising that with few notable exceptions English text writers do not refer to our cases. Where the branch of law discussed is of equal interest in both countries this omission is a mistake. Doing so would add largely to the value of the book not only in Canada but in all other Colonial possessions.

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We are more than sorry to observe that, notwithstanding the oiling of the ways for confederation by the settlement of the French treaty shore question. Newfoundland sentiment is decidedly averse to joining with the Dominion of Canada. We hope and believe that this is only a passing phase of insular sentiment, susceptible of entire removal by judicious treatment by large-minded men in both colonies and in the mother country. The Imperial authorities can do much to persuade the people of Newfoundland that the whole trend of British interests is in the direction of such a union; and Canada cannot afford to dicker about the cost of "rounding-out" her Atlantic sea-board. The solution of the difficulty lies in the Britishers of North America following the recent example of their brethren in Australia and putting the great sentiment of Imperial patriotism before any smaller considerations, such as local jealousies and the laissez-faire policy of an antiquated colonialism.

There is but small satisfaction and little to be gained by attempting to criticise bills of provincial legislatures affecting the administration of justice, inasmuch as they either are strangled in infancy, or become law before there is time for more than perfunctory criticism. This is one of the many reasons why we deprecate this everlasting tinkering of statutes, referring especially in this regard to the Province of Ontario. It would be wisdom and save much public money if things were allowed to abide-a-wee. Frequent amendments, even in the line of probable improvement, which are merely experimental, generally do more harm than good.

The proposed changes in the Judicature Act are apparently aimed at relieving the Court of Appeal and throwing more work into the High Court. This is said to be desirable at the present juncture as the Court of Appeal is over-worked and the High Court Judges, with those recently appointed, have time on their

hands. The suggestion of making two divisions of the Court of Appeal, composed of three judges each (borrowing a judge from the High Court), has properly enough, perhaps, been abandoned. Shortly stated, it is proposed, in the bill before us, to send to the Divisional Courts for final adjudication all appeals from judgments of trial judges or single judges where the amount in dispute (except in certain specified cases) is under $1,000. Before next session it may very possibly be found that this scheme throws too much work upon the High Court judges, or has some other injurious effect, or it may perchance be urged that it does not give litigants, whose smaller sums are as much to them as larger ones are to others, the recourse they ought to have to a fully constituted appellate tribunal, presumably of more weight and authority than three judges of the High Court.

The Toronto Bar Association has expressed to the Attorney-General the opinion of its members, who had the matter under consideration, that it would be advisable to give the appellant the option to print or typewrite appeal books, and to provide that the costs, whether the books are printed or typewritten, should he costs on the appeal in the discretion of the Court, and to be paid by the respondent, if so ordered, whether or not he had consented to the books being printed instead of typewritten. It was also suggested that it would be a great saving of time and an improvement in the present procedure if provision were made authorizing the appellate courts to make rules limiting the time allotted to arguments and giving the right to either or both parties to put in a written argument if so advised.

Members of the profession should always be glad of every effort to advance its interests in any legitimate way; and for this reason we welcome the appearance of the Toronto Bar Association. It would seem to have within it the germ of usefulness, and we trust it may be carried on with energy and with due regard to its objects as set forth in the constitution. These are as follows: "To maintain the honour and dignity of the profession of the law; to elevate the standard of integrity, honour and courtesy in the profession; to cultivate the science of jurisprudence; to promote

reform in the law, and increase its usefulness in the administrattion of justice; to conserve and advance the interest of the profession, and to cultivate social intercourse and cherish the spirit of brotherhood among the members" The officers and trustees are well known and esteemed members of the profession and compose an energetic body of men from whose management good results should be obtained. It was thought by some that the formation of this association was in some way a reflection upon the County of York Law Association and might have the effect of weaken ng that organization. We should regret any such result, as the County Association has done good service in the past in the line of work in which it took a special interest, viz., the establishment and maintenance of an excellent local law library; but any feeling of the sort indicated is happily passing away. There would appear to be room for both associations, and they will doubtless work harmoniously together for the benefit and advantage of the profession as a whole. The members of the new association have, we believe, been very active in connection with the effort made to solve the unlicensed conveyancing problem, and when anything practical has been accomplished in that direction the entire profession will be greatly indebted to them. There are many other ways in which such an organization can be helpful. We trust that the work of its officers may be continuous, and characterized by the energy exhibited in the inception of the undertaking. We are glad to see that the older society is now arranging for some informal social gatherings. A little wholesome and friendly rivalry in such matters will do no harm so long as all combine together to protect our interests against foes from without and traitors within. The executive of Toronto Bar Association is as follows: President, Christopher Robinson, K.C.; Vice-President, R. C. Clute, K.C.; Secretary, Thomas Reid; Treasurer, James W. Bain; Board of Trustees, Messrs. W. D. McPherson, Chairman; Adam Ballantyne, Vice-Chairman; Frank E. Hodgins, K.C., A. C. Macdonell, F. C. Cooke, E. J. B. Duncan, W. R. Smyth, W. B. Raymond, E. E. A. DuVernet, W. N. Ferguson, E. B. Ryckman, R. J. Maclennan, C. D. Scott, W. G. Thurston.

The great metropolis of Chicago has declared for municipal ownership of street railways. On the 5th of April the so-called Mueller Street Railway Act was accepted by the municipal electorate by a large majority of votes. The Mueller law was enacted by the Illinois legislature in May, 1903, and it empowers any city in the State to "own, construct, acquire, buy and operate" street railways as municipal property, upon its acceptance by a majority vote. The city, however, cannot raise the money to buy the railway property without statutory authorization; and a modus vivendi inhering in the question: "Shall the Council, instead of granting any franchises, proceed to license the street railway companies until municipal ownership can be secured, and to compel them to give satisfactory service?" was adopted by the Chicagoans by a vote of 120,181 yeas to 48,056 nays. Mayor Carter H. Harrison is not at all sanguine of the outcome of this venture of municipal ownership for the good people of his borough. He fears that "the unsatisfactory condition of Chicago's civil service, which of late has given rise to a succession of serious scandals, indicates that the addition of 10,000 street car employees to the municipal pay-rolls would be injurious to the city government, and would not render less acute the existing evils of the traction system."

The trouble is that municipal ownership demands a fine sense of probity if the people who exploit it would have it a success, and this fine sense does not at present exist. For our part we are distinctly of the opinion, formed after much enquiry and careful consideration, that municipal ownership, no matter how excellent it may appear in theory, in the present condition of things, political and municipal, would generally be disastrous to the interests of the state and lower still further the present low standard of public morality. What may be possible in England is not necessarily possible in this country.

INQUIRIES BY MAGISTRATES IN CAMERA.

The action of the Police Magistrate of the City of Woodstock in conducting behind closed doors the trials of participants in the cocking main, which last month attracted an unusual amount of public attention, reveals a most objectionable wresting of this magisterial authority from its proper objects. It would appear from that functionary's own admission, that, on assuming office in November last, he formed a compact with local newspapers, by which the name of any Woodstock resident whom he should try by virtue of his summary jurisdiction, whether that of a Justice of the Peace, or such as might be conferred specially, would be suppressed by them, if he, on his part, aided in the suppression of publicity by turning his court into a secret chamber. This certainly seems to be rather an amazing proposal.

Section 849 of the Criminal Code enacts that the room or place in which the Justice (a Police Magistrate is declared to fall within the definition) sits to hear and try any complaint or information shall be deemed an open and public court to which the public generally may have access, so far as the same can conveniently contain them.

With s. 586, sub-s. *d*, read in connection with this regulation, there ought to be nothing else required to establish the Magistrate's radical error. That provision is as follows: "A Justice, may (when holding a *preliminary* inquiry) in his discretion order that no person, other than the prosecutor and accused, their counsel, and solicitor, shall have access to, or remain in the room or building in which the enquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing." It would, therefore, appear that the compact, above referred to, provides for an exact reversal of these statutory directions, for by it privacy was to be observed in the case of persons to be tried *summarily*, and it is not part of the agreement that persons appearing before the Police Magistrate on *preliminary* hearings were to have the screen removed from their misdoings.

The genesis of trials in camera is but partially understood. The usage depends upon a rule of practice, not of law. In the Encyclopedia of the Laws of England it is affirmed "that notwithstanding changes in procedure, an English court of justice is,

in theory, open to as many citizens as can crowd into it without disturbing its proceedings." And in the same work, the information is vouchsafed that adult women and children will be excluded by order of the Court, where the subject of inquiry might unfold anything morally pernicious.

The present Lord Chief Justice of England, when Attorney-General, advised the Brewers' Society, in a well-considered opinion (See Stone's Justices Manual, 1904, p. 771), that Justices of the Peace could not, in ordinary cases, bar any one from hearings, unless he were obstreperous, and, in special cases, no more than a section of the public, namely, women and children, in matters of an indecent nature, as to which it would not be fitting to bring out the full details. To put it shortly, salacious diet was not to be furnished those to whom it could endanger. It will not be out of place in this connection to remark that no order of the Court of this description is, so far as adult women are concerned, enforceable by process.

Daubney v. *Cooper*, 10 B. & C. 240, determines that a Justice of the Peace, who caused a person not found to have misbehaved himself in such a way as to hinder or obstruct the proceedings to be ejected from a sitting of his court, was liable therefor in trespass. *Young* v. *Saylor*, 22 O.R. 513 (affirmed on appeal, 20 A.R. 645) is to the same effect. Bayley, J., pronouncing the judgment of the Court in *Daubney* v. *Cooper*, says :—"The ground upon which our present opinion is formed is that the magistrate was proceeding upon a summary conviction, and, therefore, exercising a judicial authority ; and we are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, have a right to be present for the purpose of hearing what is going on."

In *Reg.* v. *Justices of Hamphshire*, 39 J.P. 101, a defendant obtained a rule nisi (the force of his objection would seem to have been admitted, since the case did not go further) for the purpose of quashing his conviction, made where the room in which the trial occurred was kept locked during its progress, and his friends, with others, to the number of 20 or 30, who were outside, had been refused admittance. Nor only this, for it has been laid down that

any member of the community whose rights have been violated by reason of a magistrate's departure from his line of duty may apply to the court (R.S.O. c. 88, s. 6) to compel him to proceed with a trial in accordance with law.

In *Collier* v. *Hicks*, 2 B. & A., Tenterden, C.J., says, at p. 668: "This (being a case of a court proceeding on a summary conviction) is undoubtedly an open court, and the public had a right to be present, as in other courts." Park, J., remarks, at p. 671: "All the king's subjects may be present."

Sir Frederick Pollock, in his address on the expansion of the Common Law, published in the *Harvard Law Review* says: "When we pass from the second to the third quarter of the nineteenth century, we find that the Parliament of Queen Victoria has taken a widely different course from the Parliament of King Philip and Queen Mary. The secret inquisitorial proceeding has become open and judicial; there is no longer an examination of the prisoner, but a preliminary trial in court, the police court, which in modern times is to many citizens the only visible and understood symbol of law and justice. The magistrate's office is more public than ever; the feeling that judgment should be done in the light of day has been strong enough to reassert itself after a partial eclipse. . . In this we have a tradition which has persisted through all changes. Like other rules of patience, the rule of publicity is not quite inflexible; some few exceptions are allowed on grounds of decency or policy, and in some jurisdictions they have been confirmed or extended by statute. . . The settled judgment of our ancestors and ourselves is that publicity in the administration of the law is on the whole—to borrow words used by my friend, Mr. Justice O. W. Holmes, in another context—"worth more to society than it costs."

In challenging the course of the magistrate in respect of these inquiries, the amendment of the Criminal Code of 1901, 550 *a* 2, has not been overlooked. There is no doubt that, with regard to the crimes and offences particularized (all of them cases where the matter of sex is concerned, and those ejusdem generis with them), the rule of practice as to excluding adult women and children only becomes superseded, and that every class of auditors may be turned out; but the saving clause found in sub-s. 2 could have no operation here, for, even if the section, as a whole, embraced a Justice of the Peace, which admits of considerable doubt, the com-

mon law power sought to be conserved would in his case at any rate, consist of nothing beyond the right to exclude for unseemly behaviour, either directly or mediately by commitment as for contempt in face of the court.

It may be a question how far the compact between the parties hereinbefore referred to is an agreement to violate a statute, and legally a conspiracy. Of late there have been tentative casts of the judicial plummet in these waters, but there is some doubt whether bottom has been reached. In the case before us the principal actor is a lawyer, and, apart from any question as to the propriety of such a compact, he entirely misunderstood, according to our view, his position in the premises. It is quite true that the Attorney-General in answer to a question in the House, when the matter was brought to its attention, made an off-hand statement that the magistrate had the right to act as he did, but we venture to think that the Attorney-General did not take time to look into the matter.

ACTIONS FOR MALICIOUS PROSECUTION.

To what extent does opinion of counsel protect in actions of malicious prosecution?

For many years the respective functions of judges and juries as to the questions of the existence or non-existence of reasonable and probable cause, and the presence or absence of malice, in actions of malicious prosecution, have been definitely settled. Sometimes the judge lays down the factors that must co-exist in order to support the action, and directs a general verdict, either for plaintiff or defendant, in accordance as the evidence establishes on the one hand, or fails to establish on the other, the issues submitted for determination by the parties to the suit; in other words, that the finding of certain facts would or would not constitute reasonable and probable cause, and would or would not indicate malice, and that their verdict should be in accordance therewith. Or the judge directs specific findings on questions submitted by him, and on these findings will order judgment to be entered either for defendant or plaintiff, as he finds there was, or was not, reasonable and probable cause for instituting proceedings.

When the prosecutor has taken the opinion of counsel on facts submitted for his decision before laying information, another factor enters into the consideration of the question.

In 1813 it was held by the Court in *Hewlett* v. *Cruchley*, 5 Taunt., page 277, that in an action for malicious prosecution it is no answer that the defendant took the opinion of counsel in what he did, if the statement of facts was incorrect or the opinion ill-founded. Mansfield, C.J., on motion for a new trial, said: "But one would at least expect that the defendant, in order to purge himself by the testimony of the opinion of a barrister, ought to shew that he laid a most full statement of the case before him upon which he could form a full judgment of the propriety of the case." Heath, J., said: "It would, however, be a most pernicious practice if we were to introduce the principle that a man, by obtaining an opinion of counsel, by applying to a weak man or an ignorant man, may shelter his malice by bringing an unfounded prosecution."

Chief Justice Abbott, in *Ravenga* v. *Mackintosh*, 2 B. & C., p. 693 (1824), substantially charged the jury to find a verdict for the defendant if they were of the opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his legal adviser; but to find for the plaintiff if they were of the opinion he intended to use the opinion as a protection, in case the proceedings were afterwards called in question. Bayley, J., in delivering judgment on motion for a new trial, said: "I accede to the proposition that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description."

This question is set in clear light by the great leading case of *Abrath* v. *North Eastern Railway Company*, L.R. 11 Q B.D. 440 (1893). Briefly summarized, the facts were these: The plaintiff, a medical doctor, had attended one Mr. McMann for injuries sustained in a collision in two trains upon defendant's railway. Principally upon the representations of the doctor, who described the injuries as of a most serious character, the defendants compromised Mr. McMann's claim for a large amount. In consequence of certain inquiries set on foot, it seemed to the company they had been made the victim of a conspiracy on the part of the doctor and his patient, the injuries being far less serious than

represented. The facts as disclosed were submitted by the directors of the company to counsel, and he advised that there was a good case for prosecuting a charge of conspiracy against both McMann and Dr. Abrath, his medical adviser. In addition to this, two eminent medical men were of the opinion that the case of the alleged injuries to McMann was a fabrication amounting to an imposture. Information was laid and Dr. Abrath committed for trial. He was acquitted, and thereupon brought an action of malicious prosecution against the defendants. The trial judge, Cave, J., left three questions to the jury: (1) Did the defendants, in prosecuting the plaintiff, take reasonable care to inform themselves of the true state of the case; (2) did they honestly believe the case which they laid before the magistrate; (3) were the defendants actuated by any indirect motive in preferring the charge against the plaintiff. The jury answered the two first questions in the affirmative, but gave no answer to the third, whereupon the judge upon these findings drew the inference of reasonable and probable cause, and directed a verdict to be entered for the defendants, and accordingly gave judgment for them. On appeal to the Queen's Bench Division, this judgment was set aside, and a new trial ordered. On appeal to the Court of Appeal, the judgment of the Court of the Queen's Bench Division was set aside, and the appeal from the order for a new trial allowed.

In his judgment in the Court of Appeal, Brett, M.R., characterized the charge of Cave, J., to the jury as most masterly. Among other things he said: "I wish I could express what I intend to say as clearly and as concisely as he stated this case to the jury. A summing up in an action for malicious prosecution I have never read which I more admired."

This model charge was as follows: "I think the material thing for you to examine about is whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves: Did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless, they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff

to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then there is another point, and that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before magistrates with a case which appears to be good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore I shall have to ask you that question along with the others, and according as you find one way or the other then I shall tell you presently, or I shall direct you whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause, or rather that those two questions should be answered in the affirmative—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices—then I shall tell you, in point of law, that this amounts to reasonable and probable cause, and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion, if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the case which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question: Were they in what they did actuated by malice—that is to say, were they actuated by some motive other than an honest desire to bring a man, whom they believed to have offended against the criminal law, to justice? If you come to the conclusion that they did honestly believe that, then they are entitled again to your verdict; but if you come to the conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict, and then it will become necessary to consider the question of damages."

The divergence of opinion in this case between the Court of Appeal of the Queen's Bench Division and the Court of Appeal arose in a misconception, on the part of the former, as to the mode of proof. The Court of Appeal of the Queen's Bench Division held that the burden of proof was on the part of the defendants to establish probable and reasonable cause, since the facts necessary for such proof would lie peculiarly within their knowledge. That if it rested with the plaintiff, he would be called upon to prove a negative. Before this it was contended by many that when the plaintiff had proved the prosecution and that it had terminated favourably to himself, the burden was shifted upon the defendant, and consequently the plaintiff would be entitled to recover, unless the defendant could shew reasonable and probable cause for having prosecuted.

The result of this decision establishes the principle, that in actions of malicious prosecution the burden of proof throughout rests upon the plaintiff, as well to shew want of reasonable and probable cause, as to prove malice, although the knowledge of its existence lies peculiarly within the knowledge of the defendant.

Further, this case demonstrates how small a part the fact that defendants took the opinion of counsel before prosecuting played in its ultimate decision. It would seem, however, to follow as a legitimate inference, that taking the opinion of counsel as a precautionary measure may have been a material factor in leading the jury to find as they did.

It is only when the prosecutor acts bona fide upon the legal advice or opinion of counsel on facts apparently credible and fully disclosed to his counsel, and with a mind free from the taint of malice, his defence can be said to be assured. While the onus of proving malice rests upon the plaintiff, the jury may infer it from the want of reasonable or probable cause. Yet they are not bound so to do. On the other hand, however, the want of reasonable or probable cause cannot be inferred from proof of malice.

In *Rex* v. *Stewart*, 6 M.L.R., p. 264 (1889), Chief Justice Taylor is thus reported: "The law certainly seems to be now settled, that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel, he is not liable to an action."

In *St. Denis* v. *Shoultz*, 25 O.A.C., p. 131 (1898), the court held that notwithstanding the prosecution was instituted on the advice

of counsel, it was not sufficient to protect the prosecutor, if he did not exercise reasonable care to ascertain the facts in reference to the alleged offence.

The question arose incidentally in *Horsely* v. *Style*, 9 Times L. R. 605 (1893). This was an action on the case brought to recover damages for the wrongful registration of an inventory and receipt as a bill of sale, which was not a bill of sale, whereby the plaintiff was injured as alleged in his credit A verdict having been awarded plaintiff, on appeal to the Court of Appeal the verdict was set aside and judgment ordered to be entered for the defendant.

Lord Justice Esher, M.R., in delivering the judgment of the Court of Appeal, said: "That the defendant had used the law, which said that a person who was the grantee of a bill of sale could register it. The defendant had an inventory and receipt which his solicitor advised him should be registered as a bill of sale. The defendant, therefore, was using the law relating to bills of sale. It must be taken that he used the law erroneously. That was not enough to make him liable in this action. It must be proved that he used it maliciously and without reasonable and probable cause. It could not be said that there was a want of reasonable and probable cause, for his solicitor advised him to register it. Then as to malice, that was doing a thing from an improper and indirect motive. There must be actual malice. It was not enough that there should be legal malice, if there was such a thing. The learned judge, therefore, was wrong in telling the jury that malice in fact was not necessary. In the present case all the witnesses had been called and no further evidence could be given, and no evidence of malice had been given. There was no use in sending the case for a new trial, and judgment must be entered for the defendant."

In *Peck* v. *Peck*, 35 N. B. R., p. 484, it was shewn the charge upon which plaintiff was arrested was made on the advice of counsel, but it was further shewn the defendants did not disclose the facts fully to him. A verdict having been found for the plaintiff, a rule for a nonsuit or new trial was refused by the court en banc.

The following general rules should be borne strictly in mind:

1. In actions for malicious prosecution, the plaintiff must allege and prove absence of reasonable and probable cause and

malice. The affirmative of these allegations is upon him. If he fails to establish both, he fails altogether.

2. The factors necessary on the part of the defence to establish reasonable and probable cause are threefold: first, belief of the accuser in the guilt of the accused; second, belief in the existence of the facts upon which he proceeded to prosecute; and thirdly, that such belief was based upon such reasonable grounds as would lead any fairly cautious man so to believe and so to act. Upon the findings of the jury on these points, the judge draws his inference and determines whether they disclose or not reasonable and probable cause. The inference of the judge is an inference of fact and not of law, drawn by him from the facts found by the jury and from all the circumstances of the case.

3. The malice necessary to be established is not malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact. Any indirect, sinister or improper motive would be malice in fact.

4. Taking the opinion of counsel before proceeding to prosecute amounts only to a circumstance, which the jury is bound to consider in determining whether the accuser was actuated by an honest and sincere desire to bring a guilty party to justice, or whether it was resorted to merely as a cloak to cover some covert or indirect purpose.

5. From want of reasonable and probable cause, malice may be inferred. The question then arises: Can the jury, for the purpose of determining the question of malice, draw themselves for such purpose the inference of the presence or absence of reasonable and probable cause? Such is the view put forward by Sir Henry Hawkins in his judgment in *Hicks* v. *Faulkner*, L.R. 8, Q.B.D. 167. At page 175 he is thus reported: "Absence of reasonable cause to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the judge alone to determine, upon the facts found, for the jury; as evidence

of malice it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interests of justice—in which case they ought not, in my opinion, to find the existence of malice. It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the judge—but such at present is the law."

6. The recognized distinction between actions for false imprisonment and malicious prosecution should be carefully observed. In false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; whereas, in an action for malicious prosecution, the plaintiff must allege and prove affirmatively its non-existence.

St. John, N.B. SILAS ALWARD.

The murder of Gonzales in South Carolina by that brutal ruffian, Ex-Lieutenant-Governor Tillman, is doubtless in the memory of our readers. It is said that his acquittal was secured in the following ingenious manner. Shortly before the trial a number of his agents went through the county where the trial was to take place soliciting orders for the enlargement of photographs. The head of the family was always interviewed, and, as an example of the work that would be done, there was produced a picture of Tillman. This was used to bring on a conversation about the pending trial. The views of the possible juryman were thus ascertained, and, being carefully noted, were reported to the prisoner's attorney. This work was done so thoroughly that the views of the whole panel were in his possession. When the trial came on those who were called as jurymen and known to be unfavourable to the prisoner were confronted with the statement, and, having expressed an opinion on the case, they were, according to United States law, ineligible for service as jurymen. A favourable jury was thus secured and the murderer escaped the hangman's noose which he so well merited. It will thus be seen that there are many things connected with the administration of justice in which our criminal lawyers are behind the age.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—DIRECTOR—FORFEITURE OF OFFICE—CONTINUING TO ACT AFTER FORFEITURE—FEES PAID TO DIRECTOR AFTER OFFICE FORFEITED—MONEY PAID BY MISTAKE—REPAYMENT OF FEES—LIEN—QUANTUM MERUIT.

In re Bodega Co. (1904) 1 Ch. 276. In this case a director of a joint stock company under the articles of association forfeited his office if he became interested in any contract with the company. Wolseley, one of the directors of the company, on 24th December, 1900, became secretly interested in such a contract. He continued to act as director and received fees for so acting, and in July, 1901, received £400 as special remuneration for his services as director. He continued interested in the contract till the end of June, 1901. At the general meetings in July, 1901, and 1902, he retired and was re-elected to the board. In February, 1903, his secret interest in the contract of 1900 was first discovered. He then ceased to act as director and sold his shares, and the company refused to register the transfer, claiming a lien on the shares for the fees paid him, including the special remuneration for services when he was not in fact a director. Farwell, J., held that Wolseley automatically vacated his office on becoming interested in the contract, but his disqualification ceased when his interest in the contract came to an end, and that his re-elections in July, 1901, 1902, were valid. He also held that the defendant was not entitled to any quantum meruit for his services as director between 24th December, 1900, and July 8th, 1901, but that the company were entitled to all fees paid him during that period as being moneys paid under mistake of fact, and was entitled to the lien they claimed on his shares for the amount so due from him.

PRACTICE—ADMINISTRATION — NEGLECT TO RENDER ACCOUNTS—COSTS OF TAKING ACCOUNT.

In re Skinner, Cooper v. *Skinner* (1904) 1 Ch. 289. Farwell, J., held that where trustees neglect and refuse to give a proper account without suit they may be ordered to pay the costs of proceedings by way of originating summons to compel them to

account, including the costs of taking and vouching their accounts: *Hewett* v. *Foster*, 7 Beav. 348; 64 R.R. 98, which decided that the costs of taking the account should be paid out of the estate, was held not to be in accordance with the modern practice.

ADMINISTRATION—WILL—FOREIGN BONDS—FOREIGN SHARES TRANSFERABLE ABROAD OR IN LONDON—LOCALITY OF ASSETS.

In re Clark, McKicknie v. *Clark* (1904) 1 Ch. 294, was a case in which it became necessary to determine the locality of certain personal assets. A testator domiciled in England by his will had appointed certain trustees, whom he called his "home trustees," to whom he bequeathed all his personal estate in the United Kingdom. He also appointed others, whom he called his "foreign trustees," to whom he bequeathed all his personal property in South Africa. At the time of his decease he owned a number of bonds payable to bearer of a waterworks company in South Africa, where the bonds were payable. He also owned a number of shares in mining companies in South Africa. These companies were constituted according to the laws of the Transvaal and Orange River Free States and had their head offices in South Africa, where the register of shareholders was kept and the directors met; but they had also offices in London, where a duplicate register was kept and where shares might be transferred. The testator's name was on the London register of the companies, and all his bonds and share certificates were at his banker's in London. On this state of facts, Farwell, J., held that the waterworks bonds passed to the "foreign trustees" and the shares to the "home trustees," the certificates being in England and the shares being also transferable there.

WILL—UNATTESTED ALTERATION—CONFIRMATION BY CODICIL—WILLS ACT 1837 (1 VICT. C. 26) S. 31—(R.S.O. C. 128, S. 23.)

In re Hay, Kerr v *Stinnear* (1904) 1 Ch. 317, shews the necessity for attesting alteration in wills in the manner required by the Wills Act, s. 31 (R.S.O. c. 128, s. 23). In this case a testatrix had made a will on 1st February, 1901, bequeathing many legacies, including (a) £200 to C., (b) £500 to M., and (c) £3,000 to S. On 19th October, 1901, by her direction her servant struck out the three legacies. Subsequently, on 21st October, 1901, the testatrix executed a codicil referring to her will as of 1st February, 1901, and thereby revoked legacy (b), but did not refer to the other two

legacies, and concluded by ratifying and confirming the will in other respects; and it was held by Buckley, J., that only legacy (b) was revoked, and that no effect could be given to the unattested alterations.

RIVER—RIPARIAN PROPRIETOR—PRESUMPTION THAT RIPARIAN OWNER IS ENTITLED TO BED OF RIVER AND MEDIUM FILUM—ISLAND IN RIVER.

In *Great Tonington* v. *Stevens* (1904) 1 Ch. 347, the plaintiffs were grantees of land abutting on a river, but they had no express grant of the river. There was an island in the middle of the river opposite the property. The defendant took gravel from the bed of the river between the plaintiffs' land and the island, but nearer the island. The plaintiffs claimed that by presumption of law they were entitled to the bed of the river and medium filum and that such presumption extended to the whole river and entitled them to half of the island, and they sought to restrain the defendant from removing the gravel. Joyce, J., dismissed the action, holding that if the presumption applied, the medium filum aquæ ought to be drawn between the island and the plaintiffs' land.

CONTRACT—SALE TO WHOLESALE DEALER WITH CONDITIONS AS TO SALES BY RETAIL—"WHOLESALE DEALER TO BE DEEMED AGENT OF MANUFACTURER" PURCHASE WITH NOTICE OF CONTRACT OF VENDOR—CONDITION ATTACHED TO GOODS—INJUNCTION.

In *Taddy* v. *Sterious* (1904) 1 Ch. 354, the plaintiffs were manufacturers of tobacco which they sold in packets, subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing this proviso: "Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer the latter shall be deemed to be the agent of T. & Co." The plaintiffs sold to one Ritten, a wholesale dealer, who resold to the defendants Sterious & Co., who had notice of the conditions. The defendants nevertheless sold the goods at less than the minimum price mentioned in the notice, and the present action was brought to restrain them from so doing; but Eady, J., held that there was no contract between the defendants and the plaintiffs which the plaintiffs could enforce, and that conditions of the kind in question cannot be attached to goods so as to bind purchasers with notice. The stipulation that the wholesale dealer was to be deemed the plaintiffs' agent was nugatory in this case because Ritten sold the

goods as his own and not for the plaintiffs or as their agent; and in the opinion of Eady, J., it could only apply to cases where the wholesale dealer was in fact the plaintiff's agent.

COMPANY—WINDING UP - PROOF OF CLAIM AS UNSECURED CREDITOR--MISTAKE —SOLICITOR—LIEN.

In re Safety Explosives (1904) 1 Ch. 226. The solicitors of the company in liquidation, having a lien on the deeds and papers of the company, filed a claim, in which in forgetfulness of this lien, they stated they held no security. They subsequently applied to Buckley, J., to be allowed to withdraw the proof and file a new claim as secured creditors and valuing their security. Buckley, J., granted the application, but the Court of Appeal (Williams and Stirling, L.JJ.) held that it was not a case in which leave should have been granted but on different grounds. Williams, L.J., on the ground that the solicitors had not made out a case of inadvertence on their part, but even if they had they had lost their lien by parting with the deeds without calling the attention of the liquidator to their lien, and on the ground (with which Stirling, J., agreed) that the position of all parties, and especially that of the liquidator, had been altered since the proof was made.

STATUTE OF LIMITATIONS—PRINCIPAL AND AGENT—MONEYS REMITTED TO AGENT FOR SPECIAL PURPOSE AND NOT ACCOUNTED FOR—EXPRESS TRUST—ACTION FOR ACCOUNT—(R.S.O. c. 129, s. 32.)

North American Timber Co. v. *Watkins* (1904) 1 Ch. 242, was an action by principals against their agent for an account, in which the defendant pleaded the Statute of Limitations. The facts were, that in 1883 the plaintiffs remitted to the defendant in America moneys for the purpose of buying therewith prairie lands. Lands were bought and paid for out of the moneys. In 1901 the plaintiffs, for the first time, discovered that the defendant had charged the plaintiffs more for the lands than he had actually paid. Kekewich, J., held that the defendant was an express trustee of the money and the Statute of Limitations was no defence.

PRACTICE—PARTIES—BREACH OF TRUST—REPRESENTATIVES OF TRUST ESTATE.

In re Jordan, Hayward v. *Hamilton* (1904) 1 Ch. 260, was an action brought by a cestui que trust in respect of an alleged breach of the trusts of a marriage settlement. The original trustees of the settlement were Charles Jordan and Daniel Ludlow. Both

were dead. Jordan died in 1882 and Ludlow in 1886. There had been no new trustees appointed in their place: the action was against the executors of Jordan and the alleged breaches of trust were committed by both trustees. On a preliminary objection to the constitution of the suit, Byrne, J., held that the representatives of the last surviving trustee not being before the Court and no new trustees having been appointed, the trust estate was not represented, and no one having the legal title to the trust fund in question was before the Court. The case was, therefore, ordered to stand over to enable the representatives of the surviving trustee to be joined, or to enable new trustees to be appointed and added as defendants.

WILL—"TESTAMENTARY EXPENSES."—SETTLEMENT ESTATE DUTY.

In re King, Travers v. *Kelly* (1904) 1 Ch. 363, a testator directed his testamentary expenses to be paid out of his residuary estate. By statute a certain duty imposed in respect of property settled by will is payable by the executor. The question was, whether this duty was part of the "testamentary expenses." Eady, J., held that it was not, but was chargeable against the settled property.

COSTS—TAXATION—COSTS BEFORE ACTION—PREPARATION FOR DEFENCE BEFORE WRIT—RULE 1002 (29)—(ONT. RULE 1176).

In *Bright* v. *Sellar* (1904) 1 Ch. 369, the defendant being threatened with the present action for being party or privy to a fraud disclosed in a previous action to which he was not a party, in anticipation of the action and with a view to defending himself, procured a transcript of the speeches, evidence, and judgment in the previous action. The action having been dismissed, for want of prosecution, with costs it was held by Eady, J., that under Rule 1002 (29), (Ont. Rule 1176), the defendant was only entitled to the costs of so much of the transcript of the evidence and judgment as related to the present action.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.B.] TRAVERS *v.* CASEY. [March 10.

Will—Roman Catholic Bishop—Devise of personal and ecclesiastical property—Construction.

The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property: "Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real and personal, wherever situated; to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established."

Held, affirming the judgment appealed from (36 N.B.R. 229) that the private property of the testator as well as the ecclesiastical property vested in him as bishop was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction. Appeal dismissed with costs.

Pugsley, K.C., and *Quigley*, K.C., for appellants. *Stockton*, K.C., and *Barry*, K.C., for respondents.

N.B.] PEOPLE'S BANK *v.* ESTEY. [March 10.

Sale of goods—Owner not in possession—Authority to sell—Secret agreement—Estoppel.

The owner of logs by contract in writing agreed to sell and deliver them to McK., the title not to pass until they were paid for. The logs being in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner, asking if he had them for sale and was answered "No, I have sold them to McK." E.

then purchased a portion of them from McK., who did not pay the owner therefor and he brought an action of trover against E.

Held, affirming the judgment under appeal (36 N.B.R. 169), NESBITT and KILLAM, JJ., dissenting, that the owner having induced E. to believe that he could safely purchase from McK. could not afterwards deny the authority of the latter to sell.

Held, per NESBITT and KILLAM, JJ., that as there was no evidence that the owner knew the identity of the person making the inquiry by telephone, and nothing was said by the latter to indicate that he would not make further inquiry as to McK.'s authority to sell, there was no estoppel.

Held, per TASCHEREAU, C.J., that as the owner had given McK. an apparent authority to sell, and knew that he had agreed to buy for that purpose, a sale by him to a bona fide purchaser was valid. Appeal dismissed with costs.

Connell, K.C., and *Carvell*, for appellants. *Pugsley*, K.C., and *Gregory*, K.C., for respondent.

Que.] CITY OF MONTREAL *v.* MONTREAL STREET RAILWAY CO. [March 25.

Operation of tramway—Municipal franchise—Construction of contract—Suburban lines—Percentages upon earnings outside city limits.

The city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city which extend into adjoining municipalities. The contract, dated 8th March, 1893, granted the franchise to the company for the period of thirty years from August 1, 1892. A clause in the contract provided that the company should pay to the city annually during the term of the franchise, "from Sept. 1, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on Sept. 1, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city. In an action by the city to recover percentages upon the gross earnings of the lines of tramway both inside and outside of the city limits;

Held, reversing the judgment appealed from, the CHIEF JUSTICE and KILLAM, J., dissenting, that the city was entitled to the specified percentages upon the gross earnings of the company arising from the operation of

the tramway both within and outside of the city limits. Appeal allowed with costs.

Atwater, K.C., and *Ethier*, K.C., for appellants. *Campbell*, K.C., for respondents.

Ex. C.] POUPORE *v.* THE KING. [March 30.

Contract—Construction—Public work—Finding of referees.

The specifications accompanying a call for tenders for the widening and deepening of a part of the St. Lawrence Ganals which were a part of the contract subsequently entered into contained the following: "Parties tendering for the works are requested to bear in mind that no part of the work can be unwatered during the season of navigation, but that the water may be taken out of the canal at the close of navigation when the work of widening and deepening the channel way to the full capacity can in the usual way be at once proceeded with; otherwise the work below the surface water-line must be done by sub-aqueous excavation." The contractor for the work claimed payment for extra work and increased cost on account of the Government refusing to unwater during the winter months.

Held, that the contractor might be called upon to work under water during the time the canal was closed to navigation as well as when it was open and was not entitled to extra payment therefor especially as no demand was made for unwatering.

The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered and spread in a satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, the resident engineer returned 69,000 as falling under the above provision and the Government allowed 23,000 yards. The Exchequer Court Judge referred it to the registrar of the court and two engineers who reported that the amount allowed by the Crown was a sufficient allowance and their report was confirmed by the Court.

Held, that the Supreme Court would not overrate the judgment of the expert referees.

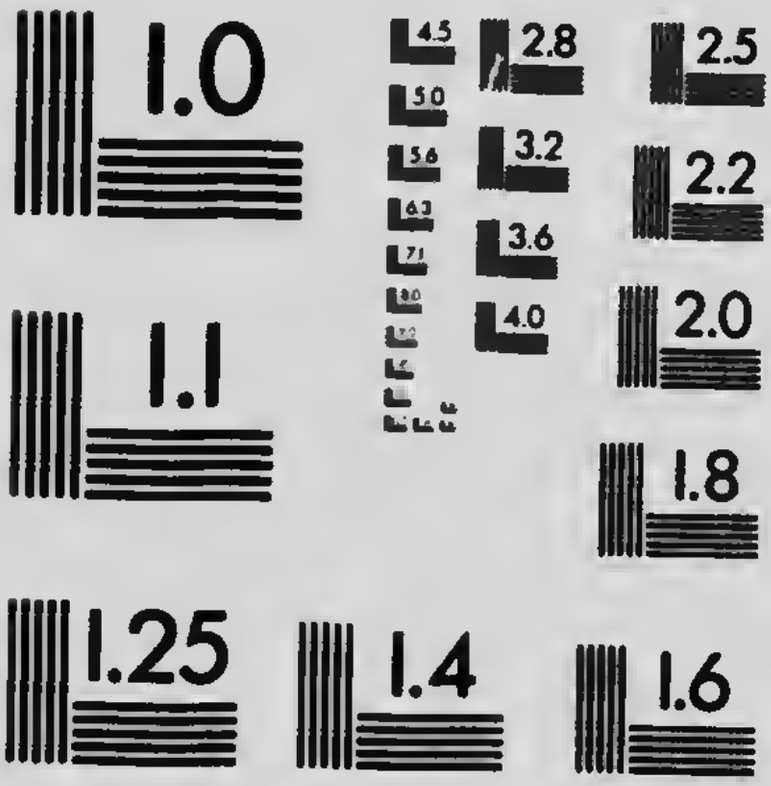
Other clauses of the contract required the contractors to make and repeat their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works and every month until adjusted or rejected. By the order-in-council referring the claims of the appellant to the Exchequer Court these clausese were waived "in so far as the repeated submission of claims is required."

Held, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to it having arisen but only from repeating it after the following certificate. Appeal dismissed with costs.

Aylesworth, K.C., and *Christie*, for appellants. *Chrysler*, K.C., for respondent.

MICROCOPY RESOLUTION TEST CHART

(ANSI and 'SO TEST CHART No. 2)



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COURT OF APPEAL.

From Divisional Court.] [Jan. 25.

HOGG *v.* TOWNSHIP OF BROOKE.

Municipal corporations—Highway—Snow drifts—Temporary side track.

Plaintiff in travelling on a highway in the defendant corporation with a team of horses and waggon came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a frame fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard; but a thaw was in progress, which had commenced three days before. When those in the waggon sought to use the track the horses broke through, and the waggon was in danger of being upset. Plaintiff got out and in assisting the horses was injured by one of them.

Held, that under the circumstances it was the duty of the defendants to have opened up a way through the drifts sufficient to enable vehicles, such as the waggon in which the plaintiff was travelling, to have passed in safety along this highway; that the defendants had notice that the highway was out of repair and that the plaintiff was entitled to recover.

Judgment of a Divisional Court (MEREDITH, C.J., and MACMAHON, J.) reversing the judgment of FALCONBRIDGE, C.J., affirmed.

Shepley, K.C., and *John Cowan*, K.C., for the appeal. *T. G. Meredith*, K.C., contra.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.] [March 4

ROGERS *v.* MARSHALL.

Chattel mortgage—Renewal—Statement of payments—Non-repetition of in subsequent statements.

In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor in which the validity of the renewals of a chattel mortgage was questioned on the ground that while the first renewal statement shewed all the payments made during the year and the total amount due; the subsequent renewal statements began with the total amount due in the preceding statement and did not repeat the payments there set out and credited.

Held, sufficient.

Judgment of the Second Division Court of the County of Lambton affirmed.

Christin v. *Christin* (1899), 1 O.L.R. 634, followed. *Kerr* v. *Roberts* (1897) 33 C. L. J. 695, overruled.

D. L. McCarthy, for the appeal. *Riddell*, K.C., contra.

Boyd, C.] [March 22.

KIRCHOFFER *v.* IMPERIAL LOAN AND INVESTMENT CO.

Evidence—Discovery—Order of foreign court—Refusal to attend—Order compelling attendance.

R.S.C. 1886, c. 140, extends to parties as well as witnesses; and a former manager of a company (while the matters in dispute in the action were taking place), as such officer, is a quasi party and stands for the person to be examined for discovery for the corporation defendant. This person had refused to attend and be examined in pursuance of an order of a Manitoba court, made on an ex parte application. An order was made on the present application to compel his attendance.

A. Hoskin, K.C., for the motion. *Beaumont*, contra.

Cartwright, Master in Chambers.] [March 30.

ATTORNEY-GENERAL OF ONTARIO *v.* TORONTO JUNCTION RECREATION CLUB.

Evidence—Production of membership roll—Recreation club—Revocation of charter—Common betting house.

In an action against the defendants for a declaration that they were using their premises as a common betting house, contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter.

Held, that the President of club was not bound to produce the membership roll of the club as it might lead to a criminal prosecution against him.

D'Ivry v. *World Newspaper* (1897) 17 P.R. 387, and *Hopkins* v. *Smith* (1901) 1 O.L.R. 659, followed.

Dewart, K.C., for the motion. *Johnston*, K.C., contra.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [April 19.

REX *v.* FRASER

Certiorari—Insufficient return—Annexing papers.

In obedience to a writ of certiorari, proceedings were transmitted by the person to whom the writ was directed, by letter to the proper officer, but they were in a loose condition, with no symptom having been annexed to the certiorari.

Held, to be a bad return which could not be looked at by the Court.

McCullough, for the applicant. *Holman*, contra.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] REG *v.* BIGELOW. [March 8.

Liquor License Act of 1886—Sale in violation of provisions—Evidence—Conviction affirmed.

Defendant's clerk received at Truro, N.S., an order addressed to Bigelow and Hood Ltd., Halifax, for one bottle of whisky. The order was sent to Halifax and returned the following day indorsed "Deliver this order from our Truro warehouse and charge, etc." Bigelow and Hood Ltd., rented from defendant, who was president of the Company, premises at Truro which they used as a bonded warehouse, but the evidence showed that the order in question was filled, not from the bonded warehouse, but from an open case in defendant's cellar, which was kept there for that purpose.

Held, that the evidence shewed a sale by defendant and that the appeal from the judgment of the County Court Judge for District No 4 affirming the conviction must be dismissed with costs.

Full Court.] CAPE BRETON ELECTRIC CO. *v.* SLAYTER. [March 8.

Electric Company—Obligation to supply meter reading to consumer—Burden to shew compliance—Offer to compromise—Not a waiver of right under statute—Payment of previous bills.

The Dominion Acts, 1894, c. 13, s. 13, sub. s. 2 enacts that "Whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser the contractor shall cause a duplicate of such reading to be left with the purchaser." In an action by the plaintiff company seeking to recover for electric lighting and rent of meter.

Held. 1. The burden was upon plaintiff to shew compliance with the Act, and that non compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it.

2. An offer to compromise made on the part of defendant could not in any sense be treated as a wavier of the right conferred by the statute.

3. Per TOWNSHEND, J. The fact of previous billls having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid.

C. P. Fullerton, for appellant. *H. Mellish*, for respondent.

Full Court.] REX *v.* TOWN OF GLACE BAY. [March 8.

Arbitration—Arbitrator being interested as ratepayer—No disqualification—Certiorari.

By the Acts of 1902, c. 80, the town of Glace Bay was empowered for the purpose of obtaining a water supply to enter upon any lands in the County of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town.

Held, dismissing with costs the appeal from the decision of TOWNSHEND. J., refusing a writ of certiorari.

1. That if the arbitrators were acting in a judicial capacity, c. 39 R.S. applied, and the fact of the arbitrator being a ratepayer afforded no valid objection to the award made by him.

2. That if the arbitrators were not acting in a judicial capacity a writ of certiorari would not lie to remove into this Court any award made by them.

H. McInnes, K.C., for appellant. *W. B. A. Ritchie*, K.C., and *T. R. Robertson*, for respondent.

Full Court.] REX *v.* COOLEN. [March 8.

Criminal Code, ss. 262, 265, 713, 787—Information charging assault causing bodily harm—Conviction for common assault—Held good—Words "indictment" and "count."

