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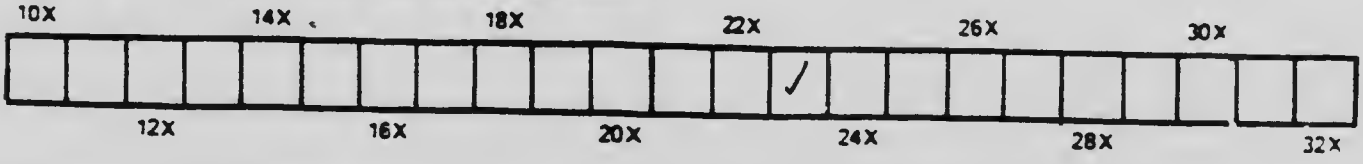

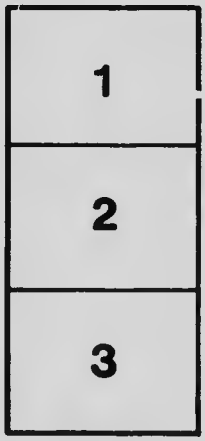

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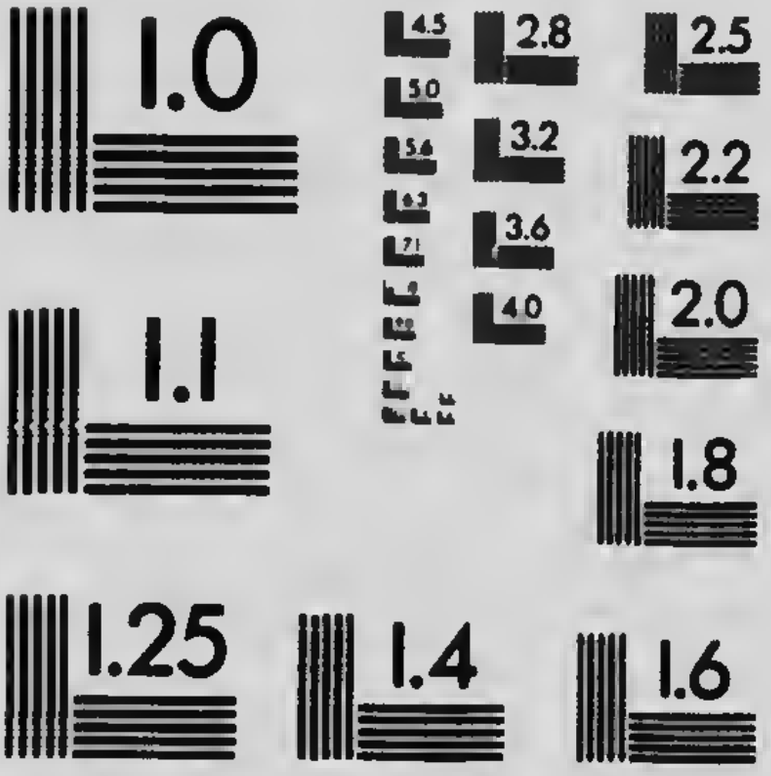

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Unity of the Empire.

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."

"Our Western Heritage."

"Then and Now:"

OR, "THIRTY YEARS AFTER."

LECTURES DELIVERED BY

SILAS ALWARD, D.C.L., K.C.

"I feel as convinced as I am that to-morrow's sun will rise, that "if you keep true to the highest ideals of duty and disinterested service, "nothing can prevent you from becoming, perhaps before the close of "the present century, not only the granary, but the heart, soul and "rudder of the Empire."

—EARL GREY

In responding to an Address of the Canadian Parliament presented him in May, 1910.

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It was my good fortune to be at Ottawa, during the special Session of Parliament, in 1880-81, and to hear the great speech of SIR CHARLES TUPPER on introducing the Bill to incorporate the Canadian Pacific Railway Syndicate, and the brilliant speech of MR. BLAKE, then leader of the Opposition, in reply. Both speeches take high rank and were equal to the occasion and such as might be expected from the eminent statesmen who delivered them. It was likewise my good fortune to visit our Northwest in 1881 and travel in the first through train of the Canadian Pacific Railway from Winnipeg to Brandon. I have twice since crossed the continent by the Canadian Pacific Railway, and thus have had a fair opportunity of forming an estimate of the resources of our magnificent heritage.

SILAS ALWARD.

ST. JOHN,

February, 1910.

"There is no occasion to exaggerate where plain truth is of so much weight and importance. But whether I put the present numbers too high or too low, is a matter of little moment. Such is the strength with which population shoots in that part of the world, that, state the numbers as high as we will, while the dispute continues, the exaggeration ends. While we are discussing any given magnitude, they are grown to it. While we spend our time in deliberating on the mode of governing two millions, we shall find we have two millions more to manage. Your children do not grow faster from infancy to manhood, than they spread from families to communities, and from villages to nations."

EDMUND BURKE.

OUR WESTERN HERITAGE.

A Lecture delivered in the Mechanics' Institute St. John, January 23rd A. D. 1882

In the graphic picture drawn by a Roman historian of the wild country beyond the Rhine, its people were represented as sunken in gross barbarism; its land a series of sand hills, morasses and tangled forests; its winters desolate beyond description, and its summers uncheered by the genial influences shed by Southern skies. Nearly two thousand years have wrought their changes. Imperial Rome lives but in name,— the story of her greatness a "school boy's tale, the wonder of an hour." The once unpromising territory, which bordered on the outskirts of the Empire, has become the seats of great nations, populous and powerful with flourishing cities, centres of wealth, refinement and culture.

Another historian drew a no less graphic picture of the dismal islands in the North Sea, as they appeared to the Roman Legions in the early years of their conquest. To the polished race of sunny Italy the foggy shores of Britain seemed a land unblest by Heaven and unfit for the abode of civilized man. He gravely writes — "In one Province of the Island, it was said, the air was such that no man could inhale it and live. To this desolate region the spirits of the departed were ferried over from the land of the Franks at midnight." Here, too, it was said, the vine would not grow, and the earth responded with but niggard yield to the husbandman's toil. Roman matrons, it is recorded, awed their children to silence by descriptions of the wild man of Britain. Likewise nearly two thousand years have wrought their changes, and now these once worthless islands, as judged by Roman estimation, constitute the seat of an Empire, grander far than that of Rome in the zenith of her greatness — an Empire whose expansive commerce embraces every shore and whose brilliant achievements, on flood and field, have extorted the unwilling admiration of all lands.

Two hundred and sixty-one years ago, the twenty-second of last December, there landed on the shores of New England a band of exiles in quest of a home, where they might serve God according to the dictates of their own conscience. The outlook was cheerless beyond description — a rock bound coast, mantled in the snows of winter — an unexplored country, the abode of [illegible] less savages — privation and suffering the immediate prospect of the future — and yet, this unpromising germ has developed into a powerful nationality, which embracing two continents, boasts of a population greater than that of either France, Germany or Austria; many of whose States are larger than great European Kingdoms and whose boundless resources have yet scarcely begun to be developed. And what, I ask, do these historic references prove? That the unknown is generally unduly disparaged; that the foundations of great nations were laid under the most unpromising circumstances; and that time, which is on the side of all new countries, is sure to correct error, however gross, and vindicate merit, however traduced.

Our Western Heritage has shared the fate of what belonged to the unknown. No country has suffered more from unjust detraction. By some it has been represented as a waste howling wilderness, given over to desolation and the storms of an almost constant winter. By others, as the counterpart of Dante's "Inferno"; a country of barren steppes, and when not bound in icy fetters, deluged with incessant rains; the fit abode of the buffalo and the untutored savage of the wilderness — utterly unsuited for successful colonization. Yet the darkness, which has so long enveloped it, is being rapidly dispelled, and we are gradually, yet none the less surely, learning, how great is the heritage of this, the latest born of nationalities; this, the land, as styled by the Earl of Beaconsfield, "of illimitable possibilities."

So little prized was this part of England's dominion in America, that in 1670, when Charles the Second granted

the Charter to the Hudson Bay Company, the only rent reserved by the "Merry Monarch" were two elks and two black beavers, whenever he or any of his successors should enter the ill-defined and unknown territory embraced within the four corners of this famous document. The operations of Prince Rupert and his one hundred and seventy co-adventurers extended over an almost limitless area, stretching from ocean to ocean and from the vague boundaries of the South to the Arctic Seas. Forts and trading posts were established, at an early day, on the bays, lakes and the banks of the great inland rivers. The hardy pioneers, on these remote outposts, made but little attempt at cultivating the soil. In 1749 a motion was made, in the British Parliament, to revoke the Charter, on the ground of non-user, which, however, proved unsuccessful. Then the Company had only five forts and one hundred and twenty employees.

The uncertain limits of the charter enabled the Company to lay claim to that vast extent of country, stretching up the valley of the Saskatchewan to the base of the Rocky Mountains, as well as that embracing Lake Winnipeg, the Red River of the North and its tributaries. For one hundred years it prosecuted the fur trade with marked success. One hundred and fifty years ago, in 1731, the first white man, a Lower Canadian, visited the country, now known as Manitoba. He descended the Winnipeg River to the Lake, ascended the Red River to the Assiniboine and explored the lands to the west for many miles.

In 1784 a Canadian company was formed, consisting principally of Montreal merchants, for the purpose of trading in the Great Lone Land. They soon extended their operations across the Valley of the Red River and the Fertile Belt to the Pacific coast. They prosecuted their enterprise with great vigor, employing five thousand men. Shortly after another trading and fur company was formed, called the X. Y. Company. It could not but follow, in the natural course of events, that these rival

companies would soon come into collision. For years their history was but a series of forays and reprisals, ending often in bloody feuds, which completely handicapped their operations and led to a reckless prosecution of their trade. To such a pitch did these rivalries extend, that Sir George Drummond, then Governor-General of Canada, in 1816, was under the necessity of sending a regiment of soldiers to the Red River to quell the disturbances and keep the peace. The hardships undergone by the soldiers in reaching their destination, considering the wilderness state of the country, can scarcely be imagined, much less described. In one of the skirmishes between the adherents of the Hudson Bay Company and the Northwest Company, twenty men lost their lives, among whom was Governor Semple.

At this time, sixty-six years ago, the stock of the Hudson Bay Company, which every one now is so keen to buy, reached its lowest figure, no dividends having been declared for several years.

In 1821, two of the rival companies, the Hudson Bay and the Northwest, amalgamated and thenceforth their operations were carried on in the name of the Hudson Bay Company. Sir George Simpson was the first to fill the high position of Governor of the united companies. For nearly forty years he faithfully discharged the onerous duties of this high trust. In 1860, at his death, he was succeeded by Governor Dallas. In 1864, Dallas resigned and MacTavish became his successor. In 1869 the Hudson Bay Company ceded, with certain exceptions, their territorial rights in the Northwest to the Dominion Government for $1,500,000. The reservations consisted of their forts, factories and large tracts of land around their trading posts, amounting in the aggregate to fifty thousand acres. Besides these, there was a further reservation of one-twentieth part of the lands set out for settlement in the Fertile Belt. The Fertile Belt for the purposes of the agreement of surrender is bounded on the South by the

United States territory; on the West by the Rocky Mountains; on the North by the north branch of the Saskatchewan, and on the East by Lake Winnipeg, and the Lake of the Woods and the waters connecting them. For two hundred and twelve years this powerful corporation has carried on its operations in the Great Lone Land. Notwithstanding the extinction, or rather partial extinction, of its territorial rights, it is still a wealthy and influential organization, possessing immense tracts of valuable land, controlling trade in many of the most important centres of the country and wielding vast municipal and political influence. It is worthy of note that the Hudson Bay Company's shares have risen in value more than thirty-three per cent. during the past year. Their lands, rendered valuable by the railway operations of the Syndicate, are being sold for six dollars per acre. The Company have now upwards of fifty forts and give employment to more than three thousand persons. Mr. Brydges, whose connection with the Intercolonial Railway brought him into contact with the people of this city, is the Chief Commissioner of the Land Department at the handsome salary of ten thousand dollars per year. Hudson Bay stockholders entertain great expectations for the future.

The first attempt at colonization on the Red River, was made in 1812, by a number of farmers from Sutherlandshire, under the patronage of the Earl of Selkirk. This distinguished nobleman purchased, in 1811, from the Hudson Bay Company, a tract of land covering 116,000 acres, on the left bank of the Red River, between the Assiniboine and Lake Winnipeg, and here he determined to plant the evicted tenants from the estates of the Duchess of Sutherland. These brawny Highlanders had been expatriated by an act of harshness, which still rankles in the breasts of their descendants. Such hardy sons of toil from the bleak hills of northern Scotland were fitting pioneers for the settlement of this country. They sailed from Stornoway, in the Island of Lewis, in 1811, and reached

Fort Churchill, in Hudson Bay, late in the Autumn. Here a winter of unusual severity admirably prepared them for that Iliad of privations and sufferings they were destined so soon to undergo. In the early spring they threaded their way up the Nelson River to Lake Winnipeg; crossed it and ascended the Red River to the spot that now marks the site of Winnipeg. Contemplate for a moment their isolated position, in the very centre of the American continent, 1600 miles from the nearest city. What condition could possibly be more cheerless?

"All hope abandon ye who enter here,"

seemed the fit welcoming. In addition to this they were looked upon as intruders by the Northwest and X. Y. Companies and were soon drawn into the bloody feuds, which for the next four years rendered the annals of this part of the British Empire a disgrace to civilization. Their houses were burned by the Indians, whose deadly hostility they encountered from the first. And to cap the climax, the locusts swept down upon them, converting their fields expectant of a golden harvest into barren wastes. Do we wonder their brave hearts well nigh despaired of hope? But

"Time and the hour runs
Through the roughest day."

As the years passed by the Indians and grasshoppers ceased from troubling and the weary colonists were at rest. Last year there died at Kildonan, some eight miles below Winnipeg, the last survivor of Selkirk's settlers, at a good old age, the connecting link between a gloomy past and a promising future.

The extinction of the territorial rights of the Hudson Bay Company, barring the reservations indicated, by the purchase of 1869, marks the dawn of a new era in the Northwest. On the twelfth of May, 1870, an Act was passed in the Dominion Parliament, establishing the Prairie Province, in the very heart of the Great North American

continent, 2500 miles from Halifax, the capital of the most eastern of the Dominion Provinces. This small province extended three degrees east and west along the forty-ninth degree of north latitude, and one and a half degree north, measuring 136 miles in length by 104 in width, and containing an area of 13,340 square miles, or in other words, a province one-half the size of New Brunswick. It lies in the latitude of Southern Belgium and Northern France, its capital being on a line of latitude south of that of London; south even that of Brussels, the capital of Belgium, and seven degrees south of that of Edinburgh. Last year its limits were very considerably extended, its western boundary having been pushed one hundred and two miles further west, so as to include Fort Ellice, at the junction of the Assiniboine and Qu'Appelle Rivers. Its area now is larger than that of any other province in the Dominion except British Columbia and Quebec, and it is nearly six times the size of New Brunswick.

The progress of Manitoba, during the past decade, has been most marked. Its population, in 1870, was 12,000; now it is 60,000. In 1870 it took thirty days to receive a despatch from Ottawa; now its capital receives daily bulletins from the important commercial centres of America and the capitals of all the great European kingdoms. In 1870 the nearest railway to Winnipeg was four hundred miles distant, at Saint Cloud. Now every morning three trains leave this city; one south, across the American boundary. Another east, for Rat Portage, in the direction of Thunder Bay; and another west, which runs as far as Brandon, awakening echoes along the valley of the Assiniboine, the rolling prairies of the Little Saskatchewan and beyond the Brandon hills. In 1870 the military expedition, under Colonel, now Sir Garnet, Wolseley, was three months in reaching Winnipeg from Collingwood, on Georgian Bay. Now you can take the train tonight at Saint John, at the close of my lecture, and next Saturday night find yourself in Winnipeg, purchasing city lots at

Wolf's auction rooms, with a fair prospect of making enough in one night to pay all the expenses of your trip there and back again, and leaving some spare cash in your pocket. In 1870 Winnipeg had a population, all told, of 215 souls; now it is 15,000 and boasts, that at the close of the next decade, it will have outstripped Toronto. In 1870 there were only thirty buildings in the place; last year over a thousand were in course of erection. In 1870 there was only one weekly mail from the east, by the way of Pembina; now the postal system overspreads, like a network, the whole Province. In 1870 a few mean shanties, surrounding Fort Garry, constituted the humble capital of the little Prairie Province; now it rejoices in public buildings, warehouses, stores and private residences, that would do no discredit to the much more pretentious cities of Montreal and Toronto.

In 1870 lots in Winnipeg, that went begging at the moderate figure of twenty dollars, are now being sold for three, four, five and six thousand dollars each. In 1870 ten lots on Main Street were offered to a Saint John man for one thousand dollars and declined; and last year they were sold for $140,000. This contrast will best illustrate the marvellous progress made in the Northwest, during the last ten years. Judging from the past, who will undertake to set limits to its possible future?

The ride by rail over the Saint Paul, Minneapolis and Manitoba road, down the Valley of the Red River of the North serves to give one an idea of the immensity of the prairie stretches, which are the distinguishing features of the Northwest. All day long the train sweeps across a sea of almost perfectly level country through this great valley, which is over three hundred miles in length by an average width of fifty. It rises with a gentle incline of three feet to the mile, on each side of the river, for twenty-five miles and then sweeps off into rolling prairie away beyond the limits of vision. The river's course can be descried by a fringe of trees that skirts its margin; but the traveller

does not catch a view of its waters until Winnipeg is reached. Settlers are rapidly filling up the waste places of this vast valley, which has an acreage south of the Canadian frontier, of twenty-two millions. Saint Paul and Minneapolis, the twin giant cities of the American Northwest, are competing for the trade of Northwestern Minnesota, Dakota and Montana. Minneapolis, on account of her enlarged milling capacity, requires about forty millions of bushels of wheat annually, or one-tenth of the whole annual yield of the United States. About twenty-five thousand barrels of flour are ground here daily.

Late at night Winnipeg is reached, and the tourist awaits impatiently the light of day to enter upon the agreeable task of sight-seeing. It would prove but purposeless to enter upon a minute description of Winnipeg. The subject has been talked and written threadbare. Bluebooks, pamphlets and the letters of correspondents, "thick as autumnal leaves in Vallombrosa," have been strewn before you descriptive of the gateway of the Northwest and the country beyond its portals. Austin of the London *Times*, Dr. McGregor of the *Weekly Scotsman*, Principal Grant of the Toronto *Globe*, not to speak of lesser lights, have graphically outlined in pen pictures the striking features and chief points of interest to be seen in this ambitious city. It would only be repeating an old story to say — Winnipeg is today the most progressive city in the Dominion of Canada — that its land speculations, in the near future, will rival in magnitude that stupendous stock-jobbing scheme of the eighteenth century, known as the "South-Sea Bubble" — that to possess a corner lot is the highest good — that it is a city of magnificent distances, with one great street two miles long and one hundred and thirty-two feet wide, throwing off side streets, in one direction to the Red River and in the other, away into the prairie — that its auction rooms are nightly crowded, where excited bidders gamble in city lots at extravagant figures — that here, land agents, in their graphic portrayal of choice townships

and fine sections, surpass the inimitable description of "Eden" by Dickens, in that masterly work of fiction, "Martin Chuzzlewit" — that it boasts of three colleges and a paper University — that it is vexed with its perpetual sewage question, just as Saint John is with its *water* question — that while it is a city with but one steeple, its morals are beyond question; this to be understood in a strictly Pickwickian sense — that its water is execrable — that the visitor soon takes a deep interest in real estate, especially after a rain, when, with a homestead on one foot and a pre-emption on the other, with faltering step and slow, he threads his way along the wretched side-walks of Main Street — that to have lived there one month renders one an authority for every matter and thing, whereof the memory of man runneth not to the contrary, and to have lived there a year — one full year — causes one to be looked upon as an ancient of days.

But why tarry in the city, compelled to undergo the exquisite torture of listening to the creaking of the quaint Red River carts with their tandem teams of harnessed oxen setting out from Fort Garry, on their long voyage of eight or nine hundred miles, or doomed to run the risk of being devoured by land sharks, when the broad prairie, more fascinating than ocean itself, invites to explore its almost measureless expanse? Before entering, however, upon a description of the country, it might not be amiss to devote a short time to a consideration of the strange blending of races in the Northwest.

The Indian is the substratum in the social organism. To him the times seem sadly out of joint. The mournful expression of his countenance betokens the woful falling off, in his view from those halcyon days, when he could wander at his sweet will over these vast prairies in pursuit of the buffalo, or thread the courses of the winding rivers in quest of game. His reservation seems a land of exile; the restraints of civilization, a burden he would gladly throw off. The treatment of the Indians by our Government constitutes

one of the brightest pages in our history, and is especially noteworthy, when contrasted with that of the United States Government. When the Indians relinquished their territorial rights, three important provisions were incorporated in the treaties made with them. In the first place, choice and valuable reservations of land were set off for them and strong inducements held out to cultivate the soil, in the shape of gifts of agricultural implements, domestic animals, seed grain, and a donation of money to every one who would remain on the reserve. Measures, too, were adopted for the education of Indian children. And in the third place, legislation was secured for the exclusion of the sale of liquors from the Reserves. But above and beyond all this, faith has been kept with the Red Man of the prairie. There are ninety thousand Indians in the Dominion all told. Besides the thirty-five thousand in British Columbia, there are forty thousand in the North-west. A Mounted Police force of three hundred, all told, is sufficient to keep the peace among the various tribes scattered all over the country. We hear of no wholesale murders; no nameless acts of rapine; no forays and midnight deeds of horror, on the part of the Indians. And why? Is it because of fear of this insignificant force of three hundred? No, "Not the Three Hundred." These they could annihilate in "one fell swoop." It is because of what is behind the three hundred; the power, that keeps faith either of a promise or a threat; the sword, which

* * * "is not in haste to smite,
Nor yet doth linger."

The reply of the little constable of the Old Bay State to the bully, who threatened violence when process of law was executed upon him, was admirable. "Ponder well before you execute your threat. It will not be a small man of five feet two you will shake, if you lay hands on me. You will shake the whole State of Massachusetts which is behind me."

To my mind that was a sublime sight, worthy of passing into history, when a lieutenant and two troopers rode down from Fort McLeod to the camp of Sitting Bull and demanded the surrender of two of his braves, who were implicated in the murder of a Cree. There stood the vanquisher of General Custer surrounded with two thousand painted warriors armed to the teeth. The demand is peremptorily made. Sitting Bull hesitates. Slowly taking out his watch and drawing his revolver, the lieutenant, in words of defiance, thunders forth — "I will give you just two minutes to make up your mind." The redoubtable warrior and his braves quail before that presence and within the prescribed time the surrender is made.

Next in order, and higher in the social scale, are the Metis, or half-breeds. Of these there are three classes — the French, English and Scotch, half-breeds. They seem peaceable; but lack energy and enterprise. For the most part, they evidently are hewers of wood and drawers of water. Some, however, are distinguished for great acuteness and more than an ordinary share of intellect. The Premier of Manitoba is a half-breed — the Hon. Mr. Norquay. I formed the acquaintance of a lawyer at Portage la Prairie, a half-breed, and found him exceedingly courteous, possessing a liberal education and respectable legal attainments.

In the north of Manitoba, fifty-six miles from Winnipeg, at Gimli — signifying in English, Elysium — is the colony of New Iceland. These descendants of the grand old Norse race emigrated to Canada in 1875 and settled in Victoria County. They became dissatisfied and the Government transported them, at the public expense, to the Northwest. Their Reserve embraces an area of 273,000 acres. They have failed to justify the expectations of those who were instrumental in establishing them in the country. At one time they numbered about two thousand. Nearly one-half of them, however, have left and wandered off to the United States.

The Mennonites, on the contrary, have proved a far more valuable acquisition to the country. This strange people have a remarkable history traceable through three centuries of persecution. The founder of the sect was Simon Menno, from whom they take their name. They were the Puritans of Western Prussia, and for conscience sake, one hundred years ago, took refuge in Southern Russia, on the Sea of Azof. Their distinguishing tenets are, not to take an oath, and not to bear arms. The Russian Government entered into a solemn pact, exempting them from military service, and conceding certain other well defined immunities. In 1871 the Muscovite broke faith with them and rather than submit to conscription, they crossed the sea, under the pressure of a conscientious scruple. While many wandered off to Kansas and Nebraska about ten thousand of these hardy people have found homes in the Canadian Northwest. There are two large settlements of Mennonites in Manitoba. One on Rat River, on the east side of the Red River; the other between Emerson and the Pembina Mountains, on the west side of the Red River, known as the Dufferin Reserve. The Rat River Reserve consists of eight townships, embracing 174,000 acres, with twenty villages. The land being low and marshy many families migrated to the Dufferin Reserve. Out of seven hundred families who settled here only three hundred and ninety-six remain. The Dufferin Reserve contains some of the best land in Manitoba and consists of seventeen townships, of 370,000 acres, with thirty-two villages and 1300 families. The Canadian Government gave them these large tracts of land outright and in addition loaned them $100,000 at six per cent. for eight years to assist in building and in their farming operations. They brought with them half a million in cash. The Government exempted them from military service and gave them the liberty to conduct their schools as they might think best. They are a hard working, loyal, thrifty and peaceable people. They live in villages and to a certain extent are

communists. Their manners are exceedingly primitive and they hasten but slowly to adopt the habits and customs of more civilized people. A whole family eats out of one dish, using their fingers instead of knives and forks. Their village priest, whom they elect, is compelled to earn his bread by the sweat of his brow. So, with the village doctor. And happy people, as they never go to law or take an oath, they have no need of a lawyer. They are said to be avaricious and seem to have accepted Iago's advice to the Moor — "Put money in thy purse." They mingle but little with others, and strive to preserve their habits, customs, language and traditions intact.

The other settlers consist of English, Irish, Scotch and Canadians. Nine-tenths of the immigrants that have settled in Manitoba, during the past year, are from the Province of Ontario. Literally they have gone up and possessed the land. Very few New Brunswickers or Nova Scotians are to be found on the farm lands of the Northwest. The immigrants that are pouring into the country are as fine a class of men as are to be found in any place in the world. Intelligent, energetic, with an eye to the main chance, upon the whole temperate, determined to succeed and blessed with strong, vigorous physiques, they are just the ones to take occasion by the hand and lay the foundations of great States — just such as you might expect, "Where Saxon blood gives evidence of liberty, civilization and manhood." Last year twelve thousand arrived at Winnipeg, who expressed themselves as determined to take up a permanent settlement in the country.

Having glanced at the people, who inhabit it, we pass on to the country itself. On the east side of the Red River, between Emerson and Winnipeg, and twenty miles west of Winnipeg, in the Valley of the Red River, much of the land is low, marshy, and at certain seasons of the year, inundated with water, on account of which agriculture has not been prosecuted with any degree of marked success. Many farms of excellent soil have been abandoned and

their former occupants have made selections in the rolling prairies to the west, or left the country in disgust. This accounts for many bringing back such unfavorable accounts of the country six or seven years ago, before it was properly explored beyond the Valley of the Red River, and when facilities for reaching the higher lands beyond were so limited. A system of drainage, under the joint operation of the Dominion and Local Governments, has been commenced, which will result in the reclamation of large tracts of the most valuable lands in the vicinity of Winnipeg and the Red River Valley. The total length of these drains already exceeds one hundred and fifty miles.

A few days spent at Portage la Prairie, said to be the finest stretch of farming land in Manitoba; a drive across the country to Lake Manitoba; a run by rail over the big plain and the Grand Valley; a drive on a buckboard, an institution peculiarly adapted to use on the prairie, down the Valley of the Little Souris and around the Brandon Hills; freely conversing and mingling with the farmers in their newly selected homes; enabled me to form a pretty accurate idea of the richness of the soil and its wondrous capabilities as a wheat-producing country. For the most part the soil is a black loam, purely a vegetable formation, without rock, gravel or sand, between two and three feet in thickness, resting upon a sub-soil of clay. As the snow melts in the Spring, the water is absorbed and the clay becomes surcharged with moisture, which quickens vegetation when the summer sun heats the surface, and all through the season prevents the crops from being injured by drouth. The clayey sub-soil thus serves as a reservoir, retaining a sufficient supply to fructify the surface where the evaporation from almost constant sunshine is very great. This heat and moisture account for the rapidity of vegetation and the marvellous yield of all kinds of root crops. Tract after tract of such land is to be found, varying from twenty and thirty to fifty miles in length, by fifteen and twenty in width, every foot of which is of the des-

cription indicated; free from stones and trees, all ready for the plough, and which, the first year of culture, will yield from thirty to thirty-five bushels of wheat to the acre, sixty of oats, and from two to three hundred of potatoes. And such potatoes! Some two, three, and even three and a half pounds each in weight. And such wheat! The best produced on the continent of America, weighing sixty-six pounds to the bushel. The Manitoba wheat commands a higher price in Minneapolis than that grown in Minnesota. This excellency arises from its flinty hardness—in other words, its "gritty" consistency. And this land may be cropped forty and even fifty years without its soil becoming exhausted. In Kildonan, a part of the old Selkirk settlement, fields are to be seen where crops of wheat have been reaped for sixty years in succession without the application of manure. The immigrant, who has just homesteaded his lot here, starts where he ends after ten or fifteen years of hard labor, who must needs fell the forest trees, log roll, stump, gather up the stones and coax the stubborn glebe by the application of manure, into anything like tolerable productiveness. Compared with the neighboring States, the average yield of cereals is much greater in our Northwest. In Manitoba the average yield of wheat is twenty-five bushels to the acre; while in Minnesota it is seventeen, and in Wisconsin only fourteen. In Manitoba that of barley is forty-one to the acre; while in Minnesota it is twenty-five, in Iowa twenty-two, and Wisconsin twenty-one. The average yield of oats in Manitoba is fifty-seven bushels to the acre; in Minnesota it is but forty.

For twenty miles west of Portage la Prairie to the outlying spurs of the sand hills, fertile plains alternate with copses and wooded heights. The sand hills consist of a series of hummocks, covered with a scraggy growth of poplar, oak and spruce, with a thin soil adapted to pasturage. These sand hills were evidently once the shore of some great inland sea in the dim and shadowy ages of the great

pre-historic past. By winds and the action of the waves of the sea, they assumed the shapes they now present, except where worn down by the attrition caused by rain and the changes of the seasons. They extend about twenty miles and mark the commencement of the second of the three great plateaus between the Red River and the Pacific coast. All this boundless range of prairie country, even to the base of the Rockies, was doubtless once the bottom of a great sea or ocean, and during countless cycles, as the waters gradually receded and the land rose, they found an outlet in Hudson Bay. A short portage of only a few miles separates Lake Travers from Big Stone Lake; in the former of which the Red River of the North takes its rise, and after coursing seven hundred miles due North empties its waters into Lake Winnipeg, which finally find their way through Nelson River into Hudson Bay.

The sand hills passed, a beautiful range of gently rolling prairie is reached, called the Big Plain, thirty miles in length by twenty in width. The soil is not only rich, but being comparatively dry is admirably adapted to the growth of all kinds of cereals and many root crops.

Brandon, one hundred and forty-five miles west of Winnipeg, on the west bank of the Assiniboine, and the center of one of the finest farming districts in the Northwest, is a place of mushroom growth. Last March there was not a house in its vicinity. Now it boasts of over one hundred buildings with a population of between five and six hundred, having its doctor, its land agents, and—as an evidence how civilization goes hand in hand with material progress—its lawyer. The Syndicate owned a section here, and cutting it into lots of twenty-five by one hundred feet and selling them at prices averaging $500.00 each, in two nights, netted at auction the handsome sum of $20,000.00. In six weeks this section of one hundred and sixty acres realized $150,000.00, nearly one hundred dollars per acre. For forty miles to the west and south of Brandon, in the direction of the Souris, the land is of the same rich mould. Being comparatively high, and con-

sisting of rolling prairie, the necessity of drainage is thus obviated. Where cultivated, it presents the appearance of an old settled country; this being especially noticeable in the Souris district and in the vicinity of the Brandon hills. Charming park-like belts, gently rising hills with softly rounded contours melting away into the hazy horizon, and peaceful homes bathed in the bright autumn sunshine, recalled portions of English landscape as well as the picturesque scenery of beautiful Normandy. The Indian Summer of the Northwest is proverbial for its glory, being felicitously described by Professor Bryce of Manitoba College as that "divine aftermath." I shall ever cherish one of those lovely days, that cannot die in memory, when with a friend, I drove across from Portage la Prairie to Lake Manitoba. Not a cloud was in the sky. The air a solemn stillness held. All nature seemed redolent of peace and hope. The golden harvests had been gathered and piled in huge stacks around the barns. The whirr of the busy threshing machines could be heard far across the prairie. Objects at a distance loomed up to nearly twice their actual size in the still clear air. The sloughs literally swarmed with ducks. The roll of the carriage started from its covert the beautiful prairie chickens at every turn. Such an Arcadian scene of sweet, rural felicity, it seemed to me, I had never before seen. Yet, alas — how soon did all this bright, joyous prospect undergo a change,— emblematic of the sunshine and shade, the happiness and sorrow, which chequer life's sad, strange career. A cloud gathers on the horizon. It rolls up into a dark, forbidding mass, and anon smites the earth in a perfect deluge of rain. The outlook is dismal in the extreme. The scene is changed into one of perfect wretchedness. Mud to the right of us; mud to the left of us, and a slough in front of us, there seemed no visible means of refuge or escape.