Defendant was tried before the Stipendiary Magistrate of the City of Halifax on an information charging him with committing an assault upon J. F., causing bodily harm. The accused having consented to be tried summarily in accordance with s. 787 of the Code was tried and convicted of a common assault only.

Held, 1. Sec. 713 of the Code enabled the magistrate to convict of the common assault under s. 265, notwithstanding that the information was for an indictable offence under s. 262 as the latter section includes common assault.

2. The contention that s. 713 only applies to indictments, "counts" being the only word used, was disposed of by s. 3 sub-sec. (b) of the Code where it is provided that the expressions "indictment" and "count" respectively include information and presentment as well as indictment and also any plea, replication or other pleading and any record.

3. Independently of the statute the conviction was good.

See *Queen* v. *Oliver*, 30 L.J.M.C. 12, and *The Queen* v. *Taylor*, L.R. 1 C.C.R. 194.

Leahy, for appellant. *O'Hearn*, contra.

Full Court.] REX *v.* GAUL. [March 8.

Criminal Code, s. 55—Punishment of child by teacher.

The Criminal Code, s. 55, authorizes parents, persons in the place of parent, school masters, etc., to use force by way of correction towards any child, etc., under his care "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorized to use force is criminally responsible for any excess." Defendant, a teacher in one of the public schools of the city, was charged before the Stipendiary Magistrate of the city of Halifax for assaulting, beating and ill using J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on the part of defendant or of permanent injury to the child.

Held, 1. The only question properly before the Stipendiary Magistrate was whether the punishment was reasonable under the circumstances, or, in other words, whether there was excess.

2. There is no warrant in the Code for the test applied in the American case of *State* v. *Pendergrass*, 31 Am. Dec. 365, and adopted by the Stipendiary Magistrate that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child.

W. A. Henry and *R. T. Murray*, for appeal. *H. McInnes, K. C.*, contra.

Full Court.] REX *v.* BIGELOW. [March 8.

Liquor License Act of 1886—Conviction as for third offence—Use of previous convictions to establish.

Previous convictions may be used as evidence upon which to base a coviction for a third offence against the provisions of the Liquor License Act as often as such an offence is charged and proved.

It is not now necessary under the statute (s. 131) to ask the defendant whether he has been previously convicted unless he is present in person.

Where at the conclusion of each of several cases tried before him the magistrate decided to convict, but at the instance of defendant's counsel retrained from imposing sentence and drawing up the formal conviction until the County Court Judge should have decided a question raised on the trial as to the use of previous convictions.

Held, dismissing defendant's motion to quash and ordering a writ of procedendo, that the magistrate was not precluded from proceeding with the convictions at a later stage.

J. A. Chisholm and *H. V. Bigelow*, for motion to quash. *S. D. McLellan*, contra.

Ritchie, J.] REX *v.* TURPIN. [March 21.

Criminal Code, ss. 241, 265, 668, 760—Indictment for wounding with intent and for common assault—Motion to quash refused—Peremptory challenges.

The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts, charging him (1) for that he in the city of Halifax on the 13th day of November, in the year of our Lord one thousand nine hundred and three, with intent to do grievous bodily harm to one Thomas J. Weatherdon, did unlawfully wound the said Thomas J. Weatherdon, and (2) for that he did in the city of Halifax on the 13th day of November, in the year of our Lord one thousand nine hundred and three, unlawfully assault one Thomas J. Weatherdon. After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it on the ground that the Clerk of the Crown had not sent the deposition taken on the prisoner's preliminary examination, before the grand jury of the County of Halifax, as required by s. 760 of the Criminal Code. When the jury was being sworn the prisoner claimed the right to sixteen peremptory challenges on the ground that these counts before the Code would have been for a felony and misdemeanor respectively, and as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was under the above section, being tried on two indictments.

Held, 1. The indictment was properly found.

2. The prisoner was only entitled under s. 668 of the Criminal Code at twelve peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence if the evidence warranted it.

The prisoner was then tried and acquitted on both counts in the indictment.

M. N. Doyle and *J. A. Knight*, for the Crown. *John J. Power*, for prisoner.

COUNTY COURT, DISTRICT No. 1.

Wallace, Co. J.] RE MYERS *v.* MURRANS. [March 24.

Landlord and tenant—Overholding Tenant's Act, R.S. 1900, c. 174—Demand for possession held bad for uncertainty—Evidence of overholding—Writ of possession refused.

An application was made by the landlord for a writ of possession against the tenant under the Overholding Tenant's Act, R.S. 1900, c. 174,

based on the following demand for possession, which was served on the tenant on March 9, 1904:

Halifax, N.S., March 9, 1903.

Lawrence D. Murrans, Esq.,
Gottingen Street, City,

Dear Sir,—

Your lease to the premises, No. 94 Gottingen St., Halifax, N.S., expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith.

Yours truly, J. E. MYERS.

The tenant had held under a lease by deed, dated in 1901 for a term of three years, but owing to erasures and alterations in the indenture there was some doubt as to whether or not the tenancy terminated on March 1, 1904, or May 1, 1904. Before service of the above demand the landlord had on the 1st February, 1904, given to the tenant a three months' notice in writing to quit (not called for by the lease) on May 1, 1904. On the hearing it was contended that no evidence had been given that the tenant had refused after the service on March 9th, 1904, of the above demand in writing to go out of possession.

Held, that the written demand for possession was bad for uncertainty and under all the circumstances, following *Re Magann* v. *Bonner*, 28 O.R. 37 and *Re Snure* v. *Davis*, 4 O.L.R., 82, as the case was not one clearly coming within the true intent and meaning of the Act, the application should be refused.

O'Mullin and *W. S. Gray*, for landlord. *John J. Power*, for tenant.

Province of New Brunswick.

SUPREME COURT.

En Banc.] EX PARTE VANCINI. [Feb. 5.

Jurisdiction of police and stipendiary magistrates in cities and towns—Made effective by Provincial Act of 1889.

The Legislature of New Brunswick in 1889 passed the following Act with reference to the jurisdiction of police and stipendiary magistrates in criminal cases: "Each and every stipendiary or police magistrate is hereby created, declared and constituted a court, and is hereby declared to have always heretofore been constituted a court, with all the powers and jurisdictions which any Act of the Parliament of Canada has conferred or may confer, or which any Act of the Parliament of Canada purports to confer upon any stipendiary or police magistrate within the province." In 1900, s. 785 of the Criminal Code, which empowers or purports to empower any police or stipendiary magistrate in Ontario to try, with the consent of the accused, any person charged in the province of Ontario with any offence "for which he may be tried at a Court of General Sessions of the Peace," by adding thereto the following sub-section: "This section

shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders, where they exercise judicial functions." The applicant consented to be tried before the police magistrate of Fredericton on a charge of stealing goods of the value of $100, pleaded guilty and was sentenced to three years' imprisonment in Dorchester Penitentiary.

Held, on application for his discharge on habeas corpus, that the provincial Act of 1889 was constitutional (it having been urged in support of the application that it was not so, being a delegation of the legislative functions of the provincial legislature with reference to the jurisdiction of provincial courts), and that the enactment made effective in New Brunswick the amendment of the Criminal Code above quoted, which it was contended was ultra vires of the Parliament of Canada.

Held, also, that the fact that there are no Courts of General Sessions of the Peace in New Brunswick, and that no person therefore could be charged in New Brunswick with an offence "for which he may be tried at a Court of General Sessions of the Peace," does not render the amendment of 1900 inapplicable to this province; and that the section is to be construed by reading into it the words "if he were in the province of Ontario."

Application refused.

Crocket, for the applicant. *Barry*, K.C., for the Crown.

En Banc.] EX PARTE PORTER. [Feb. 5.

Arrest, imprisonment and examination of debtors—Order of discharge—Failure to shew jurisdiction on its face.

An order of discharge made by a clerk of the peace under 59 Vict. 28 described the defendant as "in custody of the gaoler of Victoria county," and was signed by the "clerk of the peace in and for the county of Victoria." The notice stated that the application for discharge was to be heard at Andover, in the county of Victoria.

The Court refused under these circumstances, BARKER and GREGORY, JJ., dissenting, to quash the order of discharge for not showing on its face that the clerk of the peace was acting within his territorial jurisdiction.

Rule refused.

Carter, in support of rule. *Lawson*, contra.

Province of Manitoba.

KING'S BENCH.

Full Court.] TOWN OF EMERSON *v.* WRIGHT. [March 5.

Municipal corporation—Retainer of solicitor to bring suit may be by resolution—Subsequent ratification where suit commenced without sufficient authority.

By 57 Vict., c. 10, all the powers and authority of the Mayor and Council of the Town of Emerson were put an end to, and it was provided

that such powers under The Municipal Act and otherwise should be vested in a receiver to be appointed by the Lieutenant-Governor in Council, and that the receiver should have power to recommend the passage of such by-laws as might be passed by the Mayor and Council under said Acts, the same to be submitted to the Lieutenant-Governor in Council. By 63 & 64 Vict., c. 32, it was provided that the Lieutenant-Governor in Council might by order-in-council appoint or provide for the election of three persons to act as an advisory board for the town and prescribe the duties and powers of such board. Pursuant to this statute an order-in-council was passed appointing the members of such advisory board and defining their duties, one of which was to perform in an executive capacity all the duties vested in municipal councils under the provisions of the Municipal Act. They were also required to meet at least once a month for the transaction and ratification of all business affecting the town and to advise and assist the receiver and authorize and supervise the expenditure of the moneys of the town. The defendant was the receiver of the town appointed under c. 10 of 57 Vict., and acted as such until he was dismissed in February, 1901, when W. W. Unsworth was appointed receiver. This action was brought in the name of the town and W. W. Unsworth, its receiver, for an account of moneys alleged to have been received by the defendant while he was receiver of the town and not accounted for or paid over. On his examination for discovery the plaintiff, Unsworth, admitted that he had not authorized the bringing of the action, and the defendant then moved before the referee for the dismissal of the action or for a stay of proceedings on the ground that the action had been commenced without the authority of the plaintiff or either of them. On the return of the motion a retainer was produced, signed by Unsworth in the name of the town and for himself as receiver, and sealed with the corporate seal, authorizing the solicitors to prosecute the action, and ratifying, confirming and adopting it, and all things done and proceedings taken therein, and acknowledging that it had been brought with the full knowledge, sanction and approval of the said town and of himself as such receiver. The referee held that this did not shew sufficient authority to sue in the name of the town and ordered that the name of the town be struck out of the action, but refused to dismiss the action or stay the proceedings as authority from Unsworth was now shewn.

Both sides then appealed to a Judge in Chambers, and when the appeals came on to be heard the plaintiff's solicitors produced a resolution of the advisory board passed after the date of the referee's order and containing a retainer and authorization of the suit in the same terms as that formerly signed by Unsworth, and sealed with the seal of the town. By consent a pro forma order was made dismissing both appeals so that the whole matter might be dealt with by the full court.

Held, that a municipal corporation may authorize the commencement of an action by resolution under the corporate seal and that a formal by-law is not necessary: *Town of Barrie* v. *Weaymouth*, 15 P.R. 95; *Barrie*

Public School Board v. *Town of Barrie*, 19 P.R. 33, and *Brooks* v. *Mayor of Torquay* (1902) 1 K.B. 601, followed.

Quaere, whether a defendant has any locus standi, under the present practice, to ask for the dismissal of an action on the ground that it has been brought without the authority of the plaintiff.

Plaintiff's appeal allowed and defendant's appeal dismissed. Costs of the motion down to the appeal to the full court to be costs to the defendant in any event, as the authority for bringing the suit was not furnished until after the motion was made. No costs of the appeals to the full court.

Phippen and *Minty*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendant.

Full Court.] STARK *v.* SCHUSTER. [March 5.

Powers of Provincial Legislature—B.N.A. Act, 1867, ss. 91 and 92—Shops Regulation Act, R.S.M., 1902, c. 156—Municipal Act, R.S.M., 1902, c. 116, s. 527—Winnipeg Charter, 1902, c. 77, s. 931—Ultra vires—By-law requiring closing of shops at certain hours—Unreasonableness and uncertainty as grounds of objection to by-law.

Rule nisi to quash the conviction of defendant for breach of a by-law of the City of Winnipeg requiring all shops with certain exceptions to be closed after six o'clock p.m. except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, 1891, R.S.M. (1891) c. 140, which is now c. 156 of the R.S.M., 1902, which came into force March 6, 1903. In March, 1902, the Winnipeg charter, came into force and the new Municipal Act, c. 116 of the R.S.M., 1902, contains a clause (2a) providing that the City of Winnipeg is not included in the expression "municipality" where the same occurs in the Act. Section 15 of "The Shops Regulation Act," provides that any by-law passed by a municipal council under the Act shall be deemed to have been passed under and by authority of the Municipal Act and as if the preceding sections of the Act had formed part of the Municipal Act, and that the preceding sections of the Act and the Municipal Act should be read and construed together as if forming one Act. It was contended on behalf of the defendant that the present Shops Regulation Act does not apply to the City of Winnipeg by reason of its being incorporated as above mentioned in the Municipal Act, R.S.M., 1902, c. 116, which Act is expressly excluded from operation in Winnipeg.

Held, 1. Without deciding whether the present Shops Regulation Act applies to the city or not, that the joint effect of s. 931 of the Winnipeg Charter and s. 527 of the Municipal Act is to retain and keep in force all by-laws of the city theretofore lawfully passed, and that the by-law in question was in full force and effect.

2. As the by-law in question was in strict accordance with the powers conferred by the legislature in the Act under which it was passed, its pro-

visions could not be held to be unreasonable, uncertain or oppressive, so as to render it invalid or unenforceable. *Brydone* v. *Union Colliery Co.* (1899) A. C. 580; *Re Boylan*, 15 O.R. 13, and *Simmons* v. *Mallings*, 13 T.L.R. 447, followed.

3. The provisions of the Shops Regulation Act are intra vires of the Provincial Legislature under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the Province and not interfering to a material extent with the Regulation of Trade and Commerce assigned to the Dominion Parliament by s. 91.

The Court considered that the legislation in question in *Attorney-General of Ontario* v. *Attorney-General of Canada*, (1896) A.C. 348, and *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, (1902) A.C. 77, and which was held to be intra vires of the Province in each case, interfered with Trade and Commerce to a greater extent than the Shops Regulation Act could do.

Bonnar and *Potts*, for defendant. *I. Campbell*, K.C., and *A. J. Andrews*, for the City of Winnipeg.

Full Court.] AIKINS *v.* ALLEN. [March 5.

Principal and agent—Commission on sale of land.

About Dec., 1902, Pepler, a member of plaintiffs' firm, who are real estate agents, called on defendant and asked him if his house was for sale. Defendant replied that it was and that the price was $14,000. Nothing was said about a commission. In February, 1903, Pepler went again to defendant and was told that the house was still for sale, and again nothing was said about a commission. He then introduced a purchaser who, by arrangement with defendant, was shown over the property. The purchaser then authorized Pepler to make an offer of $12,500 for the property. The latter called on defendant and communicated this offer to him, when defendant said he would not take any less than $14,000 and that he wanted that net. Pepler objected to this, saying that he had understood that the price would cover the usual agent's commission, but said he would ascertain whether the purchaser would pay the extra amount asked. He did so, and the purchaser replied that he would let him know in a few days. Shortly afterwards, the purchaser, without any further communications between him and plaintiffs, entered into negotiations with defendant direct and bought the property for $14,000.

Held, Perdue, J., dissenting, that, under the circumstances, plaintiffs were entitled on a quantum meruit to the full amount of the usual commission on the purchase money. *Wolf* v. *Tait*, 4 M.R. 59; *Wilkinson* v. *Martin*, 8 C. & P. 1, and *Marson* v. *Burnside*, 31 O.R. 438, followed.

The mere fact that the agent has introduced the purchaser to the seller will not be sufficient to entitle him to recover a commission on the sale; but, if it appears that such introduction was the foundation on which

the negotiations resulting in the sale proceeded, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the agent's hands, and so deprive him of his commission.

Appeal dismissed with costs.

Robson, for plaintiffs. *McMeans*, for defendant.

Perdue, J.] ALLOWAY *v.* HRABI. [April 5.

Promissory note—Signature of maker obtained by false representations—Rights of holder in due course without notice—Bills of Exchange Act, 1890, c. 33, ss. 29, 38.

Action by the indorsees of three several promissory notes purporting to have been made by the defendants, payable to the order of the Winnipeg River Trading Company, and by it indorsed to the plaintiffs for value during currency. The defendants were Bohemians, none of whom could read English. One of them could write his name and speak a little English, but only such as would be used on the farm or in connection with farming or selling wood. The other two defendants could not speak or understand English and could not write. Their signatures were written by T. H. Corrigan, the manager of the trading company, with the usual × mark. Corrigan was the only witness who gave evidence to prove the signatures. The defendants desired to obtain homestead entries for the lands upon which they had squatted, and which were parts of an odd-numbered section not available for homesteads, and asked Corrigan's assistance in endeavouring to induce the Government to so modify the regulations that the entries might be made. Corrigan said that he agreed to do this for the defendants provided they would each pay him $125 in case he was successful, and that the notes sued on were taken by him in pursuance of that understanding, and that he succeeded in obtaining the entries for defendants before the notes matured. The defendants admitted that they had agreed to give Corrigan $125 each if he would obtain their homestead entries for them, but they said the amounts were to be paid in cordwood, to be delivered in one, two and three winters, a car-load to be delivered each winter. None of the defendants agreed to become responsible for the liability of the others.

At the time the notes were signed, Corrigan procured the defendants also to sign and swear to affidavits prepared by him in connection with their applications for homesteads, and defendants swore they had not knowingly signed any papers other than petitions to get homesteads. The trial judge's finding of fact was that defendants did not know that they were signing promissory notes, but thought they were signing only petitions for homesteads and affidavits in support thereof.

Held, following *Foster* v. *McKinnon*, L.R 4 C.P. 704, and *Lewis* v. *Clay*, 77 L.T.R. 653, that the defendants were not liable.

Prior to the coming into force of the Bills of Exchange Act, 1890, c. 33, it was well settled law that if the signature of the matter of a note was obtained upon the representation that it was a completely different document he was signing, and if he signed it without knowing it was a note he was signing, and under the belief that he was signing something else, and if he was not guilty of any negligence in so signing ×, he would not be liable even to a holder of the note who acquired it during its currency for value without notice of the fraud.

Sections 29, 38 of that Act have made no change in the law, as is shewn by the case of *Lewis* v. *Clay*, supra, decided in 1897, since the coming into force of the Imperial Bills of Exchange Act, which contains exactly the same provisions upon the subject as ss. 29, 38 of our Act. Action dismissed with costs.

Haggart, K.C., for plaintiffs. *Rothwell* and *Johnson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] REX *v.* TANGHE. [Jan. 5.

Certiorari—Rule nisi to quash conviction—Motion for—Jurisdiction of single judge to hear—Practice.

Motion for a rule nisi to quash a conviction.

Held, that the full court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single judge.

C. C. McCaul, K.C., for motion.

Full Court] TRADERS' NATIONAL BANK OF SPOKANE *v.* INGRAM. [Jan. 5.

Appeal—Notice of—Court at which appeal should be brought on—Supreme Court Act, ss. 76 and 79.

Motion to quash an appeal on the ground that it was not brought in time. A final judgment was pronounced and entered on 27th February; notice of appeal to the January sitting of the full court was given on 24th October. A sitting of the full court commenced according to the statute on 3rd November:

Held, per IRVING and MARTIN, JJ., HUNTER, C.J., dissenting, that the appeal was brought in time.

W. H. P. Clement, for the motion. *S. S. Taylor*, K.C., contra.

Book Reviews.

A Treatise on International Law. By WILLIAM EDWARD HALL, M.A. Fifth edition. Edited by J. B. Atlay, M.A., barrister-at-law. Oxford: At the Clarendon Press. London: Henry Frowde, Oxford University Press Warehouse, Amen Corner; and Stevens & Sons, Limited, 119 and 120 Chancery Lane. 1904.

Mr. Hall, the learned author of this standard work, having died in 1894, after completing the fourth edition, Mr. Atlay was intrusted with the preparation of the fifth. Since the last edition many important events have taken place, such as the Venezuela boundary dispute; the Hague conference; various incidents in the Spanish-American war, and the war n South Africa; events in Japan and China, etc., etc., which demands notice at the hands of the editor. These have been touched upon in the present addition, and add largely to the value of the work. The law governing States in the relation of neutrality is especially interesting at the present time, as well as the author's opinion on the questions likely to arise or which have arisen in this connection: for example, the use of neutral territory by a belligerent as a basis of operations, the asylum which may be given to the land or naval forces of a belligerent, the definition of contraband of war, and the general position of neutral persons and property within belligerent jurisdiction, etc. It is quite unnecessary to do more than call attention to these distinctive features of the present edition, as the work is so well known, and is accepted everywhere as an authority.

There will doubtless be a very large sale of so interesting a book at the present time. Its value is largely increased by an excellent index. The work of the publisher and the printer is of course of the best.

Stone's Justices' Manual, being the Yearly Justices' Practice for 1904. 36th ed. By J. R. ROBERTS, Solicitor, etc. London: Shaw & Sons, 7 & 8 Fetter Lane; Butterworth & Co., 12 Bell Yard, 1904.

This well known and most concise compendium is of course a necessity in the British Isles, as well as useful in this country to all concerned in that branch of the administration of justice. It is interesting to notice the gradual development of criminal law in reference both to the classes of persons and the subjects affected by legislation from time to time. This last edition, for example, takes up and deals with the Employment of Children Act, the Motor Car Act and the Poor Prisoners Defence Act.

Flotsam and Jetsam.

The English law periodicals record the unexpected death of Mr. Justice Byrne, which, it is said, will cause a great loss to the profession and the public. He commenced his career as a junior of the Chancery bar, became afterwards a leader in the Court of Mr. Justice Chitty, and was subsequently appointed a judge of the Chancery Division. It is said, that a judge of his ability and learning, would in due course, have been raised to the Court of Appeal. He had a pleasing personality, an irreproachable character and unfailing tact and courtesy, and to this was added, the more solid attributes of an extensive knowledge of law.

The late Lord Coleridge was once speaking in the House of Commons in support of Womens' Rights. One of his main arguments was that there was no essential difference between the masculine and feminine intellect. For example he said: "Qualities of what is called the judicial genius sensibility, quickness, and delicacy—are peculiarly feminine." In reply Sergeant Dowse said, "The argument of the honorable and learned member compendiously stated amounts to this: 'Because some judges are old women, therefor, all old women are fit to be judges.'"

We are rather inclined to sympathize with that Southern judge whose decisions were frequently reversed by the Supreme Court. Needless to say he possessed no exalted opinion of the latter. One day a negro was brought before him, charged with the usual offence and being found guilty was duly sentenced. Defendant's counsel gave immediate notice of appeal. That evening, however, a mob broke into the jail and the morning sun saw the late prisoner dangling from a telegraph pole. The sight greeted his Honor as he was turning into the Courthouse square, and he gazed long and placidly. "Well, judge," asked a friend, "what do you think of it?" "What do I think?" he repeated, as a quiet smile of satisfaction spread over his face; "I think, sir, that there's one of my judgments that that —— Supreme Court won't reverse."—*American Lawyer.*

RETORTS COURTEOUS.—At a dinner party the other evening, says the Washington Star, a well known minister sat opposite one of the leading legal lights of Washington. During a lull which often occurs on such occasions, the minister casually asked the jurist what he thought would be the outcome of Mayor Harrison's arrest in Chicago in connection with the Iroquois Theatre disaster.

"I can't express an opinion without a retainer," promptly replied the lawyer.

"Ah!" exclaimed the dominie, "I left my pocket-book at home."

"I left my opinion at home," was the quick response.

"I don't believe you have any opinion, anyhow," said the minister.

"I don't believe you have any pocket-book," was the final rejoinder, and then everybody laughed.

"I am reminded," said the lawyer, "of a retort courteous that rather knocked me out in court one day. I made a remark which rather nettled the opposing counsel, and he replied, looking intently at my rather conspicuous bald head. "That is a very bald statement," with the accent on the bald.

"Well," said I, "my barber remarked yesterday that some men have hair and some have brains," and then I looked pityingly at his heavy mane.

"Yes," was the quick reply, "and some men have neither," and he looked me right in the eye."

It would appear that "unprofessional" advertisers in this country have still something to learn in that line. The following card issued by an enterprising practitioner in one of thewestern States might give them some valuable suggestions:—

Office over First National Bank.

TOM H. MILNER,
LAWYER.

"Love not sleep, lest thou come to poverty."
—Judge Solomen.

Am the read-headed, smooth-faced, freckle-wounded Legal Napoleon of the slope, and always in the stirrups. Place in every court on earth except that of Judge Lynch. Quick as a hippopotamus and gentle as a sunstroke. Refer to my friends and likewise to my enemies.

"FEES ARE THE SINUES OF WAR"

Belle Plaine, Iowa.

UNITED STATES DECISIONS.

Criminal Law.—Upon trial of an indictment for murder, proof of the killing of a third person is held, in *People* v. *Molineux* (N.Y.) 62 L.R.A. 193, not be admissible. A very elaborate note to this case reviews all the other authorities on evidence of other crimes in criminal cases.

Bees.—A keeper of bees, who locates their hives within a few feet of a post which he has fixed for fastening horses to, when he knows that they are prone to attack perspiring horses, is held, in *Parsons* v. *Manser* (Iowa) 62 L.R.A. 132, to be properly found guilty of negligence. The other cases as to liability of owner of bees for injuries done by them are collected in a note to this case.

Firm name.—As between a surviving partner and the executor of the deceased one, the firm name is held, in *Slater* v. *Slater* (N. Y.) 61 L.R.A. 796, to be an asset of partnership which the executor has a right to have sold for the settlement of the partnership affairs.

Negligence.—An aggravation of personal injuries caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance is held, in *Texas & P. R. Co.* v. *White* (C. C. App. 5th C.) 62 L.R.A. 90, not to be chargeable against the party by whose negligence the original injury was received.

Negligence.—The owner of a structure to be used as a toboggan slide at a bathing resort is held, in *Barret* v. *Lake Ontario Beach Improv. Co.* (N.Y.) 61 L.R.A. 829, to be liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant.

Married Women.—The right of a woman to enter into a partnership aggreement with her husband, under statutory authority to acquire, own, and dispose of property to the same extent as her husand may do, and to make contracts and incur liabilities to the same extent as if unmarried, is sustained, in *Hoaglin* v. *Henderson* (Iowa) 61 L R.A. 756.

Nuisance.—Temporary occupation of a highway with rails, by a railroad company, for its convenience while elevating its roadbed to abolish a grade crossing over a highway, is held, in *McKeon* v. *New York, N. H. & H. R. Co.* (Conn.) 61 L. R. A. 730, to entitle the abutting owner whose access to and from his property is thereby destroyed, to compensation.

Railways.—One who boards a train without a ticket because the ticket office is not open for the sale of tickets as required by statute is held, in *Monnier* v. *New York C. & H. R. R. CO.* (N.Y.) 62 L.R.A. 357, to have no right to refuse to pay the extra fare required of passengers without tickets, and resist ejection on tender of the price of the ticket, but, to be required to pay the additional fare, and resort to his legal remedy to recover it and the statutory penalty for failure to have the office open.

Municipal Law.—A municipal corporation is held, in *Georgetown* v. *Com.* (Ky.) 61 L.R.A. 673, not to be subject to indictment for failure to compel the abatement of a nuisance to which it has contributed, consisting of the emptying of filth into an open drain on private property within its limits. An extensive note to this case collates all the other authorities on duty and liability of municipality with respect to drainage. An ordinance providing for the punishment of persons loitering about the streets and barrooms in idleness, without habitation or visible means of support is held, in *Re Stegenga* (Mich.) 61 L.R.A. 763, to be within the power of a municipal corporation.

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EQUITABLE CONVERSION.[1]

V.

AT the beginning of the preceding article,[2] it is stated that, previous to Ackroyd *v.* Smithson, it was held that the land of a deceased person which had been converted in equity into money by his will became in consequence assets for the payment of his debts, and that the money of a deceased person which had been converted in equity into land by his will ceased in consequence to be assets for the payment of his debts. To understand the full force of this statement, the reader must remember that previous to 3 & 4 Wm. 4, c. 104, the land of a deceased person was not in England assets for the payment of his simple contract debts, so that the effect of the foregoing statement is that a testator could by converting his land into money by his will, enable his simple contract creditors to obtain payment out of his land of what was due to them respectively, though by law such creditors would go unpaid unless the testator left sufficient personal estate to pay them; and so that a testator could, by converting his money in equity into land by his will, deprive his simple contract creditors of the right which the law gave them to be paid out of such money what was due to them respectively. That the courts should have held that the conversion of land into money by will made the land available for the payment of all the testator's debts is not surprising, but that they should have held that the conversion of money into land by will enabled a testator to deprive his simple contract

[1] Continued from 19 HARV. L. REV. 29.

[2] 19 HARV. L. REV. 1.

creditors of their legal right to be paid out of his money is very surprising. That such was, however, held to be the law, there seems to be no doubt, though the reported cases [1] are not very conclusive. Are these cases justified by the authorities which decided that land converted into money by will devolved as money at the death of the testator, and that money converted into land by will devolved as land at the death of the testator? No, it seems not, for the latter did not involve holding that an equitable conversion by will takes place prior to the testator's death, while it seems clear that the question whether any particular property of a deceased person is or is not assets for the payment of his debts depends upon the quality of that property when the testator dies. To hold, therefore, that the land of a deceased person is assets for the payment of his simple contract debts because it was converted in equity into money by his will, is to hold that the conversion took effect during the testator's lifetime, — which is impossible. To hold that the money of a deceased person is not assets for the payment of his simple contract debts, because it was converted in equity into land by his will, is to hold that a testator can effect, by converting his money into land by his will, what he could not effect by a direct and absolute bequest of the money.

In Sweetapple *v.* Bindon,[2] in which a testator directed his executor to lay out £300 in the purchase of land, and to settle the land (as the court held) upon the testator's daughter in tail, and the daughter married and had issue, but she and her issue were both dead, and the money not having been laid out, her husband filed a bill to have the money laid out and the land settled on him for his life, as tenant by the curtesy, or to have the interest of the money paid to him during his life, the court decreed the money to be considered as land, and the plaintiff to have it for life as tenant by the curtesy. But, though the case seems always to have been regarded as well decided, it seems impossible to support it on principle. If the money had been laid out during the daughter's lifetime, of course there would have been no difficulty, even though the land had not been settled on the daughter as directed, but, after the death of the daughter and her issue, there was no one who could compel the executor to lay the money out,

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1 Fulham *v.* Jones, 2 Eq. Ca. Abr. 250, pl. 3, 296, pl. 7, 298, pl. 10, note, 7 Vin. Abr. 44; Whitwick *v.* Jermin, cited in Earl of Pembroke *v.* Bowden, 3 Ch. [217] 115, 2 Vern. 52, 58; Gibbs *v.* Ougier, 12 Ves. 413.

2 2 Vern. 536.

—not the husband, as he was not one of those for whose benefit the duty was imposed upon the executor.

The courts would also undoubtedly have declared that, on the death of a husband, who is entitled to have money laid out in the purchase of land, and to have the land settled upon him in tail in possession, his wife would be entitled to dower, but for the rule which disables a wife from being endowed out of an equitable interest. This view is, however, open to the same objection as the decision in Sweetapple *v.* Bindon.

In a former article, when speaking of the ordinary bilateral contract for the purchase and sale of land I stated [1] that that was the only species of contract "in which an agreement to buy or sell land is alone sufficient to create an equitable conversion. Such a contract is also believed to furnish the only instance of an equitable conversion which is always coextensive with the actual conversion which is agreed or directed to be made."

It seems desirable that the two statements contained in this passage should be a little enlarged upon. 1. The only other species of contract in which it is certain that an agreement to buy or sell land forms an element in an equitable conversion is a unilateral covenant to lay out money in the purchase of land and to settle the land, or to sell land and settle the proceeds of the sale, and we have seen [2] that a covenant to lay out money in the purchase of land or to sell land, will not cause an equitable conversion nor even constitute a binding contract, unless it be followed up by a covenant to settle the land to be purchased, or the proceeds of the land to be sold. Why, then, is this difference between a bilateral contract to buy *and* sell land, and a unilateral covenant to buy *or* sell land? It is because of the different effect produced by the performance of the two contracts. The mutual performance of the bilateral contract causes a conversion, not only of the seller's land into money, but of the buyer's money into land, and also causes a transfer, not only of the seller's land to the buyer, but of the buyer's money to the seller. On the other hand, the performance of the unilateral covenant, from the fact that the covenant is only unilateral, cannot possibly cause more than one conversion nor more than one transfer. Does it do as much as that? It does cause a conversion of the covenantor's money into land, or of his land into money, and it does, in a sense, cause a transfer of the

[1] 18 HARV. L. REV. 251.

[2] 18 HARV. L. REV. 256-7.

money or land, but not in such a sense as to make the covenant a first step towards such transfer; for the transfer which a performance of the covenant causes is to a stranger to the covenant, and it may, therefore, in respect to the effect produced by the covenant and by its performance, be regarded as a mere accident; for the reader must remember that the covenant is not to buy land of the covenantee, nor to sell land to him, but is to buy land of, or to sell land to, some third person not a party to the covenant, nor ascertained by it. It is true that the performance of the covenant will involve the purchase or sale of land, and so will practically involve, not only the making, but the mutual performance, of a bilateral contract for the purchase or sale of land, but the only effect of such purchase or sale upon the covenantor will be to make him the owner of the land instead of the money, or of the money instead of the land, and thus to place him in a situation to settle the land or the money, just as if he had purchased or sold the land before he made the covenant, — in which case the covenant would of course be only to settle the land purchased, or the proceeds of the land sold. It will be seen, therefore, that, in the case of a unilateral covenant to purchase and settle land, or to sell land and settle the proceeds of the sale, while it is the purchase or sale of the land which causes the conversion, it is the settlement of the land or money which causes the transfer or alienation without which the covenant cannot create an equitable conversion. In order, therefore, that a unilateral covenant to buy or sell land may cause an equitable conversion, it must be a covenant to buy land of the covenantee, or to sell land to him, or there must be added, to the covenant to buy or sell land, a covenant to make a gift of some portion of the land to be purchased, or some interest therein, or of some portion of the proceeds of the land to be sold, or of some interest therein. The only instance of the latter that occurs to me is the covenant, already referred to, to lay out money in the purchase of land and to settle the land, or to sell land and settle the proceeds of the sale; and the only instance of the former that occurs to me is the unilateral contract to sell land which is commonly known as the giving of an option.[1] Such a contract is a unilateral agreement to sell land at the price, and on the terms, stated in the contract, without any agreement by the other party to the contract to purchase the land. The payment of the price,

1 18 HARV. L. REV. 10 *et seq.*

therefore, is merely a condition of the latter's right to have the land. Still, such a contract would seem, in theory, to cause an equitable conversion in favor of the holder of the option, but, in the case of the latter's death, the only right that would devolve upon any one would be the conditional right to have the land on paying the price, and whether that right would devolve in equity upon the heir or the personal representative of the deceased is at least doubtful, and I am not aware that there is any authority on the point.

2. The other statement contained in the passage quoted above is that a contract for the purchase and sale of land furnishes the only instance of an equitable conversion which is always coextensive with the actual conversion agreed or directed to be made. Why is the equitable conversion caused by such a contract always coextensive with the actual conversion which the performance of the contract involves? Because the reason why such a contract causes an equitable conversion, or rather two equitable conversions, is that its performance involves two alienations as well as two actual conversions, and these two alienations and two actual conversions are made by the same two acts, one performed by each of the two parties to the contract, namely, a delivery of a deed of conveyance of the land by the seller to the buyer, and a delivery of the price of the land by the buyer to the seller. Plainly, therefore, the thing which the seller converts into money is the same as the thing which he alienates to the buyer, and the thing which the buyer converts into land is the same as the thing which he alienates to the seller. It may be added that these two acts regularly take effect at the same instant of time, and hence the two alienations and the two actual conversions are regularly made at the same instant of time.

Why is it that no other equitable conversion is necessarily coextensive with the actual conversion required to be made by the covenant or direction which causes the equitable conversion? Because, in every other case, the actual conversion of land into money, or of money into land, must be made before any gift of the money or land into which the conversion is made can take effect; and, as it is the latter alone that causes the equitable conversion, it necessarily follows that the extent of the equitable conversion is measured by the extent of such gift and not by the extent of the actual conversion.

It is proper, however, to mention another species of agreement

which has been held to cause an equitable conversion of land into money, namely, the agreement which is sometimes made by each of several co-owners of land with the other co-owners to join the latter in making a sale of the land.[1] If it is true that such an agreement converts the land into money in equity, it seems to be another instance of a contract which converts land into money without any gift of the money into which the land is to be converted, and it seems also that the equitable conversion which it causes will always be coextensive with the actual conversion which is contracted to be made. It is clear, however, that such an agreement does not cause any equitable conversion whatever. To suppose that it does is to confound an agreement by each of several co-owners of land with all the others to join the latter in selling the land to some person not yet ascertained, — to confound such an agreement with an agreement by all such co-owners to sell the land to some ascertained person; and even the latter agreement will not cause an equitable conversion of the land into money without an agreement by the other party to the contract to purchase the land. Without the latter, the agreement will merely give an option to purchase the land, and its utmost effect, in the way of causing an equitable conversion, will be to convert the money of the person receiving the option into land in equity. The only way in which one can convert his own land into money in equity in his own favor is by procuring some one else to contract with him to purchase the land. Even in the case of a bilateral contract for the purchase and sale of land, it is, as we have seen, the purchaser's side of the contract that converts the seller's land into money in equity, while it is the seller's side of the contract that converts the purchaser's money into land in equity. It is a mistake, moreover, to suppose that the agreement in question is a contract to sell the land. If it were, the next step would be to convey the land, whereas, in fact, the next step is a bilateral contract between all the co-owners of the land and an ascertained purchaser for the purchase and sale of the land; and, of course, it is this contract that causes an equitable conversion of the land into money. It may be added that it is by no means an easy task so to frame an agreement, like that in question, that it can be enforced in a court of law, and it is believed that no in-

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1 Hardey *v.* Hawkshaw, 12 Beav. 552; *In re* Stokes, 62 L. T. 176; Darby *v.* Darby, 3 Dr. 495.

telligent person will seriously contend that such an agreement can be specifically enforced in equity.

In a former article,[1] I have considered several important distinctions, having no direct connection with equitable conversion, between a direction to sell land accompanied by a gift of the proceeds of the sale, or of some part thereof, or of some interest therein, and the creation of a lien or charge on the same land, either with or without a direction to sell the land to satisfy the lien or charge. There is, however, another important and radical distinction between these two things which has exclusive relation to the creation of an equitable conversion, — so radical indeed that, while the former always causes an equitable conversion, the latter never does. This being so, it is indispensable that the two things be accurately distinguished from each other. Fortunately, too, it is possible to distinguish them with entire accuracy, though they seldom, if ever, have been so distinguished. How, then, is the distinction to be made? 1. A gift out of the proceeds of a sale of land, though it may be of either a limited or an absolute interest, must always extend either to the entire proceeds of the sale, or to some fractional part thereof, and hence such a gift always makes a sale of all the land necessary, as it is only by a sale of all the land that the amount of money to which the gift will extend can be ascertained. 2. Where land is charged with the payment of money the amount of money which constitutes the charge bears no relation to the value of the land or to the price for which it will sell, and hence a sale of the land can never be necessary to ascertain the amount of the charge, nor will a sale of the land even aid in ascertaining its amount. How, then, shall the amount of the charge be ascertained? He who makes the charge must at his peril fix its amount or furnish the means of fixing it. For example, if the charge consists of a sum of money given, by the deed or will which creates the charge, to a person named, the usual and proper mode of fixing the amount of the charge is by naming the amount of the gift in lawful money. If the charge be made by will, and consist of all the testator's pecuniary legacies, the amount of the charge will be ascertained by adding together all the pecuniary legacies contained in the will and in the codicils thereto, if any. If the charge be created by a will, or by a deed of assignment, and consist of all the tes-

[1] 10 HARV. L. REV. 83 *et seq.*

tator's or assignor's debts, the amount of the charge will be ascertained by adding together such debts as the testator or assignor shall be proved to have owed when he died, or when he made the deed of assignment. Or, instead of charging "all his debts" he may of course charge only such debts as he shall specify in the will or deed, and, in that case, the will or deed will be conclusive both as to the number of debts and as to the amount of each.

Why does a lien or charge on land never cause an equitable conversion of the land into money? 1. Because it never constitutes any step towards the alienation of the land. When a sale of land is directed, and a gift is at the same time made out of the proceeds of the sale, to A, for example, and the land is afterwards sold pursuant to the direction, an immediate consequence of the sale is that the proceeds, to the extent of the gift, become the property of A, at least in equity, and that is of course, by virtue of the previous gift to him, which, however, remains executory till the sale is made. On the other hand, when land is merely charged with the payment of money to A, for example, and the land is afterwards sold, whether for the purpose of satisfying the charge or not, the ownership of the proceeds of the sale will be just where it would have been if the charge had not been made, and no part of such proceeds will be the property of A,—whose right against such proceeds will be precisely the same as his right against the land before it was sold, *i. e.*, he will have a lien or charge on such proceeds for the sum of money coming to him. 2. If a charge of land with a payment of a debt causes an equitable conversion of the land to the extent of the debt, it must be because of the direction to sell the land[1] which is supposed to accompany the charge; and yet such a direction is wholly unnecessary, the charge being complete without it. A direction, indeed, to sell land, and apply the proceeds of the sale to the payment of a certain debt, will of itself constitute a charge of the debt upon the land, but it is only as evidence of an intention to make a charge that such a direction is material. Besides, when an owner of land charges the same with the payment of a debt, his power over the land is, to the extent of the charge, entirely suspended, and will remain suspended till the charge is removed, and, therefore, the addition of a direction to sell the land is, for

[1] For it is only by an agreement or direction to sell, that land can be converted indirectly into money. Hyett *v.* Mekin, 25 Ch. D. 735. And see 19 HARV. L. REV. 25, proposition 9.

that reason, without meaning. The owner of the charge can require the land to be sold whenever there is a default in the payment of the debt, but that is because of the charge, — not because of a direction to sell the land. It cannot, therefore, be said, with any propriety, that, in any case where an owner of land charges it with the payment of a debt, and the land is afterwards sold for the satisfaction of the charge, the sale takes place by virtue of a previous direction by the owner of the land; and hence the making of the charge cannot cause an equitable conversion of the land into money. 3. When land is charged with the payment of a debt the debt has an independent existence, and that, too, at law as well as in equity. So far from its being at all dependent upon the charge, the charge is so dependent upon the debt that it cannot exist without it. Nor does a sale of the land have any other effect upon the debt than to produce a fund which is applicable to its payment and discharge. In short, the land has nothing to do with bringing the debt into existence, nor with the debt during the period of its existence, — only with its payment and extinguishment. It is true that the debt is personal property, but it is not because it is land converted in equity into money, for it is, from its nature, personal property at law and in fact, as well as in equity. Nor can it owe its existence to the actual sale of the land, for then it would not come into existence till after the sale, whereas it is assumed that the purpose of the sale is the payment of the debt, and hence that the debt exists before the sale is made. As, therefore, a debt charged on land is personal property without reference to the question whether the land is, to the extent of the debt or debts charged upon it, converted in equity into money or not, it follows that the latter question is not a practical one, as no person can have any interest in maintaining either the affirmative or negative of it.

The only practical question, therefore, is whether land which is charged with debts is thereby wholly converted in equity into money, for, if it is, of course any surplus over and above the charge will be converted into money in equity. As to this latter question, however, it may be observed, first, that, before the affirmative of it can be established, it must be proved that a charge of land with debts converts the land into money in equity to the extent of the debts charged upon it, and therefore the arguments which I have urged in disproof of the latter proposition are equally strong in disproof of the proposition that a charge of land

with debts converts the surplus of the land into money in equity; secondly, that, in order to establish the affirmative of this latter proposition, it must be proved that a person can, by a covenant or a direction to sell land, convert such land into money in equity as to himself, and as to those claiming under him, subsequent to such covenant or direction, — a proposition which can easily be proved by authority, but the negative of which is very clear upon principle; thirdly, that, a charge of land with debts, or a direction to sell land for the payment of debts, authorizes a sale of so much of the land only as is necessary for the payment of the debts charged, and, therefore, can not cause an equitable conversion of the surplus of the land over and above such debts. If, therefore, the charge be made by deed, any surplus of the land over and above the charge will still belong, at least in equity, to the person who made the charge, and such surplus will be land in his hands. If the charge be made by will, any surplus over and above the charge will, at least in equity, pass to the testator's heir or devisee, and will be land in his hands. Accordingly, in the case of Roper *v.* Radcliffe,[1] it was resolved by the House of Lords, reversing the decree of the Court of Chancery,

"that though lands devised for payment of debts and legacies are to be deemed as money so far as there are debts and specific legacies to be paid, yet still the heir at law has an interest in such lands by a resulting trust, so far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity and restrain the vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to enforce the devisee to convey the residue to him; which residue shall not be deemed as money, neither shall it go to the executors of the testator. Nay, the heir at law in such case may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him; for the devisee is only a trustee for the testator to pay his debts and legacies. This is a privilege which has been always allowed in equity to a residuary devisee; for if he come into court, and tender what will be sufficient to discharge all the debts and legacies, or pray that so much of the lands and no more, may be sold, than what will raise money to discharge them, this is always decreed in his favor. Therefore, though lands given in trust, or devised for payment of debts and legacies, shall be deemed in equity as money in respect to the creditors and legatees, yet it is not so in respect to the heir at law or residuary devisee; for in those cases they shall be deemed in equity as lands."

[1] 9 Mod. 167, 170.

So in Nicholls *v.* Crisp,[1] where a testator directed *all* his land to be sold, and charged the proceeds with certain legacies, and, if the proceeds should exceed £3,000 he bequeathed the surplus to his natural daughter, who died before him, Lord Bathurst declared that, the object being to convert the land merely for the purpose of paying the legacies, if the heir would pay the legacies, the lands should not be sold. Also in Digby *v.* Legard,[2] where a testator devised his real and personal estate to trustees in trust to sell to pay debts and legacies, and to pay the surplus to five persons equally, one of whom died before the testator, and the question was whether her one-fifth was real or personal estate, the counsel for the heir insisted that the testator charged and subjected her land to the payment of her debts and legacies, only in case the personal estate were not sufficient, in which event alone was the land to be sold, and only so much as should be necessary; and that the five residuary legatees might have paid the debts and legacies, and then have called for a conveyance of the land; and Lord Bathurst so held.

While, however, the foregoing cases have never been overruled or even questioned, it must be confessed that the courts have, for the most part, failed to distinguish charges on land from gifts of the proceeds of the sale of land, and hence they have assumed that the former have the same effect as the latter in converting the land into money in equity. Cases arising upon wills, in which they have so assumed, have already been sufficiently stated.[3] Cases in which a lien or charge on land is created by deed are generally cases in which debtors, in embarrassed circumstances, make an assignment of their property, both real and personal, for the benefit of their creditors. Such assignments, if they create any new right in favor of the creditors, create in their favor a lien or charge on the property assigned. They do not, however, necessarily create any new right[4] in favor of the creditors, and when they do not, the assignees, though they become the legal owners of the property, hold it simply as the agents of their assignors, whose servants they are, and who may, therefore, revoke their authority

[1] Stated by Sir R. P. Arden, M. R., in Croft *v.* Slee, 4 Ves. 60, 65.

[2] Dick. 500.

[3] See 19 HARV. L. REV. 26–28; also 17, n. (2). The cases are Hill *v.* Cock, 1 Ves. & B. 173; Maugham *v.* Mason, 1 Ves. & B. 410; Jessopp *v.* Watson, 1 Myl. & K. 665; Flint *v.* Warren, 14 Sim. 554, 16 Sim. 124; Shallcross *v.* Wright, 12 Beav. 505, and Hamilton *v.* Foote, Ir. R. 6 Eq. 572.

[4] See Biggs *v.* Andrews, *infra*, and Griffith *v.* Ricketts, *infra*.

and require a reassignment of the property at any moment. So far, however, as regards the question of equitable conversion, the courts have generally failed to recognize even this latter distinction. On the contrary, as an assignment for the benefit of creditors generally contains, in terms, a direction to the assignees to sell the property assigned, the courts have generally assumed that this direction alone was sufficient to convert any land included in the assignment into money in equity. Thus, in Biggs *v.* Andrews,[1] where one Biggs conveyed and assigned all his property to two trustees in trust to sell the same, and pay his debts out of the proceeds, and hold the surplus in trust for himself, and he died before his land was all sold, it was held that all his property devolved, at his death, on his personal representatives; but, though there is reason to believe that the decision was in accordance with the wishes of the deceased yet it seems to be very clear that it was wrong in principle; for it appears that Biggs made the conveyance and assignment, not because he was insolvent, or supposed himself to be so, but because he was out of health, and wished to retire at once from business; and accordingly he had selected the two trustees to wind up his business for him. It is clear, therefore, that, in making the conveyance and assignment he made himself the sole *cestui que trust*, no new right whatever being conferred upon his creditors; that the trustees were simply his agents, though clothed with the naked legal ownership of all the property, and, therefore, he could have revoked their authority at any moment, and required them to reconvey and reassign the property to him. They could also have given up the agency at their pleasure, and, therefore, could not have been compelled to sell any of the land.

So also in Griffith *v.* Ricketts,[2] where an equity of redemption was conveyed to trustees in trust to sell the same for the payment of the grantor's debts, any surplus to be paid to the grantor, "his executors, administrators, and assigns," it was held that, upon the grantor's death, the equity of redemption devolved in equity upon his personal representative, subject, of course, to any charge which the conveyance had created. The judgment, however, seems to rest chiefly, if not wholly, upon the words which I have placed within quotation marks. To me, however, it seems clear that those words have no bearing upon the question. The only thing that could cause an equitable conversion of the land into money

[1] 5 Sim. 424.

[2] 7 Hare 299.

was the direction to the trustees to sell the land; and the words quoted could not even aid in creating an equitable conversion, unless they constituted a gift of any surplus which should be produced by the sale; and it cannot be seriously claimed that they did constitute such a gift. Wigram, V. C., says[1]: "The first question is how the case would be if the trustees had sold the land in the lifetime of the grantor, and had the money in their hands. In that case it would, I apprehend, clearly belong to the personal representative of the grantor." Undoubtedly it would, but the plain reason seems to me to be that it would be a part of the grantor's personal estate at the time of his death, and hence would devolve like his other personal estate.[2]

Finally, Clarke *v.* Franklin,[3] where land was granted and conveyed to trustees, subject to a life estate in the grantor, in trust to convert the same into money at the grantor's death, and pay out of the net proceeds six sums of £50 each and one sum of £20, to persons named, or such of them as might be living at the grantor's death, and no valid disposition was made of the residue of the net proceeds, it was held that the land was converted into money in equity from the moment of the delivery of the deed of conveyance, and hence that it devolved in equity, at the grantor's death, as if it were money. It will be seen, however, that the deed in this case is of a very different nature from that in either of the two preceding cases; for, instead of being an assignment for the benefit of creditors, it seems to have been a substitute for a will. Accordingly, the grant which it made was not to take effect in possession until the grantor's death. So also the several sums of money which were charged on the land appear to have been gifts, and would, therefore, have taken the form of pecuniary legacies, if the document had been a will. On the other hand, the deed took effect immediately on its delivery, and, unlike a will, was irrevocable.

There is also another, but wholly different class of cases, in which money is directed to be laid out in the purchase of land, and yet the ownership of the land, when purchased, will be just where the ownership of the money was when the purchase was made, namely, where land is settled, the legal ownership being vested in trustees,[4]

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[1] Page 313.

[2] See 18 HARV. L. REV. 4–9.

[3] 4 K. & J. 257.

[4] If the legal ownership is not vested in trustees, but the limitations of the settlement are legal, the same object is accomplished by means of a power.

and the latter are authorized to sell the land, but are directed to invest the proceeds of the sale in other land, and the land is accordingly sold, but, before other land is purchased, the question arises whether the money is, from the moment of the sale, converted in equity into land; and this question has always been answered in the affirmative,[1] and seems never to have been supposed to be open to doubt; and yet it seems to be clear, upon principle, that it ought to have been answered in the negative. Neither the direction to reinvest the money in land, nor the actual reinvestment of it in land, causes any change in ownership of the settled estate, for, though no such direction, or even authority, had been given, yet, when the land was sold, the proceeds of the sale would have followed the limitations of the settlement, they taking the place of the land. The only reason, therefore, for directing the reinvestment of the money in land is that the settlor prefers land as an investment, — not that he wishes the estate to continue to devolve in equity as if it were land, notwithstanding the land is sold, as it will so devolve in any event. It has been seen, moreover, that, when money is converted in equity into land by a direction that it be exchanged for land, what actually takes place is this: the person who gives the direction, at the same time creates a right in another person to have the exchange made, and then to have the land, or some portion thereof, or some estate therein conveyed to him; and the money is said to be converted immediately into land in equity, because, if the person in whom such right is created shall die, intestate, before the actual exchange is made, his right will devolve in equity upon his heir as if it were land. In the case now under discussion, however, there is nothing of this kind. On the contrary, each person who will, under the settlement, have an interest in the land when purchased, has, in the meantime, the same interest in the money, and the land will, when purchased, simply take the place of the money, just as, when the original land was sold, the money took the place of the land. If, therefore, this money will devolve as if it were land in equity, by reason of its having been converted in equity into land, it must be because in equity it *is* land, *i. e.*, because it has, by a fiction, been transmuted by equity. In other words, if the money has been converted in equity into land, the conversion must have been direct,

[1] Chandler *v.* Pocock, 15 Ch. D. 491, 497, 16 Ch. D. 648; Walrond *v.* Rosslyn, 11 Ch. D. 640; *In re* Duke of Cleveland's Settled Estates, [1893] 3 Ch. 244; *In re* Greaves's Settlement Trusts, 23 Ch. D. 313.

and yet there is no ground upon which equity can make a direct conversion.[1]

As, however, money into which settled land has been converted will follow the limitations of the settlement, whether such money be treated as money or as land, the reader may think the question which I have been considering is not of much practical importance. It is always important, however, that a legal question should not only be correctly decided, but that the reasons given for the decision should also be correct, it being impossible to foresee what mischiefs may result from erroneous reasons given for correct decisions. Moreover, if the money into which settled land has been converted be erroneously held to have been reconverted in equity into land, the result is not likely to be the same as if what is money in fact had been treated as money in equity also, unless the equitable conversion of the money into land is confined to the limitations of the settlement; and yet we have had too much occasion to see that, when money is covenanted or directed to be laid out in the purchase of land, and the land to be settled, the courts always hold that the money is converted into land in equity, not merely to the extent of the limitations in the settlement, but also as to the reversionary interest retained by the settlor, *i. e.*, not only as to the persons in whose favor the settlement is to be made,

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[1] For the reason stated in the text, as well as for another reason, the case of Ashby *v.* Palmer, 1 Mer. 296, 1 Jarm. on Wills, 1st ed., 527, seems to have been erroneously decided, though that was a case of converting land into money, — not money into land. In that case, a testator, who was a widow, and had an infant daughter and only child, devised all her land to trustees in trust to sell the same for the payment of debts, and for educating and bringing up the daughter, and, when the latter attained twenty-one or married, the trustees were directed to pay to her any proceeds of the sale still remaining in their hands. The daughter became a lunatic before she attained full age, and so remained till her death, — more than fifty years after the will was made. None of the land having been sold, Sir W. Grant, M. R., held that the daughter's next of kin were entitled to it. It seems to be clear, however, first, that the land descended in equity to the daughter, and, therefore, that, if it had been sold, the proceeds of the sale would have belonged to her in equity, subject to any use which the trustees were authorized to make of them. Consequently, a sale of the land would have been attended with no alienation of the proceeds of the sale, and so the direction to sell caused no equitable conversion. Secondly, it seems equally clear that the trust was to cease on the daughter's attaining twenty-one or marrying, unless debts should still remain unpaid. Certainly, the trustees were not authorized to sell the land after the daughter attained her full age or married, except for the payment of debts. Assuming, then, that the direction to sell for payment of debts caused no equitable conversion, there ceased to be any equitable conversion when the daughter attained twenty-one, as a direction to sell cannot possibly cause an equitable conversion after it has ceased to confer any authority.

but also as to the settlor and those claiming under him, and to this rule the case now under consideration is no exception. Thus, in Walrond *v.* Rosslyn,[1] where, by marriage settlement, the intended husband settled land in the usual manner, and the settlement contained the usual power of sale and exchange, and, in case of a sale, the proceeds were to be invested in other land, which was to be settled to the same uses to which the land sold was settled, and some of the land had been sold, but the proceeds had not been invested in other land, and all the limitations of the settlement had come to an end, except that in favor of the intended wife by way of jointure, so that the proceeds of the sale had confessedly become the absolute property of the settlor, subject only to said jointure, and the settlor had died intestate, it was held by Sir G. Jessell, M. R., that said proceeds must be treated as land in equity, and consequently that they devolved upon the settlor's heir; and yet such proceeds ought, upon principle, to have been held to devolve upon the settlor's next of kin, and that for three reasons: first, the jointress had the same right in said proceeds that she would have had in land purchased with them, and hence there was no equitable conversion of said proceeds into land; secondly, the jointress had only a charge on the land originally settled, her jointure being by way of a legal rent-charge, and, for that reason also, there was no equitable conversion of said proceeds in her favor; thirdly, in no possible view could said proceeds be converted in equity, except in favor of the jointress, nor even in her favor for any longer period than her life.

So in Chandler *v.* Pocock,[2] where, by a marriage settlement, the father of the intended wife settled land to the use of himself, the intended husband, and the intended wife, successively for their respective lives, remainder, in the events which happened, to such uses as the intended wife should by will appoint, remainder in default of appointment by her, to the settlor in fee, and the settlement contained a power of sale, the proceeds of the sale to be invested in other land, and the land was sold accordingly for consols, but the consols had not been invested in other land, and the wife by her will bequeathed all the residue of her personal estate and effects whatsoever, and the question was whether this bequest operated as an appointment of the consols under s. 27 of

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[1] 11 Ch. D. 640.
[2] 15 Ch. D. 491, 497, 16 Ch. D. 648.

the Wills Act,[1] it was held, first, by Sir G. Jessell, M. R., and afterward by the Court of Appeal, that it did. Was the decision correct? There seems to be no room to doubt that it carried out the intention of the testator, and, if the consols were personal property in equity, as they were in fact, the question would not even have arisen. Yet both courts proceeded on the assumption that the consols had been wholly converted in equity into land, and, on that assumption, the decision involved the somewhat startling doctrine that the term "personal property," in s. 27 of the Wills Act, meant "actual personal estate, though constructively converted into land," *i. e.*, that the Legislature, in enacting that section, wholly ignored the doctrine of equitable conversion.

In *In re* Greaves's Settlement Trusts,[2] by marriage settlement, the intended husband settled land on the intended wife for her life, retaining the reversion in fee in himself. The settlement contained a power to sell the land, the proceeds to be invested in other land; and the land was accordingly sold, but the proceeds were invested in new three per cents, and so remained; the wife survived the husband, who bequeathed all his money in the public funds or elsewhere to his children equally, and Frye, Justice, held that the new three per cents did not pass, the same being converted in equity into land, and the bequest not operating as an appointment under s. 27 of the Wills Act. The consequence, therefore, of holding that the new three per cents were converted in equity into land, was that the testator's intention as to their disposition was wholly frustrated; though this was only because the conversion was held to extend to the husband's reversionary interest. If it had been held either that there had been no equitable conversion, or that the equitable conversion extended only to the wife's life interest, the testator's intention would have been fully carried out.

Lastly, in *In re* the Duke of Cleveland's Settled Estates,[3] where settled land was vested in the Duke of Cleveland as tenant for life in possession, remainder to his first and other sons successively in tail male, remainder to said Duke in fee, and the same was sold under a power conferred by a private Act, which directed the proceeds of the sale to be invested in other land, but they were invested in consols instead, and the Duke afterwards died without issue, having devised his residuary real and personal estate to

[1] 7 Wm. IV. & 1 Vict. c. 26.
[2] 23 Ch. D. 313.
[3] [1893] 3 Ch. 244.

trustees in trust for the Hay family, the Court of Appeal held that said consols passed under said residuary clause, but that they passed as land; and yet the Duke's remainder in fee, which was all that passed by his will, was entirely outside the settlement, and so the decision is open to the same objection as the decision in the preceding case.

C. C. Langdell.

CAMBRIDGE, October, 1905.

THE LIABILITY OF CORPORATIONS ON CONTRACTS MADE BY PROMOTERS.

THE law is settled to the effect that an agreement entered into between a third person and a promoter, prior to the existence of the corporation, is not binding upon it, although made on account of the corporation and with the expectation that it will be liable. It is immaterial whether the agreement in question is in the name of the prospective corporation or that of the promoter. It is an equally unquestioned rule that, under certain circumstances, the corporation may become liable on terms substantially the same as those embodied in the agreement antedating the corporate existence. The purpose of this article is to consider the legal principles on which this liability rests.

For the sake of clearness, it is advisable to refer at the outset to a certain class of cases in which corporate liability exists. Though the principles involved are not properly within the scope of the present discussion, the tendency to confuse the basis of liability in those cases with cases covered here makes it necessary to point out briefly the theory on which those decisions proceed.

In many jurisdictions statutes make the corporation liable for certain expenses attending the organization and promotion of the company; more commonly the charter or the deed of settlement makes similar provisions.[1] Where such is the case, persons performing the services provided for in reliance upon the provisions may recover against the corporation when formed, the remedy being statutory.[2]

When the promoter has made a contract with a third person, the corporation may become a party to it by novation. It is obvious that the doctrine involved here is not peculiar to promoters, but extends to all contracts dealing with subject-matter within the scope of corporate power. Neither is it material at what time the contract was entered into with reference to the corporate existence.

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[1] Lindley, Companies, 6th ed., 196.

[2] Scott *v.* Lord Ebury, L. R. 2 C. P. 254; Lindley, Companies *supra*.

The corporation may also obtain rights under a contract by means of an assignment from the promoter or other parties.[1] Here, again, it is of no consequence whether the contract is with a promoter or not, and the time when it is made is equally immaterial.

A class of cases also exists in which the corporation is liable on the theory that a trust fund has been created by the corporation for the benefit of third persons, as a result of an agreement between the promoter and the corporation. In Touche *v.* Metropolitan Ry. Warehousing Co.,[2] the plaintiff was allowed to recover in equity on the theory that the corporation had made the promoter trustee of the sum in question. The decision has been doubted, as to the propriety of the finding that a trust relation existed under the facts in evidence,[3] although the principle is admitted that a trust may be created in favor of a third person by virtue of an agreement between the corporation and the promoter. In those jurisdictions where the real party in interest is permitted to sue, the third party may frequently have a remedy against the corporation, as a result of a provision for payment contained in a valid contract between the promoter and the corporation.

These exceptional cases being disposed of, it is now possible to take up the cases, which are the immediate object of this discussion, where an agreement has been entered into between a promoter and a third person, on which it is now proposed to hold the corporation liable. The common form of statement is that a corporation, by ratification or adoption, becomes liable on contracts made by a promoter on its account, prior to organization.[4] This statement, as far as it involves any theory of ratification, is clearly incorrect if taken literally, and repugnant alike to principle and to the great weight of authority.[5] Ratification is possible only where a contract is made by a person purporting to act for an existing principal, who is capable of making the contract himself at the time it is entered into. Clearly the doctrine can have no application in the class of cases discussed here, since the alleged principal is non-existent when the contract is made. Furthermore, the

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1 Werdeman *v.* Soc. Gen'l D. Elec., 19 Ch. D. 250.

2 L. P. C. A. Cas. 671.

3 Gandy *v.* Gandy, 30 Ch. D. 57; *In re* Empress Engineering Co., 16 Ch. D. 125.

4 Stanton *v.* New York, etc., Ry. Co., 59 Conn. 272; Spiller *v.* Paris Skating Rink Co., 7 Ch. D. 368.

5 *In re* Empress Engineering Co., 16 Ch. D. 125.

promoter is not an agent in any proper sense of that term. His activities are confined to the promotion and organization of the corporation, and cease when the organization is complete. It is evident that the principles of agency will not serve in the solution of the question. The meaning of the term *adoption*, usually coupled with ratification as an alternative, by means of which the corporation may become liable, is somewhat obscure as used by the courts in this connection. It has been defined "to take or receive as one's own that with reference to which there existed no prior relation, colorable or otherwise."[1] With many courts the meaning is apparently the same as ratification. Properly it can be regarded only as a synonym of acceptance.[2]

The point of departure in the discussion, as far as the English cases are concerned, is a group of cases decided by Lord Cottingham.[3] Of these, Edwards *v.* Grand Junction Ry. Co. is the most frequently cited, on account of the full discussion by the court. The importance of the case justifies a somewhat complete statement.

The bill prayed an injunction restraining the defendant company from proceeding in violation of an agreement made by the projectors of the defendant company with the plaintiffs, by the terms of which the plaintiffs were to withdraw all opposition to the granting of a charter to the proposed company, in return for which the projectors promised to have inserted in the company's articles certain amendments respecting the width of a bridge over the turnpike operated by the plaintiffs. The corporation when formed proceeded to build the road, ignoring entirely the agreement with the projectors. The agreement in question was never acted upon by the corporation. Lord Cottingham, in granting the injunction, stated that the corporation stands in the place of the projectors and succeeds to their rights and must assume their liabilities. In reply to the argument that no undertaking by the corporation is shown, the court said: "The question is not whether there can be a binding contract at law, but whether the court will permit the company to use its powers under the act in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain powers."

[1] Schreyer *v.* Turner Flouring Co., 29 Ore. 1.

[2] Lindley, Companies, 6th ed., 232.

[3] Edwards *v.* Grand Junction Ry. Co., 1 Myl. & Cr. 650; Stanley *v.* Chester & B. Ry. Co., 9 Sim. 264; Webb *v.* L. & P. Ry. Co., 9 Hare 129.

The decision, which was followed in two later decisions[1] by the same judge, goes much further than any other case, both in its facts and conclusion, since the company had not in any way indicated an assent to the agreement of the projectors, making it impossible to invoke any doctrine of ratification or adoption.

The acceptance of the charter cannot be regarded as such an assent, since the company derives its charter from Parliament and not from the plaintiff, hence its enjoyment cannot be regarded as inconsistent with the defendant's claim of non-liability on the agreement.[2]

The decision has been repeatedly criticised in the later English decisions, and while not in terms overruled, it is seriously discredited as a precedent.[3] The decision is criticised for assuming any identity between the projectors and the corporation itself. If the identity exists, then the conclusion that the company is liable follows without question, as it would be against conscience for a group of men, acting under the cloak of a legal fiction, to ignore obligations undertaken by them in another capacity. There may be such an identity in a particular case, but as the probability is against it, the court is not justified in assuming such identity without proof. The primary purpose of the promoter is to interest investors in the proposed corporate enterprise. Almost invariably when the corporation is organized, persons not concerned in the projection are allottees of shares. Frequently the projector is not a member of the corporation at all. The injustice of the decision lies in subjecting innocent subscribers to obligations which they did not contemplate and which they cannot ascertain by reasonable diligence.[4]

If the theory advanced as to identity by Lord Cottingham be denied, it is difficult to find any ground for relief in equity, unless a contract be made out between the third person and the corporation, and such is apparently the view taken by the later decisions.[5]

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[1] *Supra*, p. 99, note 3.

[2] *In re* Skegness & St. Leonards Tramways Co., 41 Ch. D. 215.

[3] Fry, Specific Performance of Contracts, 4th ed., 103; Caledonian & Dumbartonshire Ry. Co. *v.* Magistrates of Helensburg, 2 Macq. H. L. Cas. 391; Preston *v.* L. M. Ry. Co., 5 H. L. Cas. 605; Kelner *v.* Baxter, L. R. 2 C. P. 174; Melhado *et al. v.* Porto Alegre, N. H. & B. Ry. Co., L. R. 9 C. P. 503; *In re* Empress Engineering Co., 16 Ch. D. 125.

[4] C. & D. Ry. Co. *v.* Magistrates of Helensburg, *supra*; Preston *v.* L. M. Ry. Co., *supra*; Earl of Shrewsbury *v.* N. Staffordshire Ry. Co., L. R. 1 Eq. 593.

[5] Gooday *v.* Colchester, etc., Ry. Co., 17 Beav. 132; Caledonian & D. Ry. Co.

The same conclusions are reached in cases[1] where the third person is attempting to prove in the winding-up proceedings of the corporation. In these cases the corporation had after organization passed resolutions or taken other steps for the purpose of adopting or ratifying the contract made on its account, — a circumstance not present in the cases decided by Lord Cottingham, — yet the right to prove was denied.

In the case of *In re* Northumberland Hotel Co.,[1] the directors of the company not only adopted the contract made by the promoter on its account, but took possession of leasehold premises obtained under the contract, compromised a suit for specific performance brought by the lessor, and paid rent to him, yet the lessor was not allowed to prove on the contract in the winding up proceedings, on the ground that no contract was shown to subsist between the lessor and the corporation. It is admitted by the court that if the lessor could have shown a new contract entered into between the corporation and himself, proof would have been allowed, but evidence that the directors passed resolutions adopting the agreement and took possession of property under it will not establish such a contract, since all those steps were obviously taken by the company under the assumption that the old contract was valid, and cannot be taken as showing a new contract.

In Scott *v.* Lord Ebury,[2] where the action was to recover from the promoters for money advanced by the plaintiffs to meet the parliamentary expenses incurred in securing the charter of the company, Willes, J., in reply to the contention that the debiting of the company by the plaintiff on its books, coupled with a resolution of the board of directors of the company confirming the agreement made by the promoters, showed a new contract which would discharge the promoter, observed that one element was lacking to make such a conclusion possible, namely, the assent of the bank. The acts urged as showing a new contract were taken in the mistaken belief of liability under the original contract, and there is no evidence of any meeting or agreement between the bank and the corporation.

Precisely what evidence will justify the conclusion that a new

v. Magistrates of Helensburg, 2 Macq. H. L. Cas. 391; Preston *v.* L. M. Ry. Co., 5 H. L. Cas. 605.

[1] *In re* Empress Engineering Co., 16 Ch. D. 125; *In re* Northumberland Hotel Co., 33 Ch. D. 16; Kelner *v.* Baxter, L. R. 2 C. P. 174 (*semble*); Bogat Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., 71 L. J. Ch. 158 (*semble*).

[2] L. R. 2 C. P. 254.

contract has been made is indicated in the case of Howard *v.* Patent Ivory Co.,[1] where one Jordan entered into an agreement with one Wyber, acting on behalf of the defendant company about to be formed, to sell certain property to the corporation. The corporation was organized, both the articles and memorandum providing for the adoption of the agreement in question. At a meeting of the directors, at which Jordan was present, resolutions were passed adopting the agreement and accepting the offer of Jordan to take part of the purchase price in debentures, and under the resolution the company's seal was affixed to the documents transferring a leasehold to the company and the debentures to Jordan. The company entered into possession of the leasehold premises and transacted business thereon. Subsequently the company was wound up, and the liquidator took an assignment of the rest of the property to be transferred under the agreement by Jordan to the company.

The court found on these facts that a new contract was entered into. The conclusion of the court in *In re* Northumberland Hotel Co.[2] was criticised but distinguished from the case at bar, on the ground that Jordan was present at the directors' meetings and participated in a modification of the original contract, in effect making a new contract.

It is questionable whether Edwards *v.* Grand Junction Ry. Co.[3] would be followed by the English courts[4] even if the precise question were involved. It certainly has been thoroughly discredited on principle, and the view now taken is that the corporation is not liable on contracts antedating its formation, although made on its account, but that the corporation may become liable on a new contract made directly between the corporation and the other party. In determining whether or not such contract exists, steps taken by either party in the belief that the original agreement made through the promoter still exists will not be considered. The proposition just stated, of course, excludes the exceptions previously referred to, where the liability rests on some principle of trust, novation, assignment, or express provisions of statute or charter.

The American cases, both at law and in equity, are overwhelmingly in favor of holding the corporation liable on contract antedating its existence, wherever it has "ratified or adopted" the

[1] 38 Ch. D. 156. [2] *Supra.* [3] *Supra.*

[4] Fry, Specific Performance of Contracts 107.

same, ratification or adoption being shown either by express resolution of the managing body or by accepting the benefits or fruits of the contract.[1]

The American cases without exception are subsequent in time to the group of cases decided by Lord Cottingham,[2] which are cited with approval as decisive of the questions decided by the American courts, and apparently form the basis of the generally accepted American doctrine. No case has been found, however, that goes as far as the English cases referred to, the American courts insisting in every instance on some act by the corporation subsequent to organization showing an intent to be bound.

The American courts, owing, perhaps, to the obliteration of distinctions between law and equity in matters of procedure, have failed to note the limitations which the circumstances of the English cases impose upon them as general legal propositions. The principles underlying the liability imposed are as a rule very meagerly discussed; the liability is assumed rather than justified. The criticisms of Lord Cottingham's view by the later English cases are not noticed by the American courts, although in a few instances the arguments urged against their soundness are dealt with.[3]

A number of cases come within the exceptional classes noted in discussing the English decisions where the liability properly rests on a novation or assignment.[4]

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[1] Little Rock & Ft. Smith Ry. Co. *v.* Perry, 37 Ark. 164; M. & H. Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206 (*semble*); Arapahoe Investment Co. *v.* Platt, 5 Colo. App. 515; Carter *v.* San Francisco Sugar Ref. Co., 19 Cal. 220; Stanton *v.* N. Y., etc., Ry. Co., 59 Conn. 272; The Georgia Co. *v.* Castlebury, 43 Ga. 187 (*semble*); Smith *v.* Parker, 148 Ind. 127; Dubuque Female College *v.* Township of Dubuque, 13 Iowa 555; Bank of Forest *v.* Argill Bros. & Co., 34 So. Rep. 325 (Miss.); Esper *v.* Muller, 91 N. W. Rep. 613 (Mich.) (*semble*); Grape Sugar & Vinegar Mfg. Co. *v.* Small, 40 Md. 395; Oaks *v.* C. W. Co., 143 N. Y. 430; Law *v.* Railway Co., 45 N. H. 370; Schreyer *v.* Turner Flouring Co., 29 Ore. 1; Bell Gap Ry. Co. *v.* Christy, 79 Pa. St. 54; Ireland *v.* Globe Milling Co., 20 R. I. 190 (*semble*); Huron Printing & Binding Co. *v.* Kittleson, 4 So. Dak. 520; Chase *v.* Redfield Creamery Co., 12 So. Dak. 529; Kaeppler *v.* Redfield Creamery Co., 81 N. W. Rep. 907 (So. Dak.); Pittsburg, etc., Mining Co. *v.* Quentrell, 91 Tenn. 693; McDonough *v.* Bank of Houston, 34 Tex. 309; Buffington *v.* Bordon *et al.*, 80 Wis. 635; Whitney *v.* Wyman, 101 U. S. 392 (*semble*).

[2] Edwards *v.* Grand Junction Ry. Co., Stanley *v.* Chester & B. Ry. Co., Webb *v.* L. & P. Ry. Co., *supra*.

[3] N. Y., etc., Ry. Co. *v.* Ketchum, 27 Conn. 170; Safety Deposit Life Ins. Co. *v.* Smith, 65 Ill. 309; Park *v.* Modern Woodmen of America, 181 Ill. 214; Oldham *v.* Mount Sterling Imp. Co., 103 Ky. 529.

[4] Colo. L. & W. Co. *v.* Adams, 5 Colo. App. 190; Stanton *v.* N. Y., etc., Ry. Co., 59 Conn. 272 (*semble*); Oldham *v.* Mount Sterling Imp. Co., 103 Ky. 529; Esper *v.* Miller, 91 N. W. 613 (Mich.) (*semble*); Snow *v.* Thompson Oil Co., 59 Pa. St. 209 (*semble*).

The view that a corporation may be estopped to deny that it is bound by the contract made by the promoter is advanced by a well known writer on corporations,[1] and is accepted as the basis of decision by a few courts.[2] The application of the principle is not clear, since the action of the corporation in approving the contract made on its account and in taking possession under it is attributable ordinarily to the belief shared by both parties that the original contract is binding upon them. How, then, is it possible to estop the corporation by conduct obviously due to a mutual mistake as to the legal liabilities of the parties?

In a number of jurisdictions the agreement between the promoter and third person is regarded as an open offer to the corporation, which it may accept when organized, and thus create a new contract between the third person and the corporation.[3] A resolution adopting or ratifying the original agreement, or the acceptance of the fruits of the contract is generally regarded as sufficient proof of acceptance.

It is evident that practically all of the cases decided on the ground of ratification or adoption could rest on the grounds stated in the cases just referred to, since in every instance the corporation has assented to the agreement made on its account, either in terms or by implication.

Both the English and American decisions recognize the possibility of a new contract between the corporation when organized and the third person, the broad line of distinction between the cases being the manner in which such contract can be made out; the English courts taking the position that acts of the corporation which are clearly attributable to the erroneous belief on its part that it is liable on the original contract cannot be received as evidence of a new contract, particularly when coupled with the further fact that direct negotiations between the third party and the corporation cannot be shown. The American courts, on the other hand, receive as evidence of a new contract all acts indicating an intent by the corporation to receive the benefits of the original contract.

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1 Thompson, 1 Commentaries on Corporations, § 480.

2 Blood *v.* La Serena Land & Water Co., 121 Cal. 221; Grape Sugar & Vinegar Mfg. Co. *v.* Small, 40 Md. 390 (*semble*).

3 Smith *v.* Parker, 148 Ind. 127; Penn. M. Co. *v.* Hapgood, 141 Mass. 145 (*semble*); Holyoke Envelope Co. *v.* U. S. Envelope Co., 182 Mass. 171 (*semble*); Waetherford, etc., Ry. Co. *v.* Granger, 86 Tex. 350; E. & C. Oil Co. *v.* Burks, 39 S. W. Rep. 966 (Tex.); Wall *v.* Niagara Mining & Smelting Co., 20 Utah 474; Pratt *v.* Oshkosh Match Co., 89 Wis. 406.

The Supreme Court of Massachusetts approaches most nearly the present English view,[1] when it declares that a corporation cannot become liable on its promoters' contract by ratification or adoption. In a later decision,[2] the court, by way of *dictum*, intimates that the acceptance of benefits may be evidence of a new contract between the third party and the corporation.

The American decisions, while practically unanimous in the result reached, are far from satisfactory as to the legal principles underlying the liability. The English cases, on the other hand, have developed a logical, consistent theory of liability. The consequences of the liberal American view on the question of proof are not unjust: the corporation is protected against improvident agreements made on its account by promoters, since it has the power of acceptance or refusal. It is submitted that an equally just result is possible without doing violence to recognized principles of agency and contract.

H. S. Richards.

UNIVERSITY OF WISCONSIN.

[1] Abbott *et al. v.* Hapgood *et al.*, 150 Mass. 248.

[2] Holyoke Envelope Co. *v.* U. S. Envelope Co., 182 Mass. 171.

DEBTOR'S INTERFERENCE IN THE ELECTION OF A TRUSTEE IN BANKRUPTCY.

GENERALLY in the Continental systems of bankruptcy legislation it is the policy of the law for the court to appoint its own official administrator to handle the bankrupt's estate. The creditors may be consulted, or even have some advisory or supervisory control over the official court administration, but the actual executive control of the assets is in the hands of the court official.[1]

In the English bankruptcy system it is a cardinal principle that the creditors are to have the full control of the administration of the bankrupt's estate. The court is merely the supervisory power. The last English Bankruptcy Act of 1883[2] gives the creditors an absolute right to name the trustee who shall administer the estate in their behalf. The Board of Trade may for cause object to the selection of the creditors, and the High Court will pass on the validity of the objections, which may be for any of three causes: first, that the appointment was not made in good faith; second, that the appointee is not a fit person. The only persons absolutely disqualified are the official receivers, or a person who has previously been removed from the office of trustee for misconduct or neglect. Third, that the relations of the appointee are such that it would be difficult for him to act impartially.

In this country the policy of bankruptcy legislation on this subject has not been uniform. Beginning with our first Bankruptcy Law in 1800, Congress gave to the creditors the fullest liberty in the choice of the trustee. The Act of 1800 provided that the major part in value of the creditors should choose a person or persons to whom the bankrupt's estate and effects should be transferred.[3] No approval of the choice on the part of the court was provided for.

In the Bankruptcy Act of 1841, however, the Continental practice was adopted. The title to the bankrupt's estate was vested in an assignee appointed by the court.[4]

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1 Dunacomb, Bankruptcy, Columbia College Studies in History, etc., No. 2, p. 2.

2 46 & 47 Vict. c. 53.

3 Bankruptcy Act of 1800, § 6.

4 Bankruptcy Act of 1841, § 3.

Evidently the system of official court assignees was found unsuited to American conditions, for in 1867 the Bankruptcy Act passed in that year followed more nearly the English practice. It left the creditors to choose one or more assignees of the estate of the debtor subject to the approval of the district judge.[1] The general orders of the Supreme Court expressly prohibited the appointment by the district judges of any official assignees or any general assignees to act in any class of cases.[2]

The Bankruptcy Act of 1898 was closely modeled after the Act of 1867 regarding the selection of the trustee in bankruptcy, although its provisions are not wholly consistent. The bankruptcy court is invested with power to appoint trustees pursuant to the recommendation of creditors.[3] On the other hand, the creditors themselves are given the absolute right to appoint one or three trustees.[4]

This conflict in the statute has led to a curious result. Not only has the Supreme Court copied the old General Orders under the Act of 1867 that no official trustees shall be appointed,[5] but has engrafted a limitation on the free right of selection of the trustee on the part of the creditors that the appointment "shall be subject to be approved or disapproved by the referee or by the judge."[6] There is clearly no warrant for this usurpation on the part of the court. The General Order plainly seeks to borrow from the Act of 1867 one of its provisions that Congress has not seen fit to re-enact in the present statute. Although there has been no judicial disapproval of this order, one of the leading text-book writers on bankruptcy has already expressed doubts of its validity, and the expectation that this general order will not stand the scrutiny of the court that promulgated it.[7]

The seven years of practice under the present statute has furnished an unbroken precedent of the selection of the trustee by the creditors. The court never undertakes to exercise its right of appointment under its general power, and names a trustee under the express authority given it under section 44 only when the creditors fail or neglect to exercise their rights. The selection of

[1] Bankruptcy Act of 1867, § 13.
[2] General Orders, IX, Supreme Court, October term, 1874.
[3] Bankruptcy Act of 1898, § 2 (17).
[4] Bankruptcy Act of 1898, § 44.
[5] General Orders, XIV, 172 U. S. 657.
[6] General Orders, XIII, 172 U. S. 657.
[7] Collier, Bankruptcy, 4th ed., 330.

a trustee is an important and substantial right of the creditors. It is a matter of first importance in every case. Much of the success of the present Bankruptcy Act depends on an intelligent safeguarding of this privilege to the creditors on the part of the courts.

Under our present statute one of the most important questions relating to the election of a trustee has arisen in a class of cases where the bankrupt seeks to influence or control the selection of the person who is to be trustee. The bankrupt may have much to gain from the appointment of a favorable trustee. Often his creditors are widely scattered and unknown to each other, their respective claims may be small, and important only in the aggregate. Negligent, complaisant, and friendly creditors will be only too ready to follow a request or suggestion of a debtor who may have traded with them for years or who may hold out hopes of future advantages. For a time at least the names and addresses of the creditors are in the exclusive control of the bankrupt. It is very easy to see how the debtor who desires to stifle an investigation, or to regain speedy control of his estate can turn all this to his advantage. It is an easy matter for the bankrupt to solicit the claims or proxies of his various creditors and elect his nominee to the office of trustee over the efforts of an unorganized and widely scattered body of creditors. It is, of course, obvious that such action is a gross fraud on the creditors, and that any court to whose attention this state of affairs is brought should make every effort to defeat such a scheme.

The first time such a question was brought to the attention of a court was in 1821 in the English case of *Ex parte Shaw*.[1] After a contested election a petition was presented in behalf of the defeated candidates to the Lord Chancellor, praying that the assignment of the estate to the persons who had received the majority of votes might be stayed and that the same be executed to them. One of the grounds of this request was that the election had been procured by the canvas and solicitation of the bankrupts. The Vice-Chancellor, Sir John Leach, was of the opinion that the choice should be avoided. "It is against the first principles and the whole policy of the bankrupt laws to permit bankrupts indirectly to choose their own assignees." When this question was presented to Lord Eldon on appeal, he dodged a decision by finding the choice invalid on other grounds. This case, however, has always

[1] 1 G. & J. 125.

been cited as sustaining the view of the Vice-Chancellor, and it became a fixed principle of the English bankruptcy practice that such interference by the bankrupt avoided the election,[1] until finally the subject seems to be satisfactorily covered by express provision of their bankruptcy statute.

Unfortunately the courts in this country who have considered this subject have not agreed upon either the theory or method of dealing with the problem. All our courts recognize that the whole policy of the Bankruptcy Law is to give to creditors the free, deliberate, and unbiased choice in the first instance of the person who is to administer the assets of the bankrupt estate. The present statute is very carefully drawn to check undue control of the bankrupt's affairs, either by a few interests, or by the bankrupt's influence in connection with them to the prejudice of the general body of creditors.[2] To elect a trustee a majority vote both in number and value of the creditors present and voting is necessary.[3] This insures that neither one large predominating creditor may choose a trustee in his interests, nor that several insignificant creditors in combination may elect a trustee to the prejudice of what may be the only substantial interests in the proceedings.

On the other hand, it is equally certain that an honest bankrupt can have no real interest in the choice of the trustee. The creditors alone are the beneficiaries in the administration of the estate.

"The trustee's duties are administrative, not judicial. It is not his special duty 'to hold an even hand or an unbiased mind' towards the bankrupt, but to make the most possible out of the assets, and in the performance of this duty mere bias or unfriendliness toward the bankrupt must be rarely, if ever, material. Considering the number and frequency of fraudulent bankruptcies in the past, a zealous watch and scrutiny of an insolvent's transaction cannot be looked upon as demerit, or as indicative of a lack of 'competency' in a trustee. And unfounded suspicions and prejudice even may be met by the honest merchant without fear."[4]

Where there is evidence sufficient to establish that the bankrupt or his representatives have interfered with the election of a trustee, two possible courses seem to be open to the minority creditors. They may challenge the vote, or may demand that the referee

[1] *Ex parte* Molineaux, 3 M. & Ayr. R. 703; *Ex parte* Carter, 3 De G. & J. 116.
[2] *In re* Henschel, 109 Fed. Rep. 861, 6 Am. B. Rep. 305.
[3] Bankruptcy Act of 1898, § 56 a.
[4] *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. Rep. 299. See also *In re* Clairmont, 1 N. B. Rep. 276.

disapprove the election. Some of the cases have held that the mere fact that the vote is influenced or controlled by the bankrupt in his own interests is no ground for objecting to it. The only mode of raising such an objection is by opposing the approval of the election.[1] Other cases have allowed the challenge of the votes so cast,[2] while one of the more recent cases held that the referee may either decline to receive the votes, or to approve the election.[3]

The present Bankruptcy Law has very carefully defined the qualifications of the trustee:

"Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."[4]

When the bankrupt is attempting to control the election of the trustee, he is usually sufficiently clever to select as his candidate some individual of personally irreproachable character who is perfectly competent to fill the position.[5] Conceding the validity of the General Orders, rule XIII, how can the referee withhold his approval to such a candidate if he is the selection of the unchallenged vote of the majority in value and number of the creditors? The discretion to approve or disapprove which he may exercise is not an arbitrary power. It must rest on the basis of some provisions of the statute.[6]

"The referee should not disapprove of the choice of a trustee by creditors, nor should he interfere with, or influence such choice except upon clear proof of incompetency for performance of duty or non-residence."[7] Even under the Act of 1867, in which, with one exception,[8] there was no specific disqualification for a trustee, and a general discretion to approve or disapprove of the election

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1 *Re* Noble, Fed. Cas. 10282, 3 N. B. Rep. 96; *Re* Frank, Fed. Cas. 5050, 5 N. B. Rep. 194; *Re* Bliss, Fed. Cas. 1543, 1 N. B. Rep. 78; *Re* Wetmore, Fed. Cas. 17466, 16 N. B. Rep. 514; *Re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. Rep. 811.

2 Falter *v.* Reinhard, 104 Fed. Rep. 292, 4 Am. B. Rep. 782, 106 Fed. Rep. 57, 5 Am. B. Rep. 155; *Re* Henschel, *supra;* Matter of Law, 13 Am. B. Rep. 650.

3 Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. Rep. 85.

4 Bankruptcy Act of 1898, § 45.

5 Boston Dry Goods Company, 125 Fed. Rep. 226, 11 Am. B. Rep. 97; *Re* Henschel, *supra.*

6 Bump, Bankruptcy, 10th ed., 132. *Cf.* also *Ex parte* Sheard, L. R. 16 Ch. D. 107.

7 *Re* Lewensohn, *supra.*

8 A person who had accepted an unlawful preference. Act of 1867, § 5035.

was given to the district judge, with power to order a new election when "needful or expedient," the court considered it was justified in withholding its approval of the election only where there was a want of capacity or integrity in the candidate elected. Otherwise he was assignee "by virtue of the law." [1]

The real point at issue is not whether the trustee so chosen is qualified so as to be approved or disapproved by the referee, but whether the votes which were wrongfully influenced by the bankrupt shall be accepted. There is no doubt that a creditor is the only person entitled to vote for a trustee. If the referee upon inquiry learns that the bankrupt is casting the votes in his creditors' names, it is obvious that he may reject such votes. If there is fraud practised on a creditor who votes in person, it is not much more difficult to find that, although it is the creditor who goes through the form of voting, yet in fact it is the bankrupt who casts the vote. So, too, in a case of collusion between a creditor and the bankrupt, it is the bankrupt who by consent of such creditor casts the vote in the creditor's name. In each of these cases it is the bankrupt's voice which is substituted for his creditors' in selecting the trustee. Just as the English Bankruptcy Law separates the objections which attack the election on the ground that the appointment was not made in good faith into a different class from those objections dealing with the personal fitness of the appointee, so this method of dealing with our problem distinguishes the question of the votes from all questions of approval or disapproval of the trustee elected.

The natural hesitancy of a referee formally to disapprove of the selection of some gentleman of character and standing in the local community who has been ensnared into the bankrupt's scheme often results in a substantial denial of the rights of the creditors to elect their trustee.[2] It befogs the issue and begs the whole question for the referee to resort to a question of disapproving of the trustee. In fact, what the creditors ask the court to pass upon is not whether the trustee is personally qualified or disqualified, but whether or not he has been elected to the office by the votes of the creditors. When a referee finds that the bankrupt directly or indirectly controlled the votes, he finds that the creditors did not cast the votes. Just as in any election for any office the election

[1] *In re* Barrett, Fed. Cas. 1043, 2 N. B. Rep. 533; *Re* Grant, Fed. Cas. 5693, 2 N. B. Rep. 106. *Contra*, *Re* Wetmore, *supra*; *Re* Bliss, *supra*.

[2] *Re* Boston Dry Goods Co., *supra*.

judges reject false votes, irrespective of the candidate for whom they are cast, so in such cases it is the duty of the referee to refuse these votes without passing on the qualifications of the appointee.