The further west you travel, the better satisfied do the people seem with the country. However excellent may be the land, they say, "go further west, and you will find the land still better, the climate still more agreeable."

You have the most flattering descriptions of the fine land in the Valley of the Qu'Appelle or Calling River; the Carrot or Root River, a branch of the Saskatchewan, navigable one hundred and fifty miles, with its three millions of acres of superb soil; of the Peace River plains with its seventy-six millions of acres, whose soil is more fertile and climate more enjoyable than those of Manitoba; of the Bow River district under the shadow of the Rocky Mountains, with its fine grazing parks and climate rendered doubly charming by the soft breezes that find their way from the Pacific Ocean through the clefts of these mighty barriers. You become fairly bewildered by these rose-colored descriptions and soon learn to discount much you hear. What particularly strikes one is the vast extent of the country. After having reached the western limits of Manitoba, you feel you are but upon the threshold of this grand inheritance — that you have but wandered along the shore, while the great Ocean lies beyond still unexplored. The mind staggers at the contemplation of its magnitude. The Fertile Belt, stretching from east to west eight hundred miles, and from north to south four hundred, embraces an acreage of over 200,000,000, an extent of country larger than eleven provinces of the size of New Brunswick, and including Peace River Valley, with its 76,000,000 of acres, as large as Germany and France together. And out of all this great territory only some four millions are believed to have yet been taken up — in the proportion of one acre to seventy. In view of its wondrous possibilities we appreciate the full force of Whittier's lines—

"I hear the tread of pioneers
Of nations yet to be;
The first low wash of waves, where soon
Shall roll a human sea.

"The rudiments of Empire here
Are plastic yet and warm;
The chaos of a mighty world
Is rounding into form."

From ocean to ocean what an inheritance! From the sea to the Valley of the Red River, 2500 miles, with its wealth of forest and mine. Then over a thousand miles of prairie with a richness of soil almost beyond conception. And then five hundred miles across a sea of mountains, rich in mines and pasturage — Four thousand miles with an almost infinite variety of soil and production. The rivers are on an equally grand scale. The Assiniboine is 600 miles in length; the Red River 700, having 105 miles in Canadian territory; and the Saskatchewan, by either branch, over 1000 miles.

The lands in the Northwest are held by three distinct tenures — by the Dominion Government, the Hudson Bay Company and the Syndicate. The Hon. Mr. Norquay, Premier of Manitoba, has commenced an agitation for the surrender of the public lands to the Province by the Dominion Government. His arguments are not only strong; they seem unanswerable. All the other Provinces have the control of their public lands, from which they derive considerable revenues. Why should not a similar right be accorded Manitoba? The Dominion Government is making a profit from these lands for the general exchequer, while the Province will be driven to a local tax on the people for public improvements. The excellent system of survey adopted readily enables the immigrant to locate his lot. Townships six miles square, containing thirty-six square miles, are laid off and numbered in ranges, east and west from the principal meridian, ten miles west of the Red River, and in blocks numbered from south to north. Each square mile, embracing six hundred and forty acres, is called a section and is divided into half and quarter sections. In addition to the one-twentieth part laid off for the Hudson Bay Company, each Township has a reservation of two out of thirty-six sections — one-eighteenth part of the whole country — for school purposes. This appropriation for school purposes is a most excellent provision, and will secure a free education for the many

millions that are yet to people the country. These school lands are being sold, at fair prices, and the money capitalized and the interest used for the object indicated pure and simple. The Canadian Homestead Act provides that every British subject, on paying an office fee of ten dollars, may become the owner in fee of a quarter section, of one hundred and sixty acres, provided he live on it three years and erect a dwelling not less than eighteen feet long by sixteen feet wide and cultivate a part of the land. He can also pre-empt an adjoining quarter section, within the Canadian Pacific Railway Belt — that is to say, lying within twenty-four miles on each side of the line of railway — at the rate of two dollars and fifty cents per acre, payable in instalments and upon favorable terms. From returns made by Postmasters and Station Agents, it appears there were raised in Manitoba, during the past year, 2,736,575 bushels of wheat; 3,169,970 of oats; 400,065 of barley, besides other cereals and root crops. And it must be borne in mind, there are under cultivation in the Province only 265,541 acres, a little over a quarter of a million. From these returns some idea may be formed, what the whole Province will yield, when instead of this limited acreage, millions upon millions of acres shall have been brought under culture. Aye, when the 270,000,000 of acres of the Fertile Belt and Peace River district shall yield its golden harvests to the husbandman's toil, and "Our Western Heritage" shall have become the inexhaustible granary of the Old World. Last year there were raised in the whole of the United States 400,000,000 bushels of wheat. Putting our acreage at only 200,000,000 and the yield at only twenty bushels to the acre, we have a country capable of producing 4,000,000,000 of bushels or ten times as much as this enormous yield of our neighbors.

That greatest of modern civilizers, the railway, will prove a most potent factor in paving the way for the speedy colonization of the country. Already the Canadian Pacific Railway has been completed thirty miles beyond Brandon

and one hundred and seventy-five miles west of Winnipeg. The railway mania has taken complete possession of the people, and you hear of railways being projected in the direction of almost every point of the compass. By this time fifty miles of the Southwestern have been graded. This line, which was chartered by the Dominion government, starts from Winnipeg, crosses the Assiniboine twelve miles above the city and sweeps off in the direction of the Boyne River, the Pembina and Turtle Mountains districts. The Southeastern, chartered by the Legislature of Manitoba last winter, has, as its objective point, Duluth—styled by Proctor Knott, in his celebrated speech in Congress, "The Zenith City of the Unsalted Seas." The Northwestern starts from Emerson, runs through Portage la Prairie and on to Westbourne, Gladstone and Minnedosa, south of the Riding Mountains. Another line is expected to cross the Big Plain, keeping to the north of Fort Ellice, and on to the excellent farming lands of the Touchwood Hills.

The Canadian Pacific Railway has been deflected south of the course first selected, along the Valley of the Qu'Appelle to Moose Jaw Creek, and thence across the south branch of the South Saskatchewan to Calgary, nine hundred miles due west from Winnipeg, at the junction of the Bow and Elbow Rivers, under the shadow of the Rocky Mountains. This year, it is claimed, four or five hundred miles of this road will be built, enabling immigrants to penetrate the fine prairie lands of the Qu'Appelle, the South Saskatchewan and the Red Deer River. While the Vermillion Pass has been abandoned, it is to be hoped the Rocky Mountains can be crossed by the Bow River Pass, fifty miles west of Fort Calgary and one hundred and fifty miles south of the Yellow Head Pass, first selected.

A charter has been granted, a company formed, exploratory surveys made, and all other necessary initial steps taken for the immediate construction of a line of

railway, between three and four hundred miles in length, from the north end of Lake Winnipeg to Fort Churchill at the mouth of the Churchill River, on Hudson Bay, having for its object the shortening of the distance from the wheat fields of the Northwest to the European markets. It is claimed the Hudson Bay is open for steamers during five months of the year, from June to October, in which time it would be easy to export the wheat and other produce destined for foreign markets and import all the goods required in exchange. Hudson Bay is connected with the Atlantic Ocean by a strait varying in width from fifty to one hundred miles, in the latitude of sixty-two and sixty-three degrees north. The danger of navigation arises, in certain seasons of the year, from floating masses of ice. For two hundred years, however, the Hudson Bay Company sent all their stores to the Canadian Northwest and took all of their furs out of it in sailing vessels through Hudson Bay. Since its discovery, seven hundred and thirty sailing vessels have made voyages into the Bay — from two to five vessels on an average annually. From Liverpool to Churchill the distance is 2,926 miles, while to Montreal by the way of Cape Race it is 2,990; and to New York, by the way of Cape Race, 3,040; showing a distance in favor of the Hudson Bay route, as compared with Montreal, of sixty-four miles; and with that over New York, of one hundred and fourteen miles. It is only four hundred miles from Churchill to the edge of the great wheat fields of the Northwest. It is claimed a consignment of wheat or beef sent from the Peace or Saskatchewan districts, by way of Churchill and Hudson Bay, might reach Liverpool as soon as it could arrive at Halifax, Saint John or Portland, if sent by the St. Lawrence route. But such a route, say some, is altogether beside the question and quite impracticable. So it was said, only a few years ago, with reference to a railway to Canada by the Valley of the Matapedia. In the first place, the railway could not be built, so great were the engineering difficulties; and

in the second place, if built, it could not be operated during the winter months. It has, however, been built, and trains run with a regularity, during all seasons of the year, equal to that of any other line of railway in the country. An age, which in its triumphs tunnels the Alps, enters upon the construction of a highway under the sea; which laughs at engineering difficulties and sealed oceans; which exalts the valleys and brings the mountains low, will hardly fail in the accomplishments of this great undertaking.

To us living by the sea, its climate seems the most objectionable feature of this country, judging, as we do, of its severity by the readings of the thermometer. The mercury, during the winter months, ranges from fifteen to thirty-five degrees below zero, falling even below that; and very naturally we form our opinion of its severity without considering how much it is modified by the brilliancy of the sun and stillness of the air. Not only is the air free from moisture, but it is clear and bracing and imparts to the system an elasticity most invigorating; if severe, it is uniform and consequently less trying than sudden changes from cold to warm, from chilly to muggy weather. Winter sets in about the middle of November and Spring opens early in April. Snowfalls are not frequent; winter thaws and rains rare. Two or three times in the winter there are bitter winds, whirling the snow into eddies and obscuring completely the landscape, called blizzards. The snowfalls usually range from eighteen inches to two feet. The mean fall of rain during the year is twenty-five inches. So dry is the air, so clear, bright and sunny the days, that with the thermometer thirty degrees below zero, the people find the weather enjoyable. Those who have spent several winters in the country, and such are best qualified to judge, give it as their decided opinion that the winters are less trying than those of the other Canadian provinces, or of England, Scotland or Ireland. In the great grazing country between the Bow and Elbow Rivers, where is Senator Cochrane's ranch,

notwithstanding the latitude is fifty degrees north, cattle can winter on the prairie without the slightest discomfort. Here the snowfall is exceedingly light. The climate, too, is wonderfully modified by the warm west winds that find their way through the Rocky Mountains from the Pacific Coast. A few hours of these winds, called Chinooks, will spread a warmth and mildness over the country almost magical, melting the snow, unfettering the streams and transforming a wintry scene into delightful summer weather; The isothermal line trends nearly northwest from Winnipeg, so that in the higher latitudes of the North Saskatchewan and Peace River countries, the climate is milder than that of Manitoba. Edmonton, on the North Saskatchewan, whose latitude is fifty-three and a half degrees north, has a climate milder than that of Upper Canada, whose mean latitude is forty-five degrees north. Even on the Peace River whose latitude ranges from fifty to fifty-nine degrees north the climate is said to be delightful and less severe than that of the Prairie Province.

It is time, however, to consider some of the drawbacks to be encountered in this land of promise. One serious disadvantage is the scarcity of wood. The frequent prairie fires prevent the growth of trees, except for a mile or two along the banks of the rivers or by the margins of the sloughs. These trees are principally poplars and are used for fuel and building purposes. Wood lots, of twenty acres each, are usually drawn with the homesteads, and in many instances these wood lots are from fifteen to twenty miles away. A farmer, living on the shores of Lake Manitoba, told me he had to draw his firewood from the Assiniboine, seventeen miles distant; and as the continuous cold weather demanded constant fires it took him nearly all winter to cut and haul his winter and summer supply of firewood.

Bad water, too, enters into the catalogue of drawbacks. The surface water contains a large ingredient of alkali, which, in some places, renders it unfit for use. This is

said to arise from the burnt grasses of the prairie. So injurious is the water to horses taken into the country, that many die from its use and almost all are for weeks incapable of work. Good water, however, in most places, can be obtained by sinking shafts below the clayey subsoil. At Winnipeg wells have been sunk seventy feet before reaching a good and wholesome supply.

Nor are the people of the Red River Valley quite secure from a recurrence of those fearful floods that heretofore have converted millions of acres of prairie land into vast inland seas. These floods occurred in 1826, 1852, and in 1861, completely covering that part of the Red River where now stands the City of Winnipeg, and in one instance attaining a height of seven feet above the most elevated spot within the city limits. The inhabitants sought refuge on Stony Mountain, some thirteen miles distant, until the waters abated. Imagine for a moment, the immense destruction of property, to say nothing of the depressing effect upon the sale of city lots, should such a calamity again occur; and no bow of promise spans the heavens as a token that the waters shall no more become a flood to destroy this portion, at least, of the world. "That which has been is the thing that shall be." The Winnipegeans, however, talk very loud and ill conceal anger, when you even casually refer to the floods. They tell you, with an air of assurance, which tends to allay fear, that such an occurrence is altogether out of the question; that the channel of the Red River has been deepened and widened, and is now quite capable of carrying off the accumulated waters of the prairies during the most rainy seasons. But suppose there was an extraordinary fall of snow, followed by an extraordinary fall of rain, with fierce north winds smiting down upon Lake Winnipeg and pressing back its waters into the channel of the Red River, what could possibly prevent a flood greater and more disastrous, if possible, than any which has hitherto submerged the country?

The grasshoppers have been more frequent and even more destructive visitants than the floods. Since 1812 those pests have appeared no less than thirteen times — on an average nearly once every five years. First a few are thrown forward as the advanced guard or body of skirmishers, and deposit their eggs; the next year they descend in perfect phalanxes, and, like the old Roman warriors, make a desert and call it peace. Their last scourge was in 1875–6, when they literally ate up every green thing. The settlers lost all their crops, not enough having been left for seed grain. Starvation stared them in the face. The Dominion government came forward and loaned the despairing colonists sixty thousand dollars to procure provisions and seed grain for the following season. This having proved insufficient, it was supplemented by a further loan of twenty-five thousand dollars — in all eighty-five thousand dollars. When they will again put in an appearance, who can tell? Yet the Manitobans tell you, with the most assured confidence, the grasshopper has called a truce, ground his arms and sworn lasting amity. Happy people — who look only on the golden side of the shield. Thrice happy they — in whose breasts, "Hope springs eternal."

But worse than floods, more to be dreaded than locusts, is that wild spirit of unrest and feverish anxiety begotten by a reckless gambling in real estate, which threatens to destroy the happiness and undermine the commercial probity of this people. The desire suddenly to become rich by short cuts across the old, well-defined lines of thrift, economy and industry, is the most to be deprecated of all evils. It surely saps the moral stamina of a people. It leads by the most direct road to national degeneracy. There must come a day of reckoning for a city whose lots, in so short a time, have advanced from a mere nominal price to the exorbitant figure of one hundred dollars per inch. And when it does come, woe to the hindmost.

A great many of the correspondents who have visited the Northwest have given their advice gratuitously as to

such as should or should not take up their residence in this part of our Dominion. I do not purpose to assume the role of an immigration agent by proffering any advice in the premises. While endeavoring to extenuate nothing, I have set down naught in malice. Let every one be fully persuaded in his own mind and act upon the fair exercise of his own judgment before taking a step fraught with consequences so great as changing his skies.

Such a country, as I have imperfectly attempted to describe, has in store a grand future and demands as pioneers for its settlement men of energy, enterprise and character—men with brawny arms and brave hearts — men who have faith in the country, and, beyond and higher than this, faith in themselves. Let such go up and possess this goodly land. The task is a glorious one; sufficient to fire the ambition of the most stolid — to develop its untold resources— to shape and direct its ever-widening channels of commerce — to convert its waste places into happy homes — to build great cities — to lay the foundations of future states — to frame wise and salutary laws — to mould the destiny of millions yet unborn — and to aid in drilling this "raw world for the march of mind."

Sometimes we feel despondent at our humble progress, contrasted with the rapid strides made by other countries. At times some of us would fain decry our own institutions and belittle our capabilities. Yet heirs of all the ages," gifted with the gathered experience of the past as a beacon both to guide and warn, and dowered with such a splendid heritage, we cannot but succeed. Let us take courage, too, by what has already been achieved. Our record of a hundred years, which is but as yesterday, when it is past, is not altogether a barren one. The Great Tribune of the English people, the other day, on the occasion of the celebration of his seventieth birthday, drew, as only this matchless orator can draw, a vivid contrast of the England of 1840, and the England of today. To him it was a matter of boast, that the population of England and Scotland ha

increased from 18,000,000 to 28,000,000, and that the trade of the country, in the meantime, had more than quadrupled. One hundred years ago, the population of the country, comprising now the Dominion of Canada, was only 100,000, showing an increase for the hundred years in the ratio of one to forty-five, while that of the United States, for the same period, has been in the ratio of only one to seventeen. In 1840, the year of the union of the two Canadas, the population of British America was 1,500,000. During forty years it has trebled and the revenue multiplied more than twenty-fold. In 1685, the year of the death of Charles II, less than two hundred years ago, and since the Charter was granted to the Hudson Bay Company, the population of England was five millions, only half a million more than that of the Dominion of Canada today. Then the whole annual revenue of England was $7,000,000, not one-third of that of our Dominion.

With a country of almost limitless extent, full of undeveloped resources, possessed by a people fired with the stimulating ambition of national existence, and blest with a form of government, the freest and best in the world, because it has not, on the one hand, the objectionable features of the monarchical system — a State Church, primogeniture, a privileged class, and born legislators, nor, on the other hand, the less desirable features of a purely Republican system, we need have no misgivings as to the future. Shall this glorious heritage be ours, or shall it pass under an alien flag and lose its identity under another form of government? A thousand times, No! Shall we, the sons, be less noble than our fathers? Shall the patriotism, which glowed in their bosoms as a consuming fire, die out in our breasts? We respond, No! That which they cherished, that which they bequeathed, that for which they endured thirst and hunger, cold and privation, and the "biting North wind of misfortune" to attain and bestow upon us, a priceless legacy, let us preserve and hand on, only augmented and rendered doubly hallowed by our efforts,

if needs be, by our sacrifices, to those who are to follow us. Let it be our highest ambition to follow "with steps however unequal, and at a distance however great" the pathway these noble men trod. Let us have but one faith, one hope and one aspiration, to make our country the heritage of freedom and freemen forever. Contrast for a moment our position with theirs. When reaching these shores they looked out upon an almost impenetrable wilderness. Gloomy indeed was the prospect. Like our first parents driven forth from Eden — "The world was all before them, where to choose their place of rest, and Providence their guide." They could only look forward. To them there was but a dead past. And the future only gave promise of toil, privation and suffering in hewing out for themselves homes by the sea and in the "forest primeval." Their inheritance we have entered upon. Their household gods have been committed to our keeping. Their traditions we possess. Their graves are in our midst, and their spirit, I trust, is not quite dead in the land. We stand on the high vantage ground won through the long years of their toil. We stand on the threshold of a promising future. The forests have disappeared under their well directed strokes. Comfortable residences have taken the lace of their humble cabins. Peaceful, happy homes ll the valleys and crown the hills of our fair landscapes. An active commerce encircles our shores. Cities, railways, and the thousand and one amenities of civilization are ours. And yet, shall it be said, we are unequal to the task of preserving what our fathers acquired? If so, then we are unworthy of such fathers. We are unworthy of our heritage. And we are unworthy of the race from which we trace descent.

Although our thoughts, tonight, have dwelt principally on our Western heritage, let us not forget our Eastern heritage. Of us, living by the sea, enjoying a climate the best in the world, possessing a country, which for its valuable fisheries, its mineral resources, its wealth of forest and

agricultural capabilities, is, for its size and population, second to none under the sun, and of which it may truly be said—"the lines have fallen unto us in pleasant places; yea, we have a goodly heritage." Where will you find a happier, more intelligent, and because industrious and frugal, more contented yeomanry than those who dress the hills and cultivate the charming vales of our own New Brunswick? And where will you find a hardier and more skilful class of men than those who reap the rich harvests of our own waters and "smite the sounding furrows of our own seas?" And where will you find a people of more pluck than those, who have raised the walls of this oft-smitten city after a calamity which would have completely paralyzed those of less nerve? To the young men of New Brunswick I would say — Stay at home. Here you can enjoy many privileges, which no new country can afford to the same extent; means of culture, the amenities of society and the many advantages which can only come with an advanced civilization. "Better fifty years of Europe than a cycle of Cathay." It only requires the hand of toil, the steady purpose and fixed habits of economy and industry, to secure an ample return from the abundance which Providence has placed within your immediate reach.

Let us but as faithfully perform our duty, as did our fathers, and those who celebrate the Centennial of the founding of our Dominion will be able to look back upon a record fruitful of noble deeds and brilliant achievements and look forward to a future of ever-widening promise, and boast of a heritage, which in the grand march of its progress shall have realized what we only see in prophetic vision — "A little one become a thousand and a small one a strong nation."

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THEN AND NOW:
OR, THIRTY YEARS AFTER.

A Lecture delivered by Silas Alward, D.C.L., K.C., February 8th, A.D. 1910, before the Natural History Society of New Brunswick.

As times change, so our opinions. It does not require the authority of the old Latin maxim to justify change of opinion, provided it is honest and springs logically from enlarged vision and increase of knowledge. Only a Bourbon learns nothing and forgets nothing. Hastily formed opinions, drawn from false premises and insufficient data, should be discarded as soon as found faulty. In such cases, change of opinion is not only permissible, but commendable. Forty years is but a span in the history of a country; yet, during this brief period, there has been a great change of opinion, not only among our own people, but other peoples as well, as to the status, resources and capabilities of the country we fondly call our own. "The Great Lone Land," "The Haunt of the Buffalo, the Beaver and the Bear," have ceased to be terms of reproach. Now it is "The Young Giant of the North," "The Coming Nationality of the New World." The contrast is shown in striking light when are placed, side by side, the opinions of two statesmen and two archbishops, the opinions then and now of distinguished men who could have no motive to deceive or distort. Forty years ago the Honorable Joseph Howe, after a visit to Manitoba in mid-winter, is reported to have said, "I would not give a farm in the Cornwallis Valley for the whole Northwest." In contrast may be placed the glowing speech of Sir Wilfrid Laurier, delivered at Toronto on the eighth of January last, in which he said, "There had been much shaking of the head when Sir John A. Macdonald had proposed to acquire the Northwest Territories. If ever there was a policy justified by the result, it was

that policy." Further on in the same speech the Prime Minister said, "For one hundred years it will be the magnet of the civilized world." This speech of Sir Wilfrid does him much credit, for it justifies the policy of Sir John A. Macdonald in the acquisition of the Northwest, a policy which was sharply criticized by the party to which the Premier was allied. Forty years ago, Archbishop Tache, supposed at the time to be an excellent authority on the subject, said, "The Valley of the Red River and the Valley of the Saskatchewan, could never grow wheat." In juxtaposition to this may be placed an extract from a speech, delivered a few days ago in Sheffield, England, by another archbishop, Dr. Lang, Archbishop of York, wherein he said, "Within fifty or sixty years the centre of the British Empire if there was one then, would not be in London but in the Canadian Northwest."

On 9th December, 1880, the Parliament of Canada met in special session for the purpose of considering the most important question that had hitherto engaged its attention, the construction and operation of the Canadian Pacific Railway by means of an incorporated company, aided by grants of money and lands, rather than by the direct action of the Government. The contractors, George Stephen, Duncan McIntyre, John S. Kennedy, Richard B. Angus and James J. Hill, and two financial firms of London and Paris respectively, undertook to construct, equip and complete this great work, in running order, on or before the first day of May, 1891, for a subsidy in money of $25,000,000, in land of 25,000,000 acres and 712 miles of constructed railway and railways in course of construction by the Government; and also when completed, maintain and operate the same. The constructed railway was the Pembina Branch, eighty-five miles in length, from the American boundary to Winnipeg. The lines in course of construction by the Government were the section from Burrard Inlet, up the Fraser and Thompson Rivers to Kamloops, 217 miles, and the section from Fort William to Selkirk, on

the Red River of the North, 410 miles. The amount expended, and to be expended, by the Government on these three sections was $28,000,000. Canada's outlay, therefore, for the construction of the Canadian Pacific Railway was $53,000,000 in cash and 25,000,000 acres of land. The two sections to be built by the Syndicate were the line from Nipissing around Lake Superior to Fort William, and from Selkirk, on the Red River of the North, to Kamloops, the two sections totalling 2,000 miles. The debate on the Act of Incorporation of the Syndicate occupied several weeks, and was in some respects the most noteworthy in the Parliamentary annals of the Dominion. The speeches of Sir Charles Tupper, Minister of Railways, who introduced the Bill, and Edward Blake, Leader of the Opposition, who opposed it, take rank among the ablest ever delivered in the Canadian House of Commons. The Bill was introduced on the fourteenth day of December, 1880, and passed its third reading on the first day of February, 1881. It is most interesting to read the speeches delivered in that great debate, viewed in the light of "Thirty Years After." Most of the able statesmen who spoke on that occasion have passed over to the great majority. The principal survivors are Sir Charles Tupper, Sir Wilfrid Laurier, Sir Richard Cartwright, Sir Mackenzie Bowell and the Hon. Mr. Patterson. Sir Charles Tupper concluded an exhaustive speech of several hours in the following words:—

"I am glad to know that if ever there was a measure presented for the consideration of this House, worthy and likely to receive its hearty adoption, it is the measure I have the honor of submitting for its consideration. I have the satisfaction of knowing that throughout this intelligent country every man breathed more freely when he learned that the great, enormous undertaking of constructing and operating the railway was to be lifted from the shoulders of the Government, and the liability the country was going to incur was to be brought within, not over, the

limit which in its present financial condition it is prepared to meet; within such limits that the proceeds from the sale of the land to be granted by Parliament for the construction of the line, would wipe out all liabilities at no distant day. But this is the slightest consideration in reference to this question. It is a fact that under the proposals now submitted for the Parliament to consider, this country is going to secure the construction and operation of the gigantic work which is to give new life and vitality to every section of this Dominion. No greater responsibility rests upon any body of men in this Dominion than rests upon the Government of Canada, placed as it is in a position to deal with the enormous work of the development of such a country as Providence has given us; and I say we should be traitors to ourselves and to our children if we should hesitate to secure on terms, such as we have the pleasure of submitting to Parliament, the construction of this work, which is going to develop all the enormous resources of the Northwest, and to pour into that country a tide of population which will be a tower of strength to every part of Canada, a tide of industrious and intelligent men who will not only produce national as well as individual wealth in that section of the Dominion, but will create such a demand for the supplies which must come from the older provinces, as will give new life and vitality to every industry in which those provinces are engaged." . . . "I say, I was in hopes now that we have abandoned it as a Government work and it is placed on a commercial foundation, that those gentlemen could, without loss of party prestige, unite with us on this great question and on giving to this Syndicate who are charged with this important and onerous undertaking, that fair, handsome and generous support that men engaged in a great national work in any country are entitled to receive at the hands, not only of the Government of the country, but of every patriotic member of Parliament. Sir, I say I have been disappointed, but I hope, upon future

reflection, at no distant day, when the results of this measure which we are now submitting for the approval of Parliament and which I trust and confidently expect will obtain the sanction of this House, will be such as to compel these gentlemen, openly and candidly to admit that in taking the course which we have followed we have done what is calculated to promote the best interests of the country and that it has been attended with a success exceeding our most sanguine expectations. I can only say, in conclusion, after some five and twenty years of public life I shall feel it the greatest source of pleasure that the quarter of a century has afforded me, as I am satisfied that my right honorable friend beside me will feel that it crowns the success of his public life, that while Premier of this country his Government were able to carry through Parliament a measure of such inestimable value to the progress of Canada; so I can feel, if I have no other bequest to leave to my children after me, the proudest legacy I would desire to leave was the record that I was able to take an active part in the promotion of this great measure by which, I believe, Canada will receive an impetus that will make it a great and powerful country at no distant date."

The optimistic speech of the Minister of Railways was subjected to severe criticism and evoked keen raillery, as the following extracts show:— Mr. Blake, Leader of the Opposition, said:—

"You propose with one hand to tax us and with the other to withdraw those resources out of which taxation may be paid. You are proposing to make our conditions almost intolerable. It is easy to see the game of the Government. The game is to call this proposal, signed as it is, and backed as it is by money and means, a mere farce, a trick, which they say we shall be ashamed to mention two years hence. Sir, the honorable gentleman will find it mentioned two years hence, and that other parties than ourselves will be ashamed to refer to this transaction; he

will find it is not the offer which will be a source of shame, but the contract which he proposes shall supersede the offer. He will find that not now, not two years hence, nor ten, nor twenty years hence, will the Liberal party have occasion to be ashamed of any proposition or suggestion they have made, or any action they have proposed to take. We can point with pride to our efforts to save the country, and we can contrast those efforts with your determination to ruin our common country. I want to know whether, under all these circumstances, in the face of all this, you are determined to persist. If you are determined to persist, I can only say that you remind me of nothing so much as those of old who, being possessed by evil spirits, rushed violently down a steep place into the sea and all perished in the waters; for sure I am that those who propose to vote for this contract under these present circumstances, are first ruining their country and afterwards committing political suicide."

Mr. Blake, on another occasion, is reported to have said:—

"Now I can prove that this syndicate cannot carry a bushel of wheat over that railway, and say this on the authority of a gentleman, who, when he uttered the sentiment, gave weight to every word as befitted one who was destined to become the leader of his party. He quoted the revenue derived from the Union Pacific Railway, and came to the conclusion that no company could carry one bushel of wheat over the Canadian Pacific Railway."

Mr. Laurier in a lengthy speech in opposition to the Bill, among other things, said:—

"What was to be done? Like the wizard in the tale who found his own life in constant danger from the fangs and claws of the strange progeny which he had reared, they, too, had created a monster that threatened their own destruction. What was to be done? They went to

Europe. They offered their white elephant for sale in the markets of Paris and London, but no one would accept it even as a gift. Finally, they had to take the beast home, where they gave it vast territory to roam over, made it impossible for any other being to go into the pasture, and then they found somebody who was willing to relieve them of this ever-recurring cause of anxiety. That this proposed arrangement is a vicious policy is well proved by the language which the Government used to induce their supporters to accept it." . . . "Looked at from whatever point of view you choose, there is not a single redeeming feature in the gigantic monopoly which has been given to this Company."

Sir Albert Smith said:—

"I would cheerfully see the Government continue in power if thereby this contract could be defeated. We would enter into a compact that the Government should remain in their places if they would relieve the country from the calamity threatened by this contract. I implore honorable members on the Ministerial side to consider this bargain as a commercial transaction and divest themselves of all party feeling in judging of its character."

Sir Albert Smith, on another occasion, is reported to have said:—

"No one could suppose that even after the road was built it would pay one-tenth of its working expenses, and how, therefore, could British capitalists be expected to undertake it."

Mr. Charlton said:—

"This scheme, whether designedly so or not, is a great crime. Its supporters in the Government may take the attitude of criminal complicity, or of stupidity. If they choose the latter alternative, posterity will accord to each a coat of arms, the central figure, a head with drooping

ears and pensive countenance — the head of the meditative donkey. As an act whose disastrous and far-reaching consequences cannot be appreciated fully at this hour, we arraign it before the assembled representatives of the people. As a great crime we arraign it at the bar of public opinion. The question calls imperatively for independent and honest action on the part of the members of this House. If they fail in their duty, if they forget the requirements of their trust, but a few short years will elapse before millions of Canadians will deeply regret its consummation, and the inexcusable stupidity of this House and the gentlemen upon the Treasury benches."

Mr. Ross said:—

"I would willingly forego a hundred times all the party advantages which this contract contains if the Government tonight, or at any time, would stand up in their places and tell Parliament and the country that this contract was no more; and I venture to say, from one end of the Dominion to the other, wherever this contract is understood, wherever intelligent men have considered it irrespective of politics, no more joyful news could be spread throughout this land than the tidings which the telegraph would flash from the Atlantic to the Pacific, that this contract was abandoned and that Canada was emancipated and free from any of the terrible consequences likely to flow from it."

Mr. Rykert said:—

"Of course there must be railways at once to connect the sheets of water, and eventually a through line, but I am confident that a bushel of wheat will never go to England over an all-rail route from the Saskatchewan to the seaboard, because it would never pay to send it."

Hon. Mr. Joly said:—

"For years to come the line could not pay one-tenth part of its cost, and no company would undertake it unless

they received every assistance, for the line would not obtain anything like the traffic that the Union Pacific obtained."

The following article appeared in *Truth*, published in London, October 3rd, A. D. 1881. It was inspired by the efforts of the Syndicate to float a loan of $10,000,000 of land grant bonds:—

"The Canadian Pacific Railway will run, if ever finished, through a country frost-bound for eight months of the year, and one about as forbidding as anything on the face of the earth. British Columbia is barren, cold, mountainous — not worth keeping. Fifty railways would not galvanize it into prosperity. The Canadians are not such idiots as to part with one dollar of their own for this scheme. They come to England. Canadians know that the road will never yield a single red cent of the money sunk into it. People cannot stand the cold of Manitoba. Men and cattle are frozen to death in astonishing numbers. Manitoba's street nuisances kill the people with malaria, or drive them mad with plagues of insects. It is through a death-dealing land of this kind that the railway is to run. Canada is one of the most over-rated colonies we have. Ontario is the only sound province, and the only one where you can lend money and ever hope to see it back. One of these days Ontario is certain to go over to the States; when that day comes the Dominion will disappear. The Province and City of Quebec are both notoriously bankrupt. Once the country is thoroughly committed to this railway, I see nothing but bankruptcy ahead of it. This Dominion, in short, is a fraud, and bound to burst up like any other fraud."

The predictions of Sir Charles Tupper, whose sublime optimism has been an inspiration, have been verified beyond the bounds of what many regarded as reasonable expectation; while the predictions of those who opposed the measure have been falsified in almost every particular.