Moreover, there is an additional advantage in rejecting the votes rather than in disapproving of the trustee. If the court withholds its approval, it can neither declare the rival candidate elected, nor appoint a trustee of its own choosing. It can only order a new election.[1] There is no promise that a second election will yield any better results. By rejecting the fraudulent or corrupted votes the ballots of the independent creditors will control the election, and the court may be assured of a competent official who is the real choice of those creditors of the bankrupt who are alert in their own interests and have no ulterior object other than the best possible administration of the bankrupt's estate.

Lee M. Friedman.

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1 *Re* Scheiffer & Garrett, Fed. Cas. 12445, 2 N. B. Rep. 591; *Re* McKellar, 116 Fed. Rep. 547, 8 Am. B. Rep. 699; *Re* Hare, 119 Fed. Rep. 246, 9 Am. B. Rep. 520.

A NEW PHASE OF EQUITABLE ESTOPPEL.

THE first distinctive enunciation of the modern doctrine of equitable estoppel was given by Lord Chief Justice Denham, in 1837, in the well known case of Pickard *v.* Sears,[1] in these words:

"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

This rule, which has since been greatly extended, originated in the court of chancery, but is now generally applied to cases arising in common law courts. While the doctrine is a salutary one, and founded in the main upon equitable principles, it becomes odious when not justly or reasonably applied. Estoppel being a rule of evidence, a cause of action cannot be founded upon it. Although regarded by many as rigorous and inequitable, it has gradually grown into favor since Lord Chief Justice Mansfield in 1762, in Montefiori *v.* Montefiori,[2] impressed it upon our legal system in the following forceful words:

"Where third persons represent anything material, in a light different from the truth, . . . they shall be bound to make good the thing, in the manner in which they represented it. . . . For no man shall set up his own inequity as a defence, any more than as a cause of action."

Not being a cause of action, the measure of damage in the application of this doctrine is not compensation, but the placing of the one relying upon it in the same position as if the representation, or assumed state of facts, were true.

Quite recently an important judgment was delivered in the Supreme Court of Canada, Ewing *v.* Dominion Bank,[3] involving a principle of equitable estoppel, which has elicited much comment, not less among the profession than in commercial circles and banking institutions. Its decision settled, as far as the court of last

[1] 6 Ad. & E. 474. [2] 1 Black. W. 363. [3] 35 Can. Supreme Ct. 133.

resort for the Dominion can settle, a question of considerable importance respecting forged paper discounted by a bank. The judgment cannot be said to be satisfactory for two reasons. First, the court was a divided one, three sustaining the judgment of the inferior court and two dissenting. In the second place, the amount of the judgment assessed for the plaintiff (below), the Dominion Bank, was so manifestly inequitable as to suggest the odium, which Lord Coke designated as attaching to estoppels generally. A somewhat detailed account of the facts of the case is necessary in order to form a just conception of the decision.

The plaintiff is a chartered bank having its head office at Toronto. The defendants, William Ewing & Co., are a well known firm of seed merchants in Montreal. One Wallace, managing clerk of the Thomas Phosphate Co., of Toronto, finding the company in sore need of money, on August 14, 1900, forged the name of William Ewing & Co. to a promissory note for $2,000, at four months, made payable to the Thomas Phosphate Co. at the Dominion Bank, Toronto. Wallace, on August 15th, procured the forged note to be discounted by the said bank, and the proceeds placed to the credit of the company in the bank. On the same day the assistant manager of the bank sent notice to Ewing & Co. that their note for $2,000, in favor of the Thomas Phosphate Co., would fall due on December 17, 1900, and they were requested to provide for the same at maturity. This notice was received by Ewing & Co. on the morning of August 16th. On the 15th, the day of discount, Wallace checked out part of the proceeds, so that at the close of business, on the 15th of August, the Phosphate Co. had at the credit of its account, at the bank, $1,611.65; by the 18th Wallace had drawn all but $70.

Ewing & Co. on receipt of the notice sent them by the bank, on the 16th, at once telegraphed to Wallace, whom they had personally known, asking what the notice meant. On the same day Wallace telegraphed from Boston to Ewing & Co., saying he was coming to Montreal and would explain why the bank held the note. On the 18th, he telegraphed again to Ewing & Co. to arrange to see him on the 19th. On the last named day Wallace reached Montreal, and then made known his forgery of the note, and promised to take steps to retire the same at any early day, and begged of Ewing & Co. not to let the bank know of the forgery. Wallace failed to make good his promises. From that time for nearly four months an active correspondence was carried

on between him and Ewing & Co., Wallace pleading for time to raise the money, and beseeching them not to notify the bank, and they urging him with threats and entreaties to retire the note as agreed. Wallace's efforts to extricate himself proved unavailing. On December 4, 1900, the bank again notified Ewing & Co. that the note would mature on December 17th, and would be obliged if they would kindly provide for the same. On December 10th, Ewing & Co. wrote the bank denying they were the makers of the note, and on the same day also notified Wallace that they had informed the bank to the like effect. Wallace left the country about the time the note matured. On suit brought by the bank, the defendants denied the making of the note, and the bank counter claimed that if the signature were a forgery they were estopped by their conduct from denying it.

The cause was tried in September, 1902, by Meredith, J., without a jury, and judgment passed for the plaintiff for the full amount of the note with interest amounting to $2,230, besides costs of action. The judgment did not proceed on the ground of ratification of the forged note by the defendants; but by reason of the defendants being estopped by their conduct from denying the making, the court holding it to be the legal duty of a person whose name has been forged to inform the holder of the forged instrument of the fact promptly after becoming aware of it; and that such a person becomes liable upon it if, by reason of neglect of such duty, the holder's position is altered for the worse.

On appeal to the Court of Appeal for Ontario, the judgment was unanimously sustained. The Court of Appeal held that the judgment could not be supported on the ground of ratification; on the other hand, it could rest only upon estoppel. Chief Justice Moss, after referring to the conduct of the defendants, in their attempt to shield Wallace, held that their silence for the benefit of the forger resulted in the bank's position being thereby materially altered to its prejudice, and that consequently the defendants were estopped from denying their liability upon the note.

In order to form a just conception of the import of this judgment it may here be stated that the evidence discloses that, when the forged note was presented for discount, the bank knew the Phosphate Co. was practically worthless; that the bank never had any previous dealings with the firm of Ewing & Co., had no knowledge of their signature, and made no inquiry as to the standing of the firm, or as to the genuineness of the signature, but acted entirely

upon the representation of Wallace; that the note was drawn on a Toronto form, notwithstanding the defendants resided in Montreal; that the note, apart from the printed portions, was filled up in two different handwritings, facts that would reasonably awaken suspicion; that the notice was not sent by the bank to Ewing & Co. to elicit a response as to the genuineness of the signature; and that the fact that they did not receive an answer to the notice in no way influenced the bank as to the disposition of the balance of the funds in their hands.

The counsel on behalf of the appellants contended, that they were entitled to a reasonable amount of time to make inquiries in order to satisfy themselves a forgery had been committed, and no duty to speak was cast upon them until assured of its commission; that when such knowledge was obtained by the confession of the forger on August 19th, the proceeds of the note had been substantially withdrawn; and that by the silence of the defendants after the 19th the position of the bank had not been materially altered for the worse. On behalf of the bank it was contended there was evidence to show that prompt notice would have enabled the bank, by refusing payment of the forger's checks, to have retained a part at least of the proceeds of the note, as well as other moneys afterwards withdrawn by the forger, and want of such notice prevented the bank from taking civil or criminal action or other course against the forger before he absconded.

The judgment of the Court of Appeal of Ontario was affirmed by the Court of Appeal for the Dominion of Canada, two judges dissenting.[1] Mr. Justice Nesbitt in his dissenting opinion, after concluding that in order to create a duty on the part of Ewing & Co. to notify the bank that the note was not theirs, the bank should have given some reason to Ewing & Co. to suppose that it would be prejudiced by their silence, proceeds:

"I think, that, in any event, until the interview on Sunday the 19th Ewing & Co. were not bound to assume a crime had been committed and that their explanation, which was adopted by the Court of Appeal, that, although they had not made a note, the slip by mistake or error on the part of the clerk in the bank might refer to an advice of a draft intended to be drawn upon them, was reasonable, and they were not bound to suppose a crime had been committed; and Wallace's telegram would certainly lead them to suppose he had a reasonable explanation and that they were justified in waiting until Sunday the 19th, and at that time a telegram or other

[1] See Ewing *v.* Dominion Bank, *supra*.

notice at the bank would have been quite ineffective. It was not pretended that the bank was in any worse position as to arrest by not receiving notice until the 10th of December. . . . It seems to me that even the extreme altruistic view referred to by Mr. Ewart in his work on Estoppel, page 38, does not justify a court in making a man pay a note which he did not sign when the person who discounted the note relied entirely for the genuineness of the signature upon the representation of the party discounting it and did not communicate, in any way intending or relying upon such communication, with the party sought to be charged."

The counter view of the case was briefly expressed in the following terms by Mr. Justice Killam:

"The case appears to me to come directly within the principle upon which silence under certain circumstances gives rise to an estoppel. The bank directly notified the defendants that their note would fall due at its office on a certain date and requested them to provide for the same. This distinctly implied that the bank had an interest, either of its own or on behalf of some one else, in the payment of the note and in its genuineness. While there was no intimation that the bank had acquired or was proposing to acquire the note for value, the defendants, as men of business, would know that the bank might have discounted the note and have the proceeds still at the customer's credit, or that it might make advances upon it. They would know that an immediate repudiation would enable the bank to withhold payment of any portion of the proceeds not actually paid out or of any sums not already advanced. They knew that they had made no such note, that they had given no authority for the signature. They could at once repudiate it, and they did so in their telegram to Mr. Wallace. No further information was necessary for that purpose. While the bank manager placed the proceeds to the credit of the customer without inquiry, and took no precaution against their being paid out before he could hear from the defendants, the bank did act upon the defendants' silence in the sense that it did what, it should properly be inferred, it would not have done if the defendants had at once denied the signature; it allowed the balance of the proceeds to be withdrawn."

Special leave to appeal, from the Supreme Court of Canada, to His Majesty in Council was asked and refused. So here ends the case. *Curia summa locuta est; causa finita est.* And who can say strict justice has been done? The case seems a particularly hard one for the defendants. They were brought, not by their own seeking or concurrence, into unpleasant relationship with a bank and one of its customers. When the notice referred to reached them, on the morning of the 16th of August, the damage

complained of had in part been done. When, on the 19th of August, they first learned from the lips of Wallace that their signature to the note in question had been forged by him, the whole damage had been done. And yet, in consequence of subsequent silence, they were compelled to pay the note in full, and thus make full reparation for the entire damage.

As the damages assessed by the trial judge were neither exemplary nor punitive, as in actions for deceit or misrepresentation, the judgment can be defended only on the ground of the application of a rigorous rule of evidence, which excludes a finding of the actual loss sustained by the plaintiff, and places the person relying on the estoppel in a better position than that which his own initiative materially assisted in generating. In fine, an estoppel goes to the extent of preventing an adjustment of the damage actually incurred or of ascertaining in how much worse condition the plaintiff has been placed by reason of the conduct of the one sought to be estopped. Against such technical injustice able judges have from time to time entered a vigorous protest; notably Lord Justice James, in his judgment in *In re* Collie.[1] The learned editors of Smith's Leading Cases hold with much show of reason, that it savors of injustice to allow the position of the person relying on the estoppel to be made better by the act of the estopped, simply on the ground he is precluded, by a not very well defined rule of evidence, from stating the real truth of the case. It would seem strict justice should rather demand, that the plaintiff should be relegated simply to the same position he would have occupied, had he not acted upon the representation or act complained of. It is to be hoped, however, notwithstanding that the more rigorous doctrine still prevails, that in the language of the editors referred to, in the closing words of their comments on the Duchess of Kingston's case — "Possibly the greater flexibility introduced into our system by the Judicature Acts may eventually lead to an alteration in this respect."

Silas Alward.

St. John, N. B.

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1 8 Ch. D. 816.

HARVARD LAW REVIEW.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1894–5	1895–6	1896–7	1897–8	1898–9	1899–1900
Res. Grad.	—	—	—	1	1	—
Third year	82	96	93	130	102	134
Second year	135	138	179	157	169	193
First year	172	224	169	216	218	232
Specials	13	9	31	41	58	51
	402	467	472	545	548	610

	1900–01	1901–02	1902–03	1903–04	1904–05	1905–06
Res. Grad.	1	1	—	4	1	1
Third year	144	149	167	180	182	192
Second year	202	190	196	201	232	216
First year	241	229	228	293	285	243
Specials	58	59	49	60	58	64
	646	628	640	738	758	716

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148

HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	TOTAL OF CLASS.
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243

As the twenty-four Harvard seniors in the first year class have in each instance completed the work required for the Harvard A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the sixty-four special students, fifteen have entered this year, and of these ten are graduates of a college or university, six having received a degree in law.

One hundred and eighteen colleges and universities have representatives now in the School as compared with one hundred and fourteen last year and

one hundred and eleven the previous year. In the first year class sixty-five colleges and universities, as compared with sixty-nine last year, are represented, as follows: Harvard, 71; Yale, 20; Brown, 11; Dartmouth, 11; Princeton, 10; Bowdoin, 8; Williams, 6; Georgetown, 5; Clark, Hamilton, Wesleyan (Ct.), 4; California, Carleton, Cornell University, Iowa College, 3; Amherst, Central, Kansas, Stanford, Ohio State, Wisconsin, 2; Allegheny, Austin, Boston College, Boston University, Chicago, Coe, Colby, Columbia, Denison, De Pauw, Doane, Fisk, Franklin, Gustavus Adolphus, Hobart, Holy Cross, Illinois College, Illinois University, Indiana, Iowa University, Knox, Lombard, Maine, Miami, Middlebury, Minnesota, Missouri, Montana, Mt. Allison, Nebraska, Nevada, New Brunswick, North Carolina, Northwestern, Ohio, St. Louis, St. Vincents, South, South Carolina, Swarthmore, Virginia, Washington and Jefferson, Western Reserve, Wheaton, 1. There are at present in the School eleven law school graduates, five of whom hold academic degrees also, representing the following law schools: Boston University, Columbia, Dickinson, Harvard, Iowa University, Maryland, Oxford, Pennsylvania, St. Louis, Stanford.

INHERITANCE TAXES ON SUBSEQUENTLY VESTING CONTINGENT REMAINDERS. — Like so many other broad concepts of Constitutional Law, that of vested rights is hardly reducible even to a working definition. The distinction is generally drawn between "vested" rights and mere "expectancies," which the legislature may freely impair.[1] Thus, various property rights incident to the marriage status are at the legislative mercy. Dower, being inalienable before assignment, may before assignment be diminished or destroyed.[2] On the other hand, the extent of legislative control over curtesy is in dispute. Yet since curtesy initiate is a present interest, alienable and subject to debts, though the enjoyment is postponed, the better doctrine regards it as a vested right.[3] There is a similar diversity of opinion as to the power of the legislature to deprive the husband of his common law right to reduce his wife's choses in action to possession.[4] Again, the old right of survivorship in joint tenancies may concededly be destroyed by turning them into tenancies in common.[5] But the most widely recognized field of legislative control is found in the laws governing descent and distribution.[6] Inheritance is a privilege, not a right. Heirs presumptive and testamentary beneficiaries have only a present, destructible opportunity of taking under existing expressions of governmental policy as to the disposition of a deceased's property.

This line of reasoning sustains our numerous inheritance taxes.[7] The state exacts a bounty on the passing of property by will or intestacy. It is a tax on the privilege of transmission, — not a tax on its receipt, or on property because of ownership. That is the source of the revenue, though the appraisal of interests then created may be postponed because of the difficulty of assessing until contingencies in the way of its possible enjoy-

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[1] Cooley, Const. Lim., 7th ed., 508 *et seq.*
[2] Randall *v.* Kreiger, 23 Wall. (U. S.) 137. But see Dunn *v.* Sargent, 101 Mass. 336.
[3] See McNeer *v.* McNeer, 142 Ill. 388.
[4] See note to Westervelt *v.* Gregg, 12 N. Y. 202, in 62 Am. Dec. 160.
[5] Holbrook *v.* Finney, 4 Mass. 565.
[6] See Marshall *v.* King, 24 Miss. 85.
[7] Matter of Swift, 137 N. Y. 77, 88; Knowlton *v.* Moore, 178 U. S. 41, 47.

ment are removed.[8] And yet the Supreme Court has sustained an assessment, under the New York statute, upon an estate appointed under a power granted before the existence of the tax but exercised, by will, thereafter.[9] But this is no exception to the above doctrine, for the interest is regarded as created as of the time of the exercise of the power, and the state is there again levying on a testamentary disposition. But the New York Court of Appeals decided that a vested remainder is not subject to a subsequently enacted inheritance tax law.[10] The same court now accords similar protection to a contingent remainder. *Matter of Lansing*, 182 N. Y. 238. In other words, from the constitutional, as distinguished from the conveyancing point of view, it regards a contingent remainder as a vested right. While there are important technical differences between vested and contingent remainders in the law of Property, there is little difference in substance. Whether a remainder is vested or contingent is largely a matter of phraseology, and that can hardly control the immediate question. Alienability seems to be, perhaps, the common element of interests that are protected as vested. At common law contingent remainders were inalienable and could be destroyed by tortious feoffments. But the differences in the property incidents of the two classes of remainders have now been almost universally nullified by statute. In most jurisdictions contingent remainders are now alienable and indestructible except by the contingencies on which their fate depends.[11] The owner of a contingent remainder has, therefore, a vested right to have the estate when the contingency happens, and that right the legislature should not be permitted to impair by levying a transfer tax for a privilege which has previously ripened into a right. It is conceived, however, that when the remainder is limited to a living man's "heirs," the state may, prior to its vesting, tax the receipt of such property. For to allow a man to become the heir of any person is a privilege which the state may withdraw or alter, and may therefore charge for permitting to continue.

Law Governing Power of Appointment by Will. — In considering what law determines the sufficiency of a will as an exercise of a testamentary power of appointment over personalty, two questions are involved: First, is the instrument, alleged to exercise the power, such a "will" as satisfies the direction of the donor of the power, that the power shall be exercised "by will"? Second, if it is a valid will, does it amount to an exercise of the power? Both of these questions may come up for decision in cases where the donee of a testamentary power of appointment dies domiciled in a different country from the donor, leaving a will which is alleged to exercise the power. In such cases the execution of the power is commonly to be found, if at all, in a universal legacy contained in the will, no direct reference to the power or the property subject thereto being made by the testator.

In both England and the United States the instrument in question is held to be a sufficient "will" if made in accordance with the law of the

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[8] Matter of Seaman, 147 N. Y. 69.

[9] Orr *v.* Gilman, 183 U. S. 278. See also Carpenter *v.* Commonwealth, 17 How. (U. S.) 456; Gelsthorpe *v.* Furnell, 20 Mont. 299, 310.

[10] Matter of Pell, 171 N. Y. 48.

[11] 21 L. Quar. Rev. 118, 119, note.

domicile of the donee at his death.[1] This seems a necessary application of the broad doctrine that a will of movables which is valid by the law of the testator's domicile at his death is valid in other countries.[2] In England, by a further extension which is established by authority but questioned as to principle, the power may also be exercised by a will conforming to the law of the donor's domicile.[3] A will not conforming to the law of the donee's domicile, but admitted to probate by statute,[4] is held in England incapable of exercising the power unless executed according to English law.[5]

Whether a given will constitutes an exercise of the power is determined in the United States by the law of the domicile of the donor.[6] This rule rests on the theory that the donee is merely the agency through which the donor designates the beneficiary, who takes under the instrument creating the power and not under that by which the power was exercised.[7] In an English case, however, the law of the donee's domicile is taken to govern.[8] The decision in this case is not so strong as the American decisions, for the instrument in question was not a good execution of the power by the law of the donor's domicile, and to the law of the donee's domicile powers of appointment were unknown. The case has been followed in a recent English decision which adopts its conclusion on similar facts, but leaves in confusion the question whether the law of the donee's or that of the donor's domicile governs. *In re Scholefield*, 21 T. L. R. 675.

The view taken by the English court, that the question whether the will constituted an execution of the power is to be determined by the law of the donee's domicile, seems sound. Even if the donee is a mere agent of the donor, he has an option of exercising the power, and his intention in this respect is not subject to the donor's control. The question being whether the power was exercised or not, the intention of the donee would seem the test. His intention, however, may not appear in the will. Indeed, in the common case, the will makes no reference to the power or to the property over which the power is held, but the only language from which an execution of the power may be found is that of a universal legacy. Where the intention does not clearly appear, but has to be found by implication from the language of the will, the law which decides whether it will thus be found should be the law with regard to which the will was written. That law is presumably[9] the law of the domicile of the donee.[10]

DUPLICATES AS PRIMARY EVIDENCE. — Any one of duplicate instruments may be introduced in evidence without accounting for any other.[1] In this

[1] D'Huart *v.* Harkness, 34 Beav. 324; see Ward *v.* Stanard, 82 N. Y. App. Div. 386.
[2] Dicey, Conflict of Laws 684.
[3] In the Goods of Huber, [1896] P. 209; In the Goods of Hallyburton, L. R. 1 P. & D. 90.
[4] St. 24 and 25 Vict. c. 114, § 1.
[5] Hummel *v.* Hummel, [1898] 1 Ch. 642; see also *In re* Kirwan's Trusts, 25 Ch. D. 373.
[6] Sewall *v.* Wilmer, 132 Mass. 131; Bingham's Appeal, 64 Pa. St. 345.
[7] Cotting *v.* De Sartiges, 17 R. I. 668, 671.
[8] *In re* D'Este's Settlement Trusts, [1903] 1 Ch. 898.
[9] *Cf. In re* Price, [1900] 1 Ch. 442.
[10] Wharton, Conflict of Laws, 3d ed., 1315.

[1] 2 Wigmore, Ev. § 1232.

connection, however, the term duplicate signifies more than a mere copy:[2] the instruments must be identical not only verbally but also in legal import.[3] Early examples of duplicate originals were the counterparts of deeds.[4] These became originals, not because of any coincidence of writing, but because they were delivered together. Each instrument thereby became operative as a deed, because that was the intention of the parties.[5] So, too, if the parties to a bilateral contract draw up the written contract in duplicate, each taking a copy, either party may produce his copy without accounting for the absence of the original, even though his own signature be lacking from the instrument.[6] In such cases it is obvious that nothing depends on the manner in which the instruments were written or printed.

In the case of most written or printed matter, however, intention affords no test. A man who writes to accept an offer one day cannot on the next day make a copy of his acceptance which shall be available in evidence as a duplicate original merely by "intending" that the copy shall operate as such. The question will now depend on the nature of the process by which the alleged duplicate has been produced. And here the line seems to be drawn between duplicates in the strict sense and copies. Thus, letterpress reproductions are not admissible, because really not duplicates, but copies of an original.[7] Printed "copies," on the other hand, are true duplicates, being all produced from the same types, and so are admissible.[8] In accordance with this distinction the Virginia court has recently declared that carbon "copies" of a letter, made by the same impression as the letter, are admissible as duplicate originals. *Chesapeake & Ohio Ry. Co.* v. *Stock & Sons*, 51 S. E. Rep. 161. This opinion (which, however, was not necessary to the decision in the case) seems correct. A carbon "copy" is as much an original as to printing as the letter itself, since the production of both is practically instantaneous. The present case, therefore, may properly be classed with the printing-press cases. Nor is the objection sound that, as no signature is ordinarily made on the carbon copy, such copy cannot be of the same legal import as the document which is signed. In the class of cases under discussion the contents of the document, not the signature, are in legal issue. A more serious difficulty is the danger that false evidence will be manufactured. If the other party, however, holds the original letter sent to him, the fraud may easily be shown; and if he does not hold it, the copy would be admissible as secondary evidence. At all events, the risk of fraud is probably counterbalanced by practical advantages. It has become important to business men to have some record of their business correspondence which can readily be produced without the inconvenience of accounting for the originals. To treat carbon copies as originals seems, therefore, sound and progressive as well as technically correct.

But is the test that both instruments must be made by the same mechanical process satisfactory? If letterpress copies are uniformly accurate, the distinction between them and carbon copies, made in the regular course of business, seems merely technical. The real test, then, of whether instru-

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[2] Toms *v.* Cuming, 7 M. & G. 88.
[3] Nelson *v.* Blakey, 54 Ind. 29.
[4] Lewis *v.* Payn, 8 Cow. (N. Y.) 71.
[5] Leonard *v.* Young, 4 All. (N. B.) 111.
[6] Cleveland & Toledo R. R. Co. *v.* Perkins, 17 Mich. 296.
[7] Nodin *v.* Murray, 3 Camp. N. P. 228.
[8] Rex *v.* Watson, 2 Stark. N. P. 116.

ments are duplicates would seem to be whether there is substantial certainty of identity among them. If so, they should be allowed to be introduced as primary evidence.

AGREEMENTS IN RESTRAINT OF TRADE BY COPYRIGHT-HOLDERS AND PATENTEES. — "To promote the progress of science and useful arts," Congress, under powers conferred by the Constitution,[1] has secured to authors and inventors by means of copyrights and patents the exclusive right to produce and "to vend" their writings and discoveries.[2] This statutory right of monopoly seems naturally to carry with it the right to employ ordinary and reasonable means of enforcing the monopoly. Thus, a copyright-holder or patentee is allowed to make such contracts with the vendee of the protected article as he wishes. Stipulations, for instance, that the vendee shall sell only for a fixed price or under certain conditions have been held valid, and the breach of them enjoined.[3] Yet beyond the strict scope of this statutory exemption it seems clear that the holders of copyrights and patents should be bound by the same common law and statutory restrictions upon contracts and combinations in restraint of trade as are the owners of other property. The test is whether or not the acts in question tend toward the establishment of a new monopoly. Obviously, it would seem that a new monopoly is being attempted when the holders of separate copyrights or patents on articles of the same general class combine for the purpose of controlling the market in the general class of commodities, the particular varieties of which are the subjects of the separate copyrights or patents. The Court of Appeals of New York has, nevertheless, intimated an opinion that a combination among publishers of copyrighted books to boycott all jobbers and booksellers who should not maintain the net prices of copyrighted books fixed by the individual members of the combination, is not illegal as being in restraint of trade.[4] More recently, however, a federal court strongly maintained the contrary view. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. Rep. 155. (Circ. Ct., S. D. N. Y.)

The position taken by the federal court seems eminently sound. The copyright and patent laws confer a monopoly as respects the property covered by them; but it seems unreasonable to construe them as conferring on the owners of several distinct copyrights or patents a right to combine to restrain competition and trade.[5] Such combinations are, from the public standpoint, especially undesirable. In general, it is only the competition between different copyrighted and patented commodities substantially subserving the same general want that has made copyright and patent laws tolerable. The monopoly price of the protected articles is kept down by this sort of imperfect competition; this competition withdrawn, the prices would rise from those at which people would do without that particular commodity to those at which they would do without that class of commodities.

The question as to the illegality of such combinations or agreements must, however, be carefully distinguished from the question as to the effects

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[1] U. S. Const. Art. 1, § 8, clause 8.
[2] 26 U. S. Stats. at L. 1106; 16 *ibid.* 201.
[3] Garst *v.* Harris, 177 Mass. 72; Fowle *v.* Park, 131 U. S. 88.
[4] Straus *et al. v.* Am. Pub. Assn., 177 N. Y. 473. *Cf.* Park & Sons Co. *v.* Nat., etc., Assn., 175 N. Y. 1.
[5] National Harrow Co. *v.* Hench, 83 Fed. Rep. 36, 38.

of the illegality. The illegality of a combination or agreement of copyright-holders and patentees taints the transactions of the combination and its members just so far and only so far as it would, were the property involved not the subject of patents and copyrights.[6] Thus a contract licensing the sale of a patented article, made in direct pursuance of the unlawful objects of an illegal combination is held unenforceable.[7] On the other hand, in a suit brought by the owner for the infringement of a copyright or patent, it is no defence that the plaintiff is an illegal combination or a member of it.[8]

ESTOPPEL AGAINST STATE AND UNITED STATES. — At common law and in some of our states, estoppel could not be set up against the sovereign.[1] It is now clear, however, that estoppel by record applies to the state or federal government. Thus, when a state recovered judgment for taxes due during certain years, it was estopped in another action to recover an alleged balance for the same years.[2] By the weight of authority, also, estoppel by deed may be set up against the government. Thus, where a state, for valuable consideration, granted land to an alien, his heirs and assigns, with warranty, it was estopped to set up the alienage of the grantee or of his heirs as ground of an escheat.[3] Estoppel *in pais*, or equitable estoppel, against the government, however, has not in general met with favor among the states.[4] In support of the prevailing view, courts find an analogy in the rules exempting the state from the operation of the statute of limitations and from the doctrine of laches. But the government is here exempt not from any notion of extraordinary prerogative, but for reasons of public policy. Since the fiscal transactions of the government are so numerous and its agents so scattered, it is apprehended that the utmost diligence on the part of the government might not save the people from loss through outlawed claims. Estoppel *in pais*, however, rests on principles of universal justice. "When matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain."[5] When the government engages in commercial transactions, it is subject to the same laws that govern individuals. Thus, when it becomes a party to negotiable paper, it has the rights and assumes the liabilities of individuals in a similar position, except that it cannot be sued.[6] There seems, therefore, no good reason why the government should not be estopped, like an individual.[7]

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[6] 1 Page, Contracts 698. See Strait *v.* National Harrow Co., 51 Fed. Rep. 819, 820.

[7] National Harrow Co. *v.* Hench, 76 Fed. Rep. 667; affirmed in 83 Fed. Rep. 36. *Cf.* Gamewell, etc., Co. *v.* Crane, 160 Mass. 50; Vulca Powder Co. *v.* Hercules Powder Co., 96 Cal. 510.

[8] Edison, etc., Co. *v.* Sawyer-Iman, etc., Co., 53 Fed. Rep. 592; American, etc., Co. *v.* Green, 69 Fed. Rep. 333; General Electric Co. *v.* Wise, 119 Fed. Rep. 922. But see *contra*, National Harrow Co. *v.* Quick, 67 Fed. Rep. 130.

[1] See Queen *v.* Delme, 10 Mod. 199, 200; Taylor *v.* Shufford, 4 Hawks (N. C.) 116, 132; State *v.* Williams, 94 N. C. 891, 895.

[2] Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673, 716. See also Fendall *v.* United States, 14 Ct. of Cl. 247.

[3] Commonwealth *v.* André, 3 Pick. (Mass.) 224.

[4] See People *v.* Brown, 67 Ill. 435.

[5] United States *v.* Willamette Val. & C. M. Wagon-Road Co., 54 Fed. Rep. 807, 811.

[6] United States *v.* Bank of Metropolis, 15 Pet. (U. S.) 377, 392; United States *v.* Barker, 12 Wheat. (U. S.) 559.

[7] See United States *v.* Stinson, 125 Fed. Rep. 907; State *v.* Flint & P. M. R. R., 89 Mich. 481; State *v.* Milk, 11 Fed. Rep. 389.

Enactments or resolutions of the legislative body clearly estop the government. Where the legislature, by public resolve, declared a certain monument to be the one referred to in an ancient Indian deed, the state was estopped from showing afterwards that it was not the monument referred to.[8] The acts of its agents, when fraudulent or unauthorized, do not estop the government, even when the agents act within the apparent scope of their authority; but this rule may be rested on the presumption of law that those who deal with public officers know the extent of their authority.[9] On the other hand, acts of agents as well as of the legislature, ought to estop the government, if the agents are authorized to shape its conduct in a particular transaction and have acted within the purview of their authority. Where, for instance, under a mistake of fact a public officer overpaid a corporation for its services in carrying the mail, the government was estopped to recover this money from a second corporation which had become the owner of the first, relying on the settlements made with the first by the agent of the government.[10] Even those courts, however, which accept the general principle that the state may be estopped *in pais* by acts of its agents seem still to be feeling their way, and apply the principle with extreme caution. A recent federal decision furnishes a good illustration of this attitude. *Walker* v. *United States*, 139 Fed. Rep. 409 (Circ. Ct., M. D. Ala.). The facts of the case were strong, and the estoppel was allowed, but the court circumspectly declined to commit itself to a more concrete declaration than that the rule would be applied "in a proper case." What is a proper case no court seems yet to have attempted to define.

Legislative Authorization of Nuisances. — Varying expressions of opinion are found in the books as to how far a legislature can authorize what would otherwise be a private nuisance, without providing for the constitutional compensation for the "taking" of private property. The cases seem to confine this form of protection rather strictly to instances of an actual seizure of physical property.[1] When, for example, a chartered railroad encroaches upon none of his land, a person whose real estate deteriorates in value by reason of the smoke, noise, and other concomitants of the proper operation of the road has no redress.[2] But if part of the plaintiff's land is occupied, compensation is often made not only for that portion and for the diminution in value of the remainder caused by the alteration in shape and size, but for the further depreciation resulting from the inevitable smoke, noise, cinders, and jarring created in the operation of the railroad on the portion condemned.[3] Thus, under the guise of compelling payment for land taken, are exacted damages for what is practically a nuisance to be maintained on that land. This eminently equitable result could, however, be reached without artifice simply by placing a less strict construction

[8] Commonwealth *v.* Pejepscut, 10 Mass. 155.
[9] Dement *v.* Rokker, 126 Ill. 174, 199; Filor *v.* United States, 9 Wall. (U. S.) 45.
[10] Duval *v.* United States, 25 Ct. of Cl. 46. See also Hartson *v.* United States, 21 Ct. of Cl. 451; People *v.* Stephens, 71 N. Y. 527, 561.

[1] See Garrett *v.* Lake Roland El. Ry. Co., 79 Md. 277.
[2] Beseman *v.* Pennsylvania R. R. Co., 50 N. J. Law 235; Carroll *v.* Wisconsin Cent. Co., 40 Minn. 168.
[3] Bangor, etc., R. R. Co. *v.* McComb, 60 Me. 290. See Walker *v.* Old Colony, etc., Ry. Co., 103 Mass. 10.

upon the constitutional phrase "taking of property." Property, in the constitutional sense, say many respectable authorities, consists not in the plot of land, but in the right to use it undisturbed.[4] Hence several decisions have called that a taking which without an entry by the trespasser virtually made the enjoyment by the ostensible owner impossible, as by a flood of water or of sand.[5] Others more broadly hold that an easement is property, the taking of which must be paid for.[6] The idea of property on which these cases proceed would lead to the conclusion that any material abridgment of rightful user is the taking of property.[7] On this theory, therefore, recovery might be had for all nuisances, however the legislature had attempted to sanction them, so far as they interfered with the comfortable enjoyment of an individual's land or chattel. This would make possible the collection of damages from a railroad company by very many whose land is situated near its line. Such incidental injuries, however, are said by the courts to be of that class which must be suffered for the common welfare, and which are too slight substantially to impair the rights of property recognized and protected by the state. That this position is logically inconsistent with any but a strict interpretation of constitutional phraseology has already been indicated, and that it is not even unequivocally desirable on grounds of public welfare is shown by the more modern constitutions and statutes, which provide for compensation when property is taken *or damaged*. Even these, however, under the narrow definition of property, leave many injured parties without a remedy.[8]

But whether or not the constitution is construed to assure compensation for an authorized nuisance the extent of the authorization is closely scrutinized. It may be because of such want of authorization that in a recent Texas case a householder was allowed to recover for mere personal inconvenience and annoyance arising from the operation of a freight depot near her premises. *St. Louis, etc., Ry. Co.* v. *Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). A line of track authorized by legislative enactment necessarily entails certain inconveniences to a large share of the public, but freight yards, water-tanks, and round-houses are structures which may and therefore are intended to be located where they will be of the least possible harm to the community. For any nuisance due to their improper location the railroad is unquestionably liable.[9]

CONSTRUCTIVE TRUSTS ARISING ON BEQUESTS ON SECRET UNDERSTANDINGS. — It has recently been held in New York, that where a will recited that a bequest was to be used as the testator had ordered in his lifetime,

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[4] Lewis, Eminent Domain, §§ 54, 55. See Eaton *v.* Boston, etc., R. R., 51 N. H. 504, 511; Shaw, C. J. in Old Colony, etc., Ry. Co. *v.* County of Plymouth, 14 Gray (Mass.) 155, 161.

[5] Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166; Eaton *v.* Boston, etc., R. R., *supra*.

[6] See Lamm *v.* Chicago, etc., Rd. Co., 45 Minn. 71.

[7] Lewis, Eminent Domain, § 56; Cooley, Const. Lim., 7th ed., 787, 788; City of St. Louis *v.* Hill, 116 Mo. 527; Forster *v.* Scott, 136 N. Y. 577; City of Janesville *v.* Carpenter, 77 Wis. 288, 301; Pennsylvania R. R. Co. *v.* Angel, 41 N. J. Eq. 316, 329.

[8] See Aldrich *v.* Metropolitan, etc., El. Ry. Co., 195 Ill. 456.

[9] Baltimore, etc., R. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Pennsylvania R. R. Co. *v.* Angel, *supra*; Missouri, etc., Ry. Co. of Texas *v.* Anderson, 81 S. W. 781 (Tex., Civ. App.).

and the context made it clear that the legatee was not to take beneficially, the bequest failed. *In re Keenan*, 94 N. Y. Supp. 1099.

In withholding the beneficial interest in the legacy from the legatee the decision is undeniably correct.[1] Common justice, at least, would forbid that he should hold beneficially, in the face of the express provision to the contrary in the will, and his own acquiescence in the oral instructions which lay back of the legacy. A trust, then, will be impressed upon the property in his hands, and the only open question is who should be the *cestui*. As to this question there are two well-known theories. One is, that the testator, having in himself the legal and equitable interests in the property, has given only the legal interest to the trustee; that the oral instructions are inoperative, because, without being duly executed in the testamentary form, they purport to dispose of the testator's beneficial interest upon his death; wherefore there is intestacy as to the beneficial interest, which accordingly passes to the next of kin.[2]

The unsoundness of this doctrine arises from the fact that the testator could not have had, in himself, both the legal and equitable interests as distinct things. For, as an equitable interest is merely a right *in personam* against a trustee, and the deceased could not have had a right of action against himself, he therefore could not have been intestate as to any such right. The full and absolute ownership of the property has, therefore, passed to the legatee. The legatee, however, by his express or tacit assent to the oral instructions of the testator has made a contract which the courts of equity specifically perform by enforcing the trust relation when the legacy vests. The oral instructions cannot be objected to under the Statute of Frauds, as the trust which they declare is one of personalty; nor under the Statute of Wills, since they effect the passage of no property from the testator. They tend simply to prove a personal obligation from a legatee to the orally designated *cestuis que trust*.[3] This theory of a contract on the part of the legatee is applicable to any case where the wishes of the testator are communicated to the legatee before he takes, not only when the bequest is on its face qualified but when it is absolute in form.[4] Even on this point, however, there is some dissent.[5]

RECENT CASES.

ADMIRALTY — TORTS — DIVISION OF DAMAGES BETWEEN TWO TORTFEASORS. — The plaintiff's ship collided with the ship "Caravellas," and the next day with the ship "Haversham Grange." Each inflicted damage upon the plaintiff's ship which made docking necessary, and in the dock both injuries were repaired simultaneously, those caused by the "Haversham Grange" being finished in six, those inflicted by the "Caravellas" in twenty-two days. The plaintiff sued the "Haversham Grange" for three days' dock dues and three days' demurrage. *Held*, that the plaintiff may recover the dock dues, but not

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[1] Taylor *v.* Plaine, 31 Md. 158.

[2] See Lewin, Trusts, 11th ed., p. 58; Olliffe *v.* Wells, 130 Mass. 221; Heidenheimer *v.* Bauman, 84 Tex. 174.

[3] See 5 HARV. L. REV. 389; Curdy *v.* Berton, 79 Cal. 420; Cagney *v.* O'Brian, 83 Ill. 72.

[4] Reech *v.* Kennegal, 1 Ves. 123.

[5] See Campbell *v.* Brown, 129 Mass. 23.

demurrage. *The Haversham Grange*, 21 T. L. R. 628 (Eng., C. A., June 28, 1905).

The question is in what proportion the damages shall be divided between two tortfeasors. It is an English rule of admiralty that if two parties are each obliged to dock a vessel for repairs which are executed simultaneously, the cost of docking must be divided between both parties for the period during which both are at work on the vessel. *Marine Ins. Co.* v. *China Transpacific S. S. Co.*, 11 App. Cas. 573. Evidently the case at hand falls, as to dockage, directly under this special rule. But no case lays down a similar rule as to demurrage, which question must be settled by the strict logic of legal causation. Where the inevitable consequence of A's tort is a delay of twenty-two days, and B's tort, which occurs subsequently, would have caused a delay of six days, but in fact does not increase the delay already caused, it can scarcely be said that B's tort is a proximate cause of any of the delay, so as to render B liable therefor. *Cf. Kuhn* v. *Delaware, etc., R. R. Co.*, 99 Hun (N. Y.) 74. Both the upper and the lower court took this view, although it seems hard to reconcile logically with the rule as to dock dues.

Banks and Banking — Deposits — Election of Remedies for Payment of Revoked Check. — A bank paid a check to the payee after payment had been forbidden by the drawer. In an action by the drawer against the bank, evidence showed a former action by the same plaintiff against the payee for the amount of the check. *Held*, that the bank is liable, since the former action was not a ratification of the payment. *Pease & Dwyer Co.* v. *State National Bank*, 88 S. W. Rep. 172 (Tenn.).

Under the Negotiable Instruments Law adopted in Tennessee revocation of a check before payment destroys any right of the payee in the fund and thus renders the bank liable for subsequent payment, as though no order had been drawn. Although a bailor might sue both the bailee for breach of the bailment and the receiver of the chattel in trover, the absence of a specific chattel renders this case distinguishable. See *Riley* v. *Albany Savings Bank*, 36 Hun (N. Y.) 513, 522; affirmed in 103 N. Y. 669. The bank's payment may be regarded as the act of a volunteer ratified by suit based upon it. *Cf. Simpson* v. *Eggington*, 10 Exch. Rep. 845. It has even been said that suing the payee is adoption of the payee as the maker's agent for receiving payment, and hence a defense to the bank. *Riley* v. *Albany Savings Bank*, *supra*. But the better reason seems to be that, by electing to pursue one of several inconsistent remedies, the plaintiff foregoes the others. *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450. Any action by the depositor against the payee is premised upon the bank's non-liability and necessarily is inconsistent with a claim against the bank. But on whatever theory, it seems the former suit should be a bar.

Carriers — Who are Passengers — Gratuitous Carriage of Employee. — A section hand was injured through the derailment of the work train in which he was riding home from work. *Held*, that he is still an employee, and not a passenger. *Southern Indiana Ry. Co.* v. *Messick*, 74 N. E. Rep. 1097 (Ind., App. Ct.).

Whether a railway employee occupies the position of a passenger depends on the facts of each case. It is evident that an employee who is on a train in the course of his employment is not a passenger. *Travelers' Insurance Co.* v. *Austin*, 116 Ga. 264. It is equally evident that an employee who is traveling on business in no way connected with the railroad is for the time being a passenger. *Doyle* v. *Fitchburg R. R. Co.*, 162 Mass. 66. But the present case is one of the confusing middle class in which injuries are received riding to or from work. A simple distinction that will be found to reconcile most of the decisions is that the employee should not be regarded as a passenger when he is using a privilege granted specially to employees as such. Judged by this test, the present decision is sound, for the work train was provided only for employees. On the other hand, a street railway employee riding home on a regular car like any passenger who has a pass is to be considered a passenger. *Peterson* v. *Seattle Traction Co.*, 23 Wash. 615. For a further discussion of the question presented, see 11 Harv. L. Rev. 340; 14 *ibid.* 620; 17 *ibid.* 423.

CARRIERS — WHO ARE PASSENGERS — WHEN RELATION BEGINS. — The plaintiff, desiring to become a passenger of a car, signaled to the motorman, who checked its speed. The plaintiff then attempted to board the car while it was still in motion. *Held*, that he is a passenger while in the act of boarding the car. *Lewis* v. *Houston Electric Co.*, 88 S. W. Rep. 489 (Tex., Civ. App.).

It is well established that carriers owe the highest care to passengers. It often becomes important, therefore, to determine just when the relation of carrier and passenger begins. The theory is that there must be an offer and an acceptance to a consensual relation, not to a contractual relation, as courts sometimes loosely state, for it is well settled that a carrier owes a public duty independently of contract. See *McNeill* v. *Railroad Co.*, 135 N. C. 682. Some courts regard the carrier as the offerer and hold that the acceptance is not made until the offeree has actually boarded the car. *Donovan* v. *Hartford Street Ry. Co.*, 65 Conn. 201. The better opinion supported by the weight of authority, however, considers the signal to the motorman as the offer and the checking of the car as the acceptance. *Brien* v. *Bennett*, 8 C. & P. 724; *McDonough* v. *Met. R. R. Co.*, 137 Mass. 210. To hold otherwise would be unfair to the person boarding the car since thereby the highest care would be denied when most needed.

COMPOSITIONS WITH CREDITORS — EFFECT — JOINT DEBTORS. — A and B were makers of a joint note. A being insolvent, his creditors made an oral agreement to take ten shillings on the pound. This amount had never been paid to the holder of the note, who attempted to prove in bankruptcy against B. *Held*, that the promise of A had been taken in satisfaction of any claim against him and that the other joint debtor is thereby discharged. *In re Pearse*, 1905 Vict. L. Rep. 446.