That such were the honest convictions of our public men who opposed this measure goes without saying. They were too honorable and self-respecting to allow mere partizan zeal to betray them into expressions so emphatic and unqualified. And further, their views were shared, in a large degree, by many of the ablest and best informed men in the Dominion, who were untrammelled by party affiliations and who approached the consideration of the subject with open minds.

The through line was completed and open for traffic five years before contract time. On the 7th of November, 1885, the last spike was driven in the Canadian Pacific Railway at the base of the Golden Range of Mountains, a point two thousand five hundred and forty-six miles from Montreal. By the middle of the summer of 1886, its vast system, which then aggregated 4,315 miles, was completely equipped and in good working order throughout.

The Canadian Pacific Railway today has a greater mileage of transportation than any other company in the world. It has 10,048 miles of road in Canada, and 5,000 owned or controlled in the neighboring Republic, making a total of over 15,000 miles. Its largest competitor is the New York Central, which has a mileage of 12,524 between owned and controlled miles. In addition to this, the Canadian Pacific Railway owns and controls 10,000 miles of steamship lines on the Atlantic and Pacific Oceans. So its system by land and sea extends 25,000 miles, sufficient, if placed in a direct line, to girdle the globe. It is estimated over 500 additional miles of railway will be constructed this year. The gross earnings of this great Company per year total nearly $100,000,000. Its stock is now selling in the markets of the world at the rate of eighty per cent. above par. What Canada is today is largely due to this great International Highway. It has made accessible to the world our magnificent wheat fields and unbounded resources. Being the pioneer it has led the way to the introduction of other transcontinental systems of railway. Soon three great

International lines of railway will span Canada from ocean to ocean.

Notwithstanding Canada has already 25,000 miles of railway in operation, a mileage greater than that of the United Kingdom, it has but entered upon the initial stage of construction. A new project called the Winnipeg-Yukon Railway, is engaging the attention of British, Canadian and United States capitalists. The charter provides for the construction of a line, 2,000 miles in length, extending from Winnipeg to Dawson City, by the way of Lethbridge, at the foot of the Rockies, thence by way of Calgary, Edmonton and the Valley of the Peace River to the Valley of the Yukon. This road, it is estimated, will cost $50,000,000 in construction and equipment. It will open up, if constructed, the magnificent Peace River Valley with its wondrous wealth of soil, the fine ranching lands of the foothills and the gold fields stretching beyond to the Yukon. Mr. J. J. Hill, the great railway magnate, is said to be interested in this gigantic enterprise. All that has followed the construction of the Canadian Pacific Railway is the outcome of the faith of a people of four millions, who engineered and carried on to successful completion, in the face of enormous difficulties and discouragement, a work which will stand as an enduring monument of what can be accomplished by energy and pluck.

In view of what is being accomplished, the character of the road being built, the opening up of rich agricultural lands and the laying bare of great mineral wealth, who can predict, notwithstanding mistakes made, much unnecessary expense incurred, and cases of alleged individual graft, that the Great International Highway, now in course of construction, may not some day, in the not distant future, justify a policy which many of us felt inclined to criticize in its initial stages? Such was the history of the Canadian Pacific Railway. May not such hereafter be the history of the Grand Trunk Pacific? Who knows? This question will be solved less than thirty years hence.

The railway is the great Empire builder of the day. Through its agency the progress of Canada, during the past decade, has been phenomenal. The Minister of Agriculture is responsible for the statement, that, during the past ten years, the output of Agricultural produce in Canada rose from $160,000,000 worth to $563,000,000 worth; and this only on the fringe of our possibilities. By the same authority it is estimated, Canada has sufficient cultivable wheat land in Manitoba, Saskatchewan and Alberta for growing a thousand million bushels per year. During the last year the actual cash value of wheat alone to the farmers of our Northwest was $106,000,000. Canada's foreign trade, in 1909, was more than double what it was ten years ago; and was more than treble what it was twenty years ago. The President of the Canadian Bank of Commerce, in the annual report, publishes the statement, that the total bank clearings of fourteen clearing centres, for 1909, were $5,240,000,000 against $4,142,000,000 — a gain of twenty-five per cent, over 1908, and twenty per cent. over the previous highest record of 1907. Our exodus to the United States has been replaced by the American exodus into Canada. Statistics show that during the last five years 300,000 United States farmers have come into Canada, bringing with them money and effects valued at $200,000,000. These immigrants bring with them, not only capital, but valuable experience gained in pioneer life and aptitude for the free and enlightened institutions of our country. Last year 90,000 United States farmers settled in Canada, and indications point to a larger immigration the present year than has been.

British Columbia, that "Sea of Mountains," so called by a distinguished Canadian statesman, now bulks large and gives promise of a great future. P. A. O'Farrel, United States Pure Food Commissioner, in an article published in the New York World, on the 7th of November last, after referring to Western Canada as the "Last Great West" said:—

"And let me tell the world that the most glorious country of the future is British Columbia. It covers an area greater than the British Isles, Belgium, Holland, Denmark and the German Empire combined. Its climate is superior to that of England and France, and, indeed, to that of any country on this earth of ours. Its fisheries are the most abundant of any nation on this or any other continent. It has 182,000,000 acres of standing timber of priceless commercial value. The energy of 25,000,000 horses runs waste in its mighty rivers. Its internal water highways can be formed into the most wonderful system of waterways and power developers."

The following considered expressions of opinion by such eminent men as Mr. Taft, President of the United States, J. J. Hill and Earl Grey, must carry great weight. Mr. Taft, recently said:—

"We have been going ahead so rapidly in our own country that our heads have been somewhat swelled with the idea that we are bearing on our shoulders all the progress there is in the world. We have not been conscious that there is on the North a young country and a young nation that is looking forward, as it well may, to a great national future. They have 7,000,000 people, but the country is still hardly scratched."

Mr. J. J. Hill, the American railway magnate, recently said:—

"The tide of emigration of the world must flow to Canada. There is only one other place it can go to, and that is Texas. By 1915 the United States will have to buy wheat from Canada."

Earl Grey recently said:—

"It is only a matter of time when Canada will be the most populous, the most wealthy, and the most influential part of the Empire. Only one thing was necessary — that

Canada should be true to herself, should keep her life high, her politics clean. Canada welcomed the influx of American immigrants, who in a brief period became the most patriotic Canadians."

Professor Shaw, formerly Professor of Husbandry, in the State University of Minnesota, said, in August, 1909, at Edmonton:—

"Since the virgin soil of the Western States was broken, over twenty years ago, the yield of wheat per acre has gradually decreased. While the yield per acre is decreasing the population is gradually on the increase. There will come a time when the consumption will be greater than the yield. I can see no other result than that the United States must ultimately buy wheat from Canada. The acreage in the Western States is limited. In Canada only the fringe has been touched upon." When asked when this would probably happen, the Professor said — "I am quite sure in not more than ten years."

Since my last visit to the coast, in 1890, I noticed a marked change in the cities of Winnipeg, Calgary and Vancouver. The last named city is destined to be the Canadian *entrepot* of the Pacific coast. It possesses manifold advantages. Its harbour is safe and spacious. It is backed by a Province twice as large as France, whose unrivalled resources are yet scarcely tapped. Through the portals of this rising city traffic and travel from Western Europe will pass to the Orient. Port Arthur and Fort William are sharing largely in the unprecedented prosperity of the West. Three great International Railways converge at these dual cities. Here works of the greatest magnitude are in course of construction for handling the enormous freight destined for these points. The Grand Trunk Pacific has in course of construction an elevator of a capacity of 3,500,000 bushels. The Canadian Pacific Railway is constructing huge piers and docks and cold storage plants,

said to be the largest on the continent. The Government of Canada is supplementing these enterprises by accepting plans for the widening and deepening of channels to a depth of twenty-five feet for large vessels ascending the Kaministiquia. It is said when these works are completed the twin cities at the head of Lake Superior will have harbor frontage of thirty miles, and grain storage capacity of 30,000,000 bushels, and the most modern facilities for handling the traffic, where long stretches of water communication meet great systems of land transportations.

One of the most hopeful indications of the continued prosperity and success of our rising Dominion is the deep interest taken by its people in education. In all the towns and cities of the West the largest and most noticeable buildings are the public schools, for the support of which ample provision is made by grants of public lands and provincial aid. Herein rests the hope of our country. This gives the strongest assurance of the permanence of our civilization. If the State make absolute certainty that every child, within the scholastic age, shall receive free education, we may discount many fears of the future. It is a settled axiom of political science, that, "unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty or the capacity of self-government."

Another hopeful feature is the great care taken by Government to secure immigrants of the best class, both as regards physical condition and moral stamina. The utmost vigilance should be exercised in barring every avenue against the admission of the vicious and incompetent. Our magnificent heritage should be reserved for only the highest types of manhood, and for such whose standards and ideals will prove potent factors in the development of our country.

An evil to be most jealously guarded against is corruption in political life. Unless this is fearlessly stamped out a grave peril confronts us and one which may eventually

sap the vitality of our country. We cannot preserve too carefully purity at the fountain head of government — the ballot box. Jobbery, rake-off, fraud and graft are the fruitful progeny of political corruption, and they will as surely work our final overthrow, if permitted to obtain, as they have done in the career of many a nation in the past. He is an enemy of the State who, by bribery, would attempt to wrest the popular will from its settled convictions of right and wrong, to attain some private or personal advantage. This evil is protean. In any shape it is a curse, which blights when unchecked, and against it the people must wage an unceasing and relentless war.

Such was Canada thirty years ago, and such now. And what shall we say of the future? That is a question which must give us pause. Never did a people enter upon Empire building under such favorable auspices. Our heritage is on the grandest lines and its prosperity and expansion but in their infancy. Flanked by two great oceans; that on the East looking to Western Europe with its centuries of civilization; the one on the West facing the Orient, which is awakening from the torpor of ages, and bounded on the south by a great people pulsating with the vigor of restless energy, the part we are called upon to play is no ordinary one. Heirs as we are of all the ages, standing in the foremost files of time, blessed by a form of government, the best yet devised by the ingenuity of man, possessed of undeveloped resources of fabulous wealth and on lines of latitude which must necessarily develop a vigorous, independent, energetic race, we should rise to the occasion and show the world we are not unworthy descendants of the race from which we sprung. With a population of seven millions, and virtually having the right to negotiate treaties with foreign powers, we are fast assuming the status of nationhood. This necessarily imposes upon us new duties. The first and most important of which is a contribution or assistance in some shape for defence of the Empire. The principle of union and consolidation is the watch-

word of the hour. The great Imperial movement of 1899 has been followed by two conferences in London to consider the now absorbing question of Imperial Defence. Since the days of Alfred the Great sea power has been the dominating factor in the marvellous growth of the Empire. Under her protecting ægis we have been preserved and our commercial interests protected without expense on our part. This can no longer be expected. Canada, as well as the other overseas possessions of Great Britain, recognize the justice of contribution or assistance in some form. The only question is as to the way this is to be done. With us there is a wide divergence of opinion. It has been well said:—"Every problem of Imperial Defence is a conjoint problem of land and sea power, and should always be considered from this point of view."

In the second year of Confederation the Parliament of Canada passed an Act respecting Militia and Defence of the Dominion of Canada. In the same year an Act was passed to make provision for defraying the expense of certain works of fortification required for the protection of the Dominion, notably the defences of Montreal and the City of Saint John. Surely, then, if Imperial Defence is a "conjoint problem of land and sea power," a navy is the complement of the militia, and a naval school the natural *sequitur* of a military school. One of the strongest objections to the proposed Canadian built navy is that it will be under the control of the Canadian Parliament. Our land defence, the Canadian militia, is subject to Parliamentary control. Why, then, should not the other branch of the service, our sea defence, be under like control? If the argument is sound in the one case, it must surely be sound in the other. All the world knows what splendid service our Canadian military organization performed in the late South African war.

Two propositions have been submitted to the people of Canada. The one, a direct contribution of two Dreadnoughts, at a cost of $25,000,000, to be presented to, and

under the control of the British Admiralty. The other, the creation of a Canadian built navy, under the control of the Canadian Parliament. Before entering upon a consideration of the respective merits of these propositions, it may be well to consider what the other over-seas possessions of the Empire have undertaken to do in the premises. Australia has decided to present one Dreadnought to the British Admiralty and to create an Australian fleet unit to be under the control of the Parliament of the Commonwealth. And, by the way, the first vessel of the New Australian fleet unit is to be launched tomorrow. The Dominion of New Zealand, with a population of about one million, has undertaken to present to the British Admiralty one Dreadnought. It would seem the most logical and reasonable course for us to adopt would be the creation of a Canadian built navy. A navy of our own we must construct and control, in the not distant future. With extensive coast lines, both on the East and West, provision must soon be made for the adequate protection of our ports and our constantly expanding commerce. We cannot much longer expect England to do this double duty for us. Our home ports must be made secure, and our trade routes adequately defended. How can these duties be performed without a navy to guard our ports and to patrol the watery highways on which our ventures are made? Such duties are as essential as those of the citizen to make provision for the protection of his property against land robbers. A navy is as necessary, in the one case, as a well-regulated police in the other. A navy built and manned by Canada, gradually improving in strength and efficiency with coming years and as wealth and population increase, would materially, in coast defence and in guarding trade routes, lessen the burden of the Empire and would eventually render far more effective service than occasional gifts of emergency Dreadnoughts. Now that England has withdrawn her warships from the shores of both the Pacific and North Atlantic, she has thereby

unmistakably intimated that, in future, we must assume the responsibility of our own coastal protection. The duty thus cast upon us is admirably presented by Captain A. T. Mahan in his great work on, "The Influence of Sea Power History," in these significant words:—

"Under modern conditions, however, home trade is but a part of the business of a country bordering on the sea. Foreign necessaries or luxuries must be brought to its ports, either in its own or in foreign ships, which will return, bearing in exchange the products of the country, whether they be the fruits of the earth or the works of men's hands; and it is the wish of every nation that this shipping business should be done by its own vessels. The ships that thus sail to and fro must have secure ports to which to return, and must, as far as possible, be followed by the protection of their country throughout the voyage."

We must soon undertake what must necessarily prove a long and tedious process of naval evolution. If we are to develop our country along national lines we must likewise be prepared to preserve and defend on national lines. Like all young countries we should proceed circumspectly and tentatively and thus gain wisdom by the painful process of experience. Mistakes will be made, but in the result we would be the gainers, as is the case with all peoples who enter upon untried ways. The first vessels built by the Great Alfred to protect his land from the inroads of the Danes were crude and archaic, yet by dint of effort, and the skill begotten by bitter experience, he soon was able to construct and man such a navy as enabled his people to defeat their enemies on their chosen element. Does it not seem unwise to pass the control of the expenditure of such a large sum of money, as $25,000,000 out of the hands of the Canadian Parliament? In case of a Canadian-built navy the money would be expended among our own people. Skilled laborers would be brought from abroad who would become Canadians and cast in their lot with us, sharing our

burdens and assisting us in building up our new nationality. Our own people are adepts in all that enter into the construction of wooden shipbuilding. The sons of the men who built up the commercial marine of these Maritime Provinces would soon acquire the technical skill requisite for such an undertaking. The managers of the navy yards in many of the cities of the neighboring republic are New Brunswickers and Nova Scotians, thus showing the adaptability of our own people for such skilled labor. Further, we have the coal, the iron, the steel, the nickel and the wood, and what a stimulus would be given in all departments of industrial enterprise by steel ship-building in our midst. The reason put forward by the advocates of direct contribution is the emergency of the case, since Germany has in an unmistakable manner challenged the naval supremacy of the Empire, in which is involved its security as well as that of the over-seas Dependencies. There is no doubt the policy of union and consolidation is the overshadowing question of the hour, and assuredly it entered largely as an element in the recent elections in England, as the results showed, for the Unionists are the advocates, not only of tariff reform and imperial preference, but of a strong navy as well. In deciding upon the course to be adopted we must take into consideration the possibilities as well as the probabilities of the future. We must bear in mind the rapid strides we are making towards the position and responsibilities of nationhood. We should look forward to the time when our population will be ten, fifteen and even twenty millions. Considering the state of unrest in Europe, its nations armed to the teeth, with unwonted haste constructing great warships of the most improved modern type, the Great Republic to our South increasing her naval strength, Japan and China facing us on the West, moved by a like impulse — What does all this portend? Evidently an approaching crisis in which may be involved the destiny of some one or more of these nations. An emergency may arise by which we may be compelled to rely upon our own resources, to a certain

extent, in order to preserve our territorial integrity, our sea-borne commerce and trade routes as well. In view of such a possibility we cannot too soon take the initiative to put ourselves in that position of defence which our population and resources impose. If "What we Have" we would hold, we must guard against every possible contingency which the future may disclose to work our overthrow. Safety lies in preparedness. While hastening slowly, let us forthwith make the beginning. Let us not by a makeshift endeavour to postpone the inevitable. By a tedious and painful process of evolution we may be able in time to build, man and control a navy sufficient to place us in an independent position among the sisterhood of nations and render us secure in times of stress and travail. A Canadian-built navy, constructed in our own ship yards, manned by our own people and paid for by Canadian money, we must have. And yet if the emergency is so great and pressing as to call for greater effort and more immediate assistance, our people would willingly make a cash contribution to the British Government to be expended in the building of one or more Dreadnoughts, for strengthening the Imperial navy.

For the past year Great Britain appropriated £35,000,000 sterling, for the maintenance and increase of her navy. This means a tax of five dollars per head of her population. For the current year the appropriation for a like purpose may reach £40,000,000 sterling, a tax of nearly six dollars per head. For the past year the cost of the Canadian militia and other means of national defence imposed upon the finances of the Dominion the comparatively insignificant sum of eighty cents per head. If the £40,000,000 sterling supposed appropriation of Great Britain for the current year were supplemented by contribution, either in money or navy units, on the part of her Dependencies, proportionate to their population and wealth, the Empire would be placed in such a position as would render it safe from foreign aggression. An adequate state of defence is one of the pressing needs of the hour, since its vast expansion, while

it has added greatly to its prosperity and prestige, has increased its vulnerability. In case of war between the United Kingdom and a foreign country, we would be open to attack, and yet, how much safer would we feel, if being contributors in the burden of defence, we could, as a matter of right, claim the protection of the flag. We would then become sharers in all the glories of the Empire. One sentiment would pervade all, of a common inheritance in the renown of the most prosperous and powerful nationality the world has yet seen. United for purposes of common defence no power on earth could work our overthrow.

We Canadians, are proud of our country. We know ours is an inheritance inconceivable in the wealth and prodigality of its resources. We have seen this young Dominion, in a single generation, grow from a few sparsely settled, straggling, disjointed colonies to the commanding position it occupies today; the fisheries, on the shores of two oceans, the most productive in the world; the mines and mineral wealth, in extent, variety and yield, apparently inexhaustible; the vast area of wheat land promising to become the granary of the world; the railway system, stimulating enterprise in every direction, greater in mileage than that of the motherland, and the population one-fifth that of Great Britain and Ireland. And all this while yet on the threshold of a wondrous possibility. The foundations upon which we build were laid deep and broad by a noble self-sacrificing ancestry, who gave up all and suffered much to plant British institutions in what at the time seemed a cheerless, inclement country. If faithful to our traditions, and regardful of the solemn trust committed to our charge, Canada, in the not distant future, will become, if not what Dr. Lang, Archbishop of York, predicted a few days ago,—"The centre fifty years hence of the British Empire,"—at least the seat of a vigorous nationality, which will concentrate the hopes and aspirations of a constantly increasing population, and which will become, in the words of Sir Wilfrid Laurier,—"The magnet of the civilized world."

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THE MAGNA CHARTA OF CANADA

A LECTURE

DELIVERED BY

SILAS ALWARD, D.C.L., K.C.
Dean of King's College Law School.

JANUARY 13TH, 1914

TO THE STUDENTS OF THE SCHOOL.

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THE question naturally arises, how is it, the British Empire so far surpasses any of the great world powers that have arisen in bygone ages, not only in extent, population, wealth and might, but in an apparent stability that gives promise of a permanency undreamed of by any nationalities that preceded it? It is not owing merely to the energy and enterprise of its people, found on all seas, and upon every shore; not fully to that Anglo-Saxon pluck that never acknowledges defeat, but rises superior to every disaster; but largely to that stern, heroic courage, which refused to submit to oppression, which curbed the arrogance of Kings, and wrested from despotic rulers the boasted Charters of her liberty,—Magna Charta, the Habeas Corpus Act, the Petition of Right, the Bill of Rights, and Reform Act, after Reform Act, which have slowly broadened down freedom from precedent to precedent.

Coupled with such enquiry is the further one,—What has given Canada the proud position she now holds among the rising States of the world? We reply, "she heeded the lessons taught her by a glorious ancestry, and regarded herself as heritor of all that had been hitherto so nobly won." From the early inception of Colonial Government, Canada refused tamely to submit to official dictation from Downing Street. She claimed to share the privileges and rights won by the people of the Fatherland in their struggles for liberty and in placing limitations upon the exercise of arbitrary power on the part of rulers in high places. Prerogative and privilege in the hands of the governors, sent by the Home Government to rule the colonies, seemed as hateful and as intolerable as did the arbitrary acts of King John to the

feudal baronage of the Thirteenth Century, when the Nobles rose in rebellion, and won from a faithless tyrant the first great Charter of English Liberty, Magna Charta. Canada rose in rebellion and by so doing won her Magna Charta, known in world wide celebrity as "Durham's Report." Within its four corners are contained the principles, whose subsequent adoption has placed Canada in the commanding position she now occupies. This Report is generally admitted to be the ablest state-paper, on Colonial Government, ever penned, and did more, in the words of Sir William Buller,— "In the making of Canada and in laying the foundation of its present state of prosperity and happiness than had been achieved by all the Governors and Governments of seventy years before him."

Prof. Stephen Leacock in referring to it said,— "Among all the state-papers, on British Colonial Administration, the Report of Lord Durham, both in point of form and substance, stands easily first." The Report of the great Pro-Consul, Lord Durham, may justly be styled the Magna Charta of Canada. In its consideration I propose to discuss it under four heads.

First.	The Crisis.
Second.	The Man and the Hour.
Third.	His Work; and
Fourth.	The Result.

THE CRISIS.

When the great Queen ascended the Throne, in 1837, the unhappy state of affairs existing in the British North American Colonies was fast becoming acute and threatened to end in ultimate disaster. In 1836, when the House of Assembly of Lower Canada asked for an Executive Council, which should be responsible to it and not to the Government of England, a prominent English Statesman said,— "Such demands are so inconsistent with the relations which ought to obtain between a Colony and the Mother Country that it would be better to say at once,— Let the two countries separate, than for us to pretend to govern the Colony after this," To the

like effect was the language of that distinguished Parliamentarian, Roebuck, uttered in 1837,— "Whatever course England pursued the time must inevitably come when all the American Colonies will become independent states." The Iron Duke, who, while a great soldier, was an autocratic, short-sighted statesman, declared,— "Local Responsible Government and the sovereignty of Great Britain were completely incompatible."

The Colonies and the Home Government were fast drifting apart. Officialdom at Downing Street was not in sympathy with the aspirations of the Colonists. How could it be otherwise? No definite line of policy had been adopted and pursued with uniformity and success. Frequent changes in the Colonial office was largely responsible for this. From 1827 to 1838, during a period of eleven years, there were eight Colonial Secretaries. As a matter of fact the delicate and intricate questions constantly arising in the government of the colonies, which demanded prompt and decisive action, were generally relegated to official subordinates in the Colonial Office, who virtually became judges in matters of which they knew nothing and for which they cared less.

To understand the state of unrest that prevailed it will be necessary to travel back somewhat in the history of the country. By the terms of the Treaty of Paris, in 1763, at the conclusion of the Seven Years' war, Canada was ceded to Great Britain, excepting the Islands of St. Pierre and Miquelon. The Civil Government formed, consisting of a Governor and Council appointed by the Home Government, had as ample power as the Military rule that preceded it, from the time of the fall of Quebec in 1759, to the time of its enactment. Its decrees were often harsh and oppressive. Taxes were imposed by acts of the Imperial Parliament. From the very first a repressive Colonial Policy was adopted. The navigation laws bore heavily upon the Colonists. Labor was restricted. The people could not manufacture certain specified articles, or cut down trees in the forest that had been marked by the King's officers suitable for masts for the Royal Navy. In Political matters members of old Colonial families and English Crown appointed officials bore sway,

generally in an arbitrary and overbearing manner. In Religious matters one Church assumed pre-eminence giving offence to Non-Conformists. Soon the people became restive under the rule of an Oligarchy little removed from a pure military despotism. As British population increased the people began to clamor for representative institutions. Their plaints, however, fell upon unheeding ears. Finally in 1791, an Act was passed by the Imperial Parliament, called the Constitutional Act, dividing Canada into the two Provinces of Upper and Lower Canada. Upper Canada was erected into a British Province. In it English law was introduced and Freehold Tenure adopted. In Lower Canada French Civil law and Feudal Tenure were retained. A Legislature of three branches, Governor and Council, a Legislative Council and a House of Assembly, were constituted by this Act, in both Upper and Lower Canada. The Governor was appointed by the Home Government. The Members of the Executive Council were chosen by the Governor, and the choice usually fell to Englishmen and Canadians connected with the "Family Compact," so called. The members of the Legislative Council received their appointments from the Governor and Council. The members of the Assembly, elected by the people, had power to impose taxes for the construction and maintenance of bridges, roads and other local services. The laws made by the Assembly and Legislative Council could only become operative with the assent of the Governor. The Executive Council, although advisers of the Governor, were not responsible to the Assembly for their acts. This proved to be, although called the Constitutional Act, a mere shadow of Constitutional Government as adopted and practised in the Home Country.

The "Family Compact" held the highest public offices in the land, and through their influence with the Executive Council virtually wielded all substantial powers of Government. So well were they organized that they eventually succeeded in acquiring and sharing between themselves all leading positions of emolument and trust. This very naturally caused great dissatisfaction and generated bitter hostility

on the part of the people. The Reformers entered upon a violent struggle, waged with increasing bitterness, through many years, to make the Colonial Constitution a transcript of that of Great Britain, both in form and substance, by intrusting the administration of affairs to such as possessed the confidence of the Assembly, in other words the adoption of "Responsible Government." This became the party Shibboleth of the Liberals or as they were then called, Reformers, not only in the Canadas, but in all the North American Colonies.

When the House of Assembly of Lower Canada asked for an elective Legislative Council, and an Executive Council which should be responsible to them and not to the Governor as the sole responsible Executive, as he claimed, who in turn was alone responsible, as he further claimed to the Crown under whose commission he acted, Lord John Russell, a member of a Whig Administration, said:— "We consider that these demands are inconsistent with the relations between a Colony and the Mother Country. These relations required that His Majesty should be represented in the Colony, not by Ministers, but by a Governor sent out by the King, and responsible to the Parliament of Great Britain. Otherwise Great Britain would have in the Canadas all the inconvenience of Colonies without any of their advantages." Similar petitions for redress, on the part of the Reformers, in Upper Canada, met with a like rebuff. Lord Glenelg, Colonial Secretary, said,—"In Canadian affairs, a sufficient practical responsibility already existed without the introduction of any hazardous schemes." Sir Francis Bond Head, Governor of Upper Canada, on one occasion, when a mild protest was made to one of his acts, by a committee of the popular branch of the Legislature, plainly told them,—"He was the sole responsible minister, and that he was only bound to consult his Council when he felt the need of their advice; and further, that responsibility to the people, represented in the House of Assembly, was unconstitutional."

The exercise of such an autocratic and arrogant assumption, on the part of those who represented the Crown, natur-

ally evoked strong resentment and spread broadcast the seeds of disaffection.

I pause not here to enquire, whether under such or what circumstances, rebellion against constituted authority is justifiable; but leave the question to be decided by each from his own point of view. I will, however, here cite the following statement of the Hon. Joseph Howe, in one of his masterly letters to Lord John Russell,—"Had the Imperial Parliament yielded, in 1836, what it did in 1843, hundreds of valuable lives would have been saved as well as four millions of money." The Hon. Joseph Chamberlain, when Colonial Secretary, on the 16th of July, 1902, in responding to the toast of;—"The Dominion of Canada," said,—"The loyalty of Canada has been enhanced by the free institutions given to her. If it had not been for the Charter of Liberty which she had received, perhaps the condition of things would have been different. In 1837, Canada was in a state of turmoil and excitement. There was a rebellion not only in the Province of Quebec, but in the British Province of Ontario as well. The rebellion, in his mind, was quite justified by the unworthy system which then obtained, and by attempting to rule what ought to have been a free people by methods which were unsuited to them."

In 1832 the Assembly of Lower Canada refused to vote supplies. This resulted in great individual suffering. So bitter was the strife, it is said, members of the Assembly mocked at the misery which they had created. In 1837 the Imperial Parliament passed a coercive measure empowering the Governor General to take out of the moneys, in the hands of the Receiver General in Lower Canada, the sum of One Hundred and Forty-two Thousand pounds to pay the arrears of the Civil list. This act was denounced by Papineau and other agitators as unjust and arbitrary as any that had goaded the American Colonies into rebellion. Previous to this Papineau by his inflammatory speeches, when carrying through the Assembly his ninety-two resolutions, setting forth the grievances of the people, had incited the country to the verge of revolution. The counter blast to the ninety-two

resolutions, by the coercive measure of the Imperial Parliament, had roused into fury an excitable people, swayed by the eloquence of their popular leader.

In Upper Canada William Lyon MacKenzie was the leader of the liberal party. Goldwin Smith described him as,—"A wiry and peppery little Scotchman, hearty in his love of public right, still more in his hatred of public wrong-doers, clever, brave, and energetic, but far from cool-headed or sure-footed in his conduct; temperate in his language, and steadfast in his personal connections."

There is no doubt MacKenzie was thoroughly honest in his convictions, and sincerely desirous of the people's good. Yet, like all Reformers, ahead of his time, he allowed his zeal to outrun his better judgment. It was largely through his ability as a writer, his bitter denunciation of the governing classes, and his scathing invective upon their unfair dealing, he succeeded in stirring up the people to rebellion in Upper Canada, in 1837. Without money, without organization, without efficient leadership or military skill, the uprising, in both the Canadas speedily ended, as all such ill-conceived movements must necessarily end — in disaster. Lower Canada was reduced to a pitiable condition. Civil Government was suspended and the country placed under Martial Law. In Upper Canada Sir Francis Bond Head, whose unwise and headstrong policy had given general offence, resigned. The Province was in almost as deplorable a condition as Lower Canada. Sir Francis was succeeded by Sir George Arthur, whose sympathies were with the party in power, and who ridiculed, as he called it,—"MacKenzie's impracticable scheme of Responsible Government." The Imperial Government now became fully alive to the necessity of taking decisive action to restore peace and order in the distracted country. The turning point in Canadian History had now been reached. Everything depended upon the action of the Home Government. A continuance of the arbitrary policy of the past would end only in serious disaster; it might be in the loss of all the British North American Provinces, while on the other hand, regard to the reasonable requests of the less violent

portion of the people might result in settled Government and assured prosperity. The crisis had come; a crisis involving the fate of the country. A man was needed and one was found equal to the occasion. The hour and the man met in the person of John George Lambton, Earl Durham.

Late in 1837, Her Majesty, in the first year of her reign, invested him, not only with the title, but with the actual functions of Governor General of all Her Majesty's North American provinces and appointed him "High Commissioner for the adjustment of certain important questions depending in the Province of Lower and Upper Canada, respecting the form and future Government of the said Provinces."

This leads me to a consideration of the second division of my subject.

THE MAN AND THE HOUR.

John George Lambton, afterwards Earl Durham, the descendant of an eminent Whig family, was born on the 12th day of April, 1792, at Lambton Castle, County of Durham. The Lambtons trace back, through many generations, an honorable descent, even, it is said, as far back as the times of the Saxons. Their record has been a notable one, as well. Shortly after the Norman Conquest the family settled at Lambton, on the banks of the Wear, in the County of Durham, and have held the estate in uninterrupted possession ever since. Although possessed of great wealth and of highly aristocratic lineage, the Lambtons were ever the friends of the people and spent freely of their means in securing freedom of election and a just representation of all classes in Parliament.

In 1813, shortly after attaining his majority, John George Lambton entered Parliament, representing the County of Durham. He was an advanced Liberal from the beginning to the end of his political career. His high character, not less than his commanding ability, soon enabled him to win distinction among the leaders of his party. From the very first he stood forth as a fearless, outspoken champion of civil and religious liberty. At this period the two great political questions of the day were Reform of Parliament and Catholic

Emancipation. He frankly stated his views of these questions to his constituents in the following words:—"I am no friend, gentlemen, to wild and improbable theories, but when I see seats publicly bought and sold; when I see the majority of one night dwindle into the minority of another without any alteration in the question before them; when I see the consequences visible in the shameless distribution of places and pensions, I grieve that there should be such a stain on the fairest constitution any country was ever blessed with; I blush that the free name of Englishmen should be associated with that venality and corruption. Nor do I consider the Catholic claims of less importance — claims, in my opinion, not only founded on the strictest principles of justice, but rendered, by the peculiar situation of the times, eminently expedient. I rest my pretensions, gentlemen, on the proud consciousness of an upright heart; and the consciousness that if I betray your rights I betray my own honor. Empty professions are worthy of neither you nor me; but I trust that should you elect me to the honorable situation to which I aspire, I shall never disgrace your choice."