The rule generally laid down is that only a release under seal to one of two joint debtors will release the other. *Line* v. *Nelson*, 38 N. J. Law 358. Still a seal is not necessary where there is consideration for the release. *Heckman* v. *Manning*, 4 Col. 543. So it has been held in both England and America that where there has been an accord with one joint debtor and the satisfaction agreed upon has been rendered, the other debtor is discharged, whether the agreement was under seal or not. *In re E. W. A.*, [1901] 2 K. B. 642; *Booth* v. *Campbell*, 15 Md. 569; but see 15 HARV. L. REV. 491. Several cases have been found in which a composition agreement containing a release under seal has discharged a joint debtor not a party thereto. *Merritt* v. *Bucknam*, 90 Me. 146. From the facts reported in the case at hand, the court seems to have gone a long way in finding that it was the promise which was taken in satisfaction of the claims. Connecting this with the fact that the agreement was merely oral and that the consideration which supports a composition with creditors is of a very questionable kind, the case illustrates a considerable extension of the original rule.

CONFLICT OF LAWS — CHANGE OF SOVEREIGNTY — LAW GOVERNING IN TERRITORY CEDED BY STATE TO UNITED STATES. — The plaintiff's intestate, while working in the United States Navy Yard in Brooklyn, was killed through the negligence of the defendant. When the state of New York in 1853 ceded jurisdiction over this tract of land to the federal government, a state statute existed allowing an action for causing death; but this was repealed in 1880, and another of a similar nature passed. There had been no legislation by Congress. *Held*, that the defendant is liable. *McCarthy* v. *Packard Co.*, 105 N. Y. App. Div. 436.

When a state cedes to the United States jurisdiction over territory which is used by the latter for certain public purposes, such as the erection of forts and dock-yards, the laws of the state continue in force in such territory until abrogated or changed by federal legislation. *Chicago, etc., Ry. Co.* v. *McGlinn*, 114 U. S. 542. Such territory, however, ceases to be a part of the state and becomes a separate unit subject to the exclusive jurisdiction of the federal government. *Cf. Commonwealth* v. *Clary*, 8 Mass. 72. Hence it follows that the statute passed by the state of New York after the cession did not affect the

law of the ceded territory, but as there had been no legislation by Congress upon this matter the law existing at the time of the transfer was still in force. The defendant therefore was clearly liable. The hesitation of the court to declare whether the Act of 1880 or the earlier law governed was probably due to a former decision of questionable soundness. *Cf. Barrett* v. *Palmer*, 135 N. Y. 336.

CONFLICT OF LAWS — EXECUTION OF POWER — WHAT LAW DETERMINES SUFFICIENCY OF WILL AS EXECUTION OF POWER. — Testatrix, who had under an English will a testamentary power of appointment over personalty, died domiciled in France, leaving an unattested codicil which was valid by French law and which contained a universal legacy, but made no reference to the power or the property subject thereto. *Held*, that the codicil does not constitute an exercise of the power, § 27 of the Wills Act not applying. *In re Scholefield*, 21 T. L. R. 675 (Eng., Ch. D., July 14, 1905). See NOTES, p. 122.

CONFLICT OF LAWS — JURISDICTION — QUASI IN REM GARNISHMENT OF DEBT OWED BY NON-RESIDENT. — A North Carolina debtor of a North Carolina creditor, while temporarily visiting Maryland, was garnisheed by a Maryland creditor of his obligee. By statute the non-resident debtor had ample opportunity to litigate the claim of the garnishment judgment. *Held*, that, under the "full faith and credit" clause of the Federal Constitution, the Maryland garnishment judgment is a bar against a subsequent action on the original indebtedness in North Carolina. Two justices dissented. *Harris* v. *Balk*, 198 U. S. 215.

In holding that a debt may be garnisheed wherever the garnishee may be found, the Supreme Court takes the logical step from its previous position that the debt owing to a non-resident may be garnisheed at the domicile of his debtor. *Chicago, etc., Ry. Co.* v. *Sturm*, 174 U. S. 710. The court finally repudiates the artificial doctrine of the *situs* of a debt, and bases the jurisdiction on the court's control over the garnishee-debtor. The fundamental objection is still unanswered, that the power to discharge the debt, which is the effect of allowing the garnishment judgment as a plea in bar, can be founded only on control over both the debtor and the creditor. See 17 HARV. L. REV. 188. The decision is, however, salutary in settling the deplorable conflict as to the validity of these garnishment proceedings. Further, the Court takes pains to protect the non-resident debtor-creditor by its requirement of due notice from the garnishee, to enable him to contest the claim. There still remains for settlement the diversity as to the materiality of the place for payment of the debt in conferring jurisdiction. Doubtless, the Supreme Court will produce uniformity on the whole subject by sustaining the jurisdiction in all cases. *Cf. Wyeth, etc., Co.* v. *Lang & Co.*, 127 Mo. 242; *Tootle* v. *Coleman*, 107 Fed. Rep. 41.

CONFLICT OF LAWS — PERFORMANCE OF CONTRACTS — PROVISION RENDERING INSURANCE POLICY SUBJECT TO FOREIGN LAW. — The defendant, a life insurance company incorporated under the laws of New York, issued a policy in Australia to the plaintiff, providing that he receive an equitable proportion of its surplus at the end of a specified period, and expressed to be "subject to the laws" of the former state. Subsequently the legislature of New York enacted that a decree for an accounting by an insurance company be granted only upon application of the Attorney-General. At the end of the specified period the plaintiff filed a bill in a New South Wales court asking for an account of the proportion of the defendant's surplus due to him. *Held*, that the New York statute is a bar to the plaintiff's bill. *Johnson* v. *Mutual Life Ins. Co.*, 5 N. S. W. 16.

Where, as in the present decision, the provisions of an insurance policy are admittedly valid under the laws of the place of contracting, an express stipulation that the obligations thereunder shall be defined by the laws of a foreign state, is regularly enforced. *Phinney* v. *Mutual Life Ins. Co.*, 67 Fed. Rep. 493; *Mutual Life Ins. Co.* v. *Hill*, 118 Fed. Rep. 708. The New York court has interpreted the statute in question to affect a change in the law of procedure

only. *Swan* v. *Mutual, etc., Association*, 155 N. Y. 9. Whether it became a term of the contract depends therefore solely on whether the express provision properly includes a change in procedure as well as in substantive law. According to a principle of the conflict of laws only the rules of substantive law applicable to a contract may differ from the law of the forum. *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304. Consequently, if this statute is interpreted to be a part of the contract, the plaintiff's only remedy is in New York. The clause in the policy is ambiguous, and if construed most strongly against the insurer, according to the general rule, seems not to include a statutory regulation of procedure restricting the remedy of the insured to a foreign jurisdiction. But aside from the statute the court might properly have denied an account in a controversy concerning the internal management of a foreign corporation. *Clark* v. *Mutual, etc., Association*, 14 App. D. C. 154.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — CHANGE OF REMEDIES. — A Maryland statute made each shareholder of a trust or banking corporation liable in an action at law to any creditor of the corporation for double the par value of the stock held. A subsequent statute, which changed the remedy to a bill in equity by all the creditors against all the shareholders, was made retroactive in effect so as to abate all actions at law then pending. *Held*, that the statute is unconstitutional. *Myers* v. *Knickerbocker Trust Co.*, 139 Fed. Rep. 111 (C. C. A., Third Circ.).

Though the Court of Appeals of Maryland recognized that the statutory liability of shareholders to creditors of a corporation is contractual in its nature, yet it decided that the statute here involved did not impair the obligation of contracts. *Miners' & Merchants' Bank* v. *Snyder*, 59 Atl. Rep. 707. A distinction was early taken between the obligation of a contract and the remedy to enforce the obligation. See *Sturges* v. *Crowningshield*, 4 Wheat. (U. S.) 122, 200. From this, some courts inferred that the remedy could be changed at will or absolutely withdrawn. See *Read* v. *Frankfort Bank*, 23 Me. 318, 321. But the federal courts, followed by the decided weight of authority, take the position that the remedy existing when the contract was made is part of the obligation. *Edwards* v. *Kearzey*, 96 U. S. 595. Clearly, therefore, all remedy cannot be taken away. See *Call* v. *Hagger*, 8 Mass. 423, 430. The state may, however, alter the form of the remedy or limit the time for its application. *Paschall* v. *Whitsett*, 11 Ala. 472, 478. It may likewise provide a new or more effective remedy, as this could in no way impair the obligation. But in professing to change merely the remedy the state must not impair rights accruing under the contract; and the substituted remedy must be substantially as effective as before. *Western Nat. Bank of New York* v. *Reckless*, 96 Fed. Rep. 70. In the case under consideration the obligation seems clearly impaired.

CONSTITUTIONAL LAW — VESTED RIGHTS — LEGISLATIVE AUTHORIZATION OF NUISANCES. — The defendant railroad located its main line, together with a freight yard and depot, near enough to the plaintiff's premises to cause her serious inconvenience and discomfort. *Held*, that the plaintiff may recover for such injury, although the value of her land and buildings has not been diminished. *St. Louis, etc., Ry. Co.* v. *Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). See NOTES, p. 127.

CONTRACTS — CONSTRUCTION — IMPLIED PROMISE TO USE DILIGENCE IN FORWARDING TO COMMISSION AGENT. — A company engaged the plaintiff to sell goods for it on commission, but was so negligent in not delivering on time, that the plaintiff failed to earn many commissions he otherwise might have obtained. For this the plaintiff brought action. *Held*, that he cannot recover, since no promise to use due diligence can be implied from the contract to employ. *Byrns* v. *United Telpherage Co.*, 105 N. Y. App. Div. 69.

The general rule is that a promise will be implied whenever it is necessary to give to the transaction the effect which both parties intended. *Ogdens, Ltd.* v. *Nelson*, [1903] 2 K. B. 287. On this principle, where a doctor sold his practice in consideration for a part of the future profits, the court implied a promise by the vendee "to take common and ordinary care to carry on the business so

as to realize receipts"; and the vendee was held liable for going out of practice. *M'Intyre* v. *Belcher*, 14 C. B. (N. S.) 654. Similarly a contract to employ a commission agent has been held to include an implied promise to furnish goods. *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544. If, then, the company had entirely stopped sending goods, it would have been liable. But, so far as the parties are concerned, the effect of not sending any goods is equivalent to that of sending them so late that no one will buy. In each case, the plaintiff loses commissions through the default of the defendant; and in each, the original agreement is shorn of "the effect which both parties intended." It would seem, therefore, that a clearer instance of an implied promise could hardly be found.

CONTRACTS — DEFENSES — IMPOSSIBILITY BY DOMESTIC LAW. — A lessee covenanted to pay certain rent and to use the demised premises for no purpose except that of a saloon. At the time the lease was executed a law was in force by which any county might adopt prohibition by popular vote. Before the term began, but after the lease was executed and delivered, the county, in which the demised premises were, did so adopt prohibition and thereby rendered it impossible to use the premises for a saloon. *Held*, that the lessee is not absolved by such impossibility from either covenant. *Houston Ice, etc., Co.* v. *Keenan*, 88 S. W. Rep. 197 (Tex., Sup. Ct.).

The court treats an impossibility created by the application of domestic law as analogous to a supervening impossibility of fact, and to determine whether performance should be excused applies the test of ability to foresee. For a discussion of the principles involved, see NOTES, 18 HARV. L. REV. 384.

COPYRIGHT — INFRINGEMENT — MUSICAL COMPOSITION. — The plaintiff brought suit to restrain the infringement of copyrights of two songs, which the defendant company had reproduced and sold in the form of perforated records, designed for use with mechanism to play the compositions on a musical instrument. *Held*, that a musical composition is not subject to copyright, but only its material embodiment in the form of a writing or print, and that the perforated sheet is not an infringement of such copyright. *White-Smith Pub. Co.* v. *Apollo Co.*, 139 Fed. Rep. 427 (Circ. Ct., S. D., N. Y.).

At common law, the owner of an unpublished composition has an absolute property therein, but this right is lost on publishing. DRONE, COPYRIGHTS 102, 116. Congress has power to secure "for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." U. S. Const., Art. 1, § 8. The term "writings" includes all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. *Lithographic Co.* v. *Sarony*, 11 U. S. 53. The musical conception, then, as an idea, is not subject to copyright. *Ditson Co.* v. *Littleton*, 67 Fed. Rep. 905. At the time of publishing the composition, a statutory copyright may be acquired, which gives the proprietor of any musical composition the exclusive liberty of copying and vending the same. U. S. Comp. St. 1901, § 4952. A copy is "that which comes so near to the original as to give every person seeing it the idea created by the original." *West* v. *Francis*, 5 Ban. & A. 737, 743. The perforated roll does not suggest the original to the eye, but is a mere part of the mechanism intended to produce the sound of the melody. The decision reached by the court is logical, and is supported both in England and in this country. *Boosey* v. *Whight*, [1900] 1 Ch. 122; *Kennedy* v. *McTammany*, 33 Fed. Rep. 584.

CORPORATIONS — FOREIGN CORPORATIONS — CONDITIONS UPON RIGHT TO DO BUSINESS: WHETHER COMPLIANCE CREATES A NEW CORPORATION. — A Kentucky statute required that no foreign railroad corporation should operate within the state until it should have become a corporation of the state, and provided that it might become incorporated by filing a copy of its charter, and that "thereupon . . . such company . . . shall at once become and be a corporation, citizen, and resident of this state." A foreign railway company complied with the statute, but, as a foreign corporation, paid a corporation franchise tax. *Held*, that the railway is not liable to pay a second franchise tax,

since it has not become a separate domestic corporation. *Commonwealth* v. *Chesapeake, etc., R. R. Co.*, 27 Ky. Law Rep. 1084.

A state's right to dictate the conditions upon which a foreign corporation may do business enables it to require reincorporation as a domestic corporation. Whether compliance amounts to more than a license to the foreign corporation is a question of legislative intent, but statutes in substantially the same language have been generally construed as creating within the state a second distinct corporate entity. *Debnam* v. *Southern, etc., Tel. Co.*, 126 N. C. 831. The present decision escapes some of the curious anomalies which follow the general view. See 13 HARV. L. REV. 597. But it would seem that an equally just result might have been reached, avoiding double taxation, through a more obvious construction of the statute: that as a condition precedent to entering Kentucky, the foreign corporation formed a new domestic corporation which was taxable; that the old corporation, not doing business in the state, was not taxable; and that not the second tax, but the first, was void. The case seems distinguishable from a late decision of this court holding that such a corporation as the defendant is not within a statute levying an organization tax. *Cf. Cincinnati, etc., Ry. Co.* v. *Commonwealth*, 26 Ky. Law Rep. 1106.

DOMICILE — GOVERNMENT OFFICIAL AT WASHINGTON. — On a petition for divorce, it appeared that the petitioner had left Tennessee with his family in 1882. Since that time he had lived in Washington, where he held a civil service position in the Treasury Department. He had made three short trips to Tennessee, and had voted there at those times. He testified that it had always been his intention to return to Tennessee if he should lose his position. Section 4203 of the Code provides that a divorce may be granted where the petitioner has resided in the state for the two years next preceding the filing of the petition. *Held*, that the petitioner has lost his domicile in Tennessee, and the court is without jurisdiction. *Sparks* v. *Sparks*, 88 S. W. Rep. 173 (Tenn.).

Divorce is regulated by the law of the domicile of the parties. *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517. Residence as used for the purposes of divorce is equivalent to domicile. *Shaw* v. *Shaw*, 98 Mass. 158. Domicile means a person's legal home. It requires both the *animus* and the *factum*. *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307. The intention is itself a question of fact, to be determined by evidence, the declarations of the party not being conclusive. *In re Craignish*, [1892] 3 Ch. 180. In England an intention to remain permanently is necessary. *Bell* v. *Kennedy*, *supra*. In the United States a less settled intention will be sufficient, as, for instance, to remain while one is working in a town, or while a student, provided the person has no other home. *Wilbraham* v. *Ludlow*, 99 Mass. 587; *Putnam* v. *Johnson*, 10 Mass. 488. The Tennessee court seems to have considered that the acquisition of an actual home in Washington with the intention of remaining there for an indefinite time countervailed declarations of intention to return to Tennessee upon the happening of an uncertain future event. *Cf. Mooar* v. *Harvey*, 128 Mass. 219. The result seems consistent with the general conception of this subject held by the American courts.

ELECTIONS — DISCRIMINATION IN FORM OF BALLOT. — A statute provided that squares be printed opposite the names of parties on the official ballot, and that citizens who so desired might vote a straight ticket by marking a single cross. *Held*, that this provision does not impair the freedom and equality of elections. *Oughton* v. *Black*, 61 Atl. Rep. 346 (Pa.).

A difference in the labor of preparing a ballot is not conclusive of real impairment of the constitutional principle of freedom and equality of elections. See *Todd* v. *Election Commissioners*, 104 Mich. 474. Since the ballot must be limited in size, a statute that restricts representation on it to parties that received a certain percentage of the vote at the last election is reasonable so long as the voter may insert other names at will. *Plimmer* v. *Poston*, 58 Oh. St. 620. But if he is confined to the printed names, the better view is that his freedom of choice is impaired. *Lamar* v. *Dillon*, 32 Fla. 545. A law that names of candidates nominated by two parties be printed but once on the ballot

is sound, although the voter may be inconvenienced thereby. *Runge* v. *Anderson*, 100 Wis. 523. A statute like that in the present case has been upheld. *Ritchie* v. *Richards*, 14 Utah 345. But one with an added proviso invalidating ballots containing other marks was declared unconstitutional as tending to disfranchisement, since a cross opposite the name of a party that had nominees for less than the full number of offices would cast no vote for the others, and an attempt to fill in the blanks would invalidate the whole ballot. *Eaton* v. *Brown*, 96 Cal. 371. These illustrations go to show that mere inconvenience is not impairment, and fully support the reasoning of the decision under consideration.

ESTOPPEL — PARTIES ESTOPPED — ESTOPPEL AGAINST STATE AND UNITED STATES. — In accordance with an established custom, but under a misconstruction of law, accounts of a marshal, covering certain services rendered by his deputies, were approved by the court to which they had been presented at intervals during his term of service, and were allowed by the proper officials of the Treasury Department. The money was paid by the government with knowledge that the greater part of it would be paid over by the marshal to his deputies. In an action by him, five years after his retirement from office, during which time the government had made no complaint of these payments to him, it set them up as a counterclaim. *Held*, that it is estopped. *Walker* v. *United States*, 139 Fed. Rep. 409 (Circ. Ct., M. D., Ala.). See NOTES, p. 126.

EVIDENCE — DOCUMENTS — CARBON COPIES AS DUPLICATE ORIGINALS. — *Semble*, that in an action of assumpsit against a carrier for loss of goods, a carbon copy of the letter sent to the carrier notifying it of the loss is admissible as a duplicate original. *Chesapeake & Ohio Ry. Co.* v. *Stock & Sons*, 51 S. E. Rep. 161 (Va.). See NOTES, p. 123.

EVIDENCE — DOCUMENTS — RECITAL IN ANCIENT DEED NOT ADMISSIBLE TO PROVE RELATIONSHIP. — An ancient deed reciting that the grantors were heirs of a former owner was offered as evidence of such fact. There was no proof that possession of the premises had been held under the deed. *Held*, that the evidence is not admissible. *Lanier* v. *Hebard*, 51 S. E. Rep. 632 (Ga.).

Ancient deeds have been admitted in some jurisdictions as evidence of a relationship therein recited, though the courts have differed as to the requirement of possession under them as a condition precedent to their admission. *Deery* v. *Cray*, 5 Wall. (U. S.) 795; *Scharff* v. *Keener*, 64 Pa. St. 376; *contra*, *Fort* v. *Clarke*, 1 Russ. 601. Although the court in the principal case might have excluded the evidence on the sole ground that possession had not been shown, yet it went further and intimated that even if possession had been shown the evidence would not have been admitted. This position seems sound. Recitals of relationship in a recent deed are generally held inadmissible. *Costello* v. *Burke*, 63 Ia. 361. There would appear no reason for a different rule in the case of ancient deeds. The fact of ancientness should be effective merely to authenticate the instrument, and should not remove the necessity of complying with the requirements of the pedigree rule. It is to be observed that in most of the cases where the evidence has been received this rule has not been infringed. *Cf. Fulkerson* v. *Holmes*, 117 U. S. 389.

EXECUTORS AND ADMINISTRATORS — RIGHTS — EXERCISE OF RIGHT OF RETAINER AGAINST JUDGMENT CREDITOR. — The plaintiff, in a suit upon a debt, recovered judgment *de bonis testatoris* against the defendant, who was the executrix under a will. The defendant herself was owed a debt by the testator, but did not plead *plene administravit* or a right of retainer. Later the plaintiff obtained an order for the administration of the testator's estate, which proved to be insolvent. The defendant thus claimed to be entitled to exercise her right of retainer against the plaintiff. *Held*, that she cannot do so. *In re Marvin*, 21 T. L. R. 765 (Eng., Ch. D., Aug. 10, 1905).

The common law right of an executor to retain from the assets of the estate in priority to other creditors of equal degree an amount owed him by the testator, though abolished or modified by statute in about all the states of this coun-

try, still obtains in England. *In re May*, 45 Ch. D. 499. Furthermore this right is not destroyed by a decree for the administration of the estate. *Nunn* v. *Barlow*, 1 Sim. & St. 588. A judgment, however, recovered by a creditor against an executor who does not plead *plene administravit* or a similar plea alleging insufficiency of assets, is conclusive upon him that he has assets to satisfy such judgment. *Ramsden* v. *Jackson*, 1 Atk. 292. From this it would seem to follow that he could not later assert his right of retainer to the prejudice of this creditor. See *In re Hubback*, 29 Ch. D. 934, 941. There would appear no reason, however, why he should not retain against other creditors. *Cf.* *Wilson* v. *Coxwell*, 23 Ch. D. 764. But since the loss of his right to retain against the judgment creditor is due to the executor's own fault, it would seem that he should bear the burden of this loss and retain from the other creditors only the amount by which their dividends would have been diminished had he pleaded properly.

JUDGMENTS — FOREIGN JUDGMENTS — ENFORCEMENT OF DORMANT JUDGMENT IN SISTER STATE. — A judgment was obtained against the testator in Kansas. In an action thereon brought in Rhode Island against his executor, the defendant pleaded that the testator had died more than one year previous, and that the action was therefore barred under Gen. Stat. Kan. 1901, § 4883. *Held*, that in an action on a judgment of a sister state the *lex fori* governs rather than the *lex loci*, and that the plaintiff may accordingly recover. *First National Bank* v. *Hazie*, 61 Atl. Rep. 171 (R. I.).

A state has power to prescribe the remedies which it will allow within its jurisdiction. The statute of limitations is held to affect the remedy and not the right, and the *lex fori* will in general prevail. *M'Elmoyle* v. *Cohen*, 13 Pet. (U. S.) 312. But when a judgment is barred in the jurisdiction where obtained, the rule is somewhat doubtful, though unquestionably a state may allow an action in such a case. *Miller* v. *Brenham*, 68 N. Y. 83. Nevertheless, as the whole question is one founded on public policy, the better opinion, which is supported by the weight of authority, would appear to sustain the view that an action on a judgment barred by the laws of the state of its promulgation should not be allowed in another state, as it would seem a mere gratuity for a sister state to give it greater efficacy than its home tribunal. *St. Louis, etc., Co.* v. *Jackson*, 128 Mo. 119. A judgment barred by special statute applying to personal representatives of a decedent, as in the case at hand, is a dormant judgment equally with one barred by general statute. *Mawhinney* v. *Doane*, 40 Kan. 676. The result reached by the court may be supported, however, on the alternative holding that the plea did not bring the right of action within the Kansas limitation.

JUDGMENTS — FOREIGN JUDGMENTS — RIGHT OF FOREIGN CORPORATION TO SUE. — The plaintiff, a foreign corporation, recovered judgment in Missouri on a contract made in Texas and sought to enforce that judgment in the latter state. The defendant alleged that the plaintiff at the time of the contract had not applied for or else had forfeited his permit to do business in Texas and hence could not sue there upon the judgment, since it was a demand arising out of the contract within the provisions of Rev. Civ. St. 1895, arts. 745, 746. *Held*, that if such facts concerning the permit are proved, the plaintiff cannot recover on the judgment. *St. Louis, etc., Co.* v. *Beilharz*, 88 S. W. Rep. 512 (Tex., Civ. App.).

It has been said in a case cited as a precedent for this decision that before enforcing a sister-state judgment under the "full faith and credit" clause of the Federal Constitution (Art. 4, § 1) a court may ascertain whether the claim upon which it is based is such a one as that court has jurisdiction to enforce. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265. This rule has already been practically confined to penal judgments, which are distinguishable upon the ground that the real plaintiff is not a citizen but the foreign state itself, and judgments in favor of citizens alone are entitled to extra-territorial recognition. See *Huntington* v. *Attrill*, 146 U. S. 657. Since a corporation, also, is not a citizen, within U. S. Const., Art. 4, § 2, a state may as it sees fit refuse to entertain its suits. *Anglo-*

American Prov. Co. v. *Davis Prov. Co., No. 1*, 191 U. S. 373; see also 17 HARV. L. REV. 417. Upon the basis of this right the principal case can be supported if the judgment can be said to be a demand arising out of the contract, upon which the Texas statute forbids a foreign corporation to sue.

LARCENY — CONSENT — AGENT. — The prisoner was by agreement allowed to take from the prosecutor's pile of ashes as much as he wanted at a certain price per ton, upon the understanding that the amount taken should be weighed by the prosecutor's agent, who was to enter the weight in a record book. The weigher in collusion with the prisoner entered in the book a ton and a half less than was weighed out. *Held*, that the prisoner is guilty of larceny of the ton and a half. *Rex* v. *Tideswell*, [1905] 2 K. B. 273.

As the court points out, the title had not passed to the prisoner before the entry in the book, because the weigher and the prisoner were conspirators against the prosecutor, and therefore the weigher lost his power as agent to transfer title to the prisoner. *Regina* v. *Hornby*, 1 C. & K. 305. This violation of the owner's possession was without his consent. True, at the time of his agreement with the prisoner he consented to the latter's taking what he might need, but this consent was given only upon condition that the ashes be weighed and the correct weight entered in the book. In the nature of things consent to a present taking cannot be upon condition, yet consent to a future taking may be. If the condition is unfulfilled, the taking is without consent and is therefore larceny. *Carrier's Case*, Y. B. 13 Edw. IV. 9, pl. 5. As larceny must be of specific property, it would seem that the conviction for the ton and a half can best be supported by proof of the larceny of the total amount taken. See *State* v. *Martin*, 82 N. C. 672.

MUNICIPAL CORPORATIONS — CONTRACTS — PATENTED ARTICLES. — The defendant advertised for bids for making street improvements, specifying that a patented pavement would be required and stating that the patentees had agreed with the city to sell to any bidder, at a certain price, the necessary materials therefor. A bill was filed to enjoin the letting of the contract on the ground that such a specification was in contravention of the statute requiring contracts for street improvements to be let to the best and lowest bidder. *Held*, that the defendant has no power to make such a specification. *Monaghan* v. *City of Indianapolis*, 75 N. E. Rep. 33 (Ind., Ct. App.).

The objection to the proposed contract was that it required the use of an article subject to a monopoly, while the statute called for competitive bidding. Had the specifications simply required the use of materials already in the possession of the city, obtained in the open market, no objection would have arisen. The decision is a perfectly logical result of a literal interpretation of the statute, but it is opposed to the prevailing and preferable rule that the city may make contracts like the one here contemplated. *Hobart* v. *The City of Detroit*, 17 Mich. 246; *contra*, *Dean* v. *Charlton*, 23 Wis. 590. The basis of the prevailing doctrine is that it was not the intention of the legislature, which gave the city power to make improvements, to prevent it from using patented articles when they should be desirable and beneficial. The rule laid down in the case under consideration has not proven satisfactory where longest in use. See Wis., P. & L. Laws, 1869, c. 316, § 2; *Kilvington* v. *The City of Superior*, 83 Wis. 222.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — RECOVERY BY MUNICIPALITY AGAINST NEGLIGENT CONTRACTOR. — The defendant company gave its bond to perform the provisions of an ordinance requiring it to save and keep the city fully indemnified from all damages that might occur from any of the company's acts. The city sued the defendant in tort for the amount of a judgment rendered against the city for a defect in a street, caused by the defendant's negligence. *Held*, that the city may not recover in tort, but must seek its remedy on the bond, which defines and limits its rights. *City of Pawtucket* v. *Pawtucket Electric Co.*, 61 Atl. Rep. 48 (R. I.).

In a case like this the defendant would, in the absence of a bond, be answerable to the municipality in tort. *City of Rochester* v. *Montgomery*, 72 N. Y.

65. Whether or not the bond should bar the plaintiff from such form of action must depend upon the intention of the parties as expressed therein. The presumption is that the bond is simply a collateral remedy, giving the municipality a greater security up to a certain amount, yet not waiving its right to recover in excess of that amount. Under such circumstances it seems that the agreement should not be construed as exclusive of the common law rights of the plaintiff unless such construction is necessitated by its clear import or by necessary conclusion from its terms. Such an interpretation would be in accordance with the analogy of statutes, which are construed strictly when they tend to alter the common law. *Cf. Shaw* v. *Railroad Co.*, 101 U. S. 557.

NEGLIGENCE — DEFENSES — EFFECT OF A CRIMINAL STATUTE ON THE DEFENSE OF ASSUMED RISK. — The plaintiff, a servant, brought action against his master, for injuries caused by the unguarded condition of the latter's machinery. The defendant pleaded that his servant had full knowledge and assumed the risk. The plaintiff demurred to the plea. *Held*, that the demurrer must be sustained, on the ground that the defendant had failed to comply with a criminal statute making it a misdemeanor not to guard machinery of this character. One justice dissented. *Hall* v. *West and Slade Mill Co.*, 81 Pac. Rep. 915 (Wash.).

By the common law, in occupations attended with unusual danger the master is bound to use all reasonably obtainable appliances for the prevention of accidents. *Mather* v. *Rillston*, 15 Sup. Ct. Rep. 464. But a servant who knows of the defective condition of the premises and continues to work thereon, is barred by contributory negligence from recovery for injuries caused by such defect. *Lewis* v. *New York, etc., R. R. Co.*, 153 Mass. 73. In general a statute will not be construed to alter the common law unless it appears that such was the intention. *Langlois* v. *Dunn Worsted Mills*, 25 R. I. 645. The legislature, in a number of similar statutes, has deemed it necessary expressly to cut off the defense of assumed risk, as pointed out by the dissenting opinion. The statute in the case at hand is criminal in form, and has no such provision. Wash., Laws 1903, c. 37. In the absence of express provision, or of clearly expressed intent, the better opinion seems against giving to such statutes an interpretation which destroys the defense of assumed risk. *Knisley* v. *Pratt*, 148 N. Y. 372; *O'Maley* v. *South Boston Gas Light Co.*, 158 Mass. 135.

PARTNERSHIP — RIGHTS AND REMEDIES OF CREDITORS — ASSUMPTION OF DEBTS BY CONTINUING PARTNER. — *Held*, that a creditor of a partnership, having notice of its dissolution and of the continuance of the business by one partner who assumes the firm debts, must sue the continuing partner alone and exhaust the partnership assets in his hands before he is entitled to a judgment against the partners jointly. *Morrisey* v. *Berman*, 94 N. Y. Supp. 596.

The result here reached seems clearly wrong on the following grounds: the proposition that a creditor of a solvent partnership must have recourse to the firm property before he can reach the individual property of the partners is without foundation, the separate estates of the partners being liable in the first instance. LINDLEY, PARTNERSHIP, 7th ed., 229; *Stevens* v. *Perry*, 113 Mass. 380. Though by the arrangement between the partners the retiring partner becomes surety for the other, a surety may be sued upon default of his principal before any action is taken against the principal. *Penny* v. *Crane Brothers Mfg. Co.*, 80 Ill. 244. Furthermore, there being no novation, the creditor's right to sue both original debtors cannot be altered by an agreement between the debtors alone.

POWERS — EFFECT OF APPOINTMENT TO REMAINDERMAN. — By a will probated in 1869, a testator left an estate in trust for his daughter for life, remainder to her heirs, subject however to a power given to the daughter to appoint the remainder in fee among her heirs and collateral relatives. This daughter died in 1904, leaving a will in which she exercised her power in favor of her daughter who was her only heir and was alive at the time of the testator's death. *Held*, that the granddaughter takes under the will of 1869, and not under the

power of appointment, and that a transfer tax established in 1897 can not be imposed upon the property. *In the Matter of Lansing*, 182 N. Y. 238.

The position taken by the court, that the appointee can elect either to take under the appointment or to retain the estate which by the law of New York vested in her on the death of her grandfather, seems untenable. The legal condition imposed by the will of the grandfather, which should divest the heir of her estate, has happened. To hold that she can determine whether or not it shall have any effect, is virtually to deny that it is a legal condition. A possible explanation of the decision is that, since the appointment operates to give the appointee substantially the same estate which she would have had in default of any exercise of the power, it is void. However, this theory has been properly repudiated. *Sweetapple* v. *Horlock*, 11 Ch. Div. 745. The appointment has all the necessary formal elements; and, that it does not change the *quantum* of the appointee's estate, seems no sufficient reason for holding it invalid. For a discussion of another aspect of the case, see NOTES, p. 122.

RAILROADS — RAILROAD CROSSINGS — DUTY TO WHISTLE ON APPROACHING CROSSING. — The trial court charged that it was negligence, as a matter of law, for the defendant's engineer to fail to give warning of the train's approach to a bridge under which ran a highway. The defendant excepted. *Held*, that the instruction is erroneous, since the question of the defendant's negligence is for the jury. *Louisville & N. R. Co.* v. *Sawyer*, 86 S. W. Rep. 386 (Tenn.).

In almost all jurisdictions in this country, there are statutes requiring that some warning of a train's approach to a grade-crossing be given. And even where no such statute exists there is authority that failure to give warning is negligence *per se*. See *Favor* v. *Boston, etc., Corporation*, 114 Mass. 350; *contra*, *Ellis* v. *Great Western Ry. Co.*, L. R. 9 C. P. 551. In the present case, though recognizing that there may be such a duty in regard to crossings at grade, the court nevertheless refuses to extend it to non-grade crossings. *Cf. Pennsylvania R. R. Co.* v. *Barnett*, 59 Pa. St. 259. This decision seems correct. The danger incident to the failure to give warning of an approaching train is so much greater in the case of a grade than in that of a non-grade crossing that there is little justification for applying the strict rule in the latter case. Furthermore, this distinction between the two kinds of crossings has been recognized in those decisions which hold that a statute requiring a warning to be given by trains before reaching crossings does not apply to non-grade crossings. *Cf. Jenson* v. *Chicago, etc., R. R. Co.*, 86 Wis. 589.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — AGREEMENTS CONCERNING COPYRIGHTS AND PATENTS. — Publishers formed an association the members of which agreed to sell copyrighted books only to those jobbers and booksellers who would maintain the net prices fixed by the individual members of the combination. *Semble*, that the combination is illegal as violating the Sherman Anti-trust Law. *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. Rep. 155 (Circ. Ct., S. D. N. Y.). See NOTES, p. 125.

RESTRICTIONS AS TO THE USE OF PROPERTY — ENFORCEMENT OF RESTRICTIONS: WHO MAY ENFORCE. — The legislature of Massachusetts in 1861 granted to the Massachusetts Institute of Technology a block of land in the city of Boston with the restriction that it should not "cover with its buildings more than one-third of the area granted." The surrounding lots fronting on this square were subsequently sold by the state for prices considerably influenced by the fact that the lots faced this partially open square. No mention of the restriction was made in the deeds to the purchasers. In 1903 the legislature authorized the Institute of Technology to build over their entire block. A bill for an injunction was filed by a sub-purchaser of one of the lots sold by the state to enforce the original stipulation. *Held*, that the injunction be issued. *Wilson* v. *Massachusetts Institute of Technology*, 75 N. E. Rep. 128 (Mass.).

The real point at issue in this case was as to whether this restriction was imposed for the benefit of the neighboring land or for the advantage of the

state. The fact that the state itself was the original grantor would be an element tending to support the latter view. The decision, therefore, exemplifies in an emphatic manner the inclination of courts to regard such restrictions as made for the benefit of the neighboring land. For a further discussion of the principles involved, see 18 HARV. L. REV. 535.

TRADE-MARKS AND TRADE-NAMES — THE RIGHT TO TRADE IN ONE'S OWN NAME — TRADING ON ANOTHER'S REPUTATION. — The parties dissolved their partnership in "The Simon Auction Co." The old business was continued under a new name by the plaintiff, who tried to enjoin the defendant, though the latter was now engaged in a different kind of business, from using the old name. *Held*, that the plaintiff is not entitled to the injunction, since the defendant is not using the name so as to mislead the public or defraud the plaintiff of any trade to which he is entitled. *Blanchard Co.* v. *Simon*, 51 S. E. Rep. 222 (Va.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

TRUSTS — CONSTRUCTIVE TRUSTS — FORGED TRANSFER OF STOCKS. — The defendant company was induced to transfer the plaintiff's registered bonds to bearer through a resolution of the latter's board of directors and a power of attorney, both forged by its delinquent treasurer. The power of attorney was witnessed by the other defendant, a member of the New York Stock Exchange, as required by the rules of that body, making such endorsement "a guarantee of the correctness of the signature of the party in whose name the stock stands," and was forwarded by him with the certificates to the defendant company. The plaintiff now brings suit for the bonds, and the defendant company seeks indemnity against the broker. *Held*, that the plaintiff can recover, and the defendant company is entitled to indemnity. *Clarkson Home* v. *Missouri, etc., Ry. Co.*, 182 N. Y. 47.

The defendant innocently presented a forged transfer-deed of stock and received from the plaintiff company new certificates which were in turn transferred to a *bona fide* purchaser. When the forgery was later discovered, the plaintiff was forced to issue equivalent stock to the true owner and now seeks indemnity from the defendant. Neither party was negligent. *Held*, that the defendant is liable. *Corporation of Sheffield* v. *Barclay*, 93 L. T. 83 (Eng., H. of L., July, 1905).

The House of Lords now reverses the judgment of the Court of Appeals and reinstates that of Lord Alverstone which was noticed in 16 HARV. L. REV. 228. For a full discussion of the subject see two articles in 17 *ibid.* 373 and 543. The New York decision, which is a case of first impression in that jurisdiction, might well have been rested on the broader grounds enunciated in the latter article.

TRUSTS — CREATION AND VALIDITY — WHETHER BEQUEST ON SECRET UNDERSTANDING CREATES A TRUST. — A testator bequeathed to J. D. two legacies; one "to be expended by him, as I have instructed him during my lifetime"; the other, "for his personal use." *Held*, that the first bequest is invalid, as an unsuccessful attempt to create a trust. *In re Keenan*, 94 N. Y. Supp. 1099. See NOTES, p. 128.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

FEDERAL SUPERVISION OF INSURANCE. — A new subject for the application of the power of Congress to regulate interstate commerce is suggested by the recommendation of a federal statute regulating insurance, which was made by a special committee at the last meeting of the American Bar Association. *Report of the Committee on Insurance Law.*[1] Four of the committee's five members joined in the majority opinion, while the fifth presented a minority report. Neither report was acted upon by the association, but a resolution declaring the opinion that federal control of insurance would be unconstitutional was referred to the Committee on Insurance Law for the present year.

The members of the committee, while unanimous in the opinion that Congressional regulation is desirable and practicable, disagree upon the question of its constitutionality. The majority report maintains that the past decisions of the United States Supreme Court do not exclude the business of insurance from the definition of "commerce," and intimates that Congress itself has the exclusive power to determine what articles are the subjects of interstate commerce within the meaning of the constitutional provision. The minority opinion denies both these propositions, and insists that federal supervision is impossible without a constitutional amendment.

The statement that Congress has authority to define the limits of its power to regulate interstate commerce, which is at least startling, suggests an examination of the authorities upon which it purports to be based. The majority rely upon isolated sentences quoted from decisions which denied to a state the power to exclude from its boundaries intoxicating liquors in the original packages. The language of these cases is clearly shown by the context to mean that Congress, as against the asserted police power of a state, has authority to determine whether commodities which are admittedly in fact subjects of commerce within the meaning of the constitutional clause, shall be lawful articles of commerce. Further support for the committee's position is sought in the famous case of McCulloch *v.* Maryland (4 Wheat. [U. S.] 316). This decision, however, was simply to the effect that Congress has the implied power to charter a national bank as an appropriate means to the execution of its admitted fiscal powers; and the opinion contains no intimation that Congress has authority to define the limits of the great substantive and independent powers, to which the power of choosing appropriate means of execution was held to be annexed as an incident. The authorities cited do not deny that the meaning of the term "commerce" in the constitutional phrase is a question of the interpretation of a written instrument which is to be made by judicial decision, and not by legislative *fiat*.

The majority's contention, that past decisions furnish no obstacle to federal regulation of insurance, is true only to the extent that the Supreme Court has never passed upon the validity of an act of Congress regulating insurance. It has, however, frequently held constitutional state statutes which totally exclude foreign insurance companies from doing business within state territory except upon condition that they obtain a license from the state or pay a tax upon the amount of premiums secured in the state. *Paul* v. *Virginia*, 8 Wall. (U. S.) 168, 183; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. (U. S.) 566, 573. The contention that these decisions have not excluded insurance from the definition of "commerce" cannot be supported except upon the assumption that the statutes affected only matters local and limited in their nature, which state legislatures may regulate in the absence of legislation by Congress. But the

[1] Published in pamphlet form by the American Bar Association, Baltimore.

opinions, so far from being rested upon this narrow ground, have specifically stated that insurance is not "commerce" within the meaning of the constitutional provision. Furthermore, if insurance were "commerce," state statutes exacting a tax or license from foreign insurance companies as conditions precedent to their doing business within the state, could not be sustained consistently with the line of decisions which hold invalid identical statutes concerning express companies and railroads. *Cf. Crutcher* v. *Kentucky*, 141 U. S. 47; *Hooper* v. *California*, 155 U. S. 648, 653; *Nutting* v. *Massachusetts*, 183 U. S. 553, 556. In each class of cases the state is not legislating concerning merely local subjects, but is interfering directly with the freedom of interstate business; in each the interference is sought to be justified by the right to exercise police powers. The only valid distinction between the two classes of statutes is that one does, and the other does not, attempt to regulate "commerce." The recent decision concerning lottery tickets, which is cited in the majority report holds, not that lottery companies are engaged in "commerce," but that the carrying of lottery tickets by an express company is commerce. *Lottery Case*, 188 U. S. 321, 354. This opinion, from which four justices dissented, can hardly be said to have weakened the authority of the earlier cases recognizing the power of a state to regulate insurance. A reversal of these decisions could be justified only upon the ground that a radical change in the nature of the business of insurance has occurred since they were rendered; and on principle it seems difficult to distinguish the present business of insurance from that of the negotiation of any contract by mail between parties residing in different states.

DISHONOR OF A CERTIFIED CHECK. — It is common belief that a bank is under an absolute obligation to pay a check certified at the instance of the payee as long as the check remains in his possession, and that the payee, questions of forgery aside, has an irrevocable right to compel payment, irrespective of the circumstances under which he procured the check. MORSE, BANKS AND BANKING, 4th ed., § 414. While admitting this as a general principle, a late article by an anonymous writer suggests that the bank, under certain circumstances, is justified in refusing to honor the check. *Stopping Payment of a Certified Check*, 22 Bank. L. J. 411 (June, 1905). It is, of course, assumed that the check has not reached the hands of a *bona fide* purchaser for value. The author points out that a certified check is analogous to a promissory note of the bank, and that a bank does right in refusing to pay its bank note held by a thief. *Olmstead* v. *Bank*, 32 Conn. 278. Therefore, under like conditions, it should also be protected in its refusal to pay a certified check; and it is contended that the same power should exist when the bank has notice that the check was obtained by the payee through fraud on the maker, or as payment for an illegal transaction, such as gambling, in which both maker and payee were concerned.

Though the writer does not support his view by any theoretical discussion, his result appears to be substantially correct. On certification the practice is for the bank to debit immediately the amount of the check to the maker's account, and credit its "certified check account," which is in turn debited with the check on payment. The drawer being thus effectually deprived of all control over that amount of his earlier credit, a novation arises, by which the bank promises the drawer to pay the payee, in consideration of the drawer's giving up all claim on it. As the act of certification is merely a short cut for actual payment by the bank of the amount of the check, and its redeposit by the payee, the payee, as consideration for the bank's promise, accepts the extinction of the check and allows the money to remain on deposit. Finally, the novation is completed by the payee's promise to accept the bank as debtor in the drawer's place, for which the latter promises to release his claim against the bank. A certified check is, then, like a bank note — the maker is released, and the bank is bound directly to the payee.

When fraud becomes an element of the situation, however, the ordinary rule, founded on equitable principles, permitting the defrauded party to trace and recover his property, must apply. 2 PARSONS, CONTRACTS, 9th ed., 949. Thus in the case of a certified check in the hands of a fraudulent payee, the maker has a right to recover it, and the payee holds it in constructive trust for him. See 19 HARV. L. REV. 55. If the bank has knowledge of the facts, it would seem proper not only that it should have the right not to honor the check, but that it should be liable to the maker, if it does honor it. That the payee has turned penitent when he asks the bank to pay the check, and is about to reimburse the maker, is highly improbable, and payment by the bank, with knowledge of these circumstances, is an equitable tort against the maker, an injury to his beneficial interest in the check, the *res*, such as to make the bank liable to him, as *cestui*, for its connivance at the breach of the constructive trust. Cf. 19 HARV. L. REV. 68. Where the payee has been guilty of theft, the same constructive trust relationship would arise; but it is difficult to find the basis on which the drawer could urge any equitable claim where he and the payee are confederates in illegality. In such a case the maker, since he is *in pari delicto* with the payee, is in no position to claim any equity in his own favor. See *McCord* v. *Bank*, 96 Cal. 197.

DEPENDENT SERVICES OF COMMON CARRIER. — In the general development of the law of public-service companies, certain phases of the subject have received inadequate treatment by courts and text-writers. One of these relates to the dependent services of common carriers. A recent article by Professor Wyman furnishes an admirable discussion of the question, not only collating the leading cases on the points involved, but working out a consistent theory by which to test the conflicting decisions. *The Public Duty of the Common Carrier in Relation to Dependent Services*, by Bruce Wyman, 17 Green Bag 570 (Oct., 1905). The subject involves the relations of railroads to express companies, palace and refrigerator car companies, hackmen at railway stations, transfer companies, etc. The authorities seem to be about equally divided, and as the question has been passed upon as yet in less than half of the States of the country, the subject is a fruitful one for discussion.

The case of the express companies may be taken as typical. Is the carrier bound to furnish express facilities to all express companies which apply, or may it make an exclusive agreement with one company for the carriage of all express matter over its line? The carrier's responsibility is founded on its public duty. It seems that it owes no direct duty to the express companies, for it might, *ultra vires* aside, carry on an express business itself and shut out all express companies from its line. Moreover, it has never held itself out as a carrier for all express companies. Historically the relation has always been based on contracts with individual companies. Its duty is to the shipping public to carry all express matter from one end of its rails to the other. If none of the law of public service applies between the carrier and the express company, however, it follows, argues Professor Wyman, that the latter may be charged extortionate prices by the carrier, which in turn will react upon the public. The express company is itself a common carrier, and therefore bound to carry at a reasonable rate; but this duty is relative, and if it must pay an increased price, it may charge it against the public as a necessary operating expense. To protect the public from such a result the author submits that we must apply the law of public service companies throughout. To insure the public the satisfactory service at a reasonable rate, to which it is undoubtedly entitled, we must hold that the carrier performs its whole duty only by serving all express companies with adequate facilities, without discrimination and for a fair compensation.

It may be argued, however, that since the railroads' only duty is to the public, so long as the public are served to their reasonable satisfaction, it is a

matter of no importance as to the particular agency through which this is accomplished. *Sargent* v. *Boston, etc., R. R.*, 115 Mass. 416. This doctrine has received the approval of the United States Supreme Court. *The Express Cases*, 117 U. S. 1. On strict legal theory it seems difficult to escape the result reached. Moreover, it does not seem that it allows the exploitation of the public. For if the railroad is under a duty to carry at a reasonable rate, it cannot escape this obligation by delegating the performance of it. Whether it chooses to act through one express company or several, the public may still enforce its right to a reasonable rate from the road. The case does not seem to present any insuperable practical difficulty, as the public may work out its rights as to the transportation of express matter along lines similar to those followed as to the carriage of freight. Professor Wyman's remedy is open to objection from a practical standpoint, in that it would tend to increase through the wastes of competition the reasonable rate which the public must pay.

ALIEN LABOR LEGISLATION AND THE COURTS. *Henry A. Prince.* 41 Can. L. J. 628.

CHRISTIAN SCIENTISTS AND THE LAW. *Walter Mills.* Demanding that they be treated as physicians in so far as to place them under the Medical Acts. 4 Can. L. Rev. 435.

COMPARATIVE STUDY OF THE CONSTITUTIONS OF THE UNITED STATES OF MEXICO AND THE UNITED STATES OF AMERICA, A. *William H. Burges.* Stating and contrasting seriatim the provisions of the Constitutions of the two countries. 39 Am. L. Rev. 711.

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY, THE. *T. M.* Advocating the abolition of the distinction between realty and personalty save in so far as inherent in the nature of things. 9 L. Notes (N. Y.) 125.

EXCLUSION AND DEPORTATION OF ALIENS. *Parliamentum.* Considering whether an act to return an alien "to the country whence he came" is extra-territorial in effect. 25 Can. L. T. 487.

EXCLUSIVENESS OF THE POWER OF CONGRESS OVER INTERSTATE AND FOREIGN COMMERCE. I, II. *James S. Rogers.* 53 Am. L. Reg. 529, 593.

EXIT OF THE DOCTRINE OF SITUS. *John R. Rood.* A favorable comment upon the recent decision of Harris *v.* Balk, 25 Sup. Ct. Rep. 625, holding that where a debtor is garnisheed while temporarily within a foreign state and compelled to pay the debt, such payment furnishes a defense to a subsequent action by his creditor in the state where the debt was created. 61 Cent. L. J. 265.

FEDERAL SUPERVISION OF INSURANCE. *Anon.* 9 L. Notes (N. Y.) 123.

JURISDICTION RATIONE ORIGINIS. *George Duncan.* Arguing that a Scottish domicile and personal citation will give jurisdiction against a defendant living outside of Scotland, in a petitory action. 17 Jurid. Rev. 254.

LEGITIMATE FUNCTIONS OF JUDGE-MADE LAW. *Hannis Taylor.* An historical sketch of the importance of case law in supplementing constitutions and codes and in adapting them to changed conditions of society. 17 Green Bag 557.

PROCESS TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS, OF. *Anon.* 49 Sol. J. 721, 733, 741, 748, 757.

PUBLIC DUTY OF THE COMMON CARRIER IN RELATION TO DEPENDENT SERVICES. *Bruce Wyman.* 17 Green Bag 570. See *supra.*

STOPPING PAYMENT OF A CERTIFIED CHECK. *Anon.* 22 Bank. L. J. 411. See *supra.*

TREATIES AND EXECUTIVE AGREEMENTS. *John Bassett Moore.* Pointing out distinctions to be observed when the question arises, whether ratification by the Senate is necessary. 20 Pol. Sci. Quar. 385.

WHERE THERE IS A BREACH OF CONTRACT WHICH MAY BE REGARDED AS TOTAL, IS THE INJURED PARTY PREVENTED FROM RECOVERING FUTURE DAMAGES, BY BRINGING AN ACTION ONLY FOR PAST DAMAGES, WHERE THE TIME FOR FULL PERFORMANCE HAS NOT ARRIVED? *Anon.* Criticising a New York case which held that injured party could not recover future damages. 61 Cent. L. J. 281.

II. BOOK REVIEWS.

CONSTITUTIONAL LAW OF ENGLAND. By Edward Wavell Ridges. London: Stevens & Sons, Limited. 1905. pp. xxxii, 458. 8vo.

This is a book of the hour, inspired by the two great issues that engross the attention of the thinking classes in England at the present moment, imperial federation, political and commercial. The author evidently has these matters very much at heart and has written with the aim of furnishing all those who have the same interest a practical handbook enabling them to post themselves rapidly on any of the numerous details of the constitutional mechanism that holds together the complex political entity known as the British Empire. In other words, it would be useless to turn to it for a careful exposition of the evolution of the constitution as it exists to-day, or again for a broad and philosophic treatment of constitutional questions such as we might expect from Mr. James Bryce. Mr. Ridges' aim is closely circumscribed by existing conditions; his method is too handbooky, if the term may be used, to permit digressive and comparative disquisitions.

Within the limits he has chosen Mr. Ridges does his work well. He divides and subdivides his subject clearly, and details are easy to find. He has six principal parts: 1, The Nature and Sources of English Constitutional Law; 2, The Legislature and the Public Revenue; 3, The Executive; 4, The Judiciary; 5, The Church; the Navy and the Army; 6, Countries subject to the laws of England. Within these parts are chapters and sections that range in matter from Wei-Hai-Wei to the Isle of Man, from the Indian Civil Service to the Court of Pied Poudre, and from the origin of the title of Duke to the incidence of the death duties.

Mr. Ridges attains a good standard of accuracy; among his infrequent slips the following may be noted. In Miller's case (p. 70) Wilkes was not, as stated, committed to the Tower. He refused to appear before the House of Commons except as member for Middlesex, and the House shirked the fight and let him go. George III. presided over a Cabinet Council on at least one occasion, and it is incorrect to say (p. 143) that "since the reign of George I the Crown has ceased to attend meetings of the Cabinet." At p. 15 there is a bad error in the number of States composing the American Union. Mr. Ridges defines constitutional law as embracing laws proper and conventions. These conventions he groups under eleven heads, the last two of which appear open to some exception. These two constitutional conventions are thus stated:

"(10) The foreign policy of the country ought to be conducted according to the wishes of the two Houses of Parliament, and in case of difference between the Houses, in accordance with the wishes of the House of Commons.

"(11) Declaration of war or peace against the will of the House of Commons is unconstitutional. In cases of sudden emergency (e. g. insurrection or invasion), if the Ministry require additional authority, they should convene Parliament."

Now if a convention means an actual tacit understanding, then surely Mr. Ridges goes too far in trying to make the ultimate power of the electorate anything more than a potential factor in this case. The attitude of the House of Commons towards the conduct of foreign affairs has long been one into which an element of self-effacement has entered. The Crown has continued to exercise a large amount of discretion, whether acting on its own initiative or on the advice of ministers. Not only is it the case that treatics implying war or concluding peace are constitutionally valid without reference to Parliament, but the House of Commons has rarely, if ever, shown any disposition to assert any greater right in such a case than that which it holds in every case of passing a hostile vote against the responsible Ministry. It might even be said that under the last two British sovereigns, Victoria and Edward, the House of Commons has viewed with complacency the personal intervention of the sovereign on more than one occasion. In another important question, that of imperial federation,

Mr. Ridges appears to miss some important points. His statement that "the federation of all the Australasian colonies . . . under the Commonwealth of Australia Constitution Act, 1900, marks another stage in the advance of the Empire towards cohesion and unity," is one that will not find universal acceptance; to many it appears that the assimilation of the Australasian constitution to that of this country makes eventually for a complete regrouping of the Anglo-Saxon communities. Then again in discussing the various schemes of federation before the British public at present, he hardly does justice to the least ambitious of them, that of which Sir Frederick Pollock is the energetic sponsor. Mr. Ridges' point is that a committee of the Privy Council specially constituted to advise on colonial affairs would have no weight for lack of legislative or executive functions; but the answer to this is that this body might, as it became more and more useful, gradually work its way into a position of constitutional importance very much as the Cabinet has, which, indeed, is the main hope of those who advocate this measure.

The criticisms made are of details and do not affect the value of the book which, as a handbook for students or for those interested in the question of federation, should certainly prove a convenient guide.

R. M. J.

A SELECTION OF CASES ILLUSTRATIVE OF THE ENGLISH LAW OF TORTS. By Courtney Stanhope Kenny. Cambridge: University Press. 1904. pp. xiv, 632. 8vo.

This attractive collection of cases published by the Cambridge Press inevitably suggests comparison with a similar volume lately issued at Oxford under the editorship of Messrs. Radcliffe and Miles. (See 18 HARV. L. REV. 159.) Both books are avowedly designed to accompany Sir Frederick Pollock's treatise on Torts; but Dr. Kenny's book follows Sir Frederick's classification more closely and is, on the whole, more satisfactory than the Oxford compilation. A logical development of the subject is evident, both in the subdivisions and in the cases under the various heads. Yet, perhaps, this collection errs in ambitiously including too much within its scope. Thus the cases on Principal and Agent might have been spared from a selection of illustrative cases on Torts. And while one hesitates to differ with an experienced teacher such as Dr. Kenny, one might well think it better to follow an inductive treatment throughout in a case-book, by commencing with specific torts, rather than to adopt Sir Frederick Pollock's method of presenting first the general principles of liability.

This collection offers a greater diversity and quantity of cases than the earlier volume, many of the opinions being considerably abridged. The compiler has wisely not confined himself to English cases. Thus, he summarizes and gives extracts from Vegelahn *v.* Guntner (167 Mass. 92), though this treatment is hardly adequate for a full appreciation of the case and the opinion of Mr. Justice Holmes. An interesting note on Fair Comment (p. 318) cites the recent Cherry Sisters' case in Iowa (114 Ia. 298). Portions of the opinion in the famous Roberson Case (171 N. Y. 538), denying the right of privacy, are printed, and in a note (p. 367) referring to the article of Messrs. Warren and Brandeis on "The Right to Privacy" in 4 HARV. L. REV. 193, the editor comments on the failure of the "effort of the Harvard Law Review to provide a remedy." Probably by this time English readers know that the narrow view of the New York court has been changed by statute and that, still more recently, the New York doctrine has been repudiated on common law grounds by the Georgia court. See 18 HARV. L. REV. 625. In this connection, Dr. Kenny prints a most interesting extract from an Indian decision, showing that in view of local domestic conditions, the right of privacy is recognized in India to a very wide extent. The numerous footnotes throughout the volume, though unpretentious, are suggestive. But in one of these notes the editor seems to lend unwarranted countenance to the theory of degrees of negligence. See 2 AMES & SMITH CAS. TORTS, 2d ed., 143 *et seq.*

The bracketed headnotes are a regrettable feature of the work. This pernicious plan indulgently gives the answer to the problems, the independent solution of which is one of the most valuable advantages of the study of cases. Further, it results in large, dangerous generalizations of the law, some of which in the present volume are positively misleading. Thus, the headnote to the Mogul Steamship Case (p. 195) asserts that "the right of competition exists even when you conduct the competition by means so unusual as to render it 'unfair.'" Again (p. 631), "Your breach of your contract with one person may constitute a tort against another." Throughout the book, headnotes are tainted with the ensnaring word "malice," though in several cases the editor repairs the mischief by calling attention to the misleading use of the term (pp. 187, 308). Further examples could be needlessly adduced. The danger of these notes is the greater because of their attractiveness and their convenient form as a summary of the law. Despite these defects, however, the collection is significant, not merely as another indication of the progressive tendency in English legal education, but also as an effective rejoinder to the unmerited reproach that case-books are dull and uninteresting.

INTERNATIONAL CIVIL AND COMMERCIAL LAW, as Founded upon Theory, Legislation, and Practice. By F. Meili. Translated and supplemented with additions of American and English law, by Arthur F. Kuhn. New York: The Macmillan Company. 1905. pp. xxvii, 559. 8vo.

Growing appreciation of the practical importance of a knowledge of Conflict of Laws is one of the significant features in the development of modern legal instruction. Within the last decade the leading law schools of this country have undertaken to teach the subject to their students, and gradually it is being added to the curriculum of other schools. But in spite of this renewed interest in the topic on which Mr. Justice Story wrote one of his best known and most valuable works, very little has been done by legal writers in this country to give to the profession a useful, up-to-date treatise. Much more attention has been given to the subject by Continental jurists; and it is with the work of one of them that this notice has to deal.

The opportunity for fine reasoning which is offered by Conflict of Laws particularly appeals to jurists trained in the civil law. To them, however, law is a philosophy, not a science. Each jurist works out a theory which is logically sound, and which to his mind would solve the conflicts of law. But he disregards entirely, and without compunction, decisions of courts. In the treatise of a continental jurist one finds, not the law as the court makes it, but the law as the writer thinks it should be. Professor Meili's work is no exception to this rule. For that reason its utility to the American lawyers who desire to know foreign law is limited.

On the other hand, the book is of some academic value. The author has consulted, and refers to, treatises by the best known and most distinguished jurists of the several nations of Europe, and he also refers to the codes and law of most countries in which questions in this branch of jurisprudence have been considered. The chief limitation here, and a serious one, is that the codes and law of these several countries are not considered on each and every subject discussed, but the laws of some countries are referred to under one head, and the laws of totally different countries under the next head. In other words, the treatment is not complete. It would have been better to have limited the field of countries to be considered, and to have stated the laws of the countries selected on every point.

The work of translation has been well done. The book as it appears is readable and can be readily understood. Some sentences show, by their construction, their German origin; but they are not so numerous as might have been expected. The translator has added some English and American cases, intending "to state briefly and without discussion or argument, the law recognized in those jurisdictions, upon the principal points dealt with by the author."

Mr. Kuhn frankly says that they are in no sense intended as a full exposition of the law upon the topics treated. He has made a brave attempt, but, from the nature of things, it was impossible for him in that way to make a really valuable contribution. The leading cases on the topics treated are not in all instances given, while a number of the propositions of law are inaccurately or too broadly stated. This latter defect is due to form rather than to real error; but because of it the notes as they stand should be used with some caution. To those interested in the development of Conflict of Laws the book will still be recommended by the amount of learning and useful information gathered within its covers.

S. H. E. F.

LAW OF THE DOMESTIC RELATIONS, embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant. By James Schouler. Boston: Little, Brown, and Company. 1905. pp. xxxix, 421. 8vo.

To praise a law-book because it contains so much which is not law, is ordinarily a doubtful compliment to the author. When that confused subject usually described under the title "Domestic Relations" is under consideration, however, one is prepared to see every rule suspended or reversed. This branch of law our legislatures have so diverted from its original channel that practitioners of to-day are frequently in danger of losing sight of the sources from which it starts. Yet the original common law so controls and modifies the meaning of the various sweeping statutory changes, that any opinion based upon the statutes alone is likely to be most misleading. Accordingly, the writer of the elementary treatise under discussion, who must perforce cover but a small part of the law, has chosen wisely in confining himself to the common law rules bearing upon the legal position of husband and wife, parent and child, infants, and guardian and ward, abrogated in part though they may be, and in dismissing with brief mention the widely varying statutory changes which have taken place in the different jurisdictions.

As a statement of the underlying common law this work is in most respects to be commended. Its clearness of diction and logical development of thought are refreshing. It is precisely the kind of book to be read through with profit by a person unfamiliar with the subject, but with this caution, that the reader must not attribute to it infallibility. The author, unfortunately, has a slight tendency to follow too closely the current form of statement rather than to seek for the substance of the law. For instance, in treating of the liability of infants for necessaries, he lays it down in the old way, that the infant is bound by his contract for necessaries, and fails to impress the fact that what the infant is bound to do is not to fulfill the contract by paying the contract price, but rather to pay the fair value of the necessaries. In the same way he speaks on page 65 of the liability of the husband for necessaries properly furnished to the wife as founded on the wife's agency for the husband, and yet concedes on page 82 that the usual principles of agency are inadequate to explain the law. A similar fault is disclosed in his tendency to state moral duty in terms of legal obligation. A conspicuous instance is found in the chapter upon the duties of parents as to their children, in which the author enumerates as legal duties obligations of protection, maintenance, and education, which the common law rather commends as good morals than enforces by appropriate process. As to the chapter concerning void and voidable acts of an infant, so much stress is laid upon the former that the reviewer feels some doubt whether the inexperienced reader might not be misled into thinking the proportion of void acts to voidable far greater than it really is. An unusual omission in the work is that of the names of the cases in many citations. Not the least entertaining part is the homily on marriage, beginning on page 12, in which the present day tendency toward the fuller independence of woman is somewhat deprecated. Further enumeration of defects, however, might convey a false impression of what is in reality a very useful book for the elementary student seeking a general knowledge of that branch of the law of which it treats.

H. LE B. S.

A TREATISE ON THE LAW OF CRIMES. By Wm. L. Clark and Wm. L. Marshall. Second Edition, by Herschel Bouton Lazell. St. Paul: Keefe-Davidson Co. 1905. pp. xxxiv, 906. 8vo.

The second edition of this successful elementary treatise appears in a single large volume, instead of the two smaller volumes of the first edition. This is a desirable change, so far as the lawyer's use of the book is concerned; and it is probably quite as convenient for the student.

Mr. Clark's work has the qualities which make all his books valuable: clearness and completeness of analysis, lucidity of statement, and good judgment and sense of proportion. These qualities are invaluable in a book intended to meet the needs of students. The summaries of doctrine printed in heavy-faced type as "principles" are well-made, brief, and clear. Both students and practicing lawyers will find the book helpful.

One must not expect to find here original discussion of difficult problems of the criminal law; nor should one be surprised to find that the inconsistencies and blunders of the cases on larceny, for example, appear without any attempt to cure or even to point out the errors. A topic which has tried and transcended the powers of a Bishop could hardly be elucidated in an elementary treatise. We must accept the book for what it is, and be grateful; and it is a clear and useful summary of the law as it is ordinarily administered in court.

The work of the editor has been merely to bring the authorities down to date. The new matter is not so distinguished from the old that one can say how much has been added. One useful addition, at any rate, is the references to the cases in Professor Mikell's most excellent collection. J. H. B.

A MANUAL RELATING TO THE FORMATION AND MANAGEMENT OF MERCANTILE AND MANUFACTURING CORPORATIONS, with Forms. A Book of Massachusetts Law. By George F. Tucker. Second Edition, Revised, including Revised Laws, Statutes of 1903–1905, and Massachusetts Reports, Vol. 187. Boston: Little, Brown, and Company. 1905. pp. xxvii, 401. 8vo.

OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS held at St. Louis, Missouri, U. S. A., September 28, 29, and 30, 1904, under the auspices of The Universal Exposition and The American Bar Association. Edited by the Secretary of the Congress. St. Louis: Published by the Executive Committee. 1905. pp. xix, 423. 8vo.

CORPORATIONS. A Study of the Origin and Development of Great Business Combinations, and of their Relation to the Authority of the State. By John P. Davis. In two volumes. New York and London: G. P. Putnam's Sons. 1905. pp. ix, 318; iii, 295. 8vo.

INTERNATIONAL CIVIL AND COMMERCIAL LAW, as Founded upon Theory, Legislation, and Practice. By F. Meili. Translated and supplemented with additions of American and English law, by Arthur F. Kuhn. New York: The Macmillan Company. 1905. pp. xxvii, 559. 8vo.

PROCEEDINGS OF THE FOURTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, held at St. Louis, Missouri, September 22, 23, and 24, 1904. Reprinted from the Transactions of the American Bar Association for 1904. pp. 193. 8vo.

A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES. Based on the Decisions of all the States. By George B. Clementson. St. Paul, Minn.: West Publishing Co. 1905. pp. lxi, 350. 8vo.

A TREATISE ON THE LAW OF CRIMES. By Wm. L. Clark and Wm. L. Marshall. Second Edition, by Herschel Bouton Lazell. St. Paul: Keefe-Davidson Co. 1905. xxxiv, 906. 8vo.

The Acadia Athenæum.

"Prodesse Quam Conspici"

Vo. XXV, No. 7. ACADIA UNIVERSITY, WOLFVILLE, N. S. May 1899

The Diver

Like marble, nude, against the purple sky
In ready poise, the diver scans the sea
Gemming the marsh's green placidity,
And mirroring the fearless form on high.
Behold the outward leap—he seems to fly!
His arms like arrow-blade just speeded free;
His body like the curving bolt, to be
Deep-driven till the piercing flight shall die.
Sharply the human arrow cleaves the tide,
Only a foaming swell to mark his flight;
While shoreward moves the silent ring on ring.
And now the sea is stirred and broken wide
Before the swimmer's passage swift and light,
And bears him as a courser bears a king.

Silas Alward, Q. C., D. C. L.

In September of 1856 Silas Alward began the work of his College course. He loved study, and for the prosecution of it had the necessary equipment—sound preparatory training, a fine physique, boundless good health, and a purpose that never flagged because it knew no infirmity. Indeed it seemed as if Hygeia had him under her special care and protection. He came to college to study, not to dawdle and read books saturated with maudlin sentiment. You could see from the beginning that it was no part of Alward's purpose to drop buckets into empty wells, and grow old in drawing nothing up. No doubt the Dr. will remember that his classmates frequently remonstrated with him on his devotion to study, and in sundry ways had to modify and curb an ambition that well nigh overleaped itself. The fruits

of this miser care and almost parental solicitnde did not manifest themselves fully until the last year of his course when the wisdom which is peculiar to Seniors begins to take on wondrous growth. It is then the lesson is learned that even noble minds may have a last infirmity. That he was a good student and true let the following from the pen of B. H. Eaton, M. A., Q. C., at present Chairman of the Board of Governors of Acadia University, bear its testimony:

"I come now to probably the most brilliant class that ever took the prescribed course at Acadia, the class of 1860. There is Silas Alward, one of the most persevering, indefatigable students that ever attended our college. Of strong physical frame, with great aptitude for study, a good linguist, an ambitious young man, it is not improbable that in his daily and terminal reckoning he stood in his class where the alphabet has placed him--dux."

The writer says he was a good linguist. This is true, but, to to say he was a good mathematician, a good logician, a good rhetorician, is equally true. It is not so much that he showed a peculiar faculty for a given study as that he was strong on all the subjects of the course. Others of his class might trip and forget the connection and perhaps the substance of certain paragraphs, might fail to reproduce some bewitching mathematical formula, or fail to express in adequate English some Greek or Latin lines, but Alward never. He always had his knowledge of the various subjects at ready command. "The Professor will be here in a trice, Alward; what is the meaning of this word and this: how does this passage go, and what are the formulæ for the solution of this problem: give me a clue, will you?" were words somewhat familiar to his ears. He was generally equal to the emergency and responded generously to sundry requests of this character. Thus the needy were helped, and the giver grew in the confidence and esteem of his chums.

As may be inferred, he gave his strength largely to the subjects of the curriculum. Thus thoroughness and good marks were secured. Then the temptation to do "outside" reading was not so strong as at present, and perhaps a too low estimate set upon the practice. At all events Alward was graduated in 1860 a sound and healthy scholar. His face was as ruddy, his eye as clear and sparkling, his step as firm and elastic, his voice as strong and resonant, and his ambition as regnant when he left college as when he entered it. He was graduated too with the idea that "Man is his own star, and the soul that can be honest is the only perfect man."

With admirable equipment both of body and mind he began the study of Law in the office of Hon. Charles N. Skinner, now Judge of Probate in St. John. It was while he was a law student in this office that his literary instincts began to move and dominate him. His reading became much wider than the mere reading of Law. He believed what David Swing says: "Literature is that part of thought which is wrought out in the name of the beautiful. A poem like

that of Homer, or an essay upon Milton or Dante, or Caesar from a Macaulay, or Taine, or a Froude, is created in the name of beauty, and is a fragment in literature, just as a Corinthian Capital is a fragment in art. When truth in its outward flow joins beauty, the two rivers make a new flood called *Letters*. It is an Amazon of broad bosom resembling the sea. Alward with true literary instinct fastened upon the best. He laid under tribute those authors that seemed best to serve his purpose, the masters of thought and its expression—Demosthenes, Cicero, the Pitts, Sheridan, Fox, Brougham, Burke, Disraeli, Gladstone, Bright, Webster, Choate, Lincoln, etc. It was interesting and edifying to listen to him read, and often recite the choice passages of Bright and Lincoln. Thus love for the noble in thought and beautiful in expression has made and kept his life fresh and joyous, has made his vocabulary select and copious, and in manifold ways has strengthened and enriched him for the work of his vocation.

Dr. Alward is not unknown as an author. Some of us have read his two political pamphlets, The Political Issue of the Day and The Record of the Tory Party. He is also well known as an able and popular lecturer. The subject of some of these lectures are well known : Our Western Heritage, A Bay in the Heart of England, The Permanency of British Civilization, and The great Administration, of these fine efforts the Press spoke in very complimentary language. In them there are passages exhibiting striking descriptive power and fine literary finish.

But Dr. Alward's vocation is Law. He seems to have had in childhood a vision of his mission, and so came to college as the Advocate in embryo. To attain eminence in this his chosen profession he mastered college text-books and devoured tomes of legal lore. I fancy that to him these were no dry-as-dust books on law. Each work brought to him additional stimulus and power and so became as interesting as a high-toned novel. Through his large acquaintance with literature and men, as well as by his extended travels on the continent and elsewhere, he kept as fresh as the flower just blown. He did not walk in the common ruts, and so escaped the plague of mental congestion and mildewy monotony.

His cases in court became limber and wonderously idealized and individualized as with his ample and thorough study of the subjects and cogent reasoning he argues and unfolds them to Judge and Jury.

Now he about whom we say all this is a very modest man, and probably like Channing, values only the fault that can be found with him. If so he will in all probability blame the writer of this imperfect sketch. Be this as it may, the needed word must, or should, be spoken, and who can tell what a word of eulogy may do for poor toil-worn mortals? This, however I do know that Dr. Alward would not now be holding his high position among the eminent lawyers of the day, he would not have been created Queen's Counsel by the "Powers

that be," would not now be a member of the Law Faculty of Kings College, would not have been returned by acclamation to the Legislature of his native province, would not have been twice elected President of the Mechanics' Institute of St. John and now be one of its principal directors, would not have received the degree of M. A. from Brown University and the same degree followed by D. C. L. from his own University, would not have such extensive knowledge of his mother tongue and with his persuasive rhetoric be able to touch the mind and fasten conviction, if there were not behind all this the charm of strong personality, the strength of character, the mental force, which may be regarded as at once the reason and explanation of all.

The Babbling Brook

By Miss Zitella Cocke.

'Twas in the month O' Maying that a man and maid went straying
Blooming fields and meadows green a-through.
But what the man was saying, or the pretty maid betraying,
Why, the simple smiling meadows never knew!

Down woodland ways enchanted and through flower-brake bird haunted
Where the leaves in gossip whispered low,
The man and maid went faring, but the vows the two were swearing,
Why, the green and silly leaflets did not know!

And still the hour of gloaming found the happy pair a-roaming
By the water-ways in valleys sweet,
Where a brooklet wise and wily wound about their pathway slyly
With a song of murmured music at their feet.

And aye that brooklet listened, and its waters glanced and glistened,
Till it laughed aloud in gurgling glee,
As it hurried over highways, through the hedges and the by-ways,
On its way to tell a secret to the sea.

Deem not a word of warning meet for man or maiden's scorning,
Who from morn to eve a-maying go;
For brooklets can discover all the words and ways of lover
And will babble every secret that they know.

From "A Doric Reed."

College Friendships

As one nears the completion of his University course and the consciousness grows upon him that a radical change is soon to take place in his life; that many of the associations of his school

days are about to be broken, he naturally casts about in his mind to ascertain what acquisitions he has made to his store of knowledge; what powers of thought and expression have become developed in him; and what permanent friendships he has formed. He may have been a diligent st ident and attained a high standing in his class, but if this be all, he has failed to pluck the rarest flowers and to taste the richest fruits that grow in the college garden. This garden in many respects is not different from that of the world, and yet, there is one plant which flourishes in the former as it does not in a less favorable atmosphere. Though rooted in deep soil it suffers no spurious growth. It is a dicotyledonous plant, very sensitive at first, and least among the plants of the garden, but gradually it expands and unfolds, and buds and blossoms into beauty and fragrance and e'er long is laden with a priceless fruitage. This tree is Friendship!

It is at college, if he have the privilege of attending one, that a boy forms the friendships of his life. At no other time and in no other associations are the conditions so favorable for the inception and growth of friendships. There is a kind of magnetism, an indefinable something, that attracts and binds together schoolmates and especially classmates with firmer and more enduring bonds than most other mortals can be bound. A new class enters college and generally speaking they are all strangers to each other. Some impetuous souls, will be attracted to each other at once and a familiar relationship, like Jonah's gourd, will spring up between them in a night. Such friendships are rarely lasting, and yet, the most trifling incidents may and often do lead to life long friendships. If they are wise, however, they will as, Emerson says, "Respect so far the holy laws of this friendship as not to prejudice its perfect flower, by their impatience of its opening." Jack and Harry after a time, however, find to their exquisite satisfaction, that the same currents of air warm their lives, that they have hitched their wagon to the same star, or, in common parlance are congenial. The alliance of these souls brings to them each a sweet sincerity of joy and pleasure, which quickens thought, kindles high emotions and relates them to all mankind.

There are some again of such retiring and exclusive dispositions that it is very difficult for them to find a kindred spirit and so they may past the two first years, or even the third year of their course, without forming a single friendship, regarding all their fellow students with equal reserve and seeing the classes above them pass out without a tinge of regret. But if he permit his senior year to pass without tasting the fruits of friendship, he is either an angel too good to fellowship with common mortals or an invidious foe of society who should be shunned as you would shun the man who made a confidant of every one he meets.

Two notable examples of college friendships are, first that between Milton and Edward King which has been immortalized by the former in his famous poem "Lycidas"; and, second, the friendship

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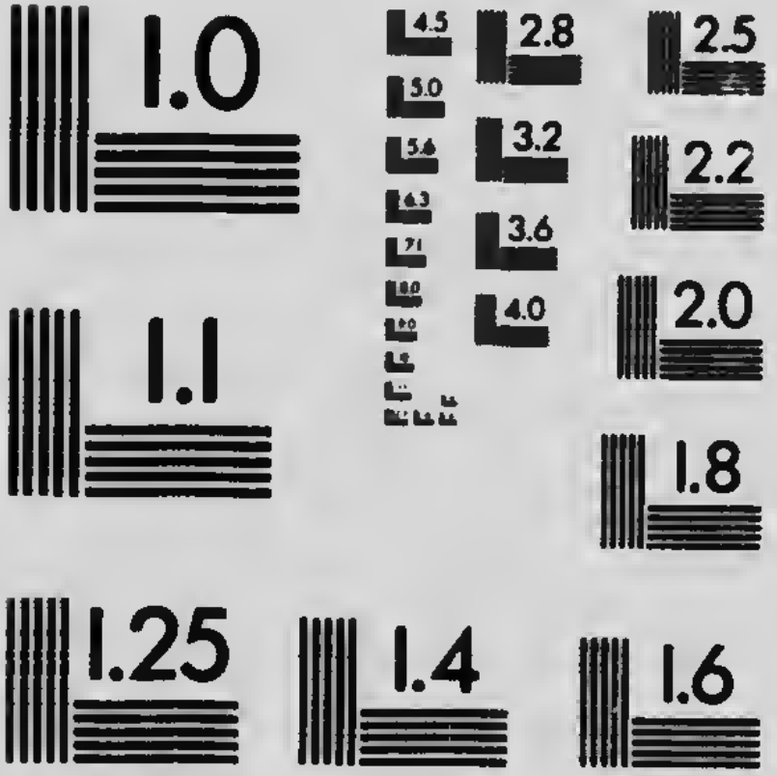

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between Alfred Tennyson and Arthur Henry Hallam, celebrated and idealized in Tennyson's immortal tribute to his friend "In Memoriam." There is something in the attitude and spirit of these distinguished college friends that comes near to hero worship, but what of this? There are few of us, who do not have this feeling of reverence toward some college friend sometime during our course. We have felt proud of our friends attainments. Our hearts have throbbed as wildly, when he was praised as the heart of the lover who hears the applause of his new made bride. We have idealized him; overestimated his conscience; his virtue; his ability, in a word, all that belongs to him. His faults if indeed we see them at all, seem virtues and quite worthy of imitation. It is true this feeling of inequality cannot continue and the friendship endure; for equality in every relation is an indispensable condition of friendship. Unless they are perfectly easy and natural in each other's presence, they will not be known at their best; and the one will never suspect the latent powers of the other. But though our hero should turn out to be but a common mortal our worship will have done us no harm, but, as it ever must a deal of good.

Making friends however is an easy thing as compared with keeping them. Friends must not be too critical. Even children cannot reform each other every time they meet and long continue to be friends, and much less maturing men. Their business is to take each other at the individual best allowing for differences of opinion and temperament. It is more difficult to forgive a friend than an enemy because of what we expect from the former. It is natural for the enemy to wrong us; unnatural for the friend, hence the magnitude of his offending in our eyes, unless our feeling for him is founded on a rock of lenient endurance. The one, however, who cannot forgive a friend ought never to taste the sacred nectar of friendship. In no other community, perhaps, are friendships so indispensable, and yet so severely tested as in student life. The boy is removed from home and all his former bearings; together with his classmates he must fight his way, cultivating but one faculty more than the faculty of getting into trouble that is the faculty of getting out of it. He bears certain relations not only to his own class, but to the whole college community, with many whose interests seem not to be identical with his own. A college friendship must, then, be a tried friendship. If it survives class-storms and inter-class conflicts it is likely to ripen into an enduring affection that will increase with the years, and with every expansion of intellect, until it transcends the immediate object and dwells and broods on the eternal.

When a man graduates from college and goes out to taste the bitter fruits of the mercenary friendships that are bought and sold in every market, his stomach will, at first, nauseate, and his soul be filled with loathing, but unless he be banqueted from time to time at the table of the gods, his taste will become depraved and he may

even become a trafficker in the husks which the swine do eat. But happy is the man who has near him an old friend of his 'Varsity days who will occasionally drop in upon him to break the bread and sip the wine of an enduring friendship; to recount old college pranks and interchange confidences that are too sacred for an ear that has not been purified by fire and dedicated to this holy office. We can scarcely imagine anything more refreshing; more likely to keep the heart young, and the mind alert and active than the meeting of old college chums who have long since doffed the ermine. Their professions may have called them to serve in widely different spheres, but there is a common point in their history where their minds meet and their souls blend and they are one. All reserve is thrown off and with the old frankness of student days, they open their hearts to each other. The hours pass, midnight comes, but conversation flows on like a placid stream. The names of old classmates who have gone to their reward are mentoned with a tenderness and reverence that reveal the most subtle instinct of their being. But the subject which consumes the hours is those never to be forgotten days, the brightness of which was often clouded by petty disappointments and trials, but now, as seen through the pale clear light of the sacred temple of memory it is a scene of enchantment—not a jar, not a discord, and yet, no less true to the experiences of other days when they were undergradnates of the dear old class of —— in the white college on the Hill.

J. W. E. '99.

Examiners and Examinations.

This is the season of the year when the anxious student is expecting a summons to the bar of the examiner. He knows that all the vulnerable points in the student armor must be patched up if he expects to gain a "pass." It is of no use for him to offer pleas for absence, indisposition, or any such trivial causes. Deficiencies must be made up, even if there is a resort to "cramming."

We hear many complaints from our secondary schools and colleges of over-pressure, over-study and the cramming of a medley of ill-assorted information for examination. Much of the ground of complaint is real and much is doubtless imaginary. It is imaginary where the instruction stimulates the student to thought and the application of all his powers. It is real where the instruction is weak and is doled out piecemeal in view of an impending examination.

The poor we always have with us; and the incompetent instructor will be an ever present factor until the educational millennium comes with its enlightened public sentiment, intelligent school boards and broadly trained teachers. But the incompetent instructor is not the only one to blame for bad training and weak scholarship. The

examiner will have to come to the bar and plead gnilty when our educational system is put on trial. He cannot escape. He should not escape if he is in any way responsible for the imperfect training of the faculties—and if he is responsible in substituting therefor the training of one faculty alone, memory

I cannot say that examiners are incompetent. They are not. Justice compels me to say that they are a scholarly and highly respectable body of people, even if they are a little antiquated in their notions, and still devoutly worship that educational fetich—the examination. But justice compels me also to say that they have not the courage of their convictions. They must realize every hour of the long day which finds them too often ruefully trying to make something out of nothing in the examination papers which come before them that there is something wrong somewhere,—when they see the results of too hasty work and ill digested ideas.

But what will you do with the examiner? "Turn him out," some one says. No, that would never do. We dare not write *Ichabod* on the doors of such a venerable institution as the Examination Temple! But what *will* you do with the examiner, may be asked in all seriousness, if knowingly he lends himself to a wrong, and allows to be perpetuated a system that induces a feeble and one sided training? If we judge that this Temple is too sacred to lay violent hands upon it, that examinations must be preserved as a necessary part of modern education, we must lay a petition before the educational throne, the Board of Education,—*to wit:*

If an examination is to be a real measure of educational growth there must be ample time and opportunity allowed the examiner to discover it. He should have ample time to frame questions and ample time to read thoughtfully and sympathetically the answers, as well as to test those examined in laboratory methods. Now, where work is paid, for the rate of pay is a pretty sure gauge of the estimate that is placed upon it. An examiner gets *ten cents* for every paper he reads and marks for col matriculation or teachers' license, and in some instances he is requ..edto prepare *gratis* the examination paper. This work is usually done during the summer vacation. I hope I am betraying no professional secrets when I say that the first thing an examiner does on taking up a paper is to ascertain its length. Then a lightning-like calculation passes through his brain: if board at a summer hotel at a seaside resort costs $20 a week for myself and family, how long will the fun last at ten cents a paper? The question solved, every nerve is set to accomplish his task, which Sisyphus-like he takes up afresh with every paper and with every recurring season. It is well for him if he does not take his task too seriously or imbecility would be the result.

I speak advisedly in this and from some knowledge of circumstances. When the examiners's questions call for mere information it is usually poured out lavishly, page after page, and in a vein that reminds him of the pages of the text book illuminated with mid-

night oil. The opinions, tastes and qualities of mind of students may vary but the examination papers of the treadmill sort never show it. There is a dead level of mediocrity, without an undulation, except where an occasional joke comes in, where the writer's memory fails to make one fact connect with another.

To give a few examples : At an examination a few years ago for entrance to one of the professions in a provincial city the following answers were selected from the papers handed in.

"Athens in Greece is noted for its ancient history."

"The Gulf Stream is a current of water from the Mississippi river. It is very warm and ships make very quick passages when influenced by the stream."

"Milton wrote an essay on man."

"The Thirty years War was caused by the beheading of the French King and the scramble for power by Napoleon and others."

"Sir Geo. Cartier was a politician in Brown's time. He used to form coalation Govts and otherwise devised means to gain honors he could never hold."

"The Halifax Award settled the claims put forth after the War of 1812."

"A noun is the name of anything you can taste, hear, feel or smell."

"A preposition is a word that marks the position such as to."

"Dickens wrote Vanity Fair ; Scott wrote Canterbury Tales ; Shakespear wrote his plays ; Spencer wrote Llewellyn and his dog ; Dickens wrote Macbeath."

"Prest Madison and the War party proposed to conquer Canada. They immagined they would have an easy task as they thought the French Canadis were disaffected and would join the invading armies. But on the contrary they showed the best spirit and stood sholder to sholder ** The Americans were victorious on the water and this made England wrathy to be defeated on her native element."

"Then he (Cartier) went further up the St. Lawrence, and here he met some Indians who tried to misled telling him there were small towns all along the course. But Cartier put his trust in God and kept on exploring the country until he came to mont Royal."

Resuming our petition to the educational authorities, from which I have digressed, I would ask, is there any need of our complex Examination system ? Is there any need that this work, harassing alike to student, teacher and examiner should occur with such terrible regularity and frequency ? If pupils are to be weighed and measured at intervals let it be an honest test of growth, not a test of their capacity to receive and empty out when tapped a certain number of facts. If we must have examinations let us make them a source of strength not of weakness. Let such tests be fewer, but let them be fair tests. Let them occur at times when they are not expected ; certainly not at the end of a term, at a time when body and mind are exhausted. Let examiners frame questions that will estimate the quality not the quantity of knowledge ; a test that knowledge has been assimilated not simply gathered. And then if estimating the value of such papers is worth paying for let it be at a rate that

will ensure a careful and sympathetic reading on the part of the examiner, and at a rate that will keep his soul and body together during that trying period.

G. U. HAY.

I Have Dined

Mr. W. T. Stead thinks that England should adopt the above phrase as a motto for the next few years. Plateful after plateful of territory and power has been swallowed; the time has arrived for assimilation. Whether this be so or not, the present writer is not politician enough to decide, and perhaps he is not scholar enough to give a verdict on the subject which he intends to talk about, but as one who knows and cares more about vacations than about politics he would like to suggest to Acadia students that their policy for the four months after the 7th of June be "I have dined."

Perhaps there is no one who feels satisfied with his course of study as he plugs away at it from the first of October to the last of May. The student enters college with the expectation that the curtains are to be pulled aside for him by certain learned scene-shifters called professors and he is to see things as they are, or, as Emerson puts it, "the boy believes there is a teacher who can sell him wisdom." How disappointing are the first few days, even the first term. The student discovers that the fees he laid on the Treasurer's desk do not entitle him to a seat in Minerva's Cabinet; he is only permitted to see heaven through a telescope. The professor cannot carry him pick-a-back to the Golden City; he is but the Evangelist who points across the plain to where on the mist-girdled horizon one can dimly see the Wicket-gate and the Slough of Despond lies between. Naturally the student frets and fumes and talks a lot of nonsense about books being sepulchres of thought, etcetera.

But vacation comes, as do all things to those who have weight with the powers that be. He gets back home and swings a hammock under the old apple-tree or attired in the peaceful—grown football sweater and as little besides as possible throws himself down on the gray rocks where in public school days he watched the gambols of the summer sea. He takes a volume of poetry with him; some might object if the writer should add a pipe, but though I write under the awful shadow of the Seminary I will say among all post-prandial delights, whether we have been gorging on roast turkey or on psychology, there is nothing to compare with the little tobacco taken for the stomach sake. But as this paper is not written in order to lure a bequest for Acadia from the munificent hand of the Montreal Knight I will dismiss the question of narcotics and return to the student whom we left with the volume of poems. As he reads the poet's

than all human strains, he sees the problem over which he worried night and day at Wolfville interpreted in the world of beauty. What is more inspiring to a young mind than to behold the very questions which have been to him as a nightmare now rising glorified from the baptism of poetry. There is no truth which is not beautiful. Philosophy and poetry have been wedded from of old and he who tries to put asunder what God has joined together finds himself cheated of the blessings of heaven. It is because not finding wisdom in our text-books in the winter that we often neglect to look for her in the shady nooks in summer. The vacation comes as a good fairy to touch with her hand the homelike Cinderella who has been lines or listens to the lyrics of sea and field, to some more rhythmic sitting in the ashes of Geometry and Botany and clothes her with the bright garments which are her due. In these select moments the prosy labor of the past bears fruit, and we are thankful for the hours we devoted to study in the winter.

It is a pity that some of us cannot own our vacations but must sell them to necessity. Too many of us were born good looking instead of rich, and although the former grace is often a stepping-stone to the latter when we come to drive hard bargains with the world in our several summer avocations, yet we must spend much of our time planning how to make both ends meet. There seems little room for the anti-dyspesia nap which in lieu of the whiff of tobacco, which we promised not to advise, one should have after his collegiate feasting. Very few however are deprived of their summer evenings. The melancholic poet Henry Kirke White, who was employed as an attorney's clerk all day, used to thank God that men did not deprive him of his nights. However much we may complain of the lack of time at our individual disposal while at college, the summer season must surely here and there yield us a few hours with which we can do as we please. That man is fortunate who knows how to use a summer night. The writer realizes that to the untutored imagination of the Cad the *summum bonum* of the summer is a plate of ice-cream and a dainty piece of muslin. He also realizes that to the Senior the same formula, with the ingredients perhaps in a reverse order, is still satisfying. But to the members of the intermediate grades who are a little too old to be frivolous and not yet wise enough to think there is nothing worthy of study there is ever truth in the words of Watson, "The sweetest of all pleasures is an evening of desultory reading." Such is what the vacation offers us and he is not wise who lets the opportunities slip past him. When the morning of the 8th of June, 1899 dawns let all text books be banished. If we cannot keep away from our Differential Calculus let us pitch the books into Mud Creek.