At the early age of twenty-five, Lambton, by his fearless exposure of abuses and his unflinching advocacy of Parliamentary Reform, had made his mark in the Commons, as well as having won high distinction in the Country. In November, 1830, on the overthrow of the Wellington Administration, the second Earl Grey was called upon to form a Ministry. Lambton, now Lord Durham, was invited by Earl Grey, whose eldest daughter he had married, to accept the post, in his Government, of Lord Privy Seal. Earl Grey was now in a position to secure Parliamentary Reform, the dream of his life. The presence of Lord Durham, known in the Country as "Radical Jack," Lord John Russell and Lord Brougham in the Cabinet, gave assurance that Parliamentary Reform would be carried at no distant day. A Committee of four, namely, Lord Durham, Lord Russell, Sir James Graham and Lord Duncannon were appointed to frame a bill. Durham, as chairman of the Committee, drew up the report of the proceedings, and took a leading part in shaping the first

Reform Bill. It passed the House of Commons, but was thrown out by the Lords. A dissolution followed and the Government was sustained by a large majority. Only upon threat of the creation of new Peers did the House of Lords yield, and finally it passed and received the Royal assent, on June 7th, 1832.

Durham was the subject of much congratulation for the distinguished service he rendered in securing the enactment of this great measure. Its results were most marked. Fifty-six Boroughs, insignificant as well as rotten, were disfranchised, and thirty-six were deprived of one member each. Twenty-two Boroughs, amongst them, Manchester, Birmingham and Leeds, and other great centres of industrial life, obtained two members.

Durham's speech on the Bill, in the House of Lords, on the 13th of April, 1832, was eloquent and masterly. He concluded with the following stirring peroration;—"Is history, he asked, to be forever a sealed book in the House of Lords? Did its pages not teem with instances of the folly and uselessness of resistance to popular rights? My Lords, I assert that the Revolution of 1641, the French Revolution of 1789, the separation of the North American Colonies, might all have been averted by timely and wise concession. Can any man with the slightest knowledge of history attempt to persuade me that if Charles I., after conceding the Petition of Right, had kept faith with his people he would not have saved his crown and his life? Again with reference to the French Revolution, I say, that if Louis XVI. had adopted the advice given by his Ministers, the people would have been satisfied, the ancient institutions of the Country ameliorated, the altar, the throne and the aristocracy preserved from the horrible fate which afterwards befell them. Twice had Louis XVI. opportunities — first under Turgot's Ministry, secondly under Necker's — of conciliating the country, and averting that fatal catastrophe by limited concessions. The nobility resisted, and the Revolution followed. I need only add my conviction that if, after the repeal of the Stamp Act, England had not destroyed all the benefit of that concession by the

Declaratory Act and the re-imposition of the Tea Duties, North America would at this hour have been a portion of the British Empire."

Froude, in the seventies, in referring to the Reform Bill of 1832, gave the following impression of his views,—"Look at England before the Reform Bill, and look at it now; its population almost doubled; its commerce quadrupled; every individual in the Kingdom lifted to a high level of comfort and intelligence — the speed quickening every year; the advance so enormous, the increase so splendid, that language turns to rhetoric describing it."

The fact of being a prominent leader, in carrying the Reform Bill of 1832, rendered Durham exceedingly popular, coupled with the following remark, made in one of his many speeches,—"That there might exist as much true nobility under a Mechanic's jacket as ever existed under the ermine robes of a Peer." Ill health, in consequence of over-work, together with the untimely death of his darling son, in whom centred his fondest hopes, caused him to tender his resignation of office in the Cabinet of Earl Grey, on the 12th of March, 1833. This step was followed by his elevation to an Earldom. Earl Grey resigned the Premiership the year following.

On July the 8th, 1835, Earl Durham was gazetted as special Ambassador to the Court of St. Petersburg, to protest against the harsh treatment of the Poles by Czar Nicholas. Doubts were expressed as to the advisability of the appointment. Strained relations existed between Russia and the leading powers of Western Europe on the Eastern question, as well, which at any moment might precipitate hostilities. It was feared Durham, on account of his advanced Radical views and his outspoken sympathy for the Poles, would not prove a *persona grata* to the unbending autocrat of all the Russias.

Durham, however, in the discharge of the important duties of his embassy was eminently successful, and fully justified expectation as to his fitness for so delicate a mission. It is generally conceded he was the means of postponing the clash of arms, on the Eastern question, for many years. Ill

health, on account of the rigour of the climate, compelled him to resign, during the second year of his embassy. On the 27th of June, 1837, a week after Queen Victoria's accession, he was received in Kensington Palace in private audience, when Her Majesty invested him with the Grand Cross of the Order of the Bath.

At the close of the year 1837 Melbourne was almost in despair over the deplorable state of affairs in Canada. It was felt Durham was the only man who could successfully grapple with the serious state of affairs existing there and ward off the blow involving the integrity of the Empire. Only a stern sense of duty induced him, in his feeble state of health, to accept so arduous a task. The Government undertook to clothe him with exceptional, even extraordinary, powers, in dealing with the rebellion and in remodelling the Constitution of the Provinces.

In a speech, delivered in the House of Lords, Durham, in referring to his acceptance of the mission, said,—"I go to restore the supremacy of the law, and next, to be the humble instrument of conferring upon the British North American Provinces such a free and liberal Constitution as shall place them on the same scale of independence as the rest of the possessions of Great Britain, and as shall tend to their own immediate honor, welfare and prosperity." The Ministry promised to give him faithful and hearty support in what seemed at least a hazardous undertaking. It is well to bear this in mind in view of their subsequent betrayal of one of the most brilliant, as well as disinterested, servants of the Crown.

From the hasty sketch above given, as well as from the extracts taken from his speeches and addresses, on the leading questions of the day, it can be seen what manner of man Earl Durham was,— fearless, outspoken, independent and occasionally arrogant and overbearing; a natural born leader of men, and alive with sympathy for the welfare of the masses; yet like all men of unresting energy and decisive action, at times wilful and impatient of control. His enemies were neither few nor unimportant. Many of his own party

were jealous of his great popularity and his influence with the masses. The Tories saw in Durham a restless and dangerous demagogue. Self-assertive, he often wounded the pride of those who resented the somewhat dictatorial manner with which he expressed his views. Mr. C. P. Lucas says of Durham,—"He was made up of strangely contradictory elements; he was an aristocrat of aristocrats and at the same time a Radical of the Radicals. While he was a pronounced Radical he was a no less pronounced imperialist." Such the man then, with all his splendid gifts of intellect, downright honesty, and settled purpose to promote the common good, and with all his faults, neither slight nor few, into whose hands was intrusted the fate of Canada, and whose future it was his either to mar or make, at this, the Supreme Crisis, in its history.

I will now pass on to a consideration of my next division.

His Work.

On the 28th day of May, 1838, he disembarked with his suite and made his state entry into Quebec. His reception was most enthusiastic. With characteristic energy he took the oath of office, on the day of landing, and on the following day, issued his first proclamation. In it, after referring to the deplorable state of affairs that, in one province, had unhappily rendered necessary the suspension of its Constitution, he expressed his anxiety to hasten by all means possible the arrival of that day when the executive power should possess all the safeguards of a free and Constitutional Government, concluding with the following significant words:—

"On you — the people of British America — on your conduct, and the extent of your co-operation with me, will mainly depend whether that event shall be delayed or immediate. I therefore invite from you the most free, unreserved communication. I beg you to consider me as a friend and an arbitrator ready at all times to listen to your wishes, complaints and grievances, and fully determined to act with

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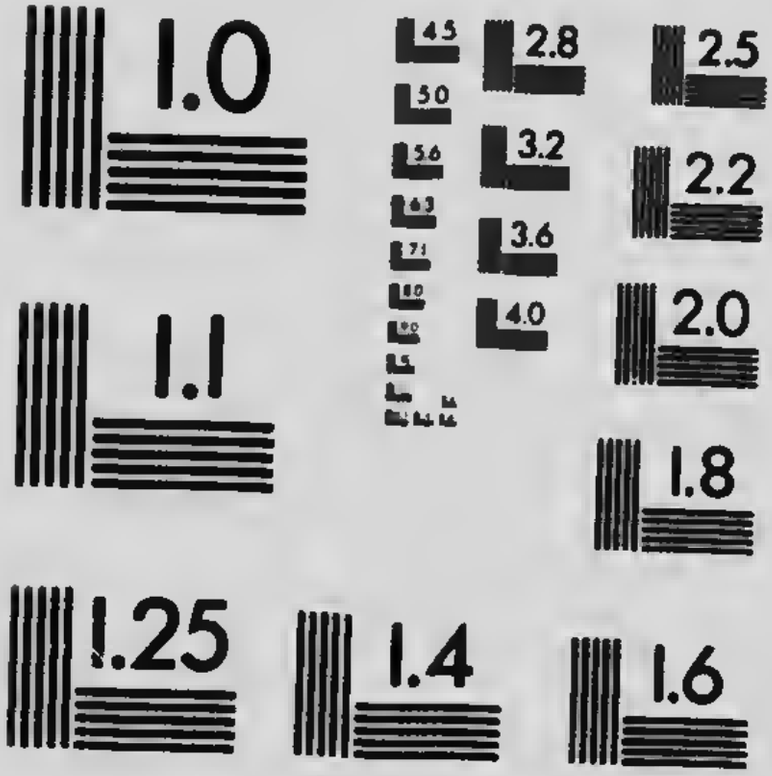

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the strictest impartiality. If you, on your side, will abjure all party and sectarian animosities, and unite with me in the blessed work of peace and harmony, I feel assured that I can lay the foundations of such a system of Government as will protect the rights and interest of all classes, allay all dissensions, and permanently establish, under Divine Providence, that wealth, greatness and prosperity of which such inexhaustible elements are to be found in these fertile countries."

He promptly directed his attention to the appointment of an Executive. He dissolved the existing Council, which Sir John Colborne had formed and appointed a special Council, one in whose advice he could place implicit reliance, and who would be free, as far as possible, from partizanship. With this object in view he appointed as his Constitutional advisers his chief Secretary, Charles Buller, and two other members of his staff, together with the acting Commissary General and provincial Secretary. Sir John assured him the two last named were the most unexceptionable of all the existing advisers. This somewhat startling act gave offence to the Official set. On the other hand it was greeted with great satisfaction by the general public and gave evidence of a determination, on the part of the incoming Governor General, to approach the consideration of the difficult questions he was called upon to settle with an open mind, unswayed by the jealousies and antipathies of those who had been participants, more or less active, in the bitter struggle through which the Colonies had so recently passed.

He next appointed several Commissions of inquiry for the purpose of obtaining the fullest and most reliable information as to the real state of the Provinces. Among them were the following: (1) The subject of Immigration. (2) The disposition of the Crown Lands. (3) A system of Municipal Institutions. (4) The state of Education in Lower Canada. The information thus obtained proved invaluable as evinced in the masterly report, subsequently submitted by him, to Her Majesty, in 1839. He also invited delegates from the different provinces, to be held at Quebec, to discuss matters connected with the welfare of the different provinces as well

as the desirability of a union of all the British Colonies in North America.

The most difficult question which confronted him was the disposal of the prisoners in custody on a charge of treason for their participation in the recent uprising. His kindly disposition naturally inclined him to clemency. Acting upon the advice of those best qualified to judge he granted an amnesty with certain exceptions, which was hailed with great satisfaction and evoked general enthusiasm. A few of the most guilty rebels who had fled for refuge to the United States, among whom was the notorious Papineau, were declared outlaws and forbidden to return to Canada on pain of death. Eight of the more prominent prisoners, among whom was Dr. Wolfred Nelson, were ordered to be transported to Bermuda, during the pleasure of Her Majesty. All other prisoners, as well as those in hiding in Canada, were declared to be at liberty to return to their homes, upon the assurance that they would be unmolested. Lord Durham, in a letter written to Her Majesty, on the 28th day of June, 1838, the day of Her Coronation, congratulated Her, that the rebellion had been terminated without a drop of blood having been judicially shed.

It was exceedingly gratifying to Lord Durham to find that the amnesty met with the approval of all parties — with the French party as well as Sir John Colborne and all the British party. Its quieting effect was immediate. This humane and politic act, whose wisdom subsequent events justified, led to his resignation in consequence of the course pursued by a weak and vacillating ministry. There is no doubt Durham exceeded his power in the transportation of the prisoners to Bermuda. But Melbourne could have obviated the effect of this stretch of power by an Act of the Imperial Parliament. The weak leader of a feeble ministry, however, allowed the Great Pro-Consul to be sacrificed at the dictation of his bitter enemies at home, especially those in the House of Lords.

Lord Durham, in a dispatch dated the 29th day of June, 1838, to Lord Glenelg, Colonial Secretary, set forth the

following reasons for deporting the prisoners to Bermuda; that political prisoners should not be deported to a Convict settlement, since it would affix upon them an indelible stain of moral infamy; that to brand them in such a way would give them an opportunity to pose eventually as political martyrs; and that it would be more conformable with sound judgment to treat them in such a manner as to render it possible, in case the Crown should deem it desirable by a further act of clemency to permit their return to Canada under assurances of good behavior. He further stated, the Ordinance and Proclamation were issued with the full approval of his Council and the approbation of Sir John Colborne, and of the British Party.

Shortly after penning this dispatch, on the fourth of July, 1838, Lord Durham left Quebec and made an extended tour through Canada, visiting all the leading cities, being received everywhere with unbounded enthusiasm and winning golden opinions from all classes. In a letter to Lord Melbourne he thus vividly describes his impressions:—"The country is really beautiful — not one hundredth part settled — and there is room for the overflowing populations of Europe; but then the Government is wretched in all its branches. The Colonies have the mockeries, the shadows of English Institutions, not the realities; the names, not the substances; a magistracy composed of the worst material, some hardly able to write, administering justice, or rather injustice, according to their own private interests; juries perjuring themselves, classes and parties protecting themselves by political associations and the Government dependent on the House of Assembly, or the Legislature, for financial support, alternately the slave of one or the other. Such is the state in Upper Canada, and was lately of the Lower Provinces. * * * Everywhere I have told the people, and I hope I shall be sanctioned by you, that the object of my mission, and of my measures, is to perpetuate the connection between England and these Colonies, indeed to render their separation impossible. You have no idea what general satisfaction this declaration has given. An opinion had gone abroad that we were indifferent

in England to the connection, and consequently men's minds were everywhere unsettled, and looking first to independence, and then to American connection, as the necessary consequence of their being abandoned."

Among the letters awaiting Durham, on his return from his western tour, was one from Lord Melbourne approving of his action, in the matter of the amnesty, by stating what he had done met with his entire concurrence. He was gratified that he had settled a difficult question so satisfactorily. He also received a letter from Lord Glenelg, Colonial Secretary, under date of 31st July, in answer to his of the 29th of June, in which he assured Durham, that the Ordinance was quite right, with the exception of "Legal inaccuracies of form" and that he had settled a perplexing question "most judiciously and ably," and in a way at once merciful and just and "equally grateful to rival and impartial judges." Yet in the short space of one month, after this avowal, the ministry basely deserted the man in whose hands, with implicit confidence, they had placed such extraordinary powers, and at the dictation of his enemies, to their lasting disgrace. Brougham, his bitter and unrelenting foe, jealous of his great powers and popularity in England for his splendid services in the carrying the Reform Bill of 1832, stooped to the basest means his malevolence could devise in his attack on the Ordinance, in the House of Lords. He was joined in a relentless tirade by other Peers, who could never forget the attack made upon them, by Durham, when Parliamentary Reform was the question of the hour. Lord Melbourne had to choose between the abandonment of Durham and the disapproval and ure of the Peers. Fearing a hostile vote, he abandoned Durham to his enemies and decided to disallow the Ordinance. Lord Melbourne delayed the notification of disallowance. The first intimation Durham had of it was gleaned from an American Newspaper. At this juncture he was in conference with delegates from New Brunswick, Nova Scotia and Prince Edward Island, on the question of a Federal Union of all the Colonies of British North America. He at once tendered his resignation.

In response to an address presented him by the delegates from the Maritime Provinces, then in Quebec, Durham said,—"At a moment when I was about to complete those plans which were maturing, party spirit, in England interposed its withering hand, and blasted all my hopes for the welfare of the Canadas. It was the duty of Her Majesty's Ministers to support me in the hour of persecution, and not to join with my bitter enemies in speaking at me. Deprived of all ability to do anything for Canada, it can be of no use for me to remain any longer in the country, and I shall leave it as soon as I receive the official account of the Parliamentary doings."

Dr. Kingsford, the able Canadian historian, in referring to the dastardly act of the Home Government, said,—"Lord Durham received no support from the Ministry who had forced on him the difficult duty he had to perform. It remains to Canada to do justice to the sagacity, wisdom and courage with which he acted in the crisis; a position not sought by him, but undertaken from a sense of patriotism. With us his name will ever be revered and honored."

Justin McCarthy, in his history, commenting upon the disallowance of the Ordinance, remarks:—"If Durham had been guilty of the worst excesses of power which Burke charged against Warren Hastings, he could not have been more fiercely denounced in the House of Lords."

Another writer referring to the great work of Durham said,—"Durham solved the problem of Colonial Government and laid down the lines on which Government in Canada has been carried on, almost from his time down to the present day, and have been applied, not only in Canada, but to every self-governing Dominion beyond the seas. Lord Durham pointed the way, and others have followed it."

From all parts of Canada influential deputations waited upon him, expressing indignation at his treatment, a recognition of the eminent services already rendered, and the hope he would remain and carry out, on the lines indicated, the great work he had undertaken.

His valedictory to the people of Canada was received with the greatest enthusiasm by one of the largest public meetings ever held in Quebec. He concluded as follows:—"Above all, I grieve to be thus forced to abandon the realization of such large and solid schemes of colonization and internal improvement, as would connect the distant portions of these extensive colonies, and lay open the unwrought treasure of the wilderness to the wants of British industry, and the energy of British enterprise. For these objects I have labored much, and have received the most active, zealous and efficient co-operation from the able and enlightened persons who are associated with me in this great undertaking. Our exertions, however, will not and cannot be thrown away. The information which we have acquired, although not as yet fit for the purpose of immediate legislation, will contribute to the creation of juster views as to the resources, the wants, and the interest of these colonies than ever yet prevailed in the Mother Country. To complete and render available these materials for future legislation is an important part of the duties, which, as High Commissioner, I have yet to discharge, and to which I shall devote the most anxious attention. I shall also be prepared, at the proper period, to suggest the constitution of a form of government for Her Majesty's dominions on this continent, which may restore to the people of Lower Canada all the advantages of a representative system, unaccompanied by the evils that have hitherto proceeded from the unnatural conflicts of parties, which may safely supply any deficiency existing in the Government of the other Colonies, and which may produce throughout British America a state of contented allegiance, founded, as colonial allegiance ever must be, on a sense of obligation to the parent State."

On the first of November, 1838, Lord Durham sailed from Quebec, and landed on the 30th at Plymouth. The journey from Plymouth to London was a triumphal procession. The leading cities through which he passed presented him with addresses of welcome and confidence.

Durham's government in Canada lasted only five months. In this short space of time he proved himself equal to a crisis, involving the fate of Canada as well as the integrity of the Empire. All this he accomplished, "without confiscation of property or the forfeiture of a single life." He was engaged in laying the foundation of a sound, stable Government on broad, comprehensive lines, which would perpetuate the connection of the British North American Colonies with the Mother Country, and secure their prosperity, when his hands were suddenly stayed by a vacillating ministry.

Now broken in health by unremitting labor, and nearing the close of a strenuous life, he applied himself with re-doubled energy to the task of completing the great work upon which rests his lasting fame — his report as High Commissioner and Governor General of British North America. This report, his *magnum opus*, was presented to Her Majesty, on the 31st day of January, 1839. It won for him enduring fame and first rank among constructive statesmen. Its publication awakened the liveliest interest on both sides of the Atlantic. It proved the vindication of his policy, and put to shame his violent detractors. Well has a recent writer said,—"Durham, by this document, built himself a monument, which will remain for centuries after Brougham's name has been forgotten. The Durham Report has become the text book of every advocate of Colonial freedom in all parts of the globe. * * * Its keynote is the memorable words,—'The Crown must consent to carry the government on by means of those in whom the representative members have confidence.'"

The Hon. Joseph Howe, shortly after its appearance, published in the columns of the Nova Scotian, the following opinion of this great state-paper,—"We have risen from the perusal of this admirable exposition of the state of the British Colonies in North America with a higher estimate of the powers of the noble Lord, and a more sanguine anticipation of the ultimate termination of Colonial misrule than we have ever ventured to form. We did not believe there was a nobleman in Britain, who had the ability and firmness to grapple with the great question committed to Lord Durham's

care, and in a spirit so searching and yet so frank; nor a man in one short summer could collect and digest so much information and draw from it such a volume of instruction to the Government and the people of England. The people of Nova Scotia should study it as the best exposition that has yet been given of the causes of the dissensions in the Canadas, and containing the best suggestions for the avoidance of kindred troubles in all the provinces, that had yet appeared. The remedy for the state of conflict between the people and the local executives, which prevails or has prevailed in all the colonies, has two prime recommendations, being perfectly simple and eminently British. It is to let the majority and not the minority govern, and compel every governor to select his advisers from those who enjoy the confidence of the people and can command a majority in the popular branch."

In the following year, on the 28th of July, 1840, his active life came to a close, at the comparatively early age of forty-eight. As he lay dying, his last words were,—"Canada will one day do justice to my memory." From Canada came the message to his sorrowing widow,—"The dead man lives in the hearts of the people."

Within the limits of this article it would be impossible to give more than a mere sketch of a few of the many improvements suggested and reforms outlined in this famous Report, which, with the dispatches to the Colonial Offices, go to make up a volume of four hundred pages.

He urged with great insistence, in order to allay discontent, the importance of applying the principles of Responsible Government, as understood in England, to the various Colonies in British North America.

The dominant characteristic of Durham's policy, during his short administration in Canada, as evidenced in his addresses, dispatches to the Home Government, and especially in his Report, was to strengthen and thereby perpetuate the ties that bind the North American Colonies to the British Empire. To this he devoted his commanding abilities with a purpose as fixed as it was unpausing, even to the sacrifice of his health and the shortening of his days. With scarcely less

emphasis did he urge the necessity of complete autonomy in matters of local and Municipal concern. He thus refers to this important question in his Report;—

"The establishment of a good system of Municipal Institutions throughout these provinces is a matter of vital importance. A general Legislature, which manages the private business of every parish, in addition to the private business of the country, wields a power which no single body, however popu. in its constitution, ought to have; a power which must be destructive of any constitutional balance * * * The establishment of Municipal Institutions for the whole country should be made a part of every Colonial Constitution; and the prerogative of the Crown should be constantly interposed to check any encroachment on the functions of the local bodies, until the people should become alive, as most assuredly they almost immediately would, to the necessity of protecting their local privileges."

Further Lord Durham urged with great force and eloquence the desirability of a confederation of all the British North American Provinces. At first he was inclined to favor a federal union, but upon a careful weighing of all the facts pro and con, and upon discussing the matter with the delegates from New Brunswick, Nova Scotia and Prince Edward Island, he ultimately came to the conclusion, a legislative union would best subserve the interests of all concerned, most readiiy subdue existing animosities and more firmly bind the provinces into an united and homogeneous community. Sir John MacDonald, it is said, at first favored a legislative union, but on account of the opposition of the French, who feared that under such an union the province of Quebec would lose its autonomy, he was compelled to yield the point and accept a federal union.

In order to show with what broad, statesmanlike views Durham considered the question and with what force he presented his arguments, the following extract is taken from his Report,—"I am, in truth, so far from believing that the increased power and weight that would be given to these colonies by union would endanger their connection with the Empire,

that I look to it as the only means of fostering such a national feeling throughout them as would effectually counterbalance whatever tendencies may now exist towards separation. No large community of free and intelligent men will long feel contented with a political system which places them, because it places their country, in a position of inferiority to their neighbors. The colonist of Great Britain is linked, it is true, to a mighty Empire; and the glories of its history, the visible signs of its present power, and the civilization of its people, are calculated to raise and gratify his national pride. But he feels, also, that his link to that Empire is one of remote dependence; he catches but passing and inadequate glimpses of its power and prosperity; he knows that in its Government he and his own countrymen have no voice. A general Legislative union would elevate and gratify the hopes of able and aspiring men. They would no longer look with envy and wonder at the great arena of the bordering federation, but see the means of satisfying every legitimate ambition in the high offices of the Judicature and Executive Government of their own Union. It would appear that every motive that has induced the union of various provinces into a single state, exists for the consolidation of these provinces under a common Legislature and Executive. They have the same common relation to the Mother Country; the same relation to foreign nations. When one is at war, the others are at war * * * With such views, I should without hesitation recommend the immediate adoption of a general legislative union of all the British provinces in North America."

He also urged the construction of a Railway from Halifax to Quebec with all possible dispatch. It would be impossible within this limited sketch to refer in detail to the many excellent reforms this eminent statesman outlined in his admirable Report. To be appreciated, every dispatch he penned to the Colonial Office and the final Report to Her Majesty, the Queen, should be carefully read and mastered, especially by every Canadian who has at heart the best interests of our common country. He concluded his masterly treatise with the following patriotic appeal,—"I cannot par-

ticipate in the notion that it is the part either of prudence or of honor to abandon our countrymen, when our Government of them has plunged them into disorder, or our territory, when we discover that we have not turned it to proper account. The experiment of keeping the Colonies and governing them as well, ought, at least, to have a trial, ere we abandon forever the vast dominion which might supply the wants of our surplus population, and raise up millions of fresh consumers of our manufactures, and producers of a supply for our wants. The warmest admirers, and the strongest opponents of republican institutions, admit or assert, that the amazing prosperity of the United States is less owing to their form of Government, than to the unlimited supply of fertile land, which maintains succeeding generations in an undiminished affluence of rich soil. A region as large and as fertile is open to Your Majesty's subjects in Your Majesty's American dominions. The recent improvements of the means of communication will, in a short time, bring the unoccupied lands of Canada and New Brunswick within easy reach of the British Isles, as the territories of Iowa and Wisconsin are of that incessant emigration that annually quits New England for the far West. I see no reason, therefore, for doubting that, by good Government and the adoption of a sound system of colonization, the British possessions in North America may thus be made the means of conferring on the suffering classes of the Mother Country many of the blessings which have hitherto been supposed to be peculiar to the state of the New World. In conclusion I must earnestly impress on Your Majesty's advisers, and on the Imperial Parliament, the paramount necessity of a prompt and decisive settlement of this important question, not only on account of the extent and the variety of interests involving the welfare and the security of the British Empire, which are perilled by every hour's delay, but on account of the state of feeling which exists in the public mind throughout all Your Majesty's North American possessions, and more especially the two Canadas."

This state-paper, aptly called one of the classics of British Political literature, stands as a lasting monument to the

memory of the great Pro-Consul for the distinguished services rendered the Empire. The Report, writes one,- "Brought about not merely the union of the two distracted Provinces, but gave the people of Canada self-government, without imperilling a single prerogative of the Thro . It worked a new era in the relation of England to her Colonies; for the broad and philosophic principles upon which it was based were capable, as after years have shown, of application to similar problems of Government in almost every quarter of the globe."

Malice had not yet quite done its work. That envious man, whose virulence pursued Durham while living, did not stay his shameless purpose to sully his reputation after he had passed to the grave, by circulating the unfounded slander, that Durham was not the author of the famous Report, but that it was the work of Charles Buller, his c . Secretary. The general consensus of opinion now is that Brougham's charge was a base fabrication, and that malignity cannot rob Lord Durham of the honor justly his due for his last great work.

We will now pass on to a consideration of the fourth division.

THE RESULT.

On the publication of his Report it was evident a statesman of broad, enlightened views and of dauntless courage had arisen; one who could grapple with the vexed question of Colonial Government, and who, in the spirit of justice and patriotism could point out a more excellent way than the effete system of redtapeism Downing Street had imposed upon Canada. The strongest evidence of its merits is shown in the fact, that when a new Constitution for South Africa was under consideration the Imperial Government ordered a reprint of his Report for general circulation. Its principles have stood the test during severe trials for a period extending through two generations of men and have not as yet been found wanting.

Upon no man did Durham's Report make a stronger or deeper impression than upon Lord John Russell, then happily for Canada installed in the Colonial Office, in the place of Lord Glenelg. Lord John not only recognized the justice, and the far sighted statesmanship of Durham's suggestions, bu immediately resolved to act upon them. In 1840, Lord Russell laid before Parliament the Union Bill, drafted upon the lines laid down by Durham. In a letter, bearing date March 25th, 1840, written to Durham, he said,—"I send you a copy of the unprinted Union Bill. You will find that all the general principles of your Report, which can be embodied in a Bill, are adopted." It passed both houses without any material change, and received the Royal assent on the 23rd of July, 1840, five days before Lord Durham's death. In the meantime Poulett Thomson had been appointed Governor General of Canada. He, fortunately for Canada as well as for the Empire, adopted, in almost every particular, the policy Durham had outlined for the future Government of Canada. He shortly after his appointment, was elevated to the peerage as Baron Sydenham and Toronto. The Imperial Act of Union was submitted by Lord Sydenham to the special Council of Lower Canada and the Assembly and Legislative Council of Upper Canada and adopted by them. Its terms were briefly these: In place of the two former colonies of Upper and Lower Canada, there was substituted the Province of Canada. The Legislature was to consist of two houses. The Legislative Council of a membership of not less than twenty for life; and the House of Assembly, elected by the people, of eighty-four members; forty-two from each of the former divisions of the province. The Union went into effect on the 10th day of February, 1841. The first united Parliament met at Kingston on June 14th, 1841.

It was fortunate the task of consummating the Union, so ably sketched by Durham was entrusted to one so capable as Lord Sydenham. The Hon. Joseph Howe, in referring to it said,—"It is rare that a statesman so firm, so sagacious and indefatigable follows in the wake of a projector so bold." Some years, however, elapsed before Responsible Government,

as now understood, was fully adopted. In the Colonial Office, there seemed a doubt, whether a governor, directly responsible, to the parent state, could at the same time act fully under the advice of ministers directly responsible to the popular branch of the Colonial Legislature. Lord Sydenham, who proved an able and successful administrator, during what is termed the transition period, stretched his powers to the full extent of their tension, by inaugurating as liberal a system of Colonial Government as possible. His early death, in September, 1841, at the close of the first session of the Parliament of United Canada, exactly one year and five months from the day he arrived at Quebec, was a distinct national loss. It was not until 1848, when that distinguished and remarkably able man, Lord Elgin, was Governor General of Canada, and during the Baldwin-La Fontaine Administration, that the principles of Responsible Government were carried out in their entirety in Canada, after years of incessant agitation and bitter strife. Since then there has been no wavering or shadow of turning from the doctrine of autonomy as enunciated by Lord Durham.

About the same time, or shortly after, the full measure of Responsible Government was adopted in Nova Scotia, New Brunswick and Prince Edward Island.

Municipal Government followed as a natural sequence, for the agitation for Responsible Government and local autonomy "had run a parallel course for fifty years." Baldwin's act of 1849 established the system of local self-government, in Upper Canada, on the broadest basis, distinguished alike for its simplicity as its workability. Its leading features have been embodied in the Statutes of all the different Provinces of Canada. The Upper Canada Law Journal thus referred to it,—"Had Mr. Baldwin never done more than enact our Municipal and jury laws, he would have done enough to entitle his memory to the lasting respect of the inhabitants of this province. Neighboring provinces are adopting the one and the other almost intact, as an embodiment of wisdom united with practical usefulness, equally noted for simplicity and for completeness of detail not to be found elsewhere."

Time forbids to present even a summary of the striking events which succeeded each other, with great rapidity, when Canada had been fairly launched upon its onward career. Among them may be mentioned a few, which were discussed at great length by Durham in his Report,— The secularization of the Clergy Reserves; the virtual abolition of the seigniorial tenure system; the Confederation of the Colonies of British North America; the construction of the Intercolonial Railway; State aid for the encouragement of immigration; a judicious system of free public schools; and the opening up of vast systems of internal transportation and the enactment of trade treaties with different parts of the world. These achievements, however great, are but stages in the wondrous advance of Canada to her assured place among the coming nations of the world.

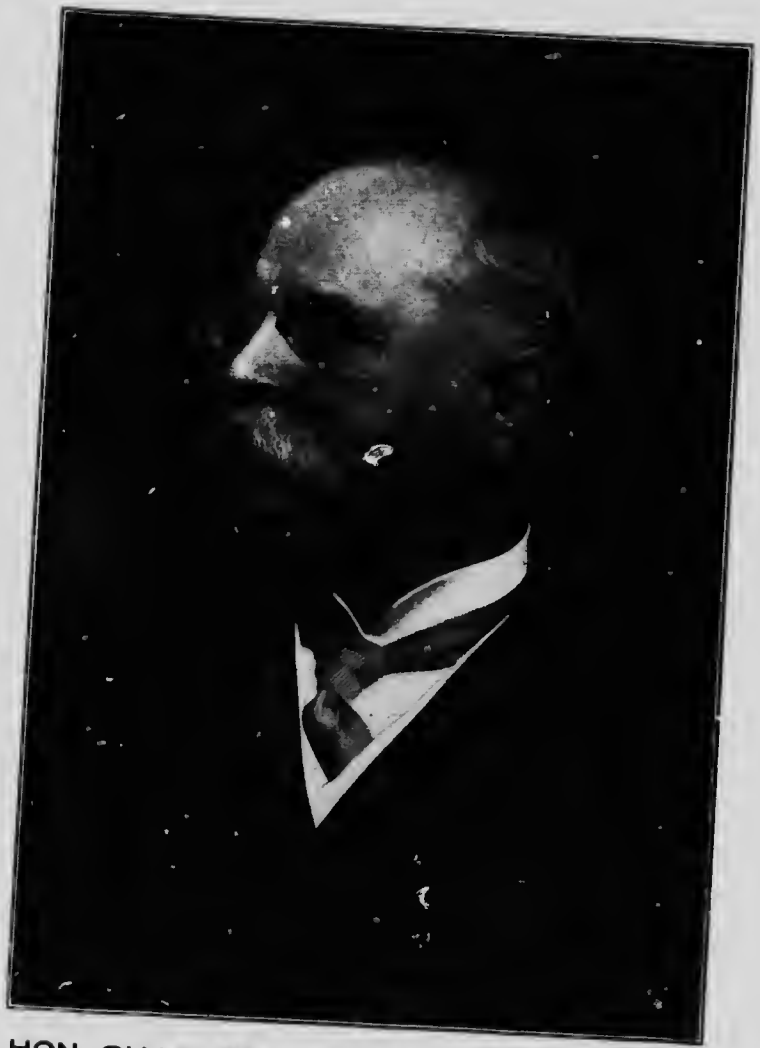
The soundness of Durham's political forecast is shown in the efficiency of the model of Colonial Government as outlined by him, and wisely adopted by the Colonists. For over sixty years it has stood the test, and not a single fundamental principle of its masterly details has proved defective. Responsible Government has been extended, almost upon the exact terms as set forth in his Report, to the extensive circle of the British Empire's world embracing colonies.

Contrast for a moment the state of affairs in Canada in 1838, when Durham entered upon his mission, with what now obtains. Then, in one province, its Constitution had been suspended, and the Habeas Corpus Act annulled. In another the Executive Council responsible to the Colonial office and not to the people; representative institutions a farce; the people unfairly taxed and their money expended without regard to their wishes; the gaols filled with political prisoners, and sullen discontent and unrest brooding over all the land; and in England the expectancy that Canada, at no distant day, would go the way of the thirteen colonies and pass under the control of an alien nationality. Then Canada had but a single line of Railway, sixteen miles in length, extending from the St. Lawrence, at La Prairie, to St. John's, on the Richelieu. Now it can boast of over twenty-eight thousand miles

of Railway. Then the population of all the British North American Colonies did not reach a million and a half; now their combined population is fully eight millions; and now our grand Dominion, blest with a form of government one of the freest and most enlightened in the world, presents, in its vast extent and untold resources, the outlines and semblance of a mighty nationality, just entering upon a career of great promise and unrivalled prosperity.

On a commanding height, in the County of Durham, in full view of Lambton Castle, stands an imposing monument, reared by private subscription, a testimony of the affection and regard with which the great Earl was held among his own people. But elsewhere stands a statelier and grander monument, which will perpetuate his name and fame as long as Canada endures. To the query — "Where found?" "*Circumspice*" is the fitting reply. It is Canada itself, the premier dependency of a world Empire.

It was not for the sake of popularity Durham preferred the hard path of self-denial, unremitting toil, and unfair, often cruel criticism, for a life of ease, which his great wealth could readily have commanded. He was guided by a truer instinct; he was obedient to a higher call and swayed by the impulse of nobler aspirations. With infinite toil, and at the sacrifice of health, he laid broad and deep the sure foundations of Canadian greatness. Others constructed on the lines laid down by this great Empire-Builder; still others are now assisting in rearing the imposing fabric. But higher, grander and statelier still, we trust, will it rise, until its greatness overshadows the continent. With us rests largely the responsibility. Whether we succeed or fail, we cannot withhold the just meed of praise due John George Lambton, first Earl of Durham, for all he accomplished. *Le jour vie dra*, the motto of the Lambtons, has attained almost prophetic fulfilment. The dying words of the great Pro-Consul — "Canada will one day do justice to my memory," — have for us a touching and pathetic interest. With confidence we can say,—"Surely that day has come," and its lustre, we firmly believe, will not fade in all coming time.



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MINISTER OF JUSTICE.

CHARLES A. MOSS, ESQ..

TREASURER ONTARIO BAR ASSOCIATION

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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 [illegible] 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 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 "s fellow," meaning thereby, endowed with a capacit making nice distinctions; untrammelled, if not by ples, 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 supply 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 Enzyklopadie 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 ... of the eminent jurists, constituting the highest C... Appeal, commands universal respect. A brief revie.. 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.J.J., 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 *Hunzzey* 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 says: "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 such prepossession—that is in cases in which the enquiry is thought 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 classic 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.[3] "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

[3] *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 300 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 47 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 limitations of Japanese subjects in this country, as well as of British subjects in the Empire of Japan. The latter Act confirming an agreement 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-contentious 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 a 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 Erie 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 Griesbach, 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. Treleaven, assistant secretary; W. A. Logie, treasurer; John W. Jones and W. S. McBrayne, 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., W. H. Covert, K.C., James A. McDonald, Edmund P. Allison and Fred. P. Bligh, councillors; Dr. J. Johnston Hunt, 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.

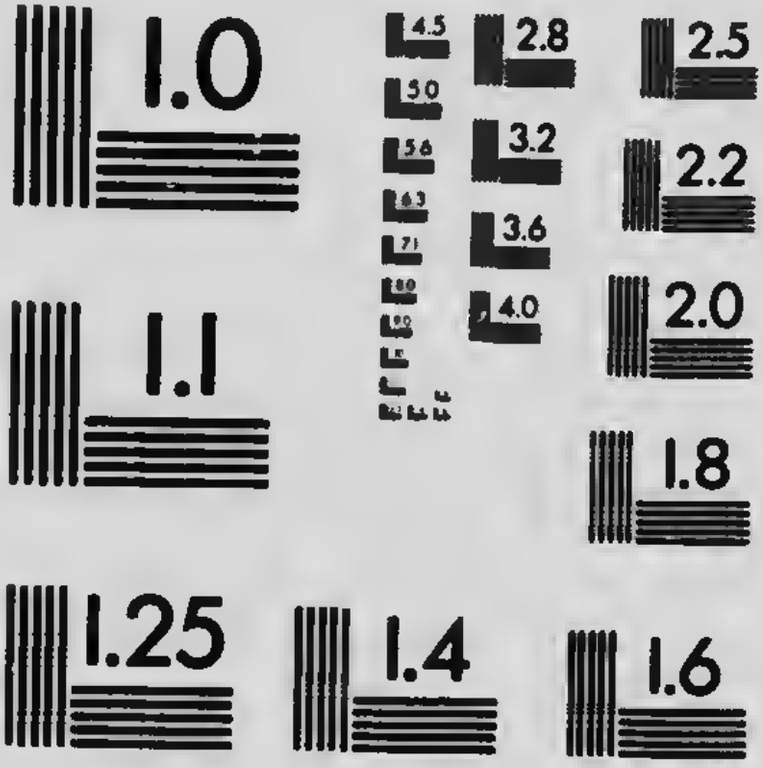
To take the general law first the Bill (Part IV.) proposes to amend it in the following particulars:—

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.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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3. Aeknowledgments 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 "real estate" is to include real estate held on trust or by way of mortgage, and a testator is to be deemed to have been entitled 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 section 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 of the settlement. That policy is, of course, fatal 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 mortgagee 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 estates" 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 executor 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 provisos in paragraphs (*a*) and (*b*).

For my part, I would rather lighten the ship by casting overboard all "the learn 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 a 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. 487 (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 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 [illegible] 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 Rul of Court and annually re-examining them. Whether su. a plan is desirable or practicable or even .orthy 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 ' es fit, regarding available men. Any member of the F ay advocate an appointment, but in most instances it wou be fatal for any one desiring a judgeship to solicit it dir tly or through his friends. No one asking for the posi.on would be deemed worthy of it. The Bar in its collective capacity d es 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;[15]—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 would be 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

[15] See, Talmud Babli Sanhedrin 88 b; 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 speci 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 a[illegible]ity has been frequently asserted, especially by those wh[illegible]erience in Courts of equity, Courts of bank-

[35] Rule [illegible].
[36] See, 3 Bla. Comm. 381.

ruptey 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[88] 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

[88] 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, for the words of the Jewish Master of Jurisprudence[41] are still 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 trained 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.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

The Dominion Conveyancer. Selected and edited by William Howard Hunter, B.A., of Osgoode Hall, Barrister-at-law. Third edition, revised and enlarged by Hugh S. Bowen. Toronto: The Carswell Co., Ltd. Price,

This third and new edition of the Dominion Conveyancer appears in a greatly improved form both as to arrangement and the number of precedents quoted in the volume, in addition to which banking and company forms are for the first time included and grouped, and the mining forms have been greatly added to and brought up to date. The various statutes referred to in the volume together with the fees for registration and a table shewing Devolution of Estates Act make the present volume not only an up-to-date but a most useful book for a conveyancer to have on his desk for ready reference.

The Contest Against Criminality. Investigation and Probation Work in Sweden. By Harald Saloman, Judge of the City Court of Stockholm.

It is, perhaps, one of the best instances of our modern social system that after the conviction of a criminal he is not entirely cast out, but that the modern tendency is, while making "the punishment fit the crime," the act of punishment itself whether detention or otherwise is reformatory and at the expiration of the period of incarceration an attempt is made to start the criminal on the upward, rather than allow him through lack of attention to continue on the downward, road. In Sweden probation work has been carried on very extensively and with great success, and the little pamphlet by Judge Harald Saloman is particularly interesting and its publication and broadcast distribution would undoubtedly be a great aid to work of a similar nature now being attempted in Canada.

Debentures and Other Charges. By Herbert W. Jordan, author of "A B C Guide to Company Law and Practice," "How to Form a Company," &c. London: Jordan & Sons, Ltd.; price, sixpence.

This useful little book is a continuation of a series of Mr. Jordan's works of a similar nature, namely, "A B C Guide to Company Law and Practice" and "How to Form a Company." In defining debentures and their uses, and also abuses, the author is supplying information on a subject generally but vaguely known and any practitioner will find it of great value to him in any work he may have to do in corporation law.

The Senate of Canada, its constitution, powers and duties historically considered. By Sir George Ross, LL.D., F.R.S.C. Toronto: the Copp Clark Co., Ltd.

This volume is particularly interesting at the present time not only on account of the intimate knowledge of its author, Sir George Ross, but also on account of the interest with which the people of Canada watched the gallant but ineffectual struggle that the veteran statesman made against the grim enemy.

With the question of Senate reform a moot one the conclusions of the author as to the best means of bringing this about must of necessity carry great weight.

The subject has been thoroughly investigated from the time of the Quebec Conference, in fact from the date of Lord Durham's report, up to the present time, and although the Senate very often come into collision with the House of Commons the author shews that the upper chamber is acting wholly within its rights and is fully alive to the fact that it equally with the House of Commons is responsible to the nation as a whole.

Chapters on the Law Relating to the Colonies, to which are appended topical indexes of cases decided in the Privy Council on appeal from the colonies, Channel Islands and the Isle of Man and of cases relating to the colonies decided in the English Courts otherwise than on appeal therefrom. By Sir Charles James Tarring, Knt., sometime Judge of H. B. M. Supreme Consular Court, Constantinople, and H. M.'s consul, late Chief Justice of Grenada, West Indies; fourth edition. London: Stevens and Haynes; price, 22 shillings 6 pence.

The distinguished author, in the fourth edition of this able work, apparently finds himself unable to get away from

the earlier conception of the word "colonies." Apart from the term colony, which at this date has become somewhat objectionable, the matter contained in the book is a concise and lucid expression of the question. Chapter 1 deals with the laws to which colonies are subject, chapter 2, with the executive, chapter 3, with legislative power, chapter 4, the Judiciary and the Bar. Subsequent chapters deal with appeals from the colonies and Imperial Statutes affecting the colonies, with a full index of the cases decided by the Privy Council.

Principles of the Common Law. By John Indermaur and Charles Thwaites. London: Stevens and Haynes; price, 20 shillings.

Although, as the author states, this work is intended for the use of students preparing for their examinations it presents the various parts of the subject in a most interesting and readable manner, the author having successfully taken away much of the drudgery incident to preparing a subject of this nature for examination.

In an interesting introduction the origin of common law is defined, the distinction between it and equity outlined, and one or two well known cases are given to impress the subject on the mind of the reader. Part 1 of the work deals with contracts in their many forms; part 2 with torts, and part 3 with damages and evidence. The table of cases is very complete, in addition to which the many references to other works will make the book a particularly desirable one to have on hand for reference.

The Report of the Thirty-sixth Annual Meeting of the American Bar Association, held at Montreal, Sept. 2nd, 1913, is at hand, and is very complete, giving as it does the addresses of the distinguished speakers who appeared before the Association and the discussion of the various subjects which came before the different sections. A very admirable feature of the book is the canons of ethics which were adopted by the Association at its annual meeting in Seattle, Washington, in 1908. The magnitude of a work such as the report of the American Bar Association indicated the virility of the organization itself when one remembers that over eight hundred distinguished men

from all parts of the United States assembled at Montreal for this meeting, which neeessitated their leaving their business for from one to two weeks. There need be no fear of degeneraey in a people who for the general weal are eapable, annually, of making what undoubtedly must be a sacrifiee.

BEST FICTION.

Lays and Lyrics. By Mrs. J. K. Lawson. Toronto: William Briggs.

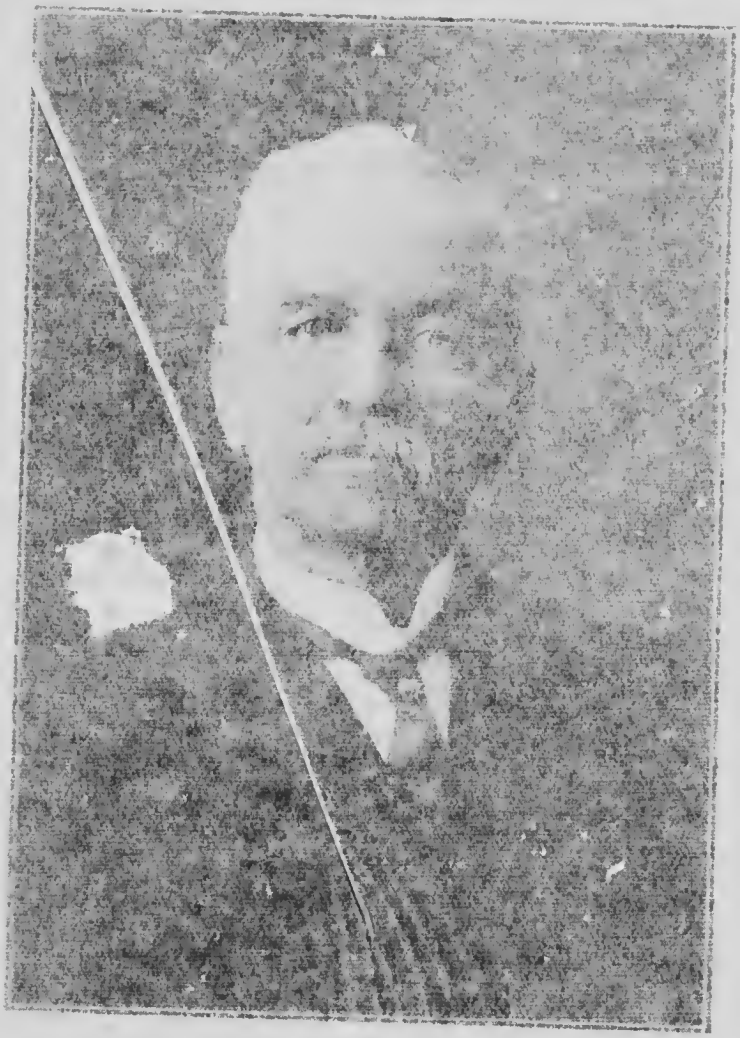
This little volume eomes as a fresh, exhilarating breath from the salt sea earrying with it the perfume of the heather as it sweeps over the hills. It is rare indeed that poetry in so high a form as "Oh, to be Gods in Babylon" appears in one volume with such charming little lyrics as "St. Monan," and "My Ain Auld Toon." The poems all speak not only of personal knowledge but with a broad, deep sympathy with the subject of each poem. The Scots dialeet is pure and undefiled and wholly unlike what passes for sueh with those who assume to represent the heart of the Seottish people. Altogether a charming little volume which will be undoubtedly appreciated by those who like poetry and nature.

Behind the Beyond. By Stephen Leacock. Illustrated by A. H. Fish. London: John Lane, the Bodley Head; New York: John Lane Company; Toronto: Bell and Cockburn.

Mr. Leacock's book is full of the most delicate satire and touches lightly on the foibles of society, but at the same time one eannot help but appreeiate the truth of some of the sketehes. In "A Modern Problem Play," although existing eonditions in polite soeiety are lightly touched upon grim reality is apparent from the very beginning and the reader is cognizant that there can be but one ending. In the other sketches the foibles of the various people are exposed in the author's inimitable way, ineluding the tipping nuisance as it exists abroad.

Many readers having personal acquaintance with Mr. Leacock will remember his inimitable sketch of the average boarding house offered to students, and the truth as outlined in this early sketch of the author's satiric humor is evidenced in his later work.

EDOUARD FABRE SURVEYER,
VICE-PRESIDENT CANADIAN BAR ASSOCIATION.



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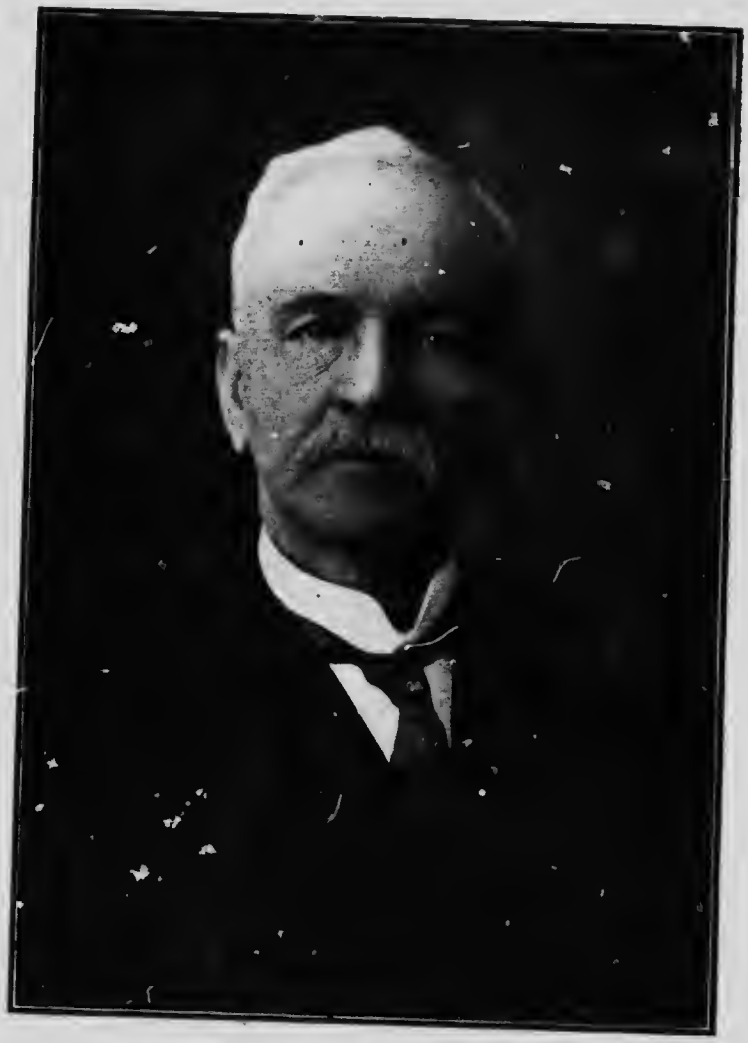

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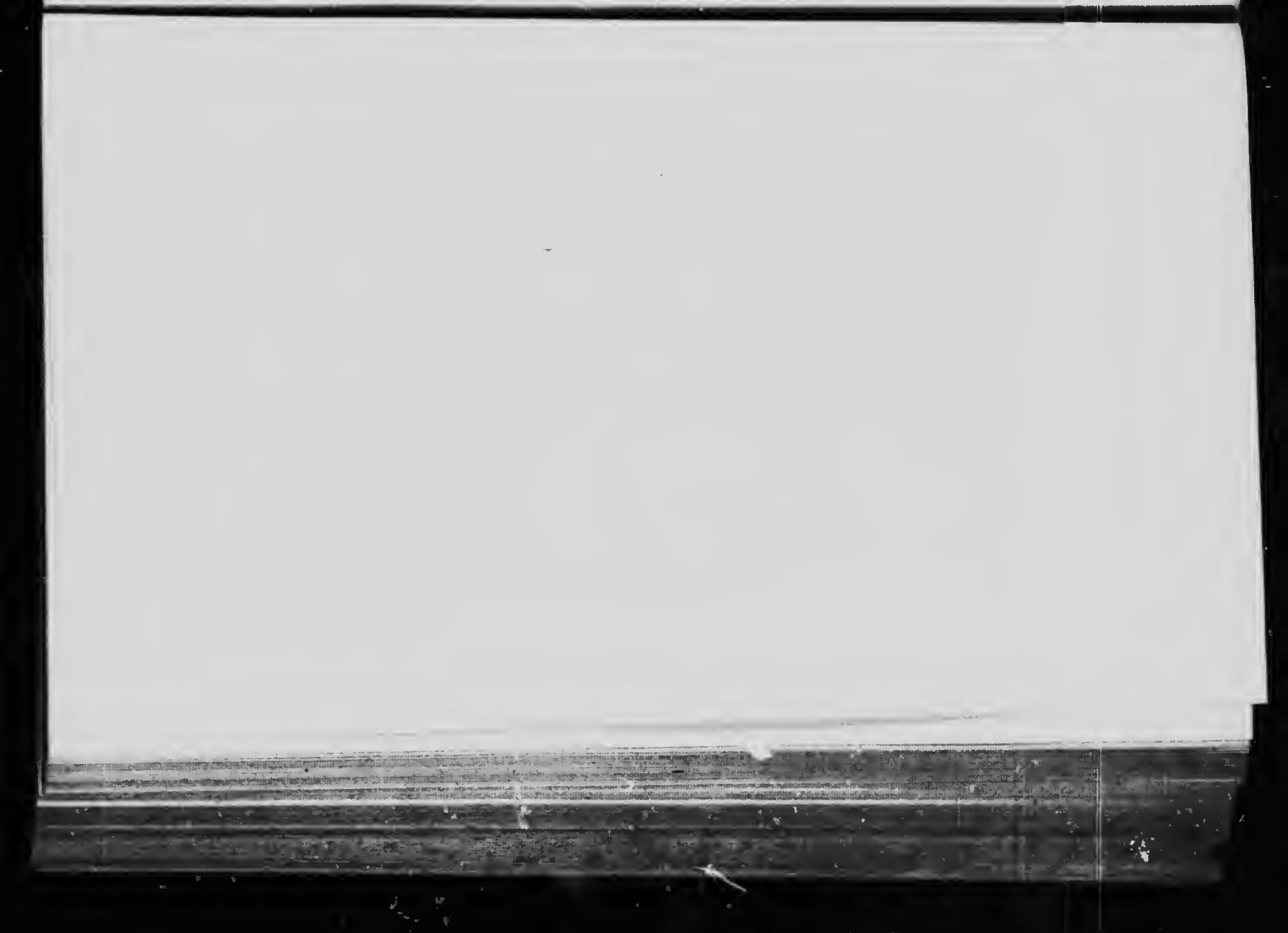

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THE FORESHORE.

Before proceeding to consider the rights, privileges and restrictions of the shore, more generally called the foreshore, of the high seas, it is well to refer to certain well established rules, both national as well as international. These rules, both national and international, are admirably grouped and defined in a celebrated case, *The Queen* v. *Keyn*, (Crown Case Reserved) L. R. 2 Exchequer, p. 63, A. D. 1876. The facts of which were simply these: The defendant was indicted, at the Central Criminal Court, for manslaughter. He was a foreigner, commanding a ship owned by a foreign country. Passing within three miles of the shore of England, on a voyage to a foreign port, when within the three mile limit, his ship ran into, and sank, a British ship, whereby a passenger in the latter was drowned. By English law the facts of the case would amount to manslaughter. It was held by the majority of the Court, that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged. The judgment of Chief Justice Cockburn is a masterly exposition of the whole subject of the rights of the high seas and territorial waters, and the public and private rights therein.

The following are some of the leading rights and privileges therein, both national and international, which are clearly established.

First. All below low water mark include and embrace the high seas.

Second seashore, called also foreshore, is that portion of the land, adjacent to the sea, which lies between high and low water mark at ordinary tides. Hall defines it in these terms: "With us it has long been settled that, that

portion only of the land adjacent to the sea, which is alternately covered and left dry by the ordinary flux and reflux of the tides, is, in legal intendment, the seashore."

Third. The property of this marginal tract along the shore of the sea, of estuaries and arms of the sea, and of navigable rivers, between high and low water mark, is vested in the Crown. The Crown holds it for the benefit of the subject, for the purpose of navigation and fishery. The Crown forbids its use for any other purpose or manner so as to derogate from or interfere with these important rights of navigation or fishery. Mr. Justice Willes, in *Malcolmson v. O'Dea*, 10 H. L. Cas. 1862, at p. 618, says: "The soil of 'navigable tidal rivers,' like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *prima facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II."

Fourth. Every state or nation by the well-established principles of international law has and occupies a maritime extension to the distance of three miles beyond low water mark, for the reason that such a zone or belt of water is necessary for its defence and security.

Lord Chelmsford, in *Gann* v. *Free Fishers of Whitstable*, 2 H. L. p. 192, says: "The three miles limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coast within the assumed distance of a cannon shot from the shore." Also in *Gammell* v. *Commissioners of Woods and Forests*, 3 Macq. p. 419, Lord Wensleydale says: "It may be worth while to observe that it would be hardly possible to extend it seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country, is under the dominion of the country by being within the cannon range, and so capable of being kept in perpetual possession."

Fifth. From the earliest times it has been established, that the soil on which the sea flows and ebbs, that is to say,

between high water mark and low water mark, may be parcel of the manor of a subject: see Scratton, 4 B. & C. p 485. The foreshore may be made the subject of express grant. The foreshore is technically the land, and consequently acts which are evidences of an inland title are evidences of title of seashore.

Sixth. Title to the foreshore may be acquired by a subject by user and prescription, giving rise to the presumption of a grant. Hall says: "As prescription and user can give no title to lands especially as against the Crown, such title, in the absence of express grant, can only be supplied by evidence of adverse possession, for the full period prescribed by the Statutes of Limitation, relating to Crown lands, viz., sixty years. The chief proprietary acts, for which sea and foreshore afford scope, are—taking wreck; taking royal fish (the whale, porpoise and sturgeon); exclusive rights of fishing; taking sand, rock and seaweed; building on, embanking and inclosing. All these acts of ownership, when exercised exclusively, tend to shew ownership of the soil. The strength of the claim will, in all cases, depend on the number of exclusive acts exercised by the claimant."

Seventh. Land formed by imperceptible or gradual accretion from the sea, and land gained by gradual and imperceptible retreat of the sea, belong to the owner of the adjoining land.

An enumeration of some of the rights a subject may exercise on the foreshore may prove worthy of consideration.

The right of the public to fish includes the right to take shell fish on the seashore, such as oysters, &c., between high and low water mark. This right of the fisherman is subservient to the right of navigation. In case of stress of weather the fisherman may exercise the right to draw up or leave his boat above high water mark, on the land of the riparian proprietor.

By the common law immemorial usage alone will not give a title to land, especially against the Crown; but adverse possession founded on the Statutes of Limitation will give a prescriptive right to the shore. The Act, in New Brunswick, respecting limitation of a claim in respect of real property, reads thus: "No claim for lands or rent shall be made, or action brought by His Majesty, after a continuous adverse possession of sixty years."

The ownership of the soil of the foreshore will not exclude the right of public fishery. This claim is established on the ground that a subject can take no more than the King had to grant out of the shore, and consequently the grantee must have taken his grant, subject to the public common right of fishery, to which the sea and seashore were liable, even in the King's hands.

The right of digging for sand on the foreshore often exists, but does not confer any title to the land. Yet it should be borne in mind, if in digging for sand, the person leaves pits or holes in the soil, which become dangerous so as to create a nuisance, he may be prosecuted on the part of the Crown for injury to general rights; or where an individual has sustained damage different from and independent of that which is sustained by the rest of the public, he may have an action at law for damages; or cause the nuisance to be abated by injunction.

The public have no common law right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner; much less to pass with bathing machines, for that purpose. This was so decided by the Court of King's Bench, 1821, in the case of *Blundell* v. *Catterall*, 5 B. & Ald. p. 268, by Abbott Ch. J. and Holroyd and Bayley, JJ. Best, J., contra. The judgment of Holroyd for learning, conciseness and lucidity, is a model worthy of careful study. Eight years after, this case was followed by *Brinckman* v. *Matley*, L. R. 2 C. D. 1904, p. 313. By Royal charter, the Manor of Minster, in the Isle of Thanet, was granted to plaintiff's predecessors in title, by James I., in 1611, and the plaintiff was in possession of the manor and the foreshore. The defendant, head master of a public school, with two hundred of his boys, formed a camp near the manor, and for two months, without consent of plaintiff, resorted to said foreshore for the purpose of bathing. The plaintiff sought by an injunction to restrain defendant from bathing from the foreshore which was granted by Buckley, J. On appeal the Court unanimously sustained the finding of Buckley, J. Romer, L.J., in the course of his judgment, in referring to the judgment of Holroyd, J., said: "I think the judgment of Holroyd has been always considered as one of the most remarkable judgments delivered by that learned Judge in the

course of his career on the Bench." Lord Justice Vaughan Williams, in referring to the same, said: "The judgment of Holroyd, J., has come to be regarded as one of the finest examples we have of the way in which the judgment of an English Judge ought to be expressed, and the reason for it given." These cases over-rule the doctrine laid down by that great law writer, Bracton, who flourished nearly seven hundred years ago during the reign of Henry III.

An obstruction to a navigable river, even for a period of over twenty years, will not operate as a bar to the public right. A building erected, even by the authority of the Crown, on the bed of a navigable river, thereby obstructing navigation, is a public nuisance and the subject of an indictment, and an action at common law by an individual on proof of special damage. Although for some time a moot question, it has at length been finally settled beyond reasonable doubt, that the owner of the soil of a navigable river may erect on its bed an obstruction or building provided it does not cause actual or probable injury either to public rights or to the adjoining proprietors.

The above principles find apt illustrations in several N. B. cases. The case of *Eagles* v. *Merritt*, 2 Allan, p. 550, decided in 1853, was an action brought by the owner of a lot of land fronting on the St. John, a navigable river in New Brunswick. Some twenty-five years before, plaintiff's father, who then was possessed of the lot, built a wharf in front of it, extending into the river thirty feet beyond low water mark. The plaintiff's father had no grant or authority to build the wharf, but he and the plaintiff collected wharfage for its use from woodboats and steamboats as well. The defendants were the owners of a steamboat navigating the river, and occupied a wharf a short distance above, and extending further out in the stream than the plaintiff's wharf; and when lying there their boat extended some twelve feet across the front of the plaintiff's wharf, but did not touch it. It was contended by plaintiff, he could not rent his wharf to the same advantage as he otherwise might, in consequence of the obstruction. On the part of the defendant it was urged that the plaintiff could not acquire a legal right to occupy the space of land covered by his wharf, much less to exclude the public from their right of navigation. The defendants' vessel had a right to be there in the ordinary course of navigating the river, but the plaintiff's wharf was wrongfully

there and he could not maintain an action against defendants for using the water in front of his wharf. Verdict passed for plaintiff for £5. On appeal a non-suit was ordered. Chief Justice Carter, in delivering judgment, said: "We are of opinion that the plaintiff is not entitled to recover in this case. He grounds his right of action for a consequential injury by an interference with the beneficial occupation of his wharf, on the mere possession of a wharf extending below low water mark in a public navigable river, without shewing any right from the Crown, or otherwise, so to occupy this public river for his private benefit against the defendants. . . . We are at a loss to discover how the act of the defendants in so placing their vessel, can be considered a wrongful act by the common law. It is not an act which directly or consequentially injures the land or the wharf of the plaintiff, and for aught that appears, the defendants had at least as much right to put their vessel where they did, as the plaintiff to put the wharf where he did."

The case of *Brown* v. *Reed*, 2 Pugsley, p. 206, A.D. 1874, was the subject of much comment, on account of the status of the city of St. John. The Crown, by Royal Charter, in 1785, granted the Mayor, Aldermen and Commonality of this city, and to their successors, that they and their successors be the conservators of the water, harbour and bay of said city, and shall have the sole power of amending and improving said city, bay and harbour for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting thereto. The plaintiff was the owner of lot No. 1, in the city of St. John, granted in August, 1784, nine months before the said Royal Charter was granted. By the terms of the grant, lot No. 1 and thirteen other lots were to extend to low water mark. In 1840, a harbour line was established by Act of the legislature, and in 1864, a new harbour line was established by like authority. The line of low water mark, receding from year to year, the plaintiff claimed the right to follow it and proceeded to erect an adjoining wharf and extend the same down to the harbour line. The mayor of the city, the city engineer and others removed the wharf in course of construction as an obstruction and a nuisance. The plaintiff brought suit and claimed damages for removal of the wharf, and for obstruction to a slip on the side of the wharf; with the latter, however, it is unneces-

sary further to refer. The jury found for plaintiff and assessed the damages for removal of the wharf, at $1,000. On appeal the judgment of $1,000 for removal of wharf was set aside. The judgment of the majority of the Court was delivered by Chief Justice Ritchie. Parts of this able judgment follow. After referring to the claims of plaintiff and the Royal Charter granted to the city, he proceeds: "What are the rights which the plaintiff has under the grant of 1784? Though that grant extended by its terms to low water mark, it is abundantly clear by all the authorities that a grant of land between high and low water mark (this subject matter of grant being *jus privatum* in the sovereign) must be subject to the *jus publicum*, or public right of the King and people, to the easement of passing and repassing both over the water and the land. See *Mayor of Colchester* v. *Brooke*, 7 Q. B. p. 339, where it was held, that the right of the Crown to the soil in arms of the sea and public navigable rivers, is subject to the public right of passage, and that any grantee of the Crown must take subject to such right. And so again in *Gann* v. *Free Fishers of Whitstable*, 11 H. L. Cas. 192, it was likewise held that the bed of all navigable rivers where the tide flows and reflows, and all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation, which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and every grant made by the Crown of the bed or soil of an estuary or a navigable river, must be subject to such public right of navigation. Therefore it is clear beyond doubt, that the grant under which the plaintiff claims, anterior to the charter, gave no right to the grantees or those claiming under them, to interpose any obstacles to that full enjoyment of the *jus publicum* between high and low water mark; and therefore, though the rights under the grant are preserved to them by the charter, those rights are in no wise enlarged or extended, and consequently, as they could not, before the charter, build to low water mark, they are in no better position now. Our opinion, therefore, in this case, is that the plaintiff had no right before or after the charter to place any erections between high and low water mark, which would interfere with the right of the public to navigate, and pass over, that portion of the harbour so lying between high and low water mark; that the corporation as conservators of the harbour,

had a right, and it was their bounden duty, to prevent the harbour being filled up or incumbered, and that as the erection of the pier without the consent of the corporation would be a nuisance, they had a right, as such conservators, to remove it, and prevent its becoming a permanent incumbrance and nuisance in the harbour; and their right to do so is, in our opinion, wholly independent of any question as to right of soil by grant or accretion, as the ownership of the soil between high and low water mark is subject to the *jus publicum,* or right of navigation and free passage."

The judgment of the Court was adverse to the first claim of plaintiff; but a new trial was ordered in the second branch of the case.

The rights of the riparian proprietor, on an arm of the sea, underwent careful consideration in the case of *Byron* v. *Stimpson,* 1 Pugsley & Burbidge, 1878, p. 697. The facts of the case were briefly these. The plaintiff was possessed of a lot of land which abutted on an arm of the sea and was bounded by high water mark and had right of access therefrom to the waters of said bay. The defendant put up a building, between high water and low water mark, in front of plaintiff's lot, thereby obstructing the access from the plaintiff's land, and plaintiff was thereby prevented from landing his fish and other goods upon part of his land. Defendant, also, erected a smokehouse near plaintiff's lot and injured the goods from its smoke in the store in which he carried on a trade in buying and selling goods. The defendant pleaded, that the building and the smokehouse were erected on the property of the Crown, between high and low water mark, and he, in common with all others of Her Majesty's subjects, had the same rights in navigable waters that the plaintiff had. On trial, the facts being agreed upon, verdict was entered, by consent, for plaintiff, with leave to submit the case to the Supreme Court on appeal for final adjudication. The judgment of the Court was delivered by Mr. Justice Fisher. The learned Judge in part said: "It appears to us therefore, that the plaintiff as riparian proprietor on the bank of the bay of Passamaquoddy, an arm of the sea, has the unobstructed right of access from his land to the navigable waters of the bay when the tide is up, and though the title to the foreshore is in the Crown, he has the unobstructed right of access from his land on the shore to the navigable

waters of the bay when the tide is out, and can recover damages from any person who interferes with or injuriously affects that right or the exercise of it. As to the claim under the third count for the injury inflicted on the plaintiff by the erection of the smokehouse, it appears that he suffered loss by the injury to his goods, from the smoke, and offensive effluvia permeating his store and premises generally. It is a well-established principle of law that a man should so use his property as not to injure another, and in this case the smoke and effluvia from the smokehouse was both injurious to the plaintiff's goods and his business. . . . Considering this case entirely in relation to the legal rights of the parties irrespective of the pleadings, we are of opinion the plaintiff is entitled to judgment for the injury done to him as a riparian proprietor by the obstruction to his access to the waters of the bay by sea when the tide is up, and the access by land when the tide is out, and also for the injury he sustained by reason of the smoke from the smokehouse, and the verdict for the plaintiff on the several counts, in pursuance of the agreement entered into, will stand."

The case of *Rose* v. *Belyea,* N. B. R. 1 Han. 1867, p. 109, is in line with the principle laid down in a former part of this article. The damage complained of was the destroying of the plaintiff's net, when fishing in the St. John, a navigable river, between high and low water mark, and opposite to the land of the defendant, who claimed as riparian proprietor, the exclusive right of fishing there. The plaintiff having recovered damages, in the Court below, for the injury done his net, on appeal the judgment was sustained. Chief Justice Ritchie, in delivering judgment, said: "The soil of a public navigable river is in the Crown, and the right of fishing belongs to the public. Since Magna Charta the Crown cannot grant the exclusive right of fishing in a public navigable river to a private individual. The claim set up by the defendant, of the exclusive right to fish in front of his own land, entirely failed."

The case of *Lyon* v. *Fishmongers' Company,* L. R. 1 A. C. 1876, p. 662, establishes the important prineiple, that private riparian rights may, and do, exist in common with public rights in a navigable river. Briefly stated, the leading facts were: The plaintiff was the owner of a freehold lot and buildings on the north bank of the Thames. The south-

ern side fronted on the river. On the western side, there was a turn in the river extending north about forty feet forming an inlet. This inlet formed the western boundary of plaintiff's property. At the bottom of this inlet and extending westwardly was a lot with buildings fronting on the river and owned by defendants. Lyon's lot enjoyed the advantage of a double river frontage; to the south on the main line of the river; to the west and at the side, by the said inlet. In 1857, by an Act of Parliament a body was constituted, called the Conservators of the Thames, granting the following powers: It shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames, a license to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall, or other work, immediately in front of his land, and into the body of the river, upon payment of such fair and reasonable consideration as by the act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose. This act was subject to a saving clause, by the terms of which, such power was not to be exercised, so as to take away or abridge any right, privilege or immunity to which any owner or occupier of any lands, tenements or hereditaments on the banks of the river were by law entitled. In 1872, the Fishmongers' Company, upon the payment of £250, obtained from the conservators permission to make an embankment in front of their wharf up to the main line of the river, which would have the effect of completely depriving the plaintiff of the use of his lateral frontage. Upon application Vice-Chancellor Malins granted an injunction restraining the conservators from giving such permission. On appeal, the Lords Justices reversed this decree. On appeal to the House of Lords, the decree appealed from was reversed, and the decree of Vice-Chancellor Malins restored. The Lord Chancellor (Lord Cairns) in the course of his judgment said:

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive

access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at that particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. It is, as was decided by this house in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an "injurious affecting" of the land, that is to say, the occasioning to the land of an *injuria*, or an infringement of right. The taking away of riv frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the owner of the wharf, which, in the absence of any parliamentary authority, would be compensated by damages or altogether prevented. It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of such a saving clause as that which I have read. . . . My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation."

Early in April last past, during the closing days of the New Brunswick Legislature, this subject of the foreshore became a burning question in St. John. On the 4th of April there appeared an announcement in the morning papers, that on the night previous the Hon. Mr. Flemming had introduced a bill respecting foreshores, which, on the ground of urgency was received and passed its first and second readings. Being introduced by the Premier as a Government bill, publication was not necessary, nor reference to a standing committee of the house. Suspicion was at once aroused; nor was it allayed, on its publication, on Monday, the 6th day of April following.

Its full text was as follows:—

AN ACT RESPECTING FORESHORES.

Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows:—

1. The Lieutenant-Governor in Council may upon application therefor in writing to the Minister of Lands and Mines,

(a) Give a grant from the Crown to any person of the ungranted bed of any river or lake within the province, or any ungranted flat, beach or foreshore upon the coast of the province, or

(b) Enter into a lease with any person of any such bed, flat, beach or foreshore.

(2) Every such grant when issued shall vest absolutely the fee simple of the land conveyed thereby in the person receiving the same, subject to any control vested in the Parliament of Canada in respect to the navigation of any lands covered with water embraced in such grant.

(3) Any lease made under this section shall be between the King represented by the Minister of Lands and Mines and the person applying therefor, and shall before being issued be approved by the Lieutenant-Governor in Council.

2. The price to be paid for grants of land capable of being granted under this chapter, and the rental, terms and conditions of leases of such land shall be fixed by the Lieutenant-Governor in Council.

3. The Lieutenant-Governor in Council shall, before making any such grant or lease, cause the ungranted bed of such river, lake, flat, beach or foreshore to be surveyed and the returns of each survey shall be taken to establish the boundary between the lands of any riparian proprietor and the lands to be granted or leased.

4. In case any flat, beach or foreshore is granted or leased for the purpose of reclamation, the Lieutenant-Governor in Council shall impose such conditions as may be necessary to ensure reasonable access to some portion of the new water boundary by any riparian proprietor who shall, in the opinion of the Lieutenant-Governor in Council have enjoyed useful access to the water boundary as it existed prior to such reclamation and such riparian proprietor shall not

have any claim against such grantee or lessee for deprivation of such riparian proprietor of such access to the original water boundary.

On Saturday, the 4th of April, 1914, the editor of the *Globe* made enquiry of its correspondent at Fredericton, as to the purport of the bill and received the following reply, which was published in its edition of that evening:—

"Fredericton, April 4. A bill introduced in the Legislature Friday, and given its first and second readings, gives the right to the province to lease foreshores between high and low water mark along tidal waters. Provision is made in the bill for a reservation of the rights of riparian owners and the new Act when passed will govern what has always been an open question as to the land between low and high waters along the St. John and other rivers used for rafting and other purposes."

Recorder Baxter says, "that because of the granted rights of St. John in its own foreshore this bill could have no application to the harbour." The editor of the *Globe* remarked, "This, however, appears to be a matter about which there should be no doubt or uncertainty. St. John has some valuable foreshore rights, that should not be jeopardized."

The *Evening Globe*, a highly respectable paper, and favourable to the government, in its issue of the 6th of April, contained the following leading editorial:—

KILL THIS BILL.

"The foreshores bill, given two readings in the Legislature on Friday evening and now only awaiting a final reading to make it law, is one of the most important measures introduced in the House this session, as a study of its provisions, published on another page, will shew. Far from being a harmless measure, it is a direct menace to every property owner along every river, stream and tidal water front in the province. The bill directly challenges the authority of the private owner. It will enable the Crown to give to any set of individuals control over the foreshores at Courtney bay. It may enable certain interests that last year were prevented from securing the Municipal Home now to get possession of the municipal rights to the foreshore, and so accomplish what was then sought. It may make it easy for

certain sand and gravel companies to acquire rights to take away valuable material from the bay shore. It may deprive every shore holder of the beach and bathing rights he now enjoys. It may cut off the rights of private property holders along the St. John river. In fact it seems to have been devised to make it easy for some parties to do things they are not now finding it easy to do. It is clearly a measure that should not be passed in its present form, and it may be doubted if it should be passed in any form. Certainly the Legislature should do nothing so drastic as is proposed without giving all the interests a chance to be heard and without a full explanation of who wants this bill and why it is being promoted."

In the same issue, it was further remarked:—

"The text of the bill published on another page, can leave no doubt of what its purpose is. Recorder Baxter, who was not in the House when the bill was rushed through two readings, told anxious enquirers that he knew nothing of the measure. Hon. Mr. Wilson and the Attorney-General gave practically the same answer and this naturally aroused curiosity as to who had the bill prepared and why. The rights of St. John in the Municipal Home property are threatened, as are the rights of every property holder in the province owning property along a tidal shore. Strong delegations will go to Fredericton to oppose the bill, which is unlikely to be further pressed."

Such a storm of protest was aroused over the whole province, when on publication its mischievous purpose was made apparent, the Premier ordered it to be withdrawn forthwith, without a word of explanation or excuse.

In an editorial of the 7th of April, the *Globe* further said:—

"The provincial premier acted wisely in withdrawing the Foreshores bill. He should go further and tell who suggested the bill. The Attorney-General and Hon. Mr. Wilson have disclaimed knowledge of the measure. The Recorder, who is supposed to have a particular eye on all legislation affecting St. John, also professed ignorance of this bill, which was introduced by the Premier, rushed through two readings in one night and would undoubtedly have been enacted into law if Commissioner McLellan had not directed the attention of the *Globe* to it and so started the agitation which quickly

resulted in so many disclaimers. The attempt to deprive property-owners of their foreshores right is not by any means the first that has been made, but it is the first, so far as recalled, attempted under the present government and it is right that full responsibility for the intended wrong should be placed where it belongs. It is not enough that the bill has been withdrawn. Its author should be known. Further, the narrow margin by which a great wrong was averted, should impress on the government the importance of extreme care in the passage of legislation affecting private rights. Even on the grounds of urgency, government bills that infringe or threaten private interests should not be introduced and advanced without all parties having full opportunity to learn the provisions of the measure and its probable intent. It is unfortunate that in late years our legislative bodies have got far away from the good old practice of telling in the speech from the throne of the public measures to be introduced and passed."

In the *Globe* of April 8th appeared the following editorial: "Every public man has many enemies. The most dangerous are those, who, under the guise of friendship, seek to make him the agent of a public wrong. The Foreshores bill made it clear that Premier Flemming has at least one such enemy. He should tell the public who inspired that bill."

And here the matter rests for the present. The same mystery seems to surround it. The hidden hand apparently even to this day, remains undisclosed. Whence this unique specimen of attempted legislation came may be shrouded in doubt; but whither it was intended to go is no longer a debatable question.

Where title over the foreshore is vested in the Dominion Government, so careful is it in protecting the rights of private owners, it will grant a lease of the same, only to the riparian owner whose land abuts on that of the foreshore sought to be leased.

The Nova Scotia Act, relating to foreshores and the beds of rivers and lakes, is drawn with care and a just appreciation of public and private rights. One of its leading provisions reads as follows:—"No grant of a water front shall be issued to any other person than the owner of the land on

which such water front abuts, without the consent in writing of such owner."

Another section reads: "Nothing in this section shall authorize the granting or leasing of any fishing right or privilege in any river or fresh water lake of the province."

Under section 2 of the Nova Scotia Act, the grant vesting the fee simple of the land, conveyed thereby in the person receiving the same, is made subject to any control vested in the Parliament of Canada in respect to the navigation of any lands covered with water embraced in such grant.

And still further in the Nova Scotia Act provision is made for the adjustment of rival claims for a lease of the same beach or flats.

The lands of the riparian proprietors along the eastern side of Courtney bay are invaluable, being the centre of the great works in course of construction by Norton Griffiths & Co., where many millions are to be expended, and destined to be a great *entrepot*. Had this bill passed into enactment, these riparian proprietors would not have received any compensation for these rights, as is evidenced by a careful reading of the fourth section. This simply spells confiscation.

Eternal vigilance is the price of liberty. Eternal vigilance, likewise, is the price the people must needs pay to secure wise, wholesome and equitable laws. Of the six representatives sent from the city, and the city and county of St. John, to guard and protect our rights, not one, not even the president of the council, raised his voice in protest against the passage of this iniquitous bill. The Premier, when presenting it, offered no explanation of its provisions; pleaded no mandate from the people for its enactment; failed to disclose the names of its promoters; nor did he give one single ground of urgency for its speedy passage through the House. Our public men cannot be too careful and vigilant in seeing that private and public rights are not jeopardized by unscrupulous promoters seeking by indirection to secure some personal advantage at the sacrifice of honesty and fair dealing.

SILAS ALWARD.

St. John, N.B.

LORD HALSBURY

AND A FAMOUS ANCESTOR.

The announcement that Lord Halsbury may be the chairman of the new Marconi Committee to be set up by the House of Lords is quite the most piquant personal event of the week. It is not merely that Lord Halsbury's passion for purity in politics is so cherished a possession, I will not say of the country, but at least of the music halls; but also that the fact gives new evidence of the vitality of this indomitable old man, who, on the threshold of his ninetieth year, is still the most pugnacious figure in politics. His memory links the present day with the passing of the great Reform Bill in 1832; but his mental and physical energy are unabated by time. There is a defiant air of immortality about the man which seems to keep the enemy at bay. Old age has left what Oliver Wendell Holmes calls his "visiting cards" on him in profusion, but he treats them with scorn and goes along twirling his cane like a gay young fellow who has all his days before him. He has never yielded to anybody, and he is not going at his time of life to yield to such a feeble thing as old age. He stands like a block of granite, four square to all the winds that blow—a quaint figure with exiguous legs, a powerful body and a mighty head set square and challenging upon the square shoulders. The features are instinct with the spirit of combat. The broad turned-up nose, the grim mouth drooping at the corners, the projecting under lip, the square aggressive lower jaw give him an air, at once humorous and formidable, which is a delight to the caricaturist.

How to Keep Young.

And if his physique is made to last, his temperament is no less virile. It is the temperament of a man who, however much his ideas may belong to the past, always lives in the present. The Bishop of Carlisle once told me that when he sought to get the late Archdeacon Jones to talk about Gladstone, whose tutor he had been nearly sixty years before, he found him singularly uninterested. Finally he cut the subject short by asking how the Philharmonic concert had gone off the previous night, observing by way of explanation, "I like to talk of the present; it keeps me young."

That is the secret of Lord Halsbury's vitality of mind. He refuses to be pensioned off by time, and the older he gets the keener becomes his passion for the fight. When, after eighteen years' tenure of the Lord Chancellorship—a tenure only exceeded by those of Eldon and Hardwicke—he was driven from the woolsack, he began the task of editing the "Laws of England," and took advantage of the Act he himself had passed which gave him the right to preside in the Appeal Court. At 85 he headed the rebellion of the Die-Hards, and very nearly succeeded in overthrowing the official leadership of Lord Lansdowne. And there is no obvious reason why, at 95, he should not still be found barring the way of Sir Robert Finlay to the Woolsack.

A Die-hard.

His opinions are as obstinate as his temperament. It was said of his father, Stanley Lees Gifford, who was the first editor of *The Standard* when that paper was founded in 1827 to oppose Catholic Emancipation, that "in the obduracy of his sympathies and antipathies in politics he was a man after Dr. Johnson's own heart." That might be said with equal truth of Lord Halsbury. He is one of the few indisputable Tories that are left to remind us of that incredible breed. He stands for everything that is in possession and is the enemy of everyone who is dispossessed. Sir Frederick Banbury himself is not a more uncompromising foe of democracy. He would not even let them have trams across the bridges in order to get to their work, lest such concessions should breed in them a perilous hunger for more luxuries and liberties. When he led the Die-Hards he talked of his "solemn duty to God and his country." And no one doubted the sincerity of his utterance, for he is not given to talking humbug. He does really believe that God and his country belong to his own class and that Parliament is a sacred institution only so long as it is in possession of that class and makes laws to preserve its privileges against the heathen without.

Jack Gifford.

His philosophy of Government is traceable to his grandfather, that famous Jack Gifford who was one of Pitt's instruments in destroying the liberties of Ireland. He was not the basest of those instruments. That bad eminence belongs to McNally, the record of whose perfidy is one of the most shock-

ing stories in the literature of any country. Jack only betrayed his country, not his friends. He was a creature of Dublin Castle and never pretended otherwise. He lives in the famous philippic of Grattan made in repudiating a charge which Gifford had levelled against him. Here is a passage from that withering utterance:—

"When I observe the quarter whence the objection comes I am not surprised at its being made. It proceeds from the hired traducer of his country, the excommunicated of his fellow-citizens, the regal rebel, the unpunished ruffian, the bigoted agitator. In the city a firebrand, in the Court a liar, in the streets a bully, in the field a coward. And so obnoxious is he to the very party he wishes to espouse that he is only supportable by doing those dirty acts the less vile refuse to do."

It is not an amiable picture and Lord Halsbury doubtless prefers the more friendly description by Sir Jonah Barrington in his "Personal Sketches and Recollections." It is not flattering but it looks singularly lifelike:—

"He had a great deal of vulgar talent, a daring impetuosity and was wholly indifferent to opinion. From first to last he fought his way through the world, and finally worked himself up to be the most sturdy partisan I ever recollect in the train of Government. His detestation of the pope and his adoration of King William he carried to an excess quite ridiculous; in fact on both subjects he seemed occasionally delirious. With all his faults or crimes, if they should be called so, he had several qualities which in social intercourse are highly valuable. He was as warm-hearted and friendly a person as I ever met with, and, on the other hand a bitterer enemy never existed."

Sir Jonah denied that he was a coward as Grattan said and it is difficult to imagine this type of bulldog to be wanting in personal courage; but there stands against him nevertheless the record of his brutal and cowardly assault on Potts, the editor of the rival Dublin paper, "Saunder's Daily News Letter," for which he was sentenced to 5 months' imprisonment—a sentence which Dublin Castle promptly cancelled by ordering his release on payment of a fine.

The Bull-dog Breed.

It is not necessary here to go over the familiar story of the astounding corruption that led to the union. That is all

told in Lecky, Fitzpatrick and elsewhere, and the part which Gifford played in the squalid business has been illuminated by the discovery of heaps of the letters of the spies addressed to "J. G.," which are still preserv at Dublin Castle. The story of "The Dog in Office," as the people of Dublin called him, is interesting here only as throwing light on the sources of Lord Halsbury's fierce antagonism to Home Rule, the pugnacity of his character and the strength of his prejudices. Sir Jonah Barrington's description of his grandfather fits him like a glove.

There is about him a force of mind and downrightness of speech that are refreshing in a world of compromise and equivocation. He has the courage to say what he means and do what he wants on all occasions, regardless of consequences or criticisms. It is this bull-dog quality which has brought him success. Neither at Oxford nor at the Bar was he specially distinguished, and his early career in Parliament was chiefly remarkable for the trouble his scornful disregard of consequences got his party into. But his grim aggressiveness ploughed through all obstruction, and leaves him to-day, when all his old colleagues of the Disraelian days are dead and forgotten, still one of the most formidable figures in politics.

As a Judge.

Within the limited range of his sympathies, his mind works with a rough vigour and directness that are shattering to falsities or evasions. "When I hear a counsel say a thing is practically so and so, then I know it is not so and so," he said on one occasion, and the saying expresses the blunt veracity of his mind where facts and forms of speech are in question. Sometimes he clothes his roughness with a homely humour that is delightful, as when he told counsel, "You must give me something I can take hold of. You are like the captain of a ship who lays out a chart of the Atlantic and spreads his hand down in the middle of it, and says: 'We are somewhere about here.'"

It is difficult to recall that a man with such a merciless tongue was as famous at the Bar for his appeals to the emotions of the jury as to their prejudices and that in the *Tichborne case* he won the sobriquet of "the weeping counsel." But on the bench there is no need for disguise and as a Judge

Lord Halsbury has been as distinguished by his loyalty to the law as in politics he has been distinguished by his loyalty to party. His judgment in the *Dover case*, for example, was one of the most memorable triumphs for the temperance party in their claim as to the public control of the liquor trade. It is true that as a politician he promptly helped his Government to blot out the effect of that judgment by giving the brewers a freehold in their licenses; but the point here is that as a Judge he has a legal conscience.

His Patronage.

As a politician he has no use for such an encumbrance, and no one in great office ever carried the license of partisanship farther. During the long period he was on the Woolsack he appointed nearly the whole judiciary, and the character of his appointments brought the Bench down to a level that it had not reached in living memory. Even his own party came to be ashamed of the unblushing jobbery. "*Truth*" gibbetted him systematically as the Lord High Jobber, and the public suffered incalculable loss and wrong by the notorious incompetence of such Judges as Sir William Grantham and Sir John Lawrence, to take only two examples of men who were raised to the Bench simply because of their political connections. Nor did he limit his operations to the High Court. He packed the magistracy of the country with his supporters so carefully that practically the whole administration of justice was in the hands of the Conservative party.

Finally, his affection for his friends was so handsomely shewn in the distribution of offices that it was said that when the end of his official career came there was nobody but his footman who was unprovided for. This was an exaggeration of course; but he *was* generous to those about him. He would enjoy the story Mr. G. W. E. Russell tells of the Irish placemen of long ago who were discussing appointments. "I don't mind confessing" said one "that, *coeteris paribus*, I prefer my own relations." "My dear fellow," replied the other, "*coetéris paribus* be damned." I think I hear Lord Halsbury laughing in joyous agreement. For, as I have said, there is no humbug about the man. He would not job a friend into office and then lay his hand on his heart and talk of his sacred oath, as Lord Westbury did. There is a jolly audacity about him that would scorn a sleek lie.

For himself he has found the union of law and politics a not unprofitable career. In the last 25 years or so he has received from his grateful country a trifle of £220,000, and with his pension of £5,000 a year still running and his health unfailing there is every reason why he should reach a round quarter of a million. As he goes along the streets twirling his cane it is not difficult, indeed, to conceive that he may yet reappear on the woolsack. It is not far short of 10 years since Mr. Choate, the retiring American Ambassador, referring to him, said:—

> "Time like an ever-rolling stream,
> Bears all its sons away.

But the Lord Chancellor stems the tide of time. Instead of retreating like the rest of us before the advancing waves he is actually working his way up stream." To-day he is pulling up stream harder than ever.

An indomitable old man. Long may he be preserved to us to inspire us with a noble indignation against political corruption.—A. G. G.

LETTERS FROM THE HON. THE MINISTER OF JUSTICE ON THE SUBJECT OF JUDGES' SALARIES.

Ottawa, May 15, 1914.

My dear ———,

I have your letter, with enclosed letter from Mr. X. I was at considerable pains to explain in the House what my Bill proposed to do with regard to the Circuit Court Judges in Montreal. Those Judges, I may point out, receive, three of them, a total income of $3,000, and one of them an income of $3,600. For this, their entire time has to be given to their judicial duties and the work they have to do is very considerable, so considerable that the Legislature of Quebec made provision for their number being increased from three, which they formerly were, to six. I declined to appoint the three additional Judges thus provided for and appointed, but one. Having done this, and having satisfied myself that four could do the work for which the Legislature had provided six, and seeing that these four must give their whole time to the doing of this work and had no other source of income, I felt justified in dividing between them the $6,000 which I had economized by appointing the smaller number of Judges.

I may point out further that the lowest income received by the County Court Judges in Toronto for performance of judicial duties is $4,600, and that one of them, at least, earns by the performance of such duties, something exceeding $7,380. It is true these incomes are not entirely derived from the Government of Canada, but they are the remuneration of the judicial duties of these gentlemen.

Under the legislation I proposed, the remuneration received by the Circuit Court Judges in Montreal will not be equal to that received by the Toronto County Court Judges, and I can only assume that when it is suggested that this action involves discrimination in favour of the Montreal Judges, the statement is the result of absence of knowledge of these facts.

May I also point out, in the interests of the Judges themselves, that, unless they are willing to permit the subject of

salaries to be dealt with by taking up first the most urgent cases, and if they insist on simultaneous action over the whole field, I am convinced that it will not, for a very long time at least, be possible to do anything. Objection on the part or in the interest of the Toronto Judges to what is proposed to be done under the circumstances above related, with regard to the Circuit Court Judges of Montreal, may as its extreme effect prevent the action that is now proposed, but much as I might desire to improve the position of the Judges generally, I regret to have to say that complaint of what is being done will certainly not bring about any addition, at present, to the salaries of the Toronto County Court Judges. This is not the result of my desire, but of my having to submit the fact that it is believed that reasons exist which make it impossible to deal with the whole subject of Judges' salaries at present.

I cannot bring myself to believe that the dissatisfaction which is expressed in the letter of your correspondent means that, in his opinion, the Toronto County Court Judges would be better off if the Circuit Court Judges in Montreal were continued in the position where their salary is $1,600 a year less than that of the Toronto Judges, who receive the least remuneration.

With regard to the case of the Superior Court Judges, who are being dealt with, it is merely carrying out an arrangement whereby we avoid the appointment of an additional Judge or Judges, which would cost $7,000, if but one were added, or $14,000 if two were added by the Legislature, by providing for rural district Judges, in addition to their district work, to share in the City and District of Montreal, at a total cost of $4,000. The work in the District of Montreal calls for more Judges. I hardly think that it can be considered discrimination, because, instead of leaving the Legislature to make provision, as it has authority to do, for the appointment of new Judges, calling for larger salaries, we have succeeded in arranging that by transferring Judges from rural districts to Montreal and making their salaries equal to those already given to Montreal Judges (which are less than the remuneration received by the High Court Judges in Ontario), we shall get the work done.

I trust this explanation will make it clear to your correspondent that there is neither in intention nor in fact any unfairness in what has been done.

Yours very sincerely,

CHARLES J. DOHERTY.

May 27, 1914.

My dear————

.I have your letter of the 26th, with enclosed communication from Mr. X. I notice that the latter now recognizes that under the recent legislation to improve the position of the Circuit Court Judges in Montreal, the only ground upon which a comparison disadvantageous to the County Court Judges in Toronto can be made, is that the latter will not be entitled to have the full amount of their remuneration taken into account in fixing their retiring allowance. This, of course, cannot be looked upon as a disadvantage as far as regards the Judge who is enabled to earn the larger income of over $7,000. Furthermore, the fact that the other Judges have been for years enjoying a larger remuneration certainly goes some distance to counterbalance the fact that the retiring allowance from this Government may not be equal to that to which the Circuit Court Judges may become entitled.

Mr. X. seems to completely overlook the fact, which has a very material bearing upon the position taken in connection with the Circuit Court Judges in Montreal, that I was enabled by the foregoing of the claims to have the full number of Judges provided by the Legislature, appointed, to make an economy on Judges' salaries in Quebec to meet the additional payment provided for those in office.

I may say that if the Ontario authorities would do something towards reducing the very large number of County Court Judges which their law now requires, it would be a great assistance towards improving the position of the others. As you know, if I were all alone, I would be glad to improve the position of all the Judges. Your correspondent and others interested in bringing about the improvement would,

in my judgment, be better advised if they did not insist on all cases being dealt with at the same time. A Minister of Justice does what he can, not always what he wishes. It is sometimes possible, when very exceptional circumstances aid, as was the case with regard to the Judges in Montreal dealt with, to do one thing when it is not possible to do a large number of others. I am sorry that the fact that it proved possible to do the particular thing which I was able to do, should apparently have provoked disapproval of the doing of it, simply because it was not possible for me to do more for Judges who already enjoyed an income equal to that given to the beneficiaries of the recent legislation.

Yours very sincerely,

CHARLES J. DOHERTY.

EDITORIAL.

Judges' Salaries.

In this issue are printed two letters from the Minister of Justice, the Honourable C. J. Doherty, addressed to one of the members for the city of Toronto, who, at the request of the Editor of this journal, had taken up the question with the Minister with a view of obtaining a similar increase in the salaries of the County Court Judges of the county of York, living in Toronto, as that given to the Circuit Court Judges of the city of Montreal in the bill recently passed.

Much weight is given to the fact that a saving to the country is made by increasing the salaries of the Quebec Judges rather than increase the number of Judges themselves as provided for by the provincial Legislature.

During the whole discussion of the proposed measure, not a single member for the city of Toronto raised his voice to speak in favour of giving the Ontario Judges the benefit of an equal increase, as that proposed for the Judges of the city of Montreal.

Position, dignity, responsibility and fame are all qualities which every Judge values in accepting the position he occupies; once appointed he ceases to be in a position to speak for himself, and the country should place him in a position financially fitting his station, for in salaries paid to the Judges as a whole there is no comparison with that received by distinguished counsel practising at the Bar, and these salaries to-day remain at the same figure they were many years ago when the cost of maintaining the position in its proper dignity was but one-third of that at the present time.

Particular stress was laid in the last issue of this magazine upon the salaries of the County Judges of the county of York since conditions in Toronto were similar to those in Montreal and the County Court Judges in Toronto do practically the same work as the Circuit Judges in Montreal who are to be benefited by the proposed bill.

In one of the letters of the Minister of Justice it is stated that the lowest income received by the County Court Judges in Toronto for the performance of judicial duties is $4,600. The same paragraph also states that this sum is not derived entirely from the Dominion Government. The salary paid

by the Dominion Government is $3,000, and the Ontario Legislature provides an allowance of $1,600 additional, from the Surrogate fees. This grant from the provincial Legislature is somewhat precarious owing to the fact that it is not permanent and is not taken into consideration in computing the retiring allowance, and again referring to the same letter in the following paragraph, although the salaries of the County Court Judges of the county of York with the $1,600, provided by the provincial Legislature, exceed by a fraction that to be paid to the Circuit Court Judges in the city of Montreal, the latter are much better off owing to the increased retiring allowance which they will receive.

The salaries of the Judges in Canada are unquestionably too small, far too small to ask men of the calibre of Canadian Judges to relinquish, what, in many cases, are incomes twice or three times as great as what they receive on the bench. Far be it from anyone to find fault with the Minister of Justice in increasing the salaries of any of the Judges,—those having the subject at heart will rather hold up his hands in supporting any such measure, for even with the increase provided by the bill, if the work performed by the Judges to be benefited, is as onerous as the discussion indicates, they are still underpaid. It is not with the increase in the salaries of the Judges in any particular locality that fault is found, but similar localities where the same or even a greater amount of work is performed, should be benefited in like manner. The Minister of Justice points out that he is dealing with what is considered the most urgent cases and if cases which are in the opinion of men most prominent in the profession, equally as urgent, will be dealt with at an early date, then patience, which in the opinion of those interested in the matter has long since ceased to be a virtue, may again be invoked with the hope that the invocation may not as in the past be in vain.

One outstanding feature during the discussion of this question in the House was, as above mentioned, the silence as a whole of the Ontario members, Quebec, Nova Scotia, New Brunswick, Saskatchewan, and Cape Breton, were all heard from very emphatically. Among the members from the city of Toronto at Ottawa are three Ministers of the Crown, two barristers, and one newspaper man, and not one of them raised his voice to present the case for the Judges of

the county of York, although fully cognizant of the tremendous amount of work performed, and only after correspondence with the members in question was any interest whatever shewn in the matter.

While discussing this question, references may be made to an article by the Lord Chancellor in the March issue of the LAW TIMES on Sheriff Courts in Scotland, in which the question of Judges' salaries is discussed. The Sheriff Court is somewhat similar to the English and Canadian County Court and in large cities like Glasgow, the Sheriff receives a salary of £1,200 or approximately $6,000 a year, and the High Court Judges, as the article sets out, are paid £5,000 or $25,000 a year. While many may not be prepared to advocate so extensive an increase in the Judges' salaries as to place them on a parity with those paid in Britain, there is no reason why Canada should not consider her judiciary in a more equitable, not say generous manner.

PERSONAL.

EDOUARD FABRE SURVEYER

VICE-PRESIDENT CANADIAN BAR ASSOCIATION.

Edouard Fabre Surveyer was born in Montreal in 1875, a son of L. J. A. Surveyer (past vice-president of the Chambre de Commerce) and Hectorine (Fabre) Surveyer. He received his education at St. Mary's College, from which institution he graduated as Gold Medalist in Letters and Arts. He studied law at the Universities of McGill and Laval, graduating with degrees of B.A., L.L.M., and B.C.L., taking first class honors at both universities. In 1896 he was called to the Bar, and in the following year he took a post-graduate course in Paris. His forensic career commenced in 1897, at Montreal with McGibbon, Casgrain, Ryan & Mitchell. He has been the editor of the Quebec *Practice Reports* since their foundation in 1898. He was vice-president of the Junior Bar Association 1902-1903, and was president 1903-1904; was member of the Council of the Bar, 1904-1905. Since 1905, Mr. Surveyer has been a lecturer on Practice and Pleading at McGill University. He was made a King's Counsel in 1909 by the Government of Quebec. In 1909 he retired from the firm of McGibbon, Casgrain, Mitchell & Surveyer and formed a partnership with Mr. H. A. Lovett, K.C., the firm dissolving one year later, since which time he has been practising with his brother, Paul. Mr. Surveyer has an office in New York City with the legal firm of Daly, Hoyt & Mason. He has published a pamphlet entitled "The Bench and Bar of Montreal" (1907). He was one of the founders of the Canadian Club and was the first vice-president 1908-1909, and president 1909-1910. He was vice-president of the Association of Canadian Clubs 1910-1911. At present he is vice-president of the Alliance Francaise of Montreal and a member of the Board of the Federation of the Alliance Francaise of the United States and Canada. He is president of the Montreal Hydro-Electric Co., Ltd.; director of the Capitol Trust Corporation, vice-president of the Union Land Corporation, Ltd.; vice-president of the Lachine Land Co., Ltd.. and director of the Franco-Canadian Land & Development Co. Ltd., and of the Rothesay Realty Co., Ltd. He is a member of the Executive Committee of

the Liberal Conservative Association. He is a charter member of the University Club of Montreal, and has been a member of the Executive Committee and of the Committee on Admissions since 1909. Is also a member of the Montreal Club, Lafontaine Club and the Montreal Amateur Athletic Association.

SILAS ALWARD.

Silas Alward, Esq., K.C., D.C.L., whose portrait appears in this issue, will be known to the readers of the LAW TIMES as one of the ablest of its contributors. Last year Mr. Alward contributed three splendid articles, "Three Great Charters of English Freedom," "Lord Chief Justice Holt," and "The Evolution of Chancery and the Judicial Murder of Sir Thomas Moore," and in the present issue is a particularly able and illuminating article on "The Foreshore." This question recently came into the lime-light by an attempt on the part of the New Brunswick legislature to grant away the rights of the people to the use of the foreshore. So great was the indignation aroused and so strong the protest that the bill was withdrawn. Similar legislation is at present being attempted by the British Columbia legislature and it is hoped that the fate of the bill will be similar to that in New Brunswick. Much of the credit for the defeat of the measure is due to the work and influence of Mr. Alward and the readers of his article in this issue will find it not only interesting but will find the law on the subject very complete. Mr. Alward has a very large practice in St. John and is one of the most influential men in the province.

SUCCESSFUL STUDENTS AT THE LAW SCHOOL AT OSGOODE HALL.

FINAL YEAR.

E. R. Thompson, with honors, Chancellorship Van Koughnet scholarship and gold medal; D. W. Lang, with honors, Christopher Robinson memorial scholarship and silver medal; L. Macaulay, with honors and bronze medal;

H. S. Hamilton, with honors; G. D. McLean, with honors; W. N. Hancock, I. Finberg, V. E. Gray, J. A. Hope, A. Singer, E. H. Cleaver, V. H. Hattin, S. Rogers, H. S. Robinson, A. W. Langmuir, P. W. Beatty, E. Bristol, W. P. MacKay, J. M. Forgie, D. G. McIntosh, S. J. Birnbaum, R. B. Law, J. R. Rumball, H. D. Anger, H. A. Beckwith, C. H. McKinnm, J. S. Bell, J. W. Broudy, B. F. Fisher, L. W. Wood, C. G. Mortimer, F. E. Hetherington, H. Morwick, C. H. A. Armstrong, T. M. Mulligan, C. J. F. Collier, W. L. L. Gordon, R. N. McCormick, B. H. L. Symmes, G. H. Tennent, J. F. P. Birnie, J. M. Baird, J. W. Gavreau, G. W. Walrond, J. E. Anderson, C. G. Robertson, A. M. Dewar, L. C. Auterbridge, R. N. Dick, G. W. Morley, J. G. Holmes, N. D. Tytler, L. S. LeVernois, J. A. Donovan, G. B. Coyne, W. Lawr, E. M. Reeve, T. W. E. Allen, W. M. Mogan, H. H. Donald, W. H. Bennett, J. S. Allan, S. E. Wedd, W. H. Latimer, J. S. Beatty, N. S. Cauldwell, F. Regan, G. G. Beckett, C. R. Widdifield, Wm. McNally, N. M. Young, D. Coffey, H. J. Stuart, J. F. Coughlin, R. P. Locke, O. Sauve, E. C. Awrey, H. Obee, L. Dale, H. A. L. Conn, F. H. M. Irwin, C. W. Carruthers, C. B. Henderson, W. A. Holmsted, S. G. Metcalfe, R. B. Williams, C. Carrick, W. W. Evans, W. H. Furlong, S. W. Graham, Eric Pepler, L. W. Goetz, E. F. McDonald, E. P. Dowdall, F. Walkingshaw, J. A. Devaney, S. C. S. Kerr, H. H. Ellis, B. P. Fitzpatrick, W. T. Robb.

SECOND YEAR.

S. Factor, with honours; H. Blake, Jr., with honours; C. Finlayson, with honours; C. Black, with honours; H. E. Manning, with honours; C. A. Payne, with honours; R. O. Daly, with honours; H. A. O'Donnell, Miss E. L. Patterson, Mrs. H. V. Laughton, W. D. Bell, W. R. Campbell, C. P. Plaxton, M. E. Mulhern, S. M. Scott, E. M. Rowand, J. M. Riddell, F. H. Barlow, L. C. Jarvis, P. L. Armstrong, T. J. Galligan, C. W. G. Gibson, H. N. Farmer, A. H. Plant, A. H. Robertson, H. W. Macdonnell, C. H. Watson, P. E. F. Smily, N. M. Retallack, J. S. Duggan, M. Aylesworth, C. J. Bovaird, C. F. Leonard, J. S. McLaughlin, J. C. McFarlane, Thos. Eakin, W. W. Parry, K. B. Maclaren, M. C. Purvis, J. P. Walsh, R. H. Green, G. M. Malone, C. A. Paul, H. R. Alley, J. O. Buckley, R. Code, J. F. Strickland, J.

H. Best, H. B. Neely, W. H. Beatty, D. McArthur, R. B. Whitehead, W. G. Lumsden, W. S. Montgomery, F. C. Richardson, J. J. Hunt, J. G. Bole, J. V. Guilfoyle, A. L. Shaver, R. A. Patchell, J. H. Naughton, W. A. McCarthy, J. W. Murphy, A. J. Johnston, H. McConnell, W. B. McPherson, J. E. Lawson, K. Munro, W. G. Hanna, J. G. Schiller, F. A. A. Campbell, G. B. Jackson, W. R. Willard, S. M. Phoenix, A. C. Casselman, D. B. Sinclair, N. J. Macdonald, R. A. Olmsted, L. V. Fitzpatrick, N. A. Keys, J. U. Garrow, A. Chenier, G. E. Edmonds, W. F. Greig, C. F. Elliott, R. S. Clark.

FIRST YEAR.

C. E. L. Babcock, with honours; H. L. Barnes, with honours; E. G. Binkley, with honours; J. W. Freeborn, with honours; W. S. Maguire, with honours; P. Shulman, with honours; W. G. Egbert, with honours; H. B. Setterington, N. H. Treadwell, S. M. Clark, M. C. Pritchard, M. F. Wilkes, C. B. McClurg, C. McLaughlin, A. R. Quirk, D. B. Coleman, T. B. Richardson, W. F. Huyche, J. D. Scott, F. W. Gallaghan, H. Kelleher, N. Newton, G. S. Dudley, H. L. Palmer, C. A. Snowdon, P. T. Jermyn, A. B. Mortimer, W. B. Cowan, C. A. S. McKay, J. M. Bullen, H. V. Hearst, Roy Henderson, R. J. Orde, W. D. Roach, A. A. Bain, E. R. Kappele, Robt. Forsyth, John Callahan, W. W. Boyd, A. S. Winchester, J. B. Keeler, A. H. Boddy, W. J. Beaton, H. St. Jacques, A. K. Cowper, A. C. McFarlane, R. B. Johnston, A. A. Mackinnon, H. E. Richardson, C. L. B. Mackenzie, G. C. Ellis, Wm. Menton, J. G. Hamilton, H. J. McLaughlin, D. Markham, W. E. V. Goodwin, S. A. Rutledge, F. P. Varcoe, A. W. Guertin, J. F. Dales, C. W. Moorehead, D. P. J. Kelly, J. L. Bishop, H. N. Barry, W. M. Wright, B. V. McCrimmon, J. F. Lucas, H. F. Logan, A. Aubin, J. C. Thomson, Miss G. Alford, E. G. Black, R. C. Berkinshaw, A. L. Reid, E. H. Brower, V. C. Gordon, D. H. Stewart, H. S. Parkinson, F. H. Snyder, A. G. Davis, J. H. A. Stoneman, Chas. Bowman, E. G. Joy, W. J. Thompson, R. T. Bethune, J. R. Hett, W. E. Morrison, W. C. LaMarsh, M. A. McKay, R. E. Mackinnon, E. A. H. Martin, J. F. Twigg.

AMERICAN BAR ASSOCIATION.

In this issue is found a preliminary notice of the American Bar Association to be held in the City of Washington, D.C., on the 20th, 21st and 22nd days of October. A copy of the programme of the meeting is here given:—

First Session: Tuesday, October 20th, 10 a.m. The President of the United States has been invited to open the proceedings.

Hon William Howard Taft, President of the Association, will deliver the President's annual address.

Second Session: Tuesday, October 20th, 8 p.m. Hon. Elihu Root, United States Senator from New York, will deliver an address, the subject to be hereafter announced.

Reception: A reception will be given to members and guests of the Association and ladies accompanying them in the Hall of the Americas, in Pan-American Union Building, Seventeenth and B Streets, N. W., on Tuesday, October 20th, 9.30 p.m.

Third Session: Wednesday, October 21st, 10 a.m. The reports of standing and special committees, to be printed and distributed by the secretary in advance of the meeting, will be presented and discussed.

Excursion: There will be an excursion to Mount Vernon, by steamer, for members and guests of the Association and ladies accompanying them, on Wednesday, October 21st, 1.30 p.m. Luncheon will be served on the steamer.

Fourth Session: Wednesday, October 21st, 8 p.m. The Right Honourable Sir Charles Fitzpatrick, Chief Justice of the Dominion of Canada, will deliver an address on "The Constitution of Canada."

Fifth Session: Thursday, October 22nd, 10 p.m. The Right Honorable Romulo S. Naón, Ambassador from the Argentine Republic to the United States, will deliver an address on "The Argentine Constitutional Ideas."

Unfinished reports of committees will be presented and discussed.

Sixth Session: Thursday, October 22nd, 2 p.m. Special resolutions, to be printed and distributed by the secretary in advance of the meeting, will be presented and discussed.

Unfinished business.

Annual Dinner: The annual dinner of the American Bar Association will be given at the New Willard Hotel on Thursday, October 22nd, 7 p.m.

President William Howard Taft will preside.

In view of the great interest aroused by the meeting of the American Bar Association held in Montreal last year, many members of the profession will doubtless avail themselves of the opportunity of being present at the one forthcoming, particularly Washington in October is almost as enjoyable as Washington in the early Spring.

In the Supreme Court recently, before the Honorable Mr. Justice Ritchie, on motion of J. J. Power, K.C., Vice-President of the Nova Scotia Barristers' Society, John Welsford MacDonald, B.A., LL.B., of Pictou, was admitted to the Bar of Nova Scotia, after taking the customary oaths and signing the roll. Mr. McDonald is the son of E. M. MacDonald, K.C., M.P. for Pictou County. In moving his call, Mr. Power said that Mr. MacDonald, who had little more than come of age, came to the Bar under the most favourable circumstances, as he was not only a graduate in Arts of the University of Toronto and in Law at Dalhousie University, both of which courses he completed with great credit to himself and to the entire satisfaction of his professors, and was thus competent to assist in administering justice in His Majesty's Courts, but also held His Majesty's commission as captain in the 78th Pictou County Highlanders. He was also a member of the contingent from his regiment at the coronation of His Majesty King George. His Lordship, in granting the motion, congratulated Mr. MacDonald on coming to the Bar under such unusually happy auspices, and wished him many years of success in the practice of his profession.

Hon. Arthur Meighen, Solicitor-General in the Dominion Government, was called to the Ontario Bar, by Sir Glenholme Falconbridge, Chief Justice of the King's Bench, at Osgoode Hall, when the hon. gentleman signed the roll and took his seat within the charmed circle. Hon. Mr. Meighen is a member of the Manitoba Bar, and an *ex-officio* bencher of the Law Society. He was introduced by the treasurer, G. F. Shepley, K.C., and was welcomed by many of the leading luminaries of the profession in the city.

The Benchers of the Upper Canada Law Society met in convocation recently, when the following appointments were made: J. D. Falconbridge, lecturer in equity and commercial law; J. Shirley Denison, lecturer in real and personal property law; S. H. Bradford. lecturer in common, constitutional, company law and practice; John King, K.C., lecturer in evidence, criminal procedure, Canadian constitutional history and law. The appointments are for three-year terms.

C. C. Robinson and H. W. A. Foster were appointed demonstrators for one year; J. A. Soule, of Hamilton, and G. F. McFarland, Toronto, examiners for four years.

J. A. M. Aikens, K.C., M.P., gave a dinner to about forty members of the New Brunswick Barristers' Society recently. He strongly advocated the formation of a Canadian Bar Association representing all the provinces.

The special examinations held by the Law Society of Saskatchewan recently, by which practising barristers from outside the province obtain the necessary certificates for this province have resulted as follows:—

Passes—J. Fisher, of Melville; H. De Mackie, D. Frazer, W. L. Chrystal, J. J. Fyffe, all of Regina; J. G. Ross, C. P. Cadie, A. J. Herder, all of Swift Current; James J. Fyfe, D. Taylor, R. Carroll, of Saskatoon; W. F. Cameron, Saskatoon; C. L. Riach, of Prince Albert; A. W. Goldsworthy, of Melfort.

The following failed either in practice or total: L. Tourigny, Regina; W. Mills, Moose Jaw; A. Blackwood, Morse; S. Moffatt, Saskatoon; R. Brockman, of Humboldt.

W. Kent Power, editor of the Alberta law reports and lecturer to the law students in Calgary, was admitted to the Bar before the Hon. Mr. Justice Stuart on the motion of Clifford Jones, K.C.

Mr. Power is a graduate in arts and law of Dalhousie university, Halifax, N.S., and before coming to Calgary two years ago he had been engaged in New York in contributing to the American and English encyclopaedia of law and other legal works.

F. G. Holyoak was recently sworn in as barrister and solicitor of the Supreme Court of Alberta before the Chief

Justice. He was introduced by C. F. P. Conybeare, K.C., vice-president of the Law Society and local benchers. Mr. Holyoak is the son of E. J. Holyoak, a prominent solicitor in the city of Leicester, England.

Crown Attorney McKay, who has held office in Dufferin county for upwards of 21 years, has resigned, and Mayor John L. Island, barrister, of Orangeville, has been appointed in his stead.

Charles Elliott, Esq., K.C., was chosen chief librarian at Osgoode Hall in place of the late W. G. Eakins.

Mr. Elliott has been conducting for some time the inspection of law libraries through the province when Mr. Eakins was unable to perform that duty on account of his illness.

The appointment of Mr. Elliott was made at the Convocation of the Benchers of the Law Society of Upper Canada.

Mr. D. Graham McIntosh, recently of Toronto, has entered in partnership with Mr. W. M. Cram, of Berlin, under the firm name of Cram & McIntosh.

The law firm of Messrs. McLaughlin, Peel, Fulton & Stinson, of Lindsay, announce that Mr. J. E. Anderson has become a member of their firm.

Mr. George Kappele, K.C., one of Toronto's most distinguished lawyers, died recently. He was 54 years of age. He was of German descent, being a son of the late Rev. Stephen Kappele, a Methodist minister. He was born and educated in Ontario. After a brilliant career as a law student at Toronto University, he was called to the Bar in 1883, and the same year received the gold medal of the Canadian Law Society.

Manitoba University council in session recently, placed the stamp of their approval on the scheme which is being formulated by the Law Society for the establishment and maintenance of a law school in conjunction with the university. Hon. Hugh A. Robson, public utilities commissioner, has the scheme in hand and is arranging the details on behalf of the law society.

The matter was presented at the meeting by President MacLean, who put forward a number of resolutions to this effect on behalf of the legal instruction committee of the university council. The administration of affairs of the law school, it was suggested would be vested in a committee of five; two to be appointed by the benchers; two by the university council, and a chairman, to be appointed by the benchers and council in conjunction. The revenues of the law school would be applied to the maintenance of the school and any deficit would be made up by the council and the law society in equal shares.

Isaac Pitblado, K.C., spoke strongly in favour of the plan and the subsequent discussion disclosed that the foundation of the school would meet with the hearty approval of the entire council.

After a short illness, J. A. St. Julien, K.C., one of the best known criminal lawyers in Montreal, passed away at his home at 1307 Delorimier avenue. Mr. St. Julien was born in St. Timothee in 1855. He studied in Montreal College and Laval University, and afterwards acted as solicitor's clerk in the office of Messrs. Prevost and Prefontaine. He was offered a partnership, which he accepted, remaining with the firm until the Hon. Mr. Prefontaine dissolved partnership. Mr. St. Julien remained with Mr. Prevost for a number of years, however, and when he went into political life, Mr. St. Julien became associated with Mr. de Boucherville who retired in 1903. Then Mr. St. Julien formed the firm of St. Julien and Theberge. He was made a King's Councillor in 1906.

Crown Attorney John Armstrong, of Owen Sound, died after an illness of some duration. He was stricken with paralysis about three years ago and never fully recovered, though he pluckily conducted the duties which devolved upon his office.

Hon. Hector C. MacDonald, County Court Judge for Queen's county, died at the Prince Edward Island Hospital, after an illness of several months. He was born at Flat River, P.E.I., May 3rd, 1856, and admitted to the Bar in 1886. He represented his native district of Belfast in the

local legislature for ten years, was Attorney-General under the Liberal Government 1897-99 and was appointed a Judge in 1899.

The death took place recently of Charles Henry Stephens, K.C., a well-known ex-journalist and barrister, of Montreal. Mr. Stephens, who was born in Montreal sixty-five years ago, was at one time connected with the *Montreal Witness,* was editor of Stephen's Digest and author of a standard work on joint stock companies.

The law firm of McKeown & Boivin, of Sweetsburg, Que., has been dissolved by mutual consent.

Mr. George H. Boivin, M.P., has opened offices in the Canadian Bank of Commerce Chambers, Granby, Que.

A partnership has been formed between Mr. W. K. McKeown, K.C., and Mr. Oscar Lefebvre-Boulanger, B.A., B.C.L., formerly of the Bar of Quebec, to take over the practise and affairs at Sweetsburg of the late firm of McKeown & Boivin.

THE LAWYER'S HEREAFTER.

By E. W. Blake, Jr.

"Apropos of the two poems in Docket," writes Alfred D. Lind, of the firm Goldfogle, Cohn & Lind, 271 Broadway, New York City, entitled 'In re the Ultimate Destination of Lawyers,' I take pleasure in sending to you a poem which I culled from the *Green Bag* a number of years ago:

When the legal fraternity, weary of breath,
Sought relief from terrestrial trials in death;
When they'd all had enough of contentions and strife,
Then, longing for peace, they signed a release
Of the bodies whereof they'd been tenants for life;
Whereupon, it is said, without further delay,
"Communis mors omnibus" took them away.
With a wild, ghostly cheer they quitted this sphere,
And sailed through the star-spangled regions of space.
Never was seen such a motley throng,
With wigs so large and with robes so long:
There were judges, solicitors, barons, and clerks,
Chief Justices, authors of learned law works,
Reporters, attorneys of different degrees,
Lots of Q. C.'s, scores of C. B.'s.
Onward they sped with astonishing ease,
Till the earth and the moon looked the size of two peas.
But at last they emerged from the regions of night,
And splendor celestial burst full on their sight.
The omnibus stopped at the pearl-covered gate,
And all were well pleased—but I'm sorry to state
That when they alighted their hopse were all blighted
By being informed they had not been invited,
And had to go elsewhere as sure as fate;
While right in the gateway a glittering sentry
Waved a fiery sword to resist tortious entry.
What a commotion was caused by the news!
Bacon, L. C., had a fit of the blues;
Clamors were heard on every hand;
Some of the band, with a good deal of sand,
Claimed estates tail in the heavenly land.
"I' faith," exclaimed Coke, "this passeth a joke;
By my halidom, somebody's neck shall be broke!"
And he drew up a writ just to make things completer,
Headed "Doe on demise of Lord Coke vs. Peter."
But when he walked up to the gate, it is said,
The guardian saint, as a means of restraint,
Just broke the sword "molliter" over his head.
Then the janitor poked his head out of the casement,
Exclaiming, "No room here; apply in the basement!"
And with mutterings loud the grumbling crowd
Remounted the wagon, while every one vowed
That so gross an injustice should not be allowed.
Then Death, on the box, with a skeleton grin,
Drove them out by the very same way they'd come in,
And putting the brakes on for fear of a spill,
Whipped up his lean horses and started down hill.
Straight downward they went, past the comets and stars,
Past Mercury, Jupiter, Venus and Mars.
Lord Holt, with a frown, looking mournfully down,
Said to Hawkins, the author of "Pleas of the Crown,"
"Ne'er have you seen in your practice, I wis,
Such a case of descent by an heir-ship as this."

Soon, as they fell, a sulphurous smell
Announced their approach to the Devil's botel;
They stopped at a door, which presented this siga:
"Apply at the office. Please get into line."
But ere they could even get down from the stage
A devil in red, with two horns on his head,
Delivered these sentiments, much to tbeir rage:
"I am sorry to hinder your furtber progression,
But really I can't let you into possession;
I'm under strict orders to take in no boarders
Who've ever engaged in the legal profession.
The fact is, my friends, tbis hotel is too small;
What in hell do you think we could do with you all?"
They were silent and dazed and greatly amazed,
For they's never expected the point would be raised.
Exclusion from heaven was certainly sad,
But this second repulse seemed a little too bad:
Tbe Devil, they said, was evading, in fact,
Liability under the Inn-Keepers' Act.
But what should they do, and how should they begin it?
It was easy to see, by reflecting a minute,
As for heaven or hell, they were simply not in it.
At last they resolved, like the pigeon of old,
To find some retreat, for the soles of their feet,
Paved neither with good resolutions nor gold.
So paying the driver the sum that they owed,
They promptly set out to secure an abode.
Whereabouts they discovered it, we do not know;
Nor how many years, 'mid hopes and fears,
They hunted the universe high and low:
But this is as certain as certain can be,
They at last became seised of a close in fee
Somewhere out in the distant sky:
And tbey dwell on high, as the years go by,
Witb never a care and never a sigh.
And oft at evening time, 'tis said,
When the lamps are lit and the board is spread,
They cheer the hours with genial mirtb,
Recalling the days that they spent on earth.
Such a banquet is spread on the table of law
As never a mortal attorney saw:
Slabs of law-calf instead of veal,
Juicy fat cases served up on appeal,
Actions of trover, remainders over,
And an excellent digest to settle the meal.
They drink the best wine that there is to be had,
In livery of seisin the servants are clad.
The food is served up on folio plates;
They sit on reports from the different courts,
Especially those from the Western States.
Three ladies enliven the jovial scene
Whose names are right well known, I ween,
Bar-maids, whose characters might be cleaner,
Miss Feasance, Miss Joinder, and Coy Miss Demeanor.
Ever they live in perpetual bliss;
What happier end could destiny send
To an honest and painstaking lawyer than this?
And ever since then, when a lawyer dies,
And his soul passes on beyond the skies,
Come he from near, or come be from far,
He's judged by the great Immortal bar;
And if he is found without legal sin,
They open their circles and take him in;
But if he has lied, or even tried
To use false means to help his side,
He is cast adrift into empty space,
And never shall find a resting place.

The Docket.

RECENT LEGAL DECISIONS AFFECTING LABOUR.

The following synopsis of recent cases affecting labour are based upon the latest reports of legal proceedings and other legal records of the different provinces of Canada.

QUEBEC CASES.

Industrial accident — Defective machine — Employer responsible for injury to workman. In the Superior Court, at Montreal, Mr. Justice Lafontaine recently heard a case in which the plaintiff claimed an indemnity and an annuity. The plaintiff was working in the defendant's shop polishing box covers. While he was placing a piece of tin under a die the machine started and crushed three fingers of his left hand, which subsequently had to be amputated. Evidence was brought to shew that the machine in question was in a bad condition, that the foreman had frequently been told of this condition, and that very little work would have put the machine in good order. The defence denied that the machine was defective, and alleged that the accident was due to the plaintiff's own negligence. The Court held that the defendant was responsible for the negligence of his foreman in not having the machine repaired, even if the accident was due to the plaintiff's own negligence, and ordered the defendant to pay the plaintiff the sum of $351 as an indemnity for his partial and permanent disability, and, further, to pay him an annuity of $45.75, and to deposit a sum of not more than $2,000 as security for the payment of said annuity. (*Lortie* v. *Aubry.*)

Employee fined for breaking contract. A case of considerable interest to employers and employees was heard in the Recorder's Court at Quebec on March 19th. The defendant was a former line superintendent in the employ of the Dorchester Electric Company, and the company were the prosecutors. The evidence shewed that the defendant left the employ of the company last June, before the expiration of his contract, and without giving the company due notice. The manager of the company took action against the former line superintendent, and the maximum penalty was awarded, namely, a fine of $20 and costs

or two months' imprisonment. (*Dorchester Electric Company* v. *Wissoll.*)

Workmen's Compensation—Injured workman earning more than $1,000 a year denied right to sue under the Act. A ruling of interest to employers and workmen generally was rendered by Mr. Justice Charbonneau at Montreal recently. The plaintiff in the case was an employee of the Grand Trunk Railway Company, and the action was brought by him against the company for injuries sustained whilst at work in the company's shops. The counsel for the company pointed out that the plaintiff could not enter a claim against the company under the Workmen's Compensation Act by reason of the fact that he was earning more than a thousand dollars a year, whereas the Act specifically states that it applies only to the case of workmen earning less than one thousand dollars per annum. The company's exception was maintained by the Court and the suit was accordingly dismissed, the plaintiff's right to sue under Common Law being reserved. (*Couture* v. *Grand Trunk Railway Company.*)

Ontario Cases.

Master and Servant — Injury to servant. Several actions for damages for injuries were brought at the Spring Assizes at Welland. Thomas V. French entered an action for damages against the Canada Cement Company for the loss of his right leg while in their employ. Plaintiff was awarded $2,100 and costs.

Antonio Potenza received $3,000 and costs for damages for the loss of his eye while in the employ of the Canadian Ramapo Iron Works.

A suit against the Clifton Sand, Gravel and Construction Company for $3,000 damages for the death of Jacob Popeu as a result of injuries received while employed in defendants' gravel pit was settled out of Court, defendants paying $1,500 and costs.

The action of Gabor Poczak against I. Y. Harper, sewer contractor, for $1,000 damages for injuries received, was dismissed with costs, the jury finding no undue negligence

on the part of the defendant. The accident happened in Welland on October 9 last, when a sewer trench caved in, breaking plaintiff's leg.

Master and Servant — Injury to servant — Damages. A workman who had the fingers and thumb of one hand cut off by the knives of a jointer in the Tudhope-Anderson factory in January, 1913, entered suit against the company for $5,000 damages. The case was tried before Chancellor Boyd at Barrie. The jury brought in a verdict of $3,000—$1,000 under the Compensation Act and $2,000 at common law. They, however, gave negative answer to a question where an affirmative would have been more consistent with their verdict, and while they were out considering the point the parties agreed on a settlement on the basis of the $1,000 awarded under the Compensation Act, it being doubtful whether the remaining $2,000 would be sustained on appeal: *Chadwick* v. *Tudhope-Anderson Company.*

MANITOBA CASES.

Master and Servant—Injury to servant — Negligence. An action was brought by James Cramb against the Foundation Company, Limited, to recover damages for injuries sustained while in the company's employ in connection with the construction of a bridge over the Red River. From the evidence it appears that the defendant was engaged during August last driving certain timbers into their place with a large wooden maul, which weighed about thirty-five pounds. The head of the maul came off and Cramb lost his balance, fell from the structure down some thirty-five feet, alighting upon a steam pump. He was severely injured and burned by reason of the fall and coming in contact with certain steam pipes, and has been incapacitated for work ever since. It was claimed that negligence was shewn on the part of the defendants in not having suitable scaffolding from which to conduct their operations, and that if such had been erected the plaintiff would not have been precipitated to the bottom of the caisson. It was claimed for the defence that the company was in no way negligent in connection with the matter, and that every practicable precaution was afforded to their workman in connection with the construction of the piers

for the bridge in question. A verdict in favour of the plaintiff for $15,000 was returned by the jury: *Cramb* v. *Foundation Company.*

Master and Servant—Injury to servant—Damages increased on re-trial. A re-trial of the action of Arthur G. Pickering against the Grand Trunk Pacific Railway Company at the Winnipeg Assizes, by Mr. Justice Galt and a jury, resulted in an increase of the damages from $10,000 to $11,000 although the company had appealed on the ground that the sum allowed by the jury at the last assizes was excessive. Mr. Justice Galt granted a certificate for special costs. Pickering had his leg cut off in the Paddington yards, St. Boniface, on March 1, 1912, by a Grand Trunk Pacific train backing into a Canadian Northern Railway train. The plaintiff, who was in the employment of the Canadian Northern Railway at the time as a fireman, was working under his engine when the accident occurred: *Pickering* v. *Grand Trunk Pacific Railway Company.*

Alberta Cases.

Master and Servant — Injury to servant — Workmen's Compensation. In the Alberta Trial Court on February 9th, Mr. Justice Walsh rendered judgment in an action for damages for injury under the Workmen's Compensation Act. The plaintiff, Ferguson, was injured while in the service of the defendant company, and brought an action at common law, alleging negligence. The jury rendered an adverse decision and the plaintiff applied to the Trial Judge under sub-section four of section three of the Workmen's Compensation Act.

The circumstances of the case were as follows: The plaintiff started to work for the defendant company as a labourer on November 30th, 1912. His work consisted of shovelling clay from a pit into the car, which carried it to the plant. On the following day he was going to his work when he was asked by a fellow workman to help him put back on the track one of the cars used for carrying clay, which had become derailed. The plaintiff went to the assistance of this man, and while helping him injured his foot so severely that it had to be amputated.

The objection raised to the payment of compensation to the plaintiff was that the accident did not arise out of and

in the course of his employment, the company contending that he voluntarily undertook work of another character, which he was not engaged to perform. The trial Judge held that the case was one of emergency, that the action of the plaintiff in assisting to place the car on the track was performed in the interests of the company, and that he was entitled to compensation. Regarding the amount of the compensation awarded, it was stated that for nearly a year he was totally incapacitated for work. Allowing him $7 a week (one-half of his average weekly earnings) from December 16th, the date from which he was entitled to compensation, the Judge gave an award for $420. Holding that $4 a week would represent the difference between his average weekly earnings before the accident and the average weekly amount which he is now able to earn, the Court fixed his compensation from the date of the trial until further orders at that sum. The defendant company was allowed to deduct from the compensation the costs caused by the plaintiff bringing the action instead of proceeding under the Act: *Ferguson* v. *Brick and Supplies, Limited.*

Master and Servant—Injury to and death of servant in course of employment—Compensation. In the Alberta Trial Court, on February 16, an action for compensation was brought by the widow of an employee of the Canadian Pacific Railway, whose death was caused while in the employ of the company. The plaintiff's husband was employed to work the defendant company's elevator. It was not used for the fifth and sixth storeys of the building (which were incomplete and unoccupied), except occasionally for the carriage of materials and workmen, and in the said two storeys the elevator shaft was not enclosed. Finding himself on one occasion unable to start the elevator upwards, he got a workman to press certain switches in the basement, which enabled him to start it, but prevented him stopping it until the switches were removed. Having started the elevator, he called to the workman to remove the switches, but the latter did not hear him, and, being unable to stop the elevator, the plaintiff's husband, while passing the fifth storey, projected his head beyond the shaft to call, and collided with the floor above and was killed.

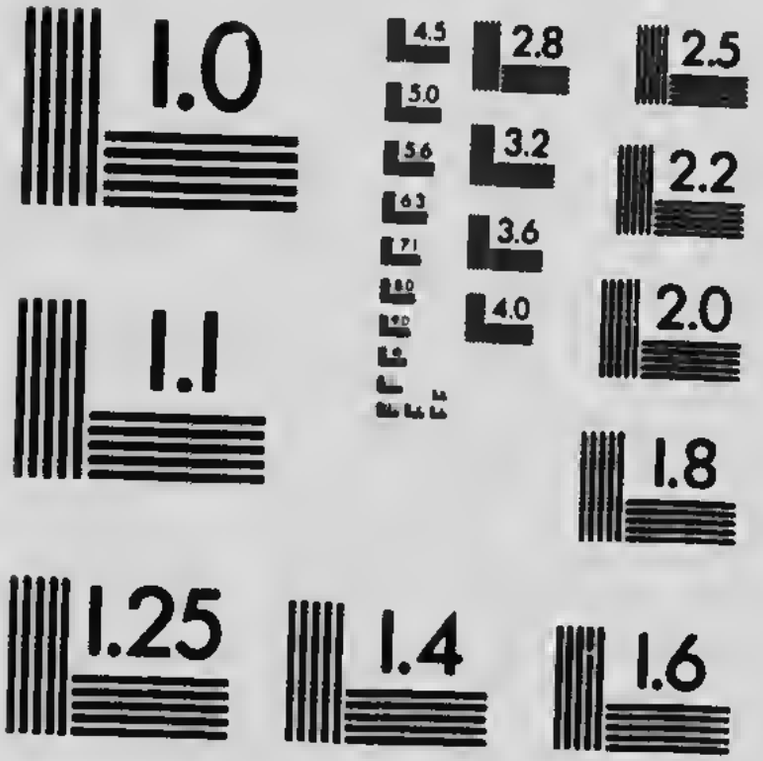
Mr. Justice Scott held that there was negligence on the part of the defendant company: First, in not providing for

the use of the deceased an elevator in proper working order, and, secondly, in not closing the elevator shaft at the fifth and sixth storeys; that, while the deceased knew, or ought to have known, the danger he would incur by putting his head beyond the shaft, the circumstances created an emergency which he had never contemplated, and a person of ordinary intelligence might easily make a mistake under the circumstances. The deceased was, therefore, not guilty of contributory negligence. Judgment was awarded for the plaintiff for $4,000, the amount to be apportioned between the plaintiff and the children of the deceased as follows: $2,200 to the plaintiff, and $600 to each of the three children: *Jackson* v. *Canadian Pacific Railway.*

British Columbia Cases.

Non-payment of Wages. An action under the new amendment to section eighty-eight of the Bank Act was decided by Mr. Justice MacDonald at Vancouver on March 18th. The section in question makes any bank liable for wage claims where it takes possession of the business. A judgment was given to the employees of the Imperial Timber and Trading Company for $10,500 and costs against the Royal Bank of Canada. The amount claimed represented the men's wages for November and December, 1913, up to the time the bank took possession of the property of the company as security for advances: *Employees of the Imperial Timber and Trading Company* v. *the Royal Bank of Canada.*

Action against representatives of Union — Restraint. An important case, involving the question of dictation by trade unions, was decided on March 25 in the British Columbia Supreme Court, when a plasterer was given damages against the local plasterers' union. The plaintiff sued seven members of the union on their own behalf, and also as representatives of the union, for damages, alleging conspiracy on the grounds that they successfully and intentionally endeavoured to dictate conditions under which he should work. It appeared from the evidence that the business agent of the union reported that the plaintiff's work was not up to the required standard, and a committee appointed by the union upheld the decision, recommending



that he be withdrawn from his job for six months. The plaintiff refused to comply and was accordingly dismissed from his employment.

The Court found that as the union had forbidden the plaintiff to work in his employer's shop for six months, the latter was forced to dismiss him, or have his own work tied up, the plaintiff's fellow-employees refusing to work with him in that particular shop. It was held that the union rules in no way authorized the defendants to take the course adopted. It was also held that a combination of two or more persons without justification to injure any workman by inducing employers not to employ him, was, if it resulted in damage to him, actionable. Mr. Justice Murphy awarded the plaintiff judgment for the amount he would have earned in wages from the time his employment ceased (Nov. 20th, 1913), until active steps against him were discontinued: *Sleuter* v. *Plasterers' Union.*

British Cases.

Accident arising out of and in the course of the employment—Drayman leaving vehicle to get refreshment—Accident in street. By the Workmen's Compensation Act, 1906, a workman injured by accident is entitled to compensation only in cases where the accident is one arising out of and in the course of the employment.

A man was employed by a brewery company as drayman, his duty being to deliver casks of beer from a dray at various public houses and private houses. His working hours were from 8 a.m. to 8 p.m., no intervals being recognized for meals or refreshment, as he was generally at a distance from his home the whole day. One day while on his round he drew up his dray on the near side of the road, and crossed the road to a public house to get a glass of beer. The public house did not belong to his employers. He was only away from the dray for about two minutes, and on crossing the road to return he was knocked over by a motor-car and killed. His dependents applied for compensation, but their claim was resisted by the employers on the ground that the accident had not occurred in the course of the employment. The County Court Judge, however, made an award of compensation.

The employers appealed. They contended that the workman had left the sphere of his employment entirely for his own purposes, and that, though he was allowed to leave his dray in order to obtain refreshment, there was a distinction between being allowed to do such a thing and doing that thing in the course of the employment. Also, it was contended that the risk of being knocked down by a motor-car in the street was not a reasonable incident of the employment, and not one to which, by the nature of his employment, he was particularly exposed. The Court of Appeal dismissed the appeal, holding that the leaving his dray to get refreshment was a reasonable incident of his employment, and that the accident had arisen out of and in the course of the employment. *Martin* v. *Lovibond & Company, Limited.*—Court of Appeal. January 30th, 1914.—*The Labour Gazette.*

THE CONDUCT OF LIFE.*

From the Juridical Review.

I have chosen a theme on which I should not have ventured had I not in days gone by been one of yourselves, and intimately acquainted with the ups and downs which beset those who were then struggling along the path to a degree.

My recollection of my undergraduate life forty years since, and of the obscurities and perplexities of that time, is still vivid; and with your permission I wish to speak to-day of how some of the old difficulties appear to one looking back on them with the light which experience of life has brought.

Before I enter on my topic I may just refer to a difference that in such a meeting as this distinguishes the present from the past. I touch the topic not without trepidation, but I will take my life in my hands. I am to-day addressing women just as much as men. For a change has come over the university since my time, a change of which I have the temerity to say at once that I am glad. Women have an access to academic life which in my student days was practically denied to them. And this is a sign of the times. It is part of a movement which is causing the world slowly to alter its point of view, and which is, I think, making for the principle of general equality, in the eye of the law and the constitution, of women with men. The differences of temperament and ability which nature has established even an omnipotent Parliament can never alter. But society, whatever Parliament may say, appears to be making progress towards a decision to leave it to nature and not law to set the limits. It is therefore obvious that in what I have to say before a university which is full of the spirit of the age, I must speak to all of you without much regard to your sex. And if I divine aright the mood of those of the gentler sex here present, they will not take it amiss if I address all who are present as though they were men.

Well, hastening away from this merely introductory point, let me relieve your minds by saying that it is my purpose neither to indulge in introspection nor to betake myself to the region of reminiscence. It is not the past that interests me. I wish rather to speak of aspects of life

*A presidential address to the Associated Societies of Edinburgh University. By the Lord Chancellor, Lord Haldane.

which at one period in it are very much the same for most of us. These aspects of life present themselves irresistibly when we enter the university. It is then that we students become anxious about many things. These things include, for some, at all events, the outlook on existence and doubt about its meaning. Then there is concern as to the choice of a career, and as to success in it or failure. There is the sense of new responsibilities which press themselves on us as we enter upon manhood, and the feeling that everything is difficult and illusive. We may be troubled about our souls, or again we may be keenly concerned as to how we can most quickly become self-supporting and cease to be a burden on others ill able to bear it. All these topics, and others besides of a less high order, crowd on the undergraduate as he finds that he has parted with his irresponsible boyhood and has to think for himself. He feels that he can no longer look to others for guidance. He knows that he must shape his own destiny and work out his own salvation. The situation has its special temptations. He is in danger of some evils against which the prophets have warned us all, and especially of a morbid concentration on his own private concerns, a concentration that is apt to result in a self-consciousness which may amount to egotism and impair his strength. Wordsworth tells us:—

> "The man whose eye
> Is ever on himself doth look on one,
> The least of Nature's works, one who might move
> The wise man to that scorn which wisdom holds
> Unlawful ever."

Now from this danger every one of us, young or old, has got to guard himself. In life we are subject to all sorts of reverses, great and small. There is only one way of providing against the depression which they bring in their train, and that is by acquiring the large outlook which shews that they are not the most important things in life. The undergraduate may find himself ploughed in an examination, or in debt, or for that matter, and do not let us overlook its possibility, hopeless in a love affair. Or he may suffer from the depression which is deepest when it arises from no external cause. If he would escape from the consequent sense of despair he must visualise his feelings and set them in relief by seeking and searching out their grounds. It is probably his best chance of deliverance; for these feelings often turn out on resolute scrutiny to arise from the obsession of his own

personality. This obsession may assume varied forms. It may become really morbid. There is a remarkable book by a modern man of genius, one whom Nietzsche and Ibsen both held in high esteem—the Inferno of August Strindberg—where you may read with advantage if you would be warned against a self-concentration that verges on the insane. There is another and better known book which in my time at the university was much read, and which is, I think, still much read, Carlyle's Sartor Resartus. There you have an analysis of the very process of deliverance of which I am speaking. The hero works out his own relief from the burden of his depression. It is not exclusively a Christian book; indeed, I doubt whether in his heart Carlyle called himself a Christian. But it exhibits certain features of the way by which, in substance and in reality, men are required by all the greatest religions to seek their salvation. These features Carlyle describes in his pictorial fashion. Teufelsdröck, weighed down by depression but never wholly losing courage, is one hot day toiling along the Rue St. Thomas de l'Enfer, when the light flashes on him, and he puts to himself this question: "What art thou afraid of? . . Hast thou not a heart, canst thou not suffer whatever it be, and as a child of freedom, though outcast, trample Tophet itself under thy feet, while it consumes thee?" Then through his soul, Carlyle tells us, rushed a stream of fire, and he shook fear away from him for ever. The Everlasting No had said, "Behold thou art fatherless, outcast, and the Universe is mine (the Devil's)"; to which his whole Me made answer—"I am not thine, but Free, and forever hate thee." Later on the diagnosis of his malady becomes clear to him. The source of the disease of his spirit has been vanity and the claim for happiness. This he has now been taught to do without. For he has learned that the fraction of life can be increased in value, not so much by increasing the numerator as by lessing the denominator. He finds, indeed, that unity itself divided by zero will result in infinity. Let him make his claim of wages a zero, and he has the world under his feet. For it is only with renunciation that the world can be said to begin. He must, as Carlyle puts it, close his Byron and open his Goethe. He must seek blessedness rather than happiness—love not pleasure but God. "This is the Everlasting Yea, wherein all contradiction is solved; wherein who walks and works it is well with him."

That was what Carlyle used to teach us students forty years ago, and I doubt not that he teaches the same spiritual lesson to many of you to-day. It is not, as I have already said, in form the language of Christianity. None the less it substantially agrees with much in the doctrine of the gospels. It gives us, in Carlyle's particular style, the highest spiritual expression at the highest level that man has reached. The form matters little. Every one must express to himself these things in the fashion that best suits his individuality. It is a question of temperament and association. Yet we all assent in our hearts, whatever be the form of our creed, to such doctrine, whether it be given in the words of the Founder of Christianity or of modern thinkers. Professor Bosanquet worked it out in a new shape in the Gifford lectures which he delivered in this University last year. There he sought to exhibit the world as a "vale of soul-making," to use the phrase which he borrowed from Keats, in which the soul reached most nearly to perfection by accepting without hesitating the station and the duties which the contingencies of existence had assigned to it, and by striving to do its best with them. Looked at in the light that comes from the Eternal within our breasts the real question was not whether health or wealth or success were ours. For the differences in degree of these were but droplets in the ocean of eternity. What did matter, and what was of infinite consequence, was that we should be ready to accept with willingness the burden and the obligation which life had cast on us individually, and be able to see that in accepting it, hard as it might be to do so, we are choosing a blessedness which meant far more for us than what is commonly called happiness could. We should rather be proud that the burden fell to us who had learned how to bear it. It thus, I will add by way of illustration of Mr. Bosanquet's words, was no sense of defeat, no meaningless cry of emotion, which prompted Emily Brontë when she defined her creed:—

"And if I pray the only prayer
That moves my lips for me,
Leave me the heart that now I bear
And give me liberty:

Yes, as my swift days near their goal
'Tis all that I implore.
In life and death a chainless soul,
With courage to endure."

There is a passage in the fifth of the second series of these Gifford lectures which expresses the other aspect of this great truth:—

"If we are arranging any system or enterprise of a really intimate character for persons closely united in mind and thoroughly penetrated with the spirit of the whole—persons not at arm's length to one another—all the presuppositions of individualistic justice at once fall to the ground. We do not give the 'best' man the most comfort, the easiest task, or even, so far as the conduct of the enterprise is concerned, the highest reward. We give him the greatest responsibility, the severest toil and hazard, the most continuous and exacting toil and self-sacrifice. It is true and inevitable, for the reasons we have pointed out as affecting all finite life, that in a certain way and degree honour and material reward do follow on merit in this world. They follow, we may say, mostly wrong; but the world in its rough working, by its own rough and ready standards, thinks it necessary to attempt to appraise the finite individual unit; this is, in fact, the individualistic justice which, when we find it shattered and despised by the universe, calls out the pessimism we are discussing. But the more intimate and spiritual is the enterprise, the more does the true honour and reward restrict itself to what lives

'In those pure eyes
And perfect witness of all-judging Jove.'"

I am probably addressing at this moment some of you who have come to our University of Edinburgh from the great but far distant country of India. There your wisest and greatest thinkers have expressed a similar truth in a similar way. Some of your best teachers of eastern philosophy have lately been among us and have spoken to us in Great Britain. The response of their hearers has been a real one. For the greatest sayings about the meaning of life come to the same thing, however and wherever they have been uttered. Perhaps nowhere more than in the east has the language of poetry and philosophy been wonderfully combined. This blending of art with thought has enabled master minds to shake themselves free of the narrowing influence of conventional categories, and has thereby made philosophy easier of approach. The thinkers of the east have been keenly aware of the chilling influence of the shadow of self. I

will cite to you some words from the Gitanjali of a prominent and highly gifted leader of opinion, Rabindranath Tagore, who has been recently preaching and teaching in this country:—

"I came out alone on my way to my tryst. But who is this that follows me in the silent dark? I move aside to avoid his presence, but I escape him not. He makes the dust rise from the earth with his swagger; he adds his loud voice to every word that I utter. He is my own little self; my lord; he knows no shame; but I am ashamed to come to the door in his company. . . .

"'Prisoner, tell me who it was that bound you?' 'It was my master,' said the prisoner. 'I thought I could outdo everybody in the world in wealth and power, and I amassed in my own treasure-house the money due to the King. When sleep overcame me I lay on the bed that was for my lord, and on waking up I found I was a prisoner in my own treasure-house.' 'Prisoner, tell me who it was that wrought this unbreakable chain.' 'It was I,' said the prisoner, 'who forged this chain very carefully. I thought my invincible power would hold the world captive, leaving me in a freedom undisturbed. Thus night and day I worked at the chain with huge fires and cruel hard strokes. When at last the work was done and the links were complete and unbreakable, I found that it held me in its grip.'"

What is the lesson of it all? It is that you must aim at the largest and widest view of life and devote your highest energies to attaining to it. This view of life, with its sustaining power, will come to you if you strive hard enough in one form or another according to temperament, intellectual and moral. To some it will come in the form of Christianity, to others in that of some other high religion, it may be one originating in the east. To yet others it will come in more abstract form, in the shape of philosophy. To yet others art will bring the embodiment of the truth that the ideal and the real, the infinite and the finite, do not really exist apart, but are different aspects of a single reality. Such a faith if it comes will, as the experience of countless thousands in different ages has shewn, help you in sickness or in health, in poverty or in wealth in depression or in exaltation. Only this faith must be a real faith. No mere opinion, still less mere lip service, can supply its place. It necessitates re-

nunciation of the lower for the higher, and the renunciation must be a real renunciation—extending if need be to life itself. "Life itself is not the highest good." "*Das Leben ist der Guter hochstes nicht,*" says Schiller in the end of a great poem. The line became at one time deeply familiar to the students at Heidelberg, because of an incident which was dramatic in its suddenness. One of their great teachers, Daub, the theologian, at the end of a lecture sank dead in his professor's chair with these words of Schiller on his lips.

In my time we were troubled about our orthodoxy more, I think, than you are to-day. It was in the Victorian period, a period in which we seemed to be bidden to chosen between the scientific view of life and the religious view. We were told by high authorities that both could not be true, and that we must make our election. But the outlook has widened since those days, and you have a greater freedom of choice. Men of science have seen their conceptions subjected to searching examination and criticism. Whether they hold with M. Bergson, or whether they hold with the idealists, or whether they pledge themselves to no philosophy, but simply aim at believing in all the phases of the world as it presents itself, the best equipped investigators no longer jump to the assumption that the universe is a substance existing wholly independently of mind, and organized in relations that are limited to those of mechanism. We look nowadays to mind for the interpretation of matter, rather than to matter as the *prius* and source of mind. We seek for God, not without, but within. And this attitude is reflected in that of the Church. For the Church no longer sets up in pulpits the sort of spiritualism which was little else than a counter-materialism to that of the men of science. The preachers are less exclusively concerned with the old and crude dogmas, and are more occupied with the effort to raise the thought and feeling of their hearers to a level higher than that of the ordinary abstractions of science and of every-day life itself. And so it has come about that you to-day are delivered from some at least of the perplexities which beset us, your predecessors, as we walked on the Braid Hills and endeavoured to find spiritual ground on which we could firmly plant our feet. The hindrances to spiritual life are to-day of a different order. They are moral rather than intellectual. They arise more from a lessened readiness to accept

authority of any kind than was the case two generations ago. But at least your task is freed from a set of obstacles which in those days were serious. You may find it hard to take the same interest in the letter of the creeds as we did. But the spirit remains the same, under whatever form religion attracts you, and the spirit is to-day more easy of approach and provokes less readily to rebellion.

What I would urge upon you is that you should avoid the practice, one that is not uncommon among young men, but is really unnatural, of affecting indifference or cynicism about these things. They are of the last importance, and it is of practical importance to have the habit of so regarding them. For without them but few will be steeled against the misfortunes of which life is full for nearly all of us, and the depressing uncertainties which render its conduct difficult. To those who are worth most there comes home early in life the conviction that, in the absence of a firm hold on what is abiding, life becomes a poorer and poorer affair the longer it lasts. And the only foundation of what is abiding is the sense of the reality of what is spiritual—the constant presence of the God who is not far away in the skies, but is here within our minds and hearts.

That is what I wished to say to you about what seems to me the deepest-lying and most real fact of life. I now turn to quite another phase of the question of its conduct. How is the student, with or without the supreme source of strength of which I have spoken, to prepare himself so that he will have the best chance of success? To me this question does not seem a difficult one to answer. I have seen something of men and of affairs. I have observed the alternations of success and failure in various professions and occupations. I have myself experienced many ups and downs, and in the course of my own life have made abundant mistakes. It always interests me to look back and observe in the light of later and fuller knowledge how I came to fail on particular occasions. And the result of the scrutiny has been to render it clear that the mistakes and failures would nearly always have been avoided had I at the time been possessed of more real knowledge and of firmer decision and persistence. We all, or nearly all, get a fair number of chances in life. But we often do not know enough to be able to take them, and we still more often pass them by, unconscious that they exist. Get knowledge

and get courage. And when you have come to a deliberate decision, then go ahead, and go ahead with grim and unshakable resolution to persist. It is not every one who can do this. But every one can improve his quality in this respect. It is partly matter of temperament, but it is also largely matter of acquired habit of mind and body. You can train yourself to increased intellectual and moral energy as you can train yourself for physical efficiency in the playing field. Both kinds of training turn largely on self-discipline, abstention, and concentration of purpose, following on a clear realisation of exactly what it is that you have set yourself to accomplish. But there is an insidious temptation to be avoided. Few things disgust his fellow-men more, or render them more unwilling to help him, than self-seeking or egotism on the part of a man who is striving to get on. A thoroughly selfish fellow may score small successes, but he will in the end find himself heavily handicapped in the effort to attain really great success. Selfishness is a vice, and a thoroughly ugly one. When he takes thought exclusively of himself a man does not violate only the canons of religion and morality. He is untrue to the obligations of his station in society, he is neglecting his own interests, and he will inevitably [illegible] quickly be found out. I have often watched the disastrous consequence of this sin, both in private and in public life. It is an insidious sin. It leads to the producton of the hard, small-minded man, and in its milder form of the prig. Both are ill-equipped for the final race; they may get ahead at first, but as a rule they will be found to have fallen out when the last lap is reached. It is the man who possesses the virtue of real humility, and who thinks of his neighbours, and is neither critical nor a grumbler if they have good fortunes, who has his neighbours on his side, and therefore in the end gets the best chance, even in this world, assuming always that he puts his soul into his own work.

Therefore, avoid the example of poor Martha. Her sister Mary loved to sit at the feet of Jesus and to hear His word. The burden of the household work doubtless for the time fell rather heavily on Martha. Instead of being cheerful and glad at what had come to her sister she got into a complaining mood. She was cumbered about with much serving, and she grumbled: "Lord, does thou not

care that my sister hath left me to serve alone?" But the Master answered, "Martha, Martha, thou art careful and troubled about many things. But one thing is needful: and Mary has chosen that good part." There are a good many Marthas in our universities, and they belong to both sexes. How common it is to hear grudging praise given, and the student complaining of the better luck which has given undue advantage to his neighbour. Now there may be undue advantage in circumstances, and there often is. But according to my experience it makes far less difference in the long run than is popularly supposed. What does make the difference is tenacity of purpose. A man succeeds in four cases out of five because of what is in him, by unflagging adhesion to his plan of life, and not by reason of outside help or luck. It is rarely that he need be afraid of shoulder ing an extra burden to help either himself or a neighbour. The strain it imposes on him is compensated by the strength that effort and self-discipline bring. And, therefore, the complaints of our Marthas are mainly beside the point. They arise from the old failing of self-centredness—the failing which has many forms, ranging from a mild selfishness up to ego-mania. And in whatever form the failing may clothe itself it produces weakness.

There is another aspect germane to it about which, speaking to you as one who has seen a good deal of affairs and of the world, I wish to say something. Independence of character is a fine thing, but we are apt to mistake for it what is really want of consideration for others. If we do not impose on ourselves a good deal of self-restraint we may readily jar on other people. We may be unconscious of the jarring manner. That is very common. But it ought to be avoided. It is worth the while of every one, and from every point of view, that of his own worldly interest included, to practise himself in the social virtue of courtesy and urbane manners. But it is more than a social virtue. In its best form it arises from goodness of heart. Some of the finest manners I have met with I have met with in cottages, because there I have found some of the most considerate of people. Courtesy is an endowment which men can acquire for themselves, and it is an endowment which is well worth acquiring. I have, to put its utility at its lowest, seen many instances of gifted men ruining their chances of getting on in life simply from want of

manners. It is well worth while to try to act naturally and without self-consciousness, and above all kindly. That is how dignity is best preserved. Some men have a natural gift for it. All ought to try to acquire it. Emerson has written an admirable essay on manners which I advise you all to read. "Defect in manners," he says, "is usually defect in fine perceptions." He, like Goethe, laid great stress on urbanity and dignity. These two great critics of life were both keenly aware of what injustice people do to themselves and to their prospects in life by not attending to the graces, which in their best form come from goodness of heart, and the fine perceptions which accompany that goodness. It makes a great difference to ourselves if we are careful in considering the feelings and repugnances of other people in small things as well as in great. Let us try to be too large-minded to resent an apparent want of consideration for ourselves, which really comes in most cases from defective manners in those with whom we may have to deal. Let us accept what comes to us undisturbed. Given the same qualities a man will be stronger as well as better, and will have more power of influencing circumstances as well as other people, if he is resolute in accepting without complaint what comes to him, and remembers the duties of his station in life, and thinks of others as much as of himself. It was something of this sort, I think, that Cromwell really had in his mind when he said to Bellievre, the French Ambassador, that "no man rises so high as he who knows not whither he is going." No doubt Cromwell thought also of the great gift of the objective mind, the mind that has no illusion, because it always turns to a great purpose, and is not deflected by its consciousness of self. But what he said applies to a less unusual type of mind just as much. It is the man who accepts his obligation to those around him, and who does his work in his station in life, great or small, whatever that station may be, with indifference as to the consequences to himself and without thought of what may happen to him individually, who makes the real impression on his fellow competitors. First, think it all out to the best of your ability, and then go straight forward on the principles and with the objects on which you have fixed, looking neither to the right nor to the left. Your principles and your objects must be high—the higher the better. And

when you have grasped them, resolve to hold to them tenaciously and over a long period. It matters less whether you have hit initially on the plan that is theoretically perfect than whether you throw yourself into it unswervingly and stick to it with all your might. Unswerving purpose and concentration are of the last importance. Stick to plans once formed, and do not let yourself think of changing them unless for the clearest reasons. It is firmness and persistence that bring success in the end probably more than anything else. You may be beaten at first; you may have to wait. But the courage that is undaunted and can endure generally at last prevails.

When my relative and predecessor in the office of Lord Chancellor, John Scott, Lord Eldon, was asked what was the real way to ensure for young men success at the Bar, he replied: "I know no rule to give them, but that they must make up their minds to live like a hermit and work like a horse." He had himself in a notable fashion put his precept into practice. But here again I must utter a word of warning about the precept of my distinguished relative. The rule of practice which I have quoted from him I believe to be indispensable, whatever career you choose. But in carrying it into effect you must guard against the temptation to become what is called too practical; that is to say, narrow and uninteresting. Youth, with its elasticity and boundless energy, is the time to lay the foundations of wide knowledge and catholic interests. The wider and more catholic these are the better, provided that they do not distract you from the necessary concentration on your special object. They need not do so. Time is infinitely long for him who knows how to use it, and the mind is not like a cubic measure that can contain only a definite amount. Increase, therefore, wherever you can, without becoming amateurs in your own calling, the range of your interests. Every man and woman is, after all, a citizen in a state. Therefore let us see to it that there is not lacking that interest in the larger life of the social whole which is the justification of a real title to have a voice and a vote. Literature, philosophy, religion, are all widening interests. So is science; so are music and the fine arts. Let every one concern himself with these, or such of them as he thinks can really appeal to him. So only will his outlook

be wide enough to enable him to fill his station and discharge his duties with distinction. He ought to be master of much knowledge besides that of his profession. He must try to think greatly and widely. So only will he succeed if he is called to the higher vocations where leadership is essential. For there is a lower class, a middle class, and an aristocracy of intelligence. The lower class may do some things better than the intellectual aristocrat. I have known Senior Wranglers who would have been below par as bank clerks. Again, there is a large class of skilled work, some of it requiring long training and even initiative, which is done better by competent permanent officials than by statesmen even of a high order. But when we come to the highest order of work it is different. There is a common cry that this, too, should be left to the expert. There is no more complete misinterpretation of a situation. The mere expert, if he were charged with the devising and execution of high aims and policy, would be at sea among a multitude of apparently conflicting considerations. What is the relation of a particular plan to a great national policy and to far-reaching principles and ends? Questions like these must always be for the true leader and not for the specialist. But if the former is wise, as soon as he has made up his mind clearly as to what he wants, he will choose his expert and consult him at every turn, and entrust him freely with the execution of a policy for which he himself will remain responsible. Such a course requires capacity of a high kind and the widest sort of knowledge. But without it success is impossible. No man can know or do everything himself, and the great man of affairs always knows how and what to delegate. The procedure of such men in their work is instructive as to other and less responsible situations. They are never overwhelmed with that work, because their knowledge and their insight enables them to sift out what they themselves must do, and to entrust the rest freely to picked subordinates. For the spirit that is necessary to develop this gift in the higher callings in life the wide outlook, the training in which can be commenced in the University better than anywhere else, is of vital importance. Whether a man is to be a teacher, or doctor, or lawyer, or minister of religion, it is width of outlook that for most men in the end makes the difference. Of course, for genius there is no rule,

and great natural talent of the rarer order can also dispense with much. But I wish to say to you emphatically that it is just here and now in your student years that you make yourselves what you will be, and that you are, nearly all of you, most responsible for your failure or success in later life. It is not that I think a purely intellectual life something of which everything else must fall short; far from it. You have only to read the Gospels to find the conclusive demonstration that this is not so. But I do think that the atmosphere of intelligence is the atmosphere where the inner life, whatever it may be, most completely expands and culminates.

Bacon, in his *Essay on Studies,* uses some words which we do well to bear in mind if we would keep our sense of proportion. "Studies," he says, "serve for delight, for ornament and for ability. Their chief use for delight is in privateness and retiring; for ornament is in discourse; and for ability is in the judgment and disposition of business. For expert men can execute, and perhaps judge of, particulars one by one. But the general counsels and the plots and marshalling of affairs come best from those that are *learned.* To spend too much time in studies is sloth. To use them too much for ornament is affectation; to make judgment wholly by their rules is the humour of a scholar. They perfect Nature, and are perfected by experience." They perfect Nature, for they provide an atmosphere in which natural gifts grow and expand. They are perfected by experience, because their gaps are filled up by what we can learn in practical life alone, and the life of theory and the life of practice, by reacting on and penetrating each other, form a truly proportioned entirety. The strength of men like Cromwell, like Napoleon, like Lincoln, and like Bismarck, is their grasp of great principles and their resoluteness in carrying them into application. For even where great men have not been of the scholar class they have been under the domination of beliefs which rested on a foundation of principle, and were inspired to the extent of becoming suffused by passion. And without passion nothing great is or ever has been accomplished. I do not mean by passion violent or obvious emotion. I mean the concentration which gives rise to singleness of purpose in forming and executing great plans, and is in fact a passion

for excellence. And if this exists enough in you to bring you into leadership of any kind at the University, it will probably again bring you into leadership later on in life, provided always that you select your line of action with prudence and hold to it undeviatingly.

I have not said to you anything particularly new, or much that you have not often heard before in different words. But I did not come here to say new things. The obvious is what is generally neglected. I have come here as an old student to speak to students who are not yet old, and to act the part of a friend by trying to point out the character of the road ahead of them and the places that are difficult. It is because I have traversed some of these difficult places myself that I have not hesitated to speak to you. It is so that we can most readily be helpful to each other. I have no longer a great number of years to look forward to, but I have a good many to look back upon. And I am myself an old *alumnus* of this University who remembers well the days when he would have given a good deal to know the real experience and conclusions of those who had gone before him along the road he had to follow.

This is what I would say to you in conclusion. It is not true that with the increase of numbers and competition life offers fewer prizes in proportion to the multitude who are now striving for them. With the progress of science and the advance in the complicated processes of specialisation and distribution of function, there are arising more and more openings, and more and more chances for those who aspire to succeed in the competition which exists everywhere. I believe that the undergraduates whom I see before me have better prospects than existed forty years ago. There are far more possible ways of rising. But the standards are rising also, and high quality and hard work are more than ever essential. The spread of learning has had a democratic tendency. Those who are to have the prizes of life are chosen on their merits more than ever before. It must, however, always be borne in mind that character and integrity count in the market-place among these merits as well as do knowledge and ability. For the man who possesses both capacity and character, and who, having selected his path, sticks to his plan of life undeviatingly, the chances of success seem to me to-day very great. But wisdom means more

than attention to the gospel of getting on. Life will at the end seem a poor affair if the fruits of its exertions are to be no more than material acquisitions. From the cradle to the grave it is a course of development, and the development of quality as much as quantity ought to continue to the last. For it is in the quality of the whole, judged in all its proportions and in the outlook on the Eternal which has been gained, that the test of the highest success lies, the success that is greatest when the very greatness of its standards