"To-morrow to fresh woods and pastures new."

Soldiering in Canada

To say that the regiments of the Canadian Militia constitute an efficient body of troops might be to convey a false impression respecting them; while to call them inefficient would be to show one's ignorance of the circumstances of the case.

In equipment and training they cannot be put on a level with the trained regiments of Europe and so might not be called efficient in one acceptation of that term; but if their efficiency is measured by the extent to which they meet the demands that are likely to be made upon them, then up to the present time they have maintained a fair efficiency. The only engagement we have had to fear from foreign sources in the past is a clash with our neighbors across the border, and whenever such a collision did take place our volunteer forces most nobly met the demands of the occasion. In the suppression of internal revolt, also, they have shown their efficiency so that, measured by this proper criterion, it would be incorrect to call them inefficient. A brief view of the organization and establishment of our militia will show us its position as to efficiency.

In the first place our militia is divided into land and naval forces; as will be seen from the title we are concerned here with the land forces only. This latter is divided again into active and reserve forces; the active militia consisting of our volunteer regiments and the reserves constituting all the male inhabitants of Canada between the ages of eighteen and sixty years not specially exempted from service by law. The active militia, again, has a permanent division as well as the battalions that drill only at intervals. The forces are of course, divided into the three arms of the service, Cavalry, Artillery and Infantry, with the additional so-called arm Engineers.

The permanent force of the active militia is divided into three bodies: The Royal Canadian Dragoons, having squadron stations at Toronto and Winnipeg; Royal Canadian Artillery, having battery stations at Kingston and Quebec; The Royal Regiment of Canadian Infantry whose establishment is limited to one thousand men and which has regimental depots at London, Ont., Toronto, St. John's, P. Q., and Fredericton. These permanent stations constitute schools of instruction at which militiamen of all ranks can be prepared for service and from which all officers must have certificates before they are qualified to serve as officers. This wise provision ensures to the Canadian militia officers who are trained in the principles of the art of modern warfare.

For purposes of administration Canada is divided into twelve military districts for the supervision of each of which a permanent staff of officers is detailed. In 1898 the number of all ranks on the rolls of these districts was 33439. The battalions constituted in these districts receive instruction by annual "camps" under the supervision of the permanent officers of the districts. These camps give each

battalion about twelve days' drill annually and here we have the bulk of soldiering in Canada. The experiences met with at camp are in the main pleasant, although some persons of a hypochondriac disposition are sometimes heard to complain if their tents leak on a rainy night or if any similar occurence transpires.

The drill our volunteers get at these camps is decidedly not such as can give them any adequate idea of actual warfare. For the last few years the programme for the twelve days has been about as follows: In the mornings about three hours daily squad and company drill; and in the afternoons this procedure was duplicated on some days while on others the afternoon was taken up with battalion or brigade drill. Then each company takes its turn at providing the brigade guard and going on picquet duty; but as this is only an institution to maintain order in the camp it gives very little knowledge of the method of such procedure in time of war. Each company has one day rifle shooting; which is, of course, all the time that can be spared for that occupation.

This, I think, will be found to be a fair statement of the work done at these camps and it will at once be seen that though there are many deficiencies that cannot be remedied without a great expenditure of the public revennes, that there are other things that can easily be altered for the better without much increase of expense. It will be seen from the above programme that the bulk of the drill done at camp is squad and company drill. Now I have always contended that drill of this kind can and ought to be done at company headquarter: thus sparing the unnecessary expense of bringing the companies to the district drill-grounds.

In the modicum of battalion and brigade drill actually done the men do not become sufficiently familiar with the different formations to ensure regularity even in the simplest movements. I have thought when watching the confusion in the performance of a simple brigade movement such as wheeling in echelon of battalions or the simpler wheeling of a battalion in column how quickly the interest of a few flying bullets would render these battalions so many mobs almost beyond the control of their officers. The drill we must have at our annual camps, if our militia is in any way to merit the name of "army" is not squad and company drill. What we want is a perfect training in battalion and brigade movements and some solid instruction in attack and defense, fire-discipline, advanced and rear guards, outpost and picquet duties together with such drill as will give us a general knowledge of the whole range of tactics and evolution. This, it seems to me, we might have without much additional expense.

It is true that our equipment is deficient and must be improved in certain respects before these reforms can take effect. Each battalion must be provided with and instructed in the use of such equipment as would be necessary in an actual engagement. One of the most important things in modern battles between civilized nations is to keep the firing-line well supplied with ammunition. The suc

cessful accomplishment of this means an efficient and active line of communication between the firing-line, the battalion reserves, and the ammunition parks; and yet the large majority of the men constituting the rank and file of our militia do not know that there are such things as reserves and ammunition parks. In combined tactics we have had very little drill, as the different arms of the service have nearly always drilled separately. This is a mistake as it would cost no more to carry on our work jointly than separately and certainly if we must work together in active service we ought to be taught the joint and several functions of the combined arms in attack and defence. A great deal more might be said about organization, establishment, equipment, and drill; but as we now have a general knowledge of our condition in these respects we shall now make a few remarks on the probable future of our soldiering.

If the Czar's proposal for disarmament should result ultimately in the disbanding of the armies of the world soldiering in Canada will be at an end. And there are many reasons why we, and most of all those of us who have been in any way connected with armies and especially regular armies, should wish for this result. We must all, I think, recognize the fact that the British military system of the present day projects before us as an ideal private soldier a man ignorant, unreasoning, and without moral scruples. If he is educated and reasoning he will not submit without resistance to the injustice to which he is subjected at the hands of his superiors and such a man will not do for a private soldier however excellent an officer he might make. If he has moral scruples he may dare to disobey on some occasions and that is contrary to the fundamental rules of discipline. However, it does not seem to me at all probable that disarmament will take effect for a few centuries yet and so we may disregard that possibility.

On the other hand if the powers continue to increase the armaments as they have been doing for years England must sooner or later call on her colonies for help A movement has already been started in the Canadian Militia in accordance with the above prophecy. The Canadian government has promised, if England should become engaged in any war in the East, to provide and maintain one regiment in the field during the campaign. Even further steps have been talked of. It has been proposed that the Canadian government provide one regiment of infantry to go on foreign service; that our four military schools become recruiting depots for four different regiments and each these take its tour of foreign duty. This is calculated to further consolidate the Empire. If the movement should take effect the Canadian militia would become, as it were, imperialized. The general officer, Major-general Hutton, who has lately come to command the militia, seems to be filled with this imperialistic idea and the energetic manner in which he has set about reorganizing our volunteer forces and projecting plans for their better

instruction is certainly commendable. If we have a militia at all, let it be efficient. Under General Hutton's command the reforms of which I have spoken will no doubt be introduced.

In closing I should like to remark upon a most prevalent and equally erroneous idea with regard to our volunteers. We are often told that in occasion of active service our volunteers, or the majority of them, would find themselves in some way unfit for service and if they did get to the front they would quickly show their heels when the bullets commenced to fly. I believe this is the most cowardly and pernicious doctrine that could possibly be employed to demoralize us as a nation. It not only brings the militia into disrepute and thus tends to lower its efficiency; but it is a lie against the courage and manhood of Canada to thus rate ourselves below others in this respect. So far as I have had opportunity to judge, there is no company in the world that I should rather have at my back in a bayonet charge than my own. It is our duty to show that appreciation of our volunteers that will stimulate them to do the best that is in them.

C. J. MERSEREAU, Capt.
73rd Batt.

The Mayflower.

BY BRADFORD K. DANIELS, ACADIA '94.

When the heart of the waking earth
Quickens the pulse of Spring,
And beauty dreams of birth
In many a sleeping thing;
Then the shy arbutus flower
Wakes from a bed of gloom,
And Spring's most perfect dower
Opens its dreams of bloom.

Thou hint of a spring
On some far, undream[illegible] shore,
Where the airs are ever vernal
And the snows return no more,
Breathe into my life thy sweetness
That mystical charm of thine
Which lends thy being completeness
And makes thy beauty divine.

—From "The [illegible] Magazine."

Summer In The Country.

"Ah! my heart is sick with longing
Longing for the May,
Longing to escape from study."

Is the refrain that rings out from many a heart now as the school year wanes slowly to a close. Some will be heard through the college corridors: "One more examination and then we shall have freedom, joy, heart's-ease and comfort; then away to the country with all its mirths and jollities.

Summer is hastening to finish the work which spring has so nobly begun. It decks all nature in a brighter bloom, and everything seems to smile at its approach. "The earth and every common sight" doth appear "Apparelled in celestial light: the glory and the freshness of a dream."

How happy one feels to escape from the rush and turmoil of school life, into a vacation of ease and quiet, in this season of brightness, beauty and glee.

Who can resist "the cock's shrill clarion" which summons one early to view the loveliness of a summer's morning? The sun is just rolling its dazzling rays above the horizon, and careering in glory and might in the deep blue sky and through the fleecy clouds. The fields sparkle and glitter with dew. "All things that breathe from earth's great altar send up silent praise to the creator." Rich notes fill the air, warbled by the happy birds welcoming the birth of another day each with a song of its own, yet, blending in perfect harmony. The flower perfumed air breathes welcome from the land of dreams. All nature seems to admonish us with the words:

"There is joy in the heaven
And gladness on earth,
So come to the sunshine,
And mix in the mirth."

By chance, while standing admiring the wonders of creation, one's eye falls on the lawn. Then some one comes tripping up to him with a challenge for a game of tennis. Nature's animation is by this time thoroughly instilled. The excitement is usually waxing warmest when the clang of the bell, summoning to the morning meal, not classes, is greeted with a welcoming shout. Then, with an appetite strengthened by the invigorating morning air, all enjoy the breakfast which "crowns the simple board, the halesome parritch" and "The soupe their" "hawkie does afford."

As the sun rises higher in the heavens, the milder sports, such as croquet engage the attention.

When the sun nears the zenith motion seems to have left all things. Deep silence holds everything, except for the lazy droning of some insects. Then the hammock, moved gently by the zephyrs under the shade of some huge tree, presents a most tempting sight.

Thither languidly turn the steps either to be "by whispering winds soon lulled asleep"; or to peruse the contents of some good books Or ve y often a ramble in the woods or along the shore, lapped gentl by the inrollin aves would please better the restless minds of those who are ever fond of rovin, for

"There is a pleasure in the pathless woods
There is a rapture on the lonely shore."

The afternoon is come. How the cool dark blue waters makes the overheated body long for it! From every direction men and maidens are seen skipping lightly over the burning sand arrayed in thing apparel. Heads are n bobbing now up now down on the ntly rising and falling waves, and borne like the ocean s bubbles. award.

The cool of the evening is at last beginning to be felt. Now for a lively canter on the pony or to indulge in many kinds of "sport that wrinkled care derides." The air is laden with the perfume of flowers on which the refreshing dew is just beginning to hang its silver drops. The birds are sending forth their evening hymn. Everything seems to rejoice in one great melody as if giving thanks for all the mercies of the day before reting. Added to all these joys and above all these charmes is the glory of the setting sun. It burnishes all things far and near with a deep, rich splendour of its own.

"The glassy ocean, hush'd forgets to roar,
But trembling murmurs on the sandy shore;
And lo! his surface, lovely to behold!
Glows in the west a sea of living gold!
While all above a thousand liveries gay
The skies with pomp ineffable array."

The moon now claims its sovereignity in the heavens. Now "blossom the lovely stars, the forget-me nots of the angels." This is an excellent time for a row or a sail. Presently these are drawn up. And soon many white sails are sprinkled over the surface of the water. The music of human voices floats on the evening breeze. Late in the night the keels again grind the shore.

Homeward the steps are bent. Soon with heavy eyelids the drowsy head is laid on the pillow; and quickly is enticed "the dewy-feathered sleep."

The next morning one rises early to follow much the same occupations as the day preceeding. Thus with its many joys and few sorrows the summer passes swiftly away. As its days shade gradually into those of autumn, though with many regrets at its departure, one cannot help saying:

"Brightly, sweet summer brightly
Thine hours have floated by,
To the joyous birds of the woodland boughs,
The rangers of the sky."

G. E. H., '01.

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MAY.

The Sanctum.

The Late Rev. A. S. Gumbart, D. D.

ON Sunday morning, March 19th, by a call of startling suddenness, the Rev'd Adolp S. Gumbart, D. D., of Roxbury, Boston, Mass., was summoned from the earthly service to the higher service of Heaven. In a sense Dr. Gumbart was one of ourselves, having received the honorary degree of Doctor in Divinity at the Acadia Commencement June, 1896, and we have a mournful pride in chronicling his name among our honored dead. During his visit in 1896, he made a most favorable impression. A man of commanding presence, of frank and pleasing manners, of intellectual vigor and personal force, a man also who gave the impression that he was about the Master's business, he won the respect and confidence of all with whom he came in contact.

We have said that the end came with startling suddenness. *Angina pictoris* was the dread disease which carried him away. Awakened at 5 o'clock in the morning by a pain which was thought to be neuralgic, and which the physician for some time regarded as not serious, at eight o'clock the strong man was no more.

The deep impression which the death made throughout Roxbury; the crowd that attended the funeral, representing every rank and condition of life; and the noble tributes paid to the worth of the departed, by such men as Dr. Nathan Hood, and Dr. Lorimer, reveal-

ed, in a striking manner, the strong and far reaching influence which the faithful servant of God and men had come to exert during his nine years service as pastor of the Dudley St. Church.

We tender our respectful and sincere sympathy to Mrs. Gumbart, and the two daughters who are left to mourn their dead.

The Resignation of Miss Adelaide F. True, M. A.

IT is with much regret that we learn of the resignation of Miss True, Principal of Acadia Seminary. Miss True has occupied this responsible and important position for the last four years with credit to herself and to the satisfaction of all. Under her wise management the school has made substantial progress in every department of its life and the graduating class this year we understand is the largest in the history of the school.

The noble christian character, mature experience and high scholarship, possessed by Miss True made her eminently qualified for the position she has occupied with so much grace and dignity. Miss True has won not only the respect and love of those associated with her as teachers and pupils, but all who have the honor of her acquaintance speak in the most glowing terms of her many estimable qualities. We know that we voice the sentiments of all when we say that she will be greatly missed by the entire student body and teaching staff connected with the life of our Institutions.

Lectures by the Faculty.

IT affords us much satisfaction to inform our readers that the effort to secure an annual course of public lectures by the Faculty has met with success. On account of the lateness of the season and the consequent pressure of work upon both professors and students, it has been thought unwise to have any lecture delivered this year. Next year however there will be four lectures given. Definite arrangements have not yet been fixed, but we understand that Professor Wortman will probably deliver the opening lecture of the course. The names of the lecturers and the dates will appear on the next college calendar.

Financial Statement And Appeal.

AN idea seems to have taken possession of the minds of a great many of those who have the honor of having their names on the subscription list of the ATHENÆUM paper that our opulence is equal to the vigor with which we attempt to collect that which is honestly our due. The fact of the matter is this :

At the beginning of the college year– 1898-'99—there was on the books of the Secr'y.-treas. to the credit of the paper the not inconsiderable sum of $612.00; this, of course, including the subscription dues of the present year. It is now very near the close of the year and we have received the sum of $95.00. Thus we have received less than sixteen per. cent of what was owed us. These facts taken together with the added one that each issue of the paper costs us not less than $30.00 seems to indicate that unless our outlying funds make haste to help us we shall be in imminent danger of being left with a large deficit.

Now there may be more than one way to account for this general deference of payment. If any are taking the paper against their will it would be a great source of pleasure to us if they would pay up their arrearages and discontinue their subscription. We are not obliged to them for their subscription unless they pay us for it. Patronage alone is not sufficiently current coin for us to pay our current expenses withal. Some seem to think that such an insignificant body is not to be granted the consideration and moral rights that would entitle it to remuneration for its labor. To such we would say that only he who is faithful in little things will be found faithful also in much. If any *cannot* pay us we hope for better circumstances for them in the near future. Bills have been sent to all who are in arrears and we shall be greatly obliged if all subscribers will see that they are promptly paid.

New England Alumni.

The seventh annual banquet of the New England Alumni Association, occurred on Monday evening, April 10 at the American House, Boston. Though the gathering was not as large as usual, the members and friends spent a very pleasant time. At the business meeting resolutions were adopted authorizing Dr. M. C. Smith and Rev. R. M. Hunt to represent the New England Alumni at the next Anniversary, and to convey to the college constituency our most cordial greetings.

Minutes were also adopted relating to the sudden and untimely deaths of Mr. Spurden, A. M. Read, and Rev. A. S. Gumbart, D. D. They were true and generous friends, and will be greatly missed.

The following officers were elected for the coming year :—

President	Dr. M. C. Smith, Lynn.
Vice-President.	Rev. E. L. Gates, Nashua, N. H.
Secretary	Benj. A. Lockhart, 61 Court St., Boston.
Treasurer	Charles H. McIntyre, Boston.
Directors	Revs. A. T. Kempton, R. M. Hunt, Geo. B. Titus, and Mr. J. E. Eaton.

At the banquet Rev. A. T. Kempton presided. A telegram was read from Dr. Trotter explaining the absence of a representative from the college, and a portion of his recent article in the "Messenger and Visitor" on the home situation, was also read. Rev. Howard B. Grose of "The Watchman" made a brief address, and Dr. Lorimer gave some happy reminiscences of his visit to Acadia and the provinces more than thirty years ago. He avowed his friendship for the small college, and asserted his strong belief in the world's need of the educated mind.

While writing this brief memorandum, I want to call the attention of those students who expect to visit New England for study, or other pursuits, to the importance of sending their addresses to Mr. Lockhart or myself. In this way we can keep track of them. The same observation applies to many old Acadia students, now scattered through New England. If, when their eye rests on these lines, they would sit right down, and send us their address, it would add much to our pleasure, and ensure a larger and more enthusiastic reunion every year. "Verbum sat sapienti."

Charles H. McIntyre,
209 Washington St.,
Boston.

The Month.

The young ladies of the Seminary once again favored a goodly audience with a Vocal Recital in College Hall, on the evening of March 24th. As usual an excellent program was rendered as follows:

1 Holy Redeemer.... .... *Marchettt*
Chorus.

2 Vocal Solo: The Maid and the Butterfly ..... *d'Albert*
Miss Maude Scott.

3 Reading. Sisters .... *Whittier*
Miss Lillie C. Webster.

4 Vocal Solo: Were I a Gard'ner..... ..... *Chaminade*
Miss Emily R. Christie

5 Vocal Solo: Invocation..... .. ..*d'Hardelot*
Miss Lydie R. Moffat.
(Violin obligato by Mrs. Wallace)

6 Piano Solo: Soirees de Vienne..... ..... *Schubert-Liszt*
Miss Annie S. Chipman

7 Vocal Solo: Barcarolle (boating song)..... .....*Schubert*
Miss Sadie I. Epps.

8 Reading: Preciosa (cutting from Spanish Student)...*Longfellow*
Miss Ethel R. Emmerson.

9 Vocal Solo: Spring Song..... ....*Weil*
Miss Hattie M. Masters.

10 Vocal Duet: The Gypsies..... ....*Brahms*
Misses Masters and Lawson.

11 Goodnight ... .*Goldberg*
Chorus.

Those present could not help being impressed with the high culture to be obtained by attending such an institution. Each selection received a hearty encore. The voices and attitude of those who took part showed much careful training. It seems impossible to make special mention of any one selection for each and all cannot be spoken of too highly.

The efforts of the Lecture Committee were successful in obtaining the services of Nicholas Flood Davin, Q. C., M. P. of Regina, N. W.T. to lecture before the Athenaeum Society. Mr. Davin arrived by the express on the morning of March 30th accompanied by Mrs. Davin. On the same morning he made a visit to the Junior and Senior class in English, and being asked to speak occupied the whole of the hour to the delight and profit of all present. During the course of the next hour Mr. Davin visited the class in Metaphysics and again spoke extemporaneously, giving the members of that class a rare treat. In the evening the lecturer gave the third address of the Star Lecture Course for the present year, on the subject "The British House of Commons as I knew it." First describing the House of Commons, he went on to the narration of scenes coming under his personal observation as a press reporter in the gallery of the House. Among noted men spoken of were Lowe, Gladstone, Disraeli and Bright, who were in the prime of their public career at that time—thirty years ago. In his critical description of these men and their oratory he was both eloquent and vivid, while in his narration of the events he seemed to live the time over again and to make his hearers do the same. The lecture was brought to a close by a description of the debate on the bill for the disestablishment of the Irish Church. Although this lecture finished Mr. Davin's engagement he kindly consented to address the students on the following morning, which he did, on the subject "Culture and practical power." If possible, this lecture was still more calculated to usefulness in the student's life than that of the previous evening. Mr. Davin left the impress of both "culture" and "power" on his audience. We are especially indebted to Mr. Davin for the way in which he entered into the life of the college during his stay among us, and for what he gave us of himself altogether apart from his lecture.

The citizens and students of Wolfville spent many enjoyable evenings during the past month; but the crowning event of all events at Acadia during that time was the Gymnasium Exhibition. The Exhibition was given in the University Gymnasium on Friday

evening, April 7th under Director E. H. McCurdy, M. The following is the program of the events :

1 Dumb Bells
2 Parallel Bars
3 Wand Drill
4 Buck
5 Indian Club Drill
6 Fancy Club Swinging
7 Torch Swinging
8 Long Pole Drill
9 Horizontal Bar
10 Miscellaneous
11 Tumbling
12 Human Alphabet
13 Pyramids

A—C—A—D—I—A

Each number received much applause and justly so, for few gymnasiums in the country could bring before the public a program of such a high order. The "Fancy Club Swinging" by L. M. DuVal and the "Torch Swinging" by S. W. Schurman and W. M. Steele deserve especial mention. Those who never have been fortunate enough to have seen the like cannot realize what they have missed. The audience showed much admiration from beginning to end and much has been the comment in its favor since then. Director McCurdy deserves much credit for the masterly way in which the program was executed.

Invitations were issued for the annual Athenaeum At Home to take place on Friday evening, April 14th. On the appointed evening a large number of guests gathered in College Hall, and were received by president Farris and vice-president Dickson. Among those present were a number from Kentville, Canning, Windsor, Halifax and other surrounding localities, including a party of students from "Old Kings." The program consisted of vocal selections from the Emerald Quartette, solos by Mr. David Pidgeon of St. John, and instrumental duets by Misses Beckwith and Munroe. These features of the evening's entertainment were greatly enjoyed proving pleasant diversions in the course of the conversation. The Reception Committee are to be congratulated on the success of the At Home, and especially on the tasty manner in which the decorations were made.

The beautiful hall of the new building recently erected by Dr. McKenna on Main St., was dedicated in a fitting way on April 7th by an "At Home," given by Dr. and Mrs. McKenna to their friends. Among those who were fortunate enough to receive an invitation was the graduating class of the college. A choice literary and musical program was rendered during the evening. Miss Lawson, teacher of vocal music in the Seminary, charmed the ears of all lovers of music by a vocal solo. Miss Jamieson, who is so popular as an elocutionist, gave a reading that proved to be enjoyable. Mr. Burpee Wallace sang a solo in his usual good form. Mrs. B. W. Wallace the gifted violin teacher of the Seminary, delighted all present by her exquisite rendering of a violin solo. Dr. Trotter in a happy and apt speech recounted some of the topics he would have discussed if he had not been unavoidably detained. Refreshments, which are never unwelcome to college students were served during the evening. Dr. and

Mrs. McKenna are royal entertainers and were indefatigable in securing the comfort of their guests. We congratulate Dr. McKenna in possessing such a valuable piece of property as this new building, and we congratulate the people of Wolfville in possessing a citizen who has so much faith in the future of the town as to cause him to erect this costly and up-to-date building.

Exchanges.

The March number of *The Theologue* contains an interesting article on "The Religion of Burns and His Influence upon Religion.

"Natural Science as a means of Development" in *University Monthly* is a well written article. The practical manner in which the subject is dealt with shows how interesting it can be made by the skillful teacher. The writer dwells at some length on the importance of the study of nature as a means for developing in the child the powers of Discrimination, Retention, Observation and Imagination.

The *Manitoba College Journal* contains a highly interesting and instructive article on "The Aim of Modern Language Study." Reference is made mainly to French and German. "They are useful as a means to literary culture and a liberal education. They are useful nay almost indispensable aids to study in other branches. They aid directly in the study of English. Their greatest value to the graduate lies in his being able to speak them not as school children, or as educational quacks, but as men of business and the world understand them."

"Modern Dutch Artists" in *McMaster Monthly* contain much valuable information for the student. The "Monthly" also gives an interesting biographical sketch of William Fraser one of the early fathers of the Baptist Denomination in Ontario and Quebec.

Kalamazoo Index opens with "The Humor of Shakespeare as found in four of his Comedies." "The Merchant of Venice," "A Midsummer Night's Dream," "Twelfth Night," and "As you like it."

In "Abraham Lincoln—The Man" is an example of perseverance. "In three qualities Lincoln's character is peerless—in his absolute honesty, in his strong faith and in his deep sympathy." It would be well if these qualities were found in all statesmen of to-day.

"The Hugenot in America" and "The Ultimate Supremacy of the Anglo-Saxon" are articles well worth reading

The fifth number of "*The Presbyterian College Journal*" is full of good reading. The articles worthy of special attention are "The Theology of Ian MacLaren" and "The Ideal Preacher" the fourth article of "The Ideals of the Old Testament."

The Bates Student gives several artieles of eonsiderable literary merit. Such as "The Pendarie Ode in Engligh Literatures" and The Three Essential in Education." The "Student" teems with college news.

Other exchanges received: *Argosy, Educational Review, Dalhousie Gazette, Shurtleff Review, Niagara Index, McGill Outlook, University of Ottawa Review, King's College Record, Trinity University Review, Excelsior, Colby Echo.*

De Alumnis

Israel M. Longley, '75, has now held the principalship of the Paradise High School for three years.

O. S. Miller, '87, is practising law in Bridgetown, N. S.

The Baptist Church at Hantsport is prospering under the faithful ministry of G. R. White, '87.

Charles H. Miller, '87, has established a lucrative practice in medicine in Boston.

Harry T. DeWolf, '89, is pastor of the Baptist Church at Foxboro, Mass.

Chas. M. Woodworth, '90, has an extensive law practice in Dawson City.

John E. Eaton, '90, resides at Dedham, Mass., and is one of the rising lawyers of Boston.

Fred L. Cox, '92, publishes the flourishing local paper, the "Outlook" at Middleton, N. S.

Isaac Crombie, '92, is principal of the school at Lawrencetown.

Charles E. Seaman, '92, is making an extensive tour of the world as companion to a young Harvard graduate.

Henry J. Starratt, '93, is taking a divinity course at Kings' College.

Shirley J. Case, '93, is professor of Greek at New Hampton, Mass.

Mary H. Blaekadar, '94, is in attendance at the wayland Institute, waiting for the Mission Board to obtain means to send her to the Foreign Field.

M. Alberta Parker, '94, is engaged in translation from the German in Boston.

D. Livingstone Parker, '94, is pastor of a church in Illinois, U. S.

George D. Blackadar, '91, has accepted the principalship of the Academy at Lockeport for the remainder of the school year.

William W. Conrad, '97, is studying for the Presbyterian ministry at Pine Hill.

A very pretty wedding took place at Oxford, on the 30th. ult. when Edwin Howard Moffatt, '96, was united in marriage to Miss Margaret B. Robb of Oxford, N. S. The bridesmaid was Miss Moffatt, of Acadia Seminary, and the groom was attended by Harry A. Purdy, '96. The ATHENÆUM extends every good wish to the happy couple.

Here And There

"There are more things in heaven and earth than are dreamt of in your philosophy."—*Hamlet*.

A holler place—the mouth.

O *Shaw*, little Freshette, hurry up.

The current faculty invitation "Sup. with us."

Leader in Prayer-meeting "Sometimes a smile is more potent than fifteen minutes talking"

One of his hearers. "Yes especially when it's from a Sem"

Professor. "I suppose you know whether you are all here or not, those not here please say so."

A well-known Senior *has* lately manifested a desire to lead a better life. Like the Pharisees of old he walked among his fellows with his earnest desire expressed not only upon his face but also upon his back.

The board of editors join in congratulations and wish the young brother success.

An item from the Island:—

S-mp-n—"They generally have big times home at this season shooting wild geese."

Witty Junior—"How is it you are here, there could not have been many gunners out last year."

Needless to say we all enjoyed our Easter holidays and felt loth to resume our arduous tasks. But "mirabile dictu" even the college bell shared the general feeling. On the morning of April 3rd, students listened in vain for the tocsin to call them from their accustomed haunts. But not a sound was heard. The Janitor tugged at the bell-rope but his efforts were useless. Investigation revealed the fact that the bell had been effectually silenced by being tongue-tied.

Prof. "Of what gender is Temp(e)"
Soph. "Feminine,—er-r-r,—neuter."
Prof. "Yes, yes, so it *appiers*."

Recent excavations in Egypt have unearthed a number of mummies with this peculiarity :—that one of their nether limbs is longer than the other Evidently this place was the site of an ancient university.

At the recent Gymnasium exhibition a trio of——s were conspicuous by their lack of courtesy. Their witty (?) and sarcastic (?) remarks concerning the performance and the performers will doubtless go *down* (to confront them post mortem.) We are glad to state that a subscription has been started to provide each with a copy of "Manual of Etiquette, or How conduct oneself in Public."

Prof. "Do you think the shades in the nether world have college yells."

Whisper. "Yes, the freshmen imported their yell from there."

It is rumored that the faculty have decided to utilize the X Rays machine on the heads of some of the students before the next exams.

No insinuations of course.

With haughty mein and gaze serene,
He stalks about the college,
His head erect you'd but expect,
That he was filled with knowledge.
When on the street sweet sens he'll meet,
He'll bow so condescending,
The frigid stare and icy air
And awe-struck feeling lending.
But not a jot cares he for aught,
And some have closely reckoned
(Tis truly said) five motions made
Four motions he will second.

The trials of the local editor :—
"Say, I wish you fellows would stop laughing so much."
"Why. Can't you enjoy a laugh"
"No I have been trying for the last fifteen minutes to think of a joke."

If the report, that the Sems are about to order a supply of

class rings, is true, we would suggest that they apply to the college bell.

Prof. "Will you try and subdue the noise in the back seat, gentlemen."

Soph. "I wish you fellows would throw those neck-ties out of the window, I can hardly hear my own ears."

Great *Scott*, did you see Hutch up in the gallery at the reception.

At the Athenæum reception an inquisitive freshman, who had at length come to the end of his long list of questions, absentmindedly regarded his fair partner and mused thusly :—

"Ah let me see, there was another question I wanted to ask of you, what in the world was it" (a long pause) "O yes ! can I go home with you ?"

After a recent prayer-meeting a theologue was heard to remark "I can't say that I derived much benefit from that meeting."

Sympathizing friend "Why I thought it was a good meeting."

"Hang it all man there were only four Sems. there."

For the benefit of those who might entertain erroneous ideas on the subject, we are requested to state that the young man from Sussex, who habitually sits among the seniors at church, is not yet a senior. Apparently the power of attraction at that extremity of the building is so great that he is unable to reach the Sophomore seats.

Prof. "We call a ship, she, do you know why that is ?"

Soph. "Because it is hard to manage."

Among the living pictures given on the 22nd ult. was one of a well-known young lady most appropriately entitled. "Use *Robie*-foam."

THE TEN COLLEGE COMMAMDMENTS (Revised version.)

I

Thou shalt not prefer any other college to this one.

II

Thou shalt not form unto thyself any vain ideas of thy greatness, thy knowledge or thy wisdom ; for a zealous spirit watches over thee,

which will visit the iniquities of thine egotism even to the third and fourth years of thy course.

III

Thou shalt not look upon the instruction of thy professors as vain, for the prof. will not mark that student as perfect who holdeth his instruction as vain.

IV

Remember all holidays and keep them strictly.

V

Write long letters to thy father and thy mother, that thou mayest enjoy the sweetmeats etc. which they will send to thee.

VI

Thou shalt not make unseemly noises in the st[illegible]rs o, the night.

VII

Thou shalt not wear gowns, large pockets, big [illegible] finely-written finger-nails in exams.

VIII

Thou shalt not work thy ponies too hard.

IX

Thou shalt not talk to the Sems on the street.

X

Thou shalt not covet thy neighbor's tobacco, nor his m[illegible]es, nor his coal, nor his kindling, nor his bed-slats, nor [illegible]s packing boxes, nor anything from which kindling may be made, nor anything that is thy neighbor's.

N. B.—Our revised reading for the ten [illegible]n com[illegible]ts crowded out for lack of space. Pocket editions however [illegible] be obtained at the Sanctum for two cents.

As upon the midnight dreary,
Working hard as usual, weary,
On a task that made me sore;
In a realm that's so confounding,
On this column I was pounding,
Which I twice had tried before.
And I vowed ere it was ended
Upon which so much depended
I would try it nevermore.
Then I prayed, I plead, entreated,
For the muse I so much needed,
But I blundered as before.

I have lived to tell the story
Not for love, nor gold, nor glory,
Will I write this awful column evermore.

Acknowledgements

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Unity of the Empire.

The Unity of the Empire.

The Alumni Oration, delivered the 20th of June, A.D. 1907, at the Encaenia of King's College, Windsor, N. S.

By SILAS ALWARD, D.C.L., K.C.

With flag and banneret, with strains of enlivening music, and with thunder of cannon, in a few days the six millions of this great Dominion will celebrate, in fitting manner, the completion of forty years of national existence. From a few disjointed Colonies, with but slight bonds of cohesion, with hostile tariffs, with restricted trade and with contracted intercommunication we have, in this short span, grown into a Commonwealth, which has already challenged the admiration of many countries and attracted the attention of the world. We boast, if boast be permissible, of a territory almost limitless in extent and fabulous in the wealth of its resources; a commercial marine, which carries our sea-borne traffic to all shores; a volume of trade totalling in value over six hundred millions of dollars; a system of railways aggregating twenty thousand six hundred miles, being within ten per cent. of the mileage of the United Kingdom; a great highway with its bands of steel stretching from ocean to ocean and two others in course of construction; and a form of government the freest and best yet devised by the wit or ingenuity of man. And all this, accomplished in four decades, is but earnest of what we yet shall do. The Statesmen, who conceived the scheme of Confederation, who laid its foundations and reared the superstructure, builded better than they knew. As is often the case with great en-

terprises they encountered what seemed insuperable difficulties. It was said no permanent union was possible with such incongruous elements; that trade could not be forced from the Maritime Provinces to the Upper, no more than water could be made to run up hill; that our trade was naturally with the people of the neighboring Republic; and with much more that has long since been forgotten. All subsequent steps taken for the development of the country met with like opposition. In 1868, when Parliament introduced an Act for the purchase of Rupert's Land from the Hudson's Bay Company, for the sum of one million five hundred thousand dollars, it was opposed on the ground that this Great Lone Land, with its Arctic cold and herds of buffalo and wild Indians, was unfitted as an abode for civilized man, and that its purchase for such a sum was a reckless expenditure and could not be justified on the grounds of economy. Yet, as fact is sometimes stranger than fiction, out of this Great Lone Land have been carved three flourishing Provinces, into which are pouring annually hundreds of thousands of immigrants from all parts of the world, attracted by their marvellous fertility of soil. Their yield of wheat last year amounted to over one hundred millions of bushels. Of two of them, the last created, it has been said:—"Put together the whole German Empire, the Republic of France and your England and Scotland and you shall find place for them in these two new Provinces." And also, when it was proposed to construct a railway across the Continent it was met with most determined opposition. In 1880 a resolution was moved in the House of Commons to suspend construction at the foothills of the Rocky Mountains, and members were implored not to ruin the credit of Canada for the sake of twelve thousand white people in British Columbia. It was said the sea of mountains beyond the foothills presented an impassable barrier to its further construction. Yet, in 1885, eighteen years after Confedera-

tion, this great undertaking was carried to successful completion. The veil of the Great Lone Land was lifted, the sea of mountains crossed, and now this national highway is changing the current of trade and travel of Continents. The Canadian Pacific Railway now owns and operates 13,000 miles of railway, together with a fleet of 186,000 tons, yielding annually a revenue of over seventy millions of dollars. In view of what has been achieved in the past and the status already attained, it becomes us to pause and seriously consider the question, whither are we drifting? Well has it been said:—"We have reached the parting of the ways." The overshadowing question of the hour is:—"What is the destiny of the Empire?" Its solution, it would seem, can only be solved in one of two ways: Either separation or Imperial partnership. Separation, with each unit striving as best it may to work out its destiny with the almost absolute certainty of being finally absorbed by some more powerful neighbor. Or Imperialism based upon the principle of mutual support and joint responsibility. Firmly united we would stand four square to all the world. Federated, other nations recognizing our power would court our friendship, thus leaving us to develop our resources, preserve our commerce and advance our financial interests. Federated, we would constitute so great a power as materially to lessen the possibility of war, thereby subserving the best interests of humanity. Since 1887, the period of the first Jubilee Conference, attention has been focussed upon this most important question. The Diamond Jubilee Conference, ten years after, as well as the Coronation Conference of 1902, served to accentuate its importance. A still greater impetus has been added by the Imperial Conference just closed. What, it may be pertinently asked, has been accomplished by the Imperial Conference of 1907? The following may be claimed as some of the results achieved: First, the Conference is made a permanent institution to be

hereafter styled "Imperial," and held every four years, and not as in the past, an occasional occurrence coincident with some great national state function, as Her late Majesty's Jubilee, twenty years ago, her Diamond Jubilee, ten years ago, and the Coronation of King Edward in 1902. Second, an Executive Committee, or Secretarial staff, is to be created as a permanent bureau, in the Colonial Department, the purpose of which, during the intervals of the Conference, is to keep the Home and Colonial Governments supplied with information; to attend to the execution of their resolutions; to conduct correspondence on matters relating to their offices; and to gather data bearing upon the industrial, commercial and political interests of the United Kingdom and her far flung Colonial system. This will, doubtless, tend to facilitate the work of the Conferences and keep alive the interest from sitting to sitting. Third, a fund is to be raised, called the Empire Education Fund, the object of which is to promote knowledge respecting the outlying portions of the Empire, so as to enable the people of the Empire to think nationally and not parochially. Fourth, the Conference of 1907 marks the conversion, or at least the committing, of the leader of the Conservative party, Mr. Balfour, to the principle of preferential trade within the Empire, so ably championed in the Conferences of 1897 and 1902 by the great Colonial Secretary, Mr. Chamberlain. This question will, doubtless, be made one of the issues when appeal is next made to the people. The great self-governing Colonies, the Dominion of Canada, the Commonwealth of Australia, New Zealand and Cape Colony adopted some years ago the principle of preferential trade, each Colony passing the necessary legislation to carry into effect a preference on the goods of the Mother Country imported into these respective Colonies. In the Conference of 1887 it was proposed by one of the representatives, that for the purpose of encouraging trade a

duty of an equal rate on all imports entering the Empire from foreign countries should be imposed, and that the revenue derivable therefrom be applied towards the expense of defending the Empire. The Imperial Government declined to accede to this proposition. When it was proposed in the Conference just closed to reaffirm the following resolution, passed in the Conference of 1902: "That this Conference recognizes that the principle of preferential trade, between the United Kingdom and His Majesty's Dominions beyond the Seas, would stimulate and facilitate commercial intercourse, and would, by promoting the development of the resources and industries of the several ports, strengthen the Empire," Mr. Asquith, Chancellor of the Exchequer, expressed the mind of the Imperial Government in opposition to the settled policy of the Colonial Premiers, with the exception of Mr. Botha, Premier of the Transvaal, as set forth in the above resolution. Not only did the Imperial Government enter its *Non Possumus* against tariff reform generally, but even refused a resolution offered to impose a duty of the trifling amount of one per cent., on foreign goods, to be hypothecated for purposes of defence. In this debate it was shown beyond question, so clear and so convincing were the arguments put forward by the Colonial Ministers, that preferential trade as a means for the consolidation of the Empire, had passed the stage of discussion and had become a settled principle. The question, consequently, simply remains in abeyance, and nothing more can be done until the people of the United Kingdom agree to abandon the strict interpretation of free trade to the limited extent asked for by the Colonial Premiers. A change of ministry would, doubtless, settle it once and for all. When adopted it will mark a stage in the direction of Imperial Federation, since nothing so tends to unite and bind the people together as intimate trade relations. The Premier of Australia has well said:—"Reciprocity alone is the com-

mercial tie which will demonstrate the unity of the Empire, and assist to make it a potent reality." The late Prime Minister, Lord Salisbury, touched the crux of the question in these significant words:—"We live in an age of a war of tariffs. Every nation is trying how it can, by agreement with its neighbour, get the greatest possible protection for its industries, and at the same time the greatest possible access to the markets of its neighbours. * * * It is in this great battle Great Britain has deliberately stripped herself of her armour and her weapons by which the battle is to be fought. You cannot do business in this world of evil and suffering on those terms. If you fight you must fight with the weapons with which those whom you are contending against are fighting." Fifth, if the Colonial Premiers failed in their preferential tariff scheme a most important point was gained in the last resolution adopted by the Conference for the establishment of a new independent mail, passenger and freight route through Canada to Australia and New Zealand, popularly designated the All-Red Route, bringing these last named Colonies within three weeks' journey of the Mother Country, instead of as now six weeks by the Suez Canal. For the purpose of carrying this enterprise into effect financial aid will be asked to be contributed by Great Britain, Canada, Australia and New Zealand in equitable proportions. The transit to these distant countries will be made swift and easy. To Canada such a project will be fraught with inestimable advantage, since the greatest commercial highway of the world will pass from one end of the Dominion to the other. If the Imperial Conference of 1907 had accomplished nothing else, this of itself would be sufficient to demonstrate its utility. Sir Wilfrid Laurier, our Premier, is entitled to the credit of introducing and carrying through this important matter of national policy. These are some of the advantages achieved by the Imperial Conference of 1907. Above and beyond these may be added the indirect

benefits flowing from the free interchange of thought on all great questions of national import by leading statesmen from all parts of the Empire; also the like free discussion of the same subjects in the leading journals of the world. In all of the Conferences, from the first in 1887, the question of Imperial Defence has occupied a prominent place on the list of subjects for discussion. At the last Conference, Australia, New Zealand and Cape Colony, respectively, tabulated the following resolutions on the Conference *agenda:* By Australia—That it is desirable that the Colonies should be represented on the Imperial Council of Defence. By New Zealand—That the question of an increased contribution by the Australasian Colonies to the Australasian-New Zealand squadron should be considered, together with other matters connected with Colonial Defence. By Cape Colony—That this Conference considers necessary the organization of a plan of Imperial defence by which the contributions of each Colony should be equitably fixed and provided for.

Dr. Jameson, the Prime Minister of the Cape Colony, has been most insistent upon this question of Colonial assistance towards defence of the Empire. He believes it would be another link, between the United Kingdom and the mighty circle of her Colonies, which might materially assist in the consummation of a closer union. In the Conference of 1902 Mr. Chamberlain, in emphasizing the question of the Colonies taking a share in the burden of maintaining an efficient navy for mutual defence, made use of the following pregnant words:—"If the United Kingdom stood alone, as a mere speck in the Northern Sea, it is certain that its expenditure for these purposes of defence might be immensely curtailed. It is owing to its duties and obligations to its Colonies throughout the Empire; it is owing to its trade with those Colonies—a trade in which, of course, they are equally interested with ourselves—that the necessity has been cast upon us to make these enormous preparations."

It is to be hoped all of the seven self-governing Colonies will soon be brought to recognize the importance of becoming cocontributors towards the common object of securing an effective command of the sea, in order to protect the trade and secure the safety of all parts of the Empire. The Colonies of Australia, New Zealand, Cape Colony and Natal, however, are now contributors, to a limited extent, for the general maintenance of the navy. The Dominion of Canada still refuses to enter into any arrangement as to a direct contribution. The sum total of the population of the seven self-governing Colonies amounts to sixteen millions, more than one-third of the population of the United Kingdom. The population of the Dominion of Canada is more than one-eighth of that of the United Kingdom. Is it just, is it manly, that the eight millions of overtaxed artizans of England, Scotland and Ireland should have added to an ever-increasing burden the additional tax of contributing to the support of a Navy to shield us from foreign aggression or encroachment and to patrol the marine highways of our far spread commercial enterprises? The objection raised, on the part of Canada, against contribution towards Imperial Defence is, she would have no control over its expenditure, and it would be used towards the maintenance of a Navy exclusively directed by the British Admiralty. It is the old, old question of taxation without representation. It is claimed an Imperial Parliament should be created representing all the great self-governing Colonies, before contribution should be exacted for the general purposes of defence. Is it to be expected that Canada, which ranks seventh in the list of Maritime Nations, with a registered tonnage of seven thousand vessels, can much longer owe the safety and protection of her commercial marine to the generosity of the Motherland? Here we stand confronted by the great question pressing upon us for solution: "Is the Federation of the Empire within the range of practical politics?" Organically to

cement and rear a solid enduring fabric, on the broad lines of equal rights and free representation, is surely possible. This vital question must soon be settled. Not to advance is to retrograde. The larger self-governing Colonies are now arranging commercial agreements with other countries. The bonds of mutual trade not only make for friendship, but are most effective in uniting nations. If we temporize and delay the opportunity may be lost for achieving what we now so ardently desire, closer union with the great heart of the Empire. We need not stop to inquire, how or by what means this important question is to be carried to a successful issue? When it shall have been demonstrated that the safety of the Empire depends upon its accomplishment, British Statesmanship will be found equal to the emergency, as it has been in many a trying crisis in the nation's history.

It is said when Bismarck faced the difficult problem of Germanic unity, a problem more difficult and intricate than that now confronting British statesmen, he counselled patience. He said:—"As long as we have the impulse to unity in the soul of our people, almost any scheme will work. But if we once begin to squabble about details and impose a cast iron constitution no scheme on earth will work. We cannot coerce the national life into narrow channels, but if we foster that life it will make in time proper channels for itself." It was the love of Fatherland that rendered possible the union of the twenty-six petty Kingdoms, Principalities, Duchies and States of Germany. It is love of country that renders its people willing to submit to taxation, most grinding, in order to drill an army and equip a navy sufficient to safeguard its commercial highways and preserve inviolate its national honor. Does the flame of patriotism burn less brightly on British Altars? Does the Anglo-Saxon heart beat less responsive to the well recognized truth, that eternal vigilance is requisite to hold what arms have won? It cannot be. Let us, then, face with equal courage a problem not

more difficult than that already solved by Germany. Acting on the salutary advice of the great German Chancellor, let us cultivate the impulse to unity in the soul of our people. Let us foster the spirit of national life, then this great scheme of Imperial Federation will gradually assume practical shape, and result in certain accomplishment. This spirit of unity is making, we trust, for solidarity in all parts of the British Empire. It was this spirit that welded the disjointed members of the Saxon Heptarchy into the Kingdom of England; that fused the group of Isles in the Northern Ocean into Great Britain; that, across the seas, in Greater Britain, created and solidified these two great Federations—The Dominion of Canada and the Commonwealth of Australia; it was in this spirit Dr. Jameson spoke, when he expressed the hope that, at the next Imperial Conference, the Empire may have another Confederation composed of Cape Colony, the Orange Colony, Natal, the Transvaal, and Rhodesia; and it was in this spirit our Premier spoke, when at Guildhall, in referring to the prediction of the Prime Minister of the Cape, he said: "That is truly an Imperial Policy, and, so long as the British Empire is maintained on these lines, I venture to assert that it rests upon foundations firmer than rock, and as endurable as the ages."

AN

ANGLO-AMERICAN

ALLIANCE

BY

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"Nations are in bondage to army and navy expenditure. May the time come when they shall realize that the law is a better remedy than force."

—Sir Edward Grey.

"Nations by preparing for war spend millions and millions for the purpose that man shall kill his fellowman, who was created in the image of God. It isn't war, but the possibility of war that we must fear. I can only hope that this fund will have the co-operation of every one in bringing men to know the real meaning of war. War is a crime of nations against their God."—Carnegie

(On donating the princely gift of ten millions of dollars to be devoted to the establishment of universal peace)

AN ANGLO-AMERICAN ALLIANCE.

A Lecture Delivered Before the Natural History Society, February 28th, 1911.

Those were the palmy days of Spain, when Ferdinand and Isabella, uniting the crowns of Castile and Aragon, swayed the destinies of a brave and chivalrous people. The Moors, driven from the sunny vales of Andalusia and the vine-clad slopes of Granada; the Cross raised over the glittering domes of fair cities, where long had waved the Crescent; and a new world given to the old, through their enlightened enterprise, were some of the triumphs that graced the career of these remarkable sovereigns. Never is a nation so great as when, oppressed for ages and bound down by the merciless pressure of an unrelenting foe, it has risen in its might, and its swelling energies have burst the fetters that bound it. For eight centuries had the Moslems battened on the fairest portions of Spain, while sheltered by the great bulwarks of nature, the Asturian hills and the fastnesses of the Pyranees, the conquered people cherished a love of country as pure as the flame of vestal altar, and as unshaken as the granite of their mountain home. Here, in their hardy struggle with nature for sustenance, an energetic race was formed, brave, chivalrous and embodying every manly virtue. While thus amidst the sternest difficulties and fiercest trials, the native Spaniards were gradually disciplined for the supreme effort for liberty, their conquerors were fast becoming enervated on the generous soil and under the sunny skies of Southern Spain. The day of reckoning finally came, and the Christians avenged the wrongs of centuries. Their independence secured, an unwonted energy was imparted to the nation. A spirit of enterprise, discovery and conquest bore it on to the accomplishment of the grandest achievements. Her arms were borne triumphantly into foreign countries, and soon Sicily, Naples and the Lowlands of the North acknowledged her supremacy,

while Cortes and Pizarro conquered for her countries in the New World. Such was Spain, shortly after the discovery of America, the leading power in Europe.

What a marked contrast is presented in the status of England, at this period, compared with that of Spain. The cruel Wars of the Roses, which had paralyzed the energies of the people, wasted their wealth, prostrated their infant manufactures, almost suspended agricultural pursuits, and driven commerce from the sea, had but recently been brought to a close. To draw off the minds of his people from so cheerless a prospect at home, Henry VII. entered upon a senseless Continental War, which neither added to his reputation nor contributed to the advantage of the kingdom. Although the traces of the Feudal system were fast disappearing, the great body of the people were little better than slaves. It was the age of the infamous Court of the Star Chamber, one of the most arbitrary engines of oppression that ever disgraced a country. It was a time when men believed in the doctrines of passive obedience, non-resistance and the divine rights of kings. Such was Spain, and such England, two nations destined to play the greatest parts in the New World, when America was discovered. It may be pertinently asked, "which nation will take the lead in colonization, which will secure the most permanent foothold in this land of promise, and which will the most indelibly stamp the impress of its national characteristics and civilization upon a virgin soil?" You would readly respond, the former. She will pre-empt its choicest portions, monopolize its wealth and infuse into the natives something of her own energetic, chivalric nature. History discloses results quite the contrary. It is well to pause and inquire the causes that rendered the career of the one a career of shame, and that of the other, a glorious mission, whose history chronicles the records of the grandest achievements won for civilization.

How intense the excitement when the Old World awoke to the fact that beyond the Western Main was an immense Continent, rich beyond description in wealth of forest, mine and soil, inviting the sons of toil to its shores. This truly was the veritable El Dorado, which many had long pictured in fancy, and do we wonder they right joyfully turned their faces towards the setting sun and embarked for the land of promise? This grand discovery opened up to the nations of Europe a new world of policy. Now, it may be said, con

menced the colonial system of the Old World. Spain inaugurated hers in carnage and spoilation. The cavalier was lured by the prospect of achieving more glorious victories on the tablelands of Mexico and Peru than those won in the vales of Andalusia and Granada. Caravel after caravel bore from Spain to the New World nobles, soldiers and adventurers, intent upon plunder and conquest. The industrial classes, either from want of means to secure a passage, or because of actual restraint on the part of the government, entered not into the spirit of colonization. Industry was checked and ordinary toil despised by the newcomers in these prolific regions. The natives made heroic resistance, but valor was finally compelled to yield to superior discipline, and upon the ruins of kingdoms, probably as ancient as those of Europe, Spain erected a colonial system, the most extensive, the most restrictive and the most impolitic the world ever saw, stretching on the shores of the Pacific ninety-five parallels of latitude, more than half the distance from pole to pole, and sweeping on the eastern coast round the Gulf of Mexico and the coast of South America, almost to Cape Horn. It embraced an extent of territory nearly five thousand miles in length and in places three thousand in width — a country rich beyond the dreams of avarice. What a theatre for the achievement of the grandest triumphs! Spain was unfaithful to her solemn trust. The occasion was lost, and with it her prestige. Her system of colonization was one of restriction and monopoly. She hedged in her possessions with more than Chinese exclusiveness. For many years no ship could clear from a port in Spain except Seville, and could only touch at a few points in the New World. The trade was carried on by a fixed number of vessels, which sailed at stated periods. No one was permitted to emigrate without a special permit from the Cortes. No foreigner could enter the Spanish American colonies, for many years, except on pain of death. The colonies were not permitted to trade with each other, and so far were these absurd restrictions carried, that no colonist could even enter the territory of another without subjecting himself to the severest penalties. It does not require the sagacity of the political economist to predict the results of such a system. Commerce being under ban, all useful industry was checked. Agricultural pursuits were despised. Sterility, the most blighting, soon brooded over the fairest portions of the new world. The precious metals were wrung from the wretched

natives and sent to the mother country to pamper the dissolute retainers of the Court, fast becoming corrupted through affluence and the exercise of almost unbounded power. Soon the avenging Nemisis was upon the track of the devoted nation. The unhallowed thirst for gold led to effeminacy, which in turn hastened the decay of national virtue and the consequent downfall of her power. As her power declined her hold upon her colonies relaxed, till in the early part of the past century all her vast possessions in South America rose in rebellion and finally succeeded in asserting their independence. One by one has she been stripped of the others till the close of the past century witnessed the utter demolition of that giganic colonial system that once evoked universal admiration. Such was the career of Spain in the New World; one characterized by the grossest outrages, the most impolitic restrictions, and finally the most humiliating results. She left no abiding monuments which attest enlightened sway, no institutions worthy of imitaion, no form of government presenting a model fit for adoption, and no lasting trace of thought impressed upon the national sentiment of those she so long ruled. Had Spain been faithful to the sacred trust assumed by her, today, enthroned in splendor and power, she might rule the destinies of enlightened millions on this Continent. Was there no one to point out her true policy? No enlightened statesman to unfold a wiser system? No plilanthropist to wage a crusade against oppression? No patriot to

"Ring out the narrowing lust of gold?"

Alas, there was none, or his voice was unheeded in the din of conflicting interests and the wild tumult of contending factions.

The career of France, on this Continent, has been a checkered, as well as a disastrous one. During the reign of Henry IV., one of the most enlightened and powerful Sovereigns that ever bore sway in that country, an expedition was fitted out under the command of DeMonts, who, in 1604, took formal possession of all North America comprised between the 40th and 54th degrees of north latitude, from Virginia to Hudson Bay. A fierce struggle for supremacy ensued between England and France. It was waged with unabated fury and varying success for over one hundred and fifty years. In 1763 England emerged from the contest

victorious, having extended her sway over the greater part of North America.

The gifted McGee thus eloquently sketches the career of this chivalrous people in America:—"Canada was theirs. Likewise Newfoundland, the uttermost, and one large section of its coast is still known as the French shore; Cape Breton was theirs till the final fall of Louisbourgh. Prince Edward Island was their Island of St. Jean, and Charlottetown was their port Joli. In the heart of Nova Scotia was that fair Acadian land, where the roll of Longfellow's noble hexameters may any day be heard in every wave that breaks upon the base of Cape Blomedon. In the northern counties of New Brunswick, from the Miramichi to the Metapedia, they had their forts and their farms, their churches and their festivals, before the English speech had ever once been heard between those rivers. Nor is that tenacious Norman and Breton race extinct in their old haunts and homes."

Although the attempts of France to maintain her foothold on the Continent ended in disaster, yet many brilliant feats in arms partially redeemed the reverses of a failing cause.

As far back as 1497, five years after the discovery of America, in the reign of Henry VII., an English expedition was fitted out, under the command of John Cabot, to make explorations in the New World. Nothing, however, was effected in the way of colonization for nearly a century afterwards. The first to discover the mainland of the Continent, England was the last to plant colonies on it. In the reign of Elizabeth, Sir Walter Raleigh and a few adventurous spirits established plantations in Virginia. Yet it was not till 1620 the first grand impulse was given to English colonization. Bigotry and oppression drove from its shores some of England's noblest and best, who for principle severed every tie that bound them to the land of their nativity and perilled all in quest of a home across the estranging sea, secure beyond the reach of persecution. King James regarded these fanatical zealots as "too insignificant to be looked after." Could this narrow-minded monarch have seen in vision the unfolding of this humble attempt at colonization; could he have seen the America of today, stretching for thousands of miles beyond the spot where these fugitives of fate landed, thirty-fold larger than his kingdom, and with a population fifteen times greater than those whom he ruled, this hasty exclamation would never have escaped his lips.

In a century and a half the population has grown to over three millions. Mr. Burke, in his great speech on Conciliation With America, delivered in 1775, in which he sought to arrest the insane policy that finally resulted in wrenching the thirteen colonies from their allegiance to the British throne, thus graphically sketched the rapid progress of this infant commonwealth:

"If that angel should have drawn up the curtain and unfolded the rising glories of his country, and whilst he was gazing with admiration on the then commercial grandeur of England, the genius should point out to him a little speck, scarce visible in the mass of the national interest, a small seminal principle, rather than a formed body, and should tell him: 'Young man, there is America, which at this day serves for little more than to amuse you with stories of savage man and uncouth manners; yet shall, before you taste of death, show itself equal to the whole of that commerce which now attracts the envy of the world. Whatever England has been growing to by a progressive increase of improvement, brought in by varieties of people, by succession of civilizing conquests and civilizing settlements in a series of 1700 years, you shall see as much added to her by America in the course of a single life.'"

A century and a half has not elapsed since this great philosophical statesman gave expression to his unbounded admiration at the rapid progress of Anglo-American civilization. Could he have lifted the veil of the future and seen the America of 1911, his gigantic powers of mind could scarcely have grasped the astounding reality. From 3,000.000 its population has grown to 93,000,000; its expanding commerce embraces every shore; its spreading prairies and smiling valleys stretch thousands of miles beyond what were the outposts of civilization 190 years ago. History fails to show its parallel. A few adventurers land on a far distant shore, with the cheerless prospect of starvation or immediate destruction by relentless savages; yet in less than three centuries they have grown into a nation with a population nearly treble that of France, which required over two thousand years to attain its present growth.

Wherein lies the secret of this marvellous progress? It springs largely from the fact the country was peopled by the Anglo-Saxon race, the most daring, energetic and the greatest colonizing race the world has yet seen. When Rome was overshadowing the nations of Southern and Central

Europe with its greatness, in the cheerless, uninviting north, a people was undergoing hardy discipline, on land and sea, in constant strife and endless foray, which produced a nobler type of manhood than Rome, even in the days of the Scipios or the Graechi, could boast of — a race whose brilliant deeds on "flood and field" have extorted the unwilling admiration of the world; whose invincible navy has made their island home "the mistress of the world;" in fine, a race that "has carried freedom and civilization round the world from the rising to the setting sun." Whence the source of its strength? Whence the origin of that forceful will that has stamped itself on all races with which it came in contact? And how formed those "wrestling thews that throw the world?" To answer these questions we must travel far back in history, to those gloomy times of the first conquest of Albion by the Celts, when the native race, rather than yield to the yoke of foreigners, sought refuge in the mountain fastnesses and dreary fen lands of the interior. Here they learned self-reliance, and here was formed that sturdy spirit of independence which constitutes the basic principles of a truly national character. After the Celts came the world-conquerors, the Romans. For four hundred years native and Celt submitted to the stern rule of this masterful race, and through severe training learned the value of settled and uniform law; strong government, as well as thorough military training. Thus was the subject race moulded to the will of its conquerors, at the formative period of national existence, and thus was a bias of character imparted which has made itself felt through subsequent centuries, even unto these times.

The next conquest, that of the Angles and Saxons, occurred in the fifth century. This Gothic people, bold and hardy pirates of the German Ocean, planted themselves, uninvited, in the heart of Britain, from which they could not be dislodged. Flocking into the country, on the departure of the Roman legions, and mingling with the Britons, they eventually merged into the Anglo-Saxon race, and gave to the land of their adoption the name of England. Their love of freedom, in their native homes along the shores of the German Ocean, was proverbial. It had been their boast, they were a free-necked people, who had never bent the knee to a lord. The Romans had found it impossible to conquer this intractable people. It is from these fearless freemen of North Germany, England is indebted in a large measure for

her political liberties. During four hundred years Saxon-England, in spite of internecine wars, made rapid advance in commerce, learning and literature.

In the ninth century the Danes, or the Heathen, as they were called, worshipping strange and uncouth gods, a fierce and cruel people living in a dreary country along the shores of the Baltic and Norway, intent upon plunder and destruction, swept down upon the shores of England, carrying ruin and destruction in their path. The Iliad of woes England underwent, at the hands of these unfeeling marauders, has never been, nor ever can be told. Their pastime was killing priests and monks, destroying churches and burning monasteries. No race ever so impressed itself upon another people as did the Danes upon the English.

Then in the eleventh century occurred the fifth and last invasion and conquest of England, that of the Normans.

Thus through terrible ordeals of foreign invasion and conquest; through untold internecine wars; through unspeakable suffering and privation; through infinite disaster and bitter travail, patiently borne through many centuries, blow following blow, misfortune succeeding misfortune, which would have forever crushed the spirit of a less resolute and determined people, was slowly evolved the most self-reliant and masterful race the world ever produced — that grand old Anglo-Saxon race, which has made liberty and justice the birthright of all lands wherever its flag floats or the roll of its drum is heard. Still further, the neighboring Republic owes much of her success to the readiness with which she adopted the principles of Anglo-Saxon self-government, in the management of her municipal, state and national affairs. Spanish and French principles transplanted in American soil were exotics that soon drooped and withered, yielding but scant fruitage. English principles of government, on the contrary, from the first seemed to flourish in a congenial soil, and the result surpassed all expectancy. Whatever success she has achieved is owing largely to England. It is true, Providence cast the lot of its people in a highly favored land; yet the principles upon which her government and her institutions are based were fought out and secured by our common ancestors in countless struggles between freedom and oppression long years ago. Her system of jurisprudence is based upon the grand English models. Her literature draws its nourishment from the language which Burke and Chatham spoke and Milton

and Shakespeare wrote. Notwithstanding the ill-feelings engendered by the collisions of the past, America would not, on this acount, discard English institutions, nor shut her eyes to the light of English civilization. As evidencing the hostlity that once obtained on her part, a Bill, many years ago, was introduced in the State Legislature of Kentucky, prohibiting the reading of any British elementary work or law, or the citation of any precedent of a British court. The withering rebuke administered by Henry Clay, however, silenced the fanatic zeal of the mover, and defeated the Bill. Providence never designed that the two great branches of the Anglo-Saxon race on this continent, fostering the same ideals, sharing an ever-increasing community of interests in trade, and possessing like principles of liberty and justice, should live divided in sentiment, hating each other. It is gratifying to see a spirit of good-will, of generous kindly feeling rapidly developing beween them. Much of the ill-will engendered by the attitude of England, during the late civil war, was removed by the fearless advocacy of John Bright for the cause of the North. In the darkest days of America's bitter trial, when other tongues were silent or busy in the work of detraction, when misrepresentation was rife, and a large part of the English press was burdened with uncharitable expressions, the voice of Bright, in clarion tones, was raised in the British House of Commons, in behalf of that policy, to use his own expressive words — "which gave hope to the bondsmen of the South, and which tended to generous thoughts and generous deeds, between the two great nations, who speak the English language, and from their origin are alike entitled to the English name." Within the past few years, the change in this direction has been most marked. Less than a quarter of a century ago the relations between the United States and Canada were so strained as to give cause for serious apprehension, in both England and America, growing out of the friction caused by the strict enforcement, on the part of Canada, of the Articles of the Fisheries Convention of 1818. Congress threatened retaliation by the adoption of a measure of non-intercourse with Canada. Skilful statesmanship alone averted so dire a calamity as the passage of such an Act would entail. In May, 1887, Mr. Bayard, Secretary of State, wrote as follows to a leading Canadian statesman — Sir Charles Tupper:—

"The gravity of the present condition of affairs between our two contries demands entire frankness. I feel that we stand at the parting of the ways; in one direction I can see a well-assured, steady, healthful relationship, devoid of petty jealousies and filled with the fruits of a prosperity, arising out of a friendship cemented by mutual interests, and enduring because based upon justice; on the other a career of embittered rivalries, staining our long frontier with the hues of hostility, in which victory means the destruction of an adjacent prosperity without gain to the prevalent party —a mutual, physical and moral deterioration which ought to be abhorrent to patriots on both sides, and which, I am sure, no two men will exert themselves more to prevent than the parties to this unofficial correspondence."

This unofficial correspondence led up to what is generally spoken of as the Washington Treaty of 1888. Notwithstanding its rejection by the Senate of the United States, the friction between the two countries was largely, if not entirely, removed by establishing the modus vivendi arrangement, under which licenses were issued from year to year to American fishermen, upon the payment of certain fees, and giving them permission to enter the bays and harbours of Canada to purchase supplies.

In 1898, an Anglo-American High Commission sat, both at Quebec and Washington, charged with the settlement and amicable adjustment of all possible grounds of controversy between Canada and the United States of America. The following list of topics, as officially stated, in the protocol, shows the latitude of the enquiry and the extent of the powers of the Commissioners. It embraced the following subjects: —

1st. The questions in respect to the fur seals in Behring Sea and the waters of the North Pacific Ocean.

2nd. Provision in respect to the fisheries off the Atlantic and Pacific coasts, and in the waters of their common frontier.

3rd. Provisions for the delimitation and establishment of the Alaska-Canadian boundary, by legal and scientific experts, if the Commission shall so decide, or otherwise.

4th. Provision for the transit of merchandise in transportation to or from either country, across intermediate territory of the other, whether by land or water, including natural and artificial waterways and intermediate transit by sea.

5th. Provisions relating to the transit of merchandise from one country to be delivered at points in the other beyond the frontier.

6th. The question of the alien labour laws applicable to the subjects or citizens of the United States and of Canada.

7th. Mining rights of the citizens or subjects of each country within the territory of the other.

8th. Such readjustment and concessions as may be deemed mutually advantageous of customs duties applicable in each country to the products of the soil or industry of the other, upon the basis of reciprocal equivalents.

9th. A revision of the agreement of 1817, respecting naval vessels on the great lakes.

10th. Arrangements for the more complete definition and marking of any part of the frontier line, by land or water, where the same is now so insufficiently defined or marked as to be liable to dispute.

11th. Provisions for the conveyance for trial or punishment of persons in the lawful custody of the officers of one country through the territory of the other.

12th. Reciprocity in wrecking and salvage rights.

Happily, the most of these questins, which once threatened to become sources of constant irritation, have been amicably adjusted, and a relationship of fair dealing and good-will established between the United States and Canada. Also good fellowship likewise obtains in a marked degree between England and the United States of America. The question, above all others, which most nearly affects us as Candians is, whether this is a mere passing emotion, soon to be forgotten or a feeling destined to grow into a settled conviction, that there should be formed an alliance, both offensive and defensive, between the British Empire and the Republic of the United States in the interests of univrsal peace.

Its desirability had been frequently referred to at representative functions; but these sentimental effusions, however, merely excited passing comment. Yet when the Right Honorable Joseph Chamberlain, in May, 1898, delivered his great speech before the Birmingham Liberal Unionist Association, he sounded a note which awakened a response in two continents, the like of which had not occurred for a generation. This imperially-minded statesman had been referring, in this speech, to the isolation of England among the great powers of Europe; how she in turn had been envied by all and suspected by all, and might become the victim of a conspiracy it would be difficult to withstand; that it became their duty to draw all parts of the Empire more closely together, and to infuse into them a spirit of united and imperial patriotism. Then passing on, he inquired—"What is our next duty?"

> "It is to establish and maintain bonds of permanent amity with our kinsmen across the Atlantic. They are a powerful and a generous nation. They speak our language, they are bred of our race. Their laws, their literature, their standpoint upon every question are the same as ours; their feeli.., their interest in the cause of humanity and the peaceful development of the world are identical with ours. I do not know what the future has in store for us. I do not know what arrangements may be possible with us, but this I know and feel—that the closer, the more cordial, the fuller and the more definite these arrangements are, with the consent of both peoples, the better it will be for both and for the world. And I even go so far as to say that, terrible as war may be, even war itself would be cheaply purchased if in a great and noble cause the Stars and Stripes and the Union Jack should wave together over an Anglo-Saxon alliance. Now, it is one of the most satisfactory results of Lord Salisbury's policy that at the present time these two great nations understand each other better than they have ever done since more than a century ago. They were separated by the blunder of the British Government."

The sentiments of the Colonial Secretary met with general approval on the part of the leading statesmen and the most influential journals of both countries. This proposed

alliance between the two great branches of the English-speaking race tended to throw into stronger relief the undisguised hostility and envy of the European powers.

On the 13th of July, 1898, an Anglo-American League was formed in London, under the Presidency of the Right Hon. James Bryce, with the Duke of Sutherland as Treasurer. The Executive Committee embraced such names as Earl Gray, Lord Coleridge, Earl of Jersey, Sir Stafford Northcote and Sir Walter Besant. The first resolution of the League read as follows: —

> "Considering that the peoples of the British Empire and of the United States of America are closely allied in blood, inherit the same literature and laws, hold the same principles of self-government, recognize the same ideals of freedom and humanity in the guidance of their national policy, and are drawn together by strong common interests in many parts of the world, this meeting is of opinion that every effort should be made in the interests of civilization and peace to secure the most cordial and constant co-operation between the two nations."

That great African Imperialist, Mr. Cecil Rhodes, thus expressed his views of such an alliance: —

> "The two countries have need of each other. It is not for either of us to run after the other. But race will tell. Our interests are the same. To work for the unity of the English-speaking race is the duty of every English speaker who aspires to be a statesman."

The chorus of approbation on this side of the Atlantic was no less decided and emphatic. It met the hearty approval of Whitelaw Reid; Mr. Olney, Secretary of State under President McKinley; Captain Mahan, Senator Depew, and a host of American representatives and senators.

Nor have Canadian statesmen, of both shades of politics, been behind others in assurances of approval of such an alliance. In September last, Sir Charles Tupper, in the course of an interview, at his residence, at Bexley Heath, England, is reported to have said: —

> "Speaking of the German war scare, Sir Charles was asked what position he thought Canada woud take in the event of a European war. He declined to give an

opinion. When it was suggested that a defensive alliance between the United States and Great Britain would be a happy solution and would dispel any fear of England being overwhelmed in an European conflict he was warmly sympathetic. If Great Britain and the United States would stand together, he said, no combination of powers could affect their position. They could keep the peace of the world. I do not mean that they could prevent the antagonisms of European countries among themselves, but they could maintain the supremacy of the Anglo-Saxon race."

Sir Wilfrid Laurier, at Weyburn, Saskatchewan, on the 4th of August, 1910, in the presence of a large number of American settlers, who had recently made their homes ther , said: —

"We welcome you, and we offer you all of our privileges, and I hope that your presence here may lead to an alliance, defensive and offensive, between Great Britain and the United States. If so, the result, in my humble judgment, and I think I know something about it, the result would be that no gun in any part of the world could be shot without the permission of these two nations."

Mr. Robert L. Borden, leader of the opposition, in a speech delivered in the Canadian House of Commons, on the 21st of November last, in referring to the Centennial of Peace, to be celebrated in 1912, said: —

"In that way this Empire and the great adjoining Republic would give to the world an object lesson which is very much needed in these days of great armaments and great preparations for war; and then I am sure we might look forward to a day, which may come, and which I hope will come, when the great Republic and this great Empire, acting together in the interests of humanity and of justice, can command and will command the peace of the world."

So it is seen that veteran statesman, Sir Charles Tupper, to whom Canada is so much indebted for the proud position she occupies today, as well as the leader of the government, and the leader of the opposition, have all given expression to the desirability of such an alliance for the object indicated.

A scheme of an alliance and league of all English-speaking peoples was the dream of that great Canadian statesman, the Hon. Joseph Howe. At the time his utterances were generally regarded as Utopian; but now, after the lapse of several years, they seem within the range of possible achievement. "We look forward, said he, to a day when, in a great federation of peace and unity, the English-speaking lands will be united — when there will be two ruling Christian nations to secure and guard the peaceful progress of the world. This is the consummation most devoutly to be wished for, and those who believe in it and long for it and work for it are not mere dreamers. They dream of that which is to come."

On the 25th of February, 1911, the Hon. Philander C. Knox, Secretary of State in President Taft's Cabinet, in a speech delivered in Chicago, on the proposed Reciprocity Agreement, after remarking upon the improbability that the contemplated change in trade relations would involve any political change or annexation or obsorption, made the following significant statement: —

> "In the higher atmosphere and broader aspects of the situation it is certain that if there should be any great world movement, involving this Continent, Canada and the United States would, as a matter of course, act in the most perfect concert in defence of the common rights of a common blood and civilization."

The present state of unrest among the leading powers of the world; the construction of enormous engines of destruction in the shape of Dreadnoughts, torpedoes and cruisers; the equipment of great standing armies, and the formation of ceeentric alliances, have a signifieancy which bodes ill for national tranquility. While rulers cry "Peace! peace!" the feverish haste of preparation for war goes on apace, among great as well as small nations. Among so much inflammable material a spark might kindle a flame that would envelop the world.

The unexpected alliance recently formed between Russia and Japan, nations so recently engaged in deadly conflict, and possessing so little in common, is a strong argument in favor of an alliance between the Empire of Great Britain and the Republic to our South, having so much in common, in language, race and representative institutions, and whose

interests are so intimately interwoven; in order, if for no higher reason, to guard and protect their mutual interests.

The British Empire's colossal lead, in merchant shipping on the high seas, accentuates the necessity of the preservation of peace. Nearly sixty per cent. of the trade of the world is carried under the British flag. Her enormous commerce, still increasing, shows she is justly entitled to the proud distinction of "the Mistress of the Seas." Her supremacy is largely the outcome of her expanding commerce. In the language of one of her most eminent statesmen:— "Her Empire was created by Commerce, it is founded on Commerce, and it would not exist a day without Commerce." To retain this supremacy, her great commercial highways, which compass the world, must be guarded against, the possibility of hostile incursion, and her "open door" maintained at all hazard. This great asset of wealth can only be preserved by an invincible navy. The wall of steel, by which she defends the arteries of her Commerce and protects her ventures on every sea, imposed for the current year the enormous expenditure of over £40,000,00. This burden, increasing with passing years, is the price she pays, and must continue to pay, to sustain the proud distinction already won. To falter in the race spells disaster, and notes the commencement of her "decline and fall." The keen competition of other nations, particularly Germany, to share more fully in the carrying trade of the world demands increasing effort, and still greater sacrifices on her part.

How important is peace to preserve her status is shown in her enormous investments in foreign countries. The New York Journal of Commerce is authority for the statement that British income from invested capital abroad, actually remitted, is now not less than $500,000,000 a year, and is probably a good deal more.

To guard against the dread alternative of so terrible a scourge as war, we are compelled, however reluctantly, to accept the maxim:—"Si vis pacem, para bellum." Weakness invites aggression. Such is the lesson history teaches. As long as human nature remains as it is, such will continue to be the case.

Of all the leading nations of the world, Germany stands easily first from a military point of view. Her standing army, for numbers, efficiency and completeness of preparation to the minutest detail, is the equal of any two in the first rank of powers. Never was there such an engine of human

destruction forged by the skill of a people as that wielded by the almost absolute will of one man. Did the occasion demand, at the touch of a button, over half a million soldiers, completely equipped and provisioned, and with ready money on actual deposit to meet a sudden emergency, could be instantly set in motion and transported, with the utmost despatch, to any point bordering on her territory. Such a state of preparedness should not be allowed to pass unheeded. In that great country the military spirit is never allowed for a moment to smoulder. It is fanned into life by almost perpetual drill, spectacular reviews and manoeuvres on the grandest scale.

It cannot be supposed Germany, with the set purpose of filching the territory of a neighboring power or working for its overthrow, is subjecting herself to the almost crushing burden which such preparation involves. So far from this, we will accept the theory put forward, that she is merely placing herself in such a position as would, in the event of a conflict in arms, enable her to gain some substantial advantage over her enemy.

Such was her position, in 1864, when Denmark lost, in unequal contest with her, two of her fairest provinces. So, in 1866, when loss of territory was the price Austria paid for the stricken field of Sadowa. And so again, in 1871, when at Sedan, France paid the price of unpreparedness by the loss of the fertile Provinces of Alsace and Lorraine. The policy of Bismack, inaugurated nearly fifty years ago, is the dominating policy of Germany's present ruler. It is in great financial crises the man of ready means wins through the misfortune of others. So in great national crises the nation which is in a position to take advantage of the exigencies of other nations, makes history and acquires territorial expansion.

The rise of the German navy to the front rank, within a period of less than a quarter of a century, is one of the marvellous events of recent times. But yesterday it ranked only fifth in Europe. At the present rate of progress it may before long draw ahead of the navy of the United States, which, at the moment, comes next to the British. Since the Kaiser uttered his famous watchword:—"Our future lies upon the water," he has not for a moment faltered in his purpose to raise his navy to the proud position held by the army. Within twenty years the expenditure on the navy increased nine-fold; the number of battleships six-fold, and

the number of men has quadrupled. This indicates the herculean efforts put forth to place the German navy on a par with the army. The navy is kept in close touch with the army, and, it is said, is constantly practicing the embarkation and disembarkation of troops. There seems to be a note of menace in all this hot haste to construct and equip such formidable engines of destruction on the part of a seemingly friendly power. The Germans claim they have as good a right to build Dreadnoughts as Englishmen. So they have, if their purpose is the protection of their commerce, and not to filch the territory of a weaker power. The terrible strain of this rivalry among the nations may, however, result in disastrous consequence. Such danger is graphically expressed in the following words of Professor Horning, of Victoria College: — "When two lusty opponents stand over against one another, both armed cap-a-pie, there is very grave danger that some comparatively irresponsible person may drop a spark into some tinder and then the "fun" will "begin."

This then leads us back, as already stated, to the only ground of safety, under existing circumstances, for the Empire of which we form a part — to secure peace we must prepare for war. This insane career of rivalry among the nations in preparation for war will continue so long and until two powerful nationalities, such as Great Britain and the American Republic, shall have formed an alliance (both offensive and defensive) to preserve national integrity and the status quo among the nations; then the peace of the world will be asured beyond peradventure, for any combination formed against them would end in certain and speedy disaster.

The question now presents itself, are there any reasons which might induce the neighboring Republic to look with favor upon such an alliance? It would seem there are many. Our neighbors have adopted an imperial policy. They have extended their borders and brought themselves within the sphere, it may be the storm centre, of international complications. They may need more than the moral support of the British Empire. Their commerical interests are great and world-wide, and to safeguard them has imposed an onerous burden. Sydney Brooks, in an article, in a recent number of Harper's Weekly, after commenting upon the warning of Germany's naval increase, and the prodigious preparations for war, or for warding off war, by both

Germany and England, on both sides of the North Sea, propounds the following questions: — "In the scale of American material interests which weighs the heavier, Germany or Great Britain? Are Americans now in sympathy with the British or German form of civilization and of government; with British or German ideals and ethical principles; with the British or the German language, spirit and genius?" After pressing home these queries he imparts the following salutory advice — "To stand by the nation that would fight for the status quo, and not for the nation that fights for dominion and world upheaval."

The Eastern question has been transferred from the Bosporus to the far distant East. In other words, the Orient is fast approaching the Occident. The battle arena of the future may be in and around the shores of the Pacific. The prophecy of the late Secretary Seward, made over half a century ago, seems on the eve of fulfilment. "The Pacific its shores, its islands and the vast regions beyond, will become the chief theatre of events in the world's great hereafter"—was the prediction of this sagacious statesman. The sudden rise of Japan to the full stature of a world power, the crushing defeat dealt by her upon Russia, and the no less unexpected alliance recently formed between them, give color to Mr. Seward's political forecast. More than half of the world's population is within the sweep of the Pacific's territorial surroundings. It is estimated that two-thirds of the undeveloped resources of the earth are in the lands upon whose shores the waters of the Pacific Ocean break. The Republic, in possession of the Philippines, and having an extensive coast line along the shores of the Pacific, is drawn within the range of influence of the great and populous nationalities, whose interests centre here, and she must be prepared to defend and uphold her rights and position against all comers. This may impose a burden which would tax her resources to such an extreme as would imperil her national integrity.

Homer Lea, a retired American officer of distinction, in a remarkable book recently published, entitled "The Valor of Ignorance," has sounded a note of alarm as to the menace confronting the Republic, especially since the Occident entered into close contact with the Orient. According to Mr. Lea, the overshadowing power in the Pacific is Japan. He says: — "Fifteen years ago Japan eliminated China from the Pacific; four years ago she crushed for all time the power

of Russia in this same ocean. Her present strategic position on the North Asian coast gives her complete control of it and all the trade routes that diverge from its shores." * * "As the supremacy of the Mediterranean was necessary to whatever nation was to be supreme upon its shores, so to Japan is the control of the Pacific, not alone vital to her mastery among nations, but to her existence." * * * "It is this singular and undue power that naval and military supremacy gives to a nation possessing it that has confirmed Japan's determination to become the Shogun of the Pacific." * * * "Japan, militarily supreme in the Pacific, becomes industrially the controlling factor in Asia. And in due time, with the mastery of the major portion of the undeveloped wealth of the earth, Asiatic militancy and industrialism shall reign supreme and the Mikado shall become the Mikado of kings."

It may be that Mr. Lea is unduly alarmed at what has been familiarly called the "Yellow Peril." Yet the enormous expenditure for naval purposes recently incurred by Japan must necessarily excite a certain degree of anxiety in the United States of America, whose possesions in the Pacific they are bound to hold at all hazard.

The burden of taxation imposed by the great leading powers in the construction of huge battleships, which after a few years seem better fitted for the scrap heap than for naval purposes, and also in increasing and perfecting their military systems, is causing widespread discontent and will soon become insufferable. And at the same time alliances are constantly being formed, changed and renounced — alliances triple and dual, alliances reasonable and unreasonable; alliances natural and unnatural. To what end and for what purposes are these alliances formulated, changed or renounced? These are questions that press for solution.

In January, 1902, Great Britain and Japan entered into an alliance to maintain their territorial rights in the regions of Eastern Asia and of India and in defence of their special interest in these regions. Three years afterwards, during the war between Japan and Russia, in 1905, by fresh stipulations a second Anglo-Japanese alliance was enacted, by which Great Britain agreed to maintain strict neutrality, unless some other power or powers should join in hostility against Japan — in which case Great Britain stipulated to come to the assistance of Japan and conduct war in common and make peace in mutual agreement with her. This alli-

ance will cease by expiry of time, in 1915. It may, however, be renounced on twelve months' notice by either of the high contracting parties. Strange to say, only the other day an alliance was formed between Japan and Russia. Such an alliance, seemingly strange and unnatural, having no great apparent objective, may yet mean more than is indicated upon a mere superficial view.

The struggle for supremacy in the future may lie between races, rather than individual states. On this Continent we have seen how the Latin was overborne by the Anglo-Saxon race. In fact Latin nations are among the decaying ones. The question may hereafter present itself as to which will be the dominating world power — Saxon or Slav. Its solution may be determined upon purely Darwinian principles, the survival of the fittest. The Slav is developing into a conquering as well as a colonizing race. Where Russia once plants her foot there she remains. "Vestigia nulla retrorsum." What she over-runs she assimilates. She possesses a territory nearly three-fold that of the United States, with a population fast approaching one hundred and fifty millions. During the past century she has, in violation of treaty rights, filched from neighboring states vast stretches of territory, which have become thoroughly Russianized. She long fixed her eye on Constantinople as the seat of her Empire, and to this end bent all her energies with a purpose as settled as it was unpausing. Unshaken by reverses, defeat following defeat, disaster crowning disaster, she would renew the contest elsewhere with like determined zeal. Her over-mastering ambition is to seek an ice-free seaboard, and gain an outlet for sharing the world's commerce. Checked in one direction she renews her ultimate aim elsewhere, and along the lines of least resistance. Effectually blocked by the great European powers in her effort to reach the sea by the way of Constantinople, she pressed down upon China with a momentum that threatened to sweep before it every opposing barrier, her last objective being to secure an outlet to the markets on the shores of the Western Ocean, and thus become a great sea power. Here she met an unexpected reverse at the hands of the nationality of the Rising Sun. Not in the least discouraged by defeat in arms and the destruction of her navy, she may yet achieve, by the subtle wiles of diplomacy, what arms failed to accomplish. Russia allied with Japan may prove a combination of such strength, on the shores of the Pacific, as will in the near future prove

a menace to the peace of the world. Both Russia and Japan have recently appropriated enormous sums for the construction and equipment of Dreadnoughts. For what object? Is it to act in concert for a common purpose, and if so, what purpose?

In view of these alliances, the feeling of unrest abroad, and the anxious haste with which all nations are arming, as if in anticipation of an impending Armageddon, the time has surely come when an alliance should be formed by and between the greatest and most powerful nationalities for the sole purpose of preserving the peace of the world. The nations whose united mandate would be so imperial and power so potential, as to secure such a desideratum, would be the British Empire and the Republic of the United States. The elements of strength which such a combination would command would enable them to defend themselves against a world in arms. The territory comprised within the limits of such an alliance would cover more than one-half of the cultivable land of the earth, containing a population over one-third that of the world.

In addition to the elements of power it would command, such an alliance would be a natural one. They are people of the same or similar origin. They cultivate largely the same ideals and hold in a marked degree the same political faith. They are the inheritors of the same glorious traditions. Their laws and institutions closely resemble each other. On all the great questions which are likely to arise in the economy, policy and management of national affairs, they, in the main, would see, think and act alike. Their interests, commercial and otherwise, in all parts of the world, have much in common. The drawing together then of these two peoples, one in blood, language and aspiration, by such an alliance would render signal service to humanity, because the spirit, principles of freedom and love of law and order they represent would make for the elevation of mankind. It, too, would afford such a guarantee for the peace of the world as would materially promote general prosperity. The safety of these nations, the foremost in civilization and freedom, depends largely upon such an alliance. Great Britain, by her wonderful success in colonization, has excited the jealousy of the continental powers. Some day a combination might be formed bent on her dismemberment. The American Republic now shares with her, to a certain extent, the same danger. In the struggle between representative institutions

and all they imply on the one hand, and despotism and all it implies on the other hand, these two nations should stand side by side. Severed, they might be crushed in detail; united, they would present a tower of strength that would stand "four square to all the winds that blow."

In all matters of commercial interest such an alliance would likewise make for the common good. The country that hereafter will control the commerce of the world will be the dominating power. The trade of the British Empire now almost staggers belief, being two-thirds that of the entire world. To safeguard its channels, to keep the "open door," and to preserve the "bread route" for her own people might, in the teeth of a formidable combination, prove a task beyond even her power; yet all fear of such a contingency would cease to exist if backed by the moral and material support of the ninety-three millions to the south of us. Let the aspirations of these two great nations be one, to make liberty the heritage of the nations, and the peace of the world their loftiest ideal. Let us listen to the voice borne across the sea:—

> We severed have been too long;
> Now let us have done with a wornout tale,
> The tale of an ancient wrong.
> And our friendship last long as love doth
> Last, and be stronger than death is strong.
> A message to bond and thrall to wake,
> For wherever we come, we twain,
> The throne of the tyrant shall rock and quake
> And his menace be void and vain,
> For you are lords of a strong young land
> And we are lords of the main.

And further, in support of such an alliance, it is worthy of mention that English is fast becoming the dominant speech of the world. The tongue of Shakespeare, Milton and Burke is adding conquest to conquest and seems destined, in the not distant future, to be the language of diplomacy as well as of commerce. The French is losing its hold, its declension being most marked in recent years. The spread of the English language, during the past century, was phenomenal. It is admitted to be the best for all purposes of commerce, as well as of diplomacy. By the end of the century, it is predicted, it will be the language of over three hundred millions. Grant Allen predicts that the French, German and

Italian languages will eventually become insignificant and dwindling European dialects, as numerically unimportant as Flemish or Danish in our own day. Grimm, the great German scholar and grammarian, pays the English the following significant tribute: — "The English tongue, which by no mere accident has produced and upborne the greatest and most predominant poet of modern times, may be with all right called a world-wide language, and like the English people, seems destined to prevail with a sway more extensive even than at present over all regions of the Globe; for in wealth, good sense, closeness of structure, no other language now spoken deserves to be compared with it."

An alliance of Great Britain and the American Republic, making for liberty and peace, making for the spread of civilization and representative institutions, making for law, order and righteousness, would prove an auspicious opening to the century we have so recently entered upon, and afford a sure and certain guarantee for the peace, happiness and prosperity of the race in coming years.

A century and a quarter ago an off-shoot of the all-conquering Anglo-Saxon race established itself on the northern part of this Continent and rendered possible the Dominion of Canada. All we are today we owe largely to the forty thousand United Empire Loyalists, by and through whose indomitable pluck and energy were laid deep and broad, and as we trust, the firm and lasting foundations of a great state. From a few straggling colonies with no bond of union we have been welded into a compact nationality, stretching from ocean to ocean, with a population of eight millions. We possess a country of limitless possibilities, whose virgin soil and vast resources are attracting immigrants from all parts of the world. I feel assured we are all one in our hopes and aspirations to make British institutions a grand success on Canadian soil. Love of country, I believe, is the dominating factor of our Canadian people. It should be the distinguishing characteristic of every true man. It was love of country that built up the commercial supremacy of Holland. It was love of country that fired the hearts of the people of the low countries, who, rather than submit to foreign dictation, broke their dykes and welcomed the invasion of the sea. We possess in these stern latitudes the material out of which heroes are made. Who can tell what lies in our immediate future? There doubtless will come a time, amid its changes and uncertainties, when some sacrifice

greater and dearer than houses or lands, or anything material, will be demanded. The legend of Manlius Curtius, as depicted in the pages of Livy, is one of the most attractive in Roman story. Some fearful convulsion had opened a chasm in the very centre of the Forum. All human efforts failed to fill or bridge it over. The people consulted the Oracles; but they were dumb. They then appealed to the Soothsayers, and there came the doubtful response: — "To it must be devoted that which Rome holds the most sacred." Manlius Curtius, hearing the reply, all armed and mounted urged forward his steed, and leaped into the yawning chasm, shouting as he did: — "What more sacred than arms and life?" The chasm immediately closed and Rome was saved. I feel assured should the emergency arise in our country, demanding not only a material, but a higher, even a sacred sacrifice, with the hour will be found the man. Let us then, emulating the patriotic of other times, work cheerfully together for the consummation of this glorious object — the building up along the lines of these northern latitudes a powerful nationality which in the onward march of civilization will keep step wth the great English-speaking countries of the world, and towards which will beturned the eyes of all, looking for the better time to come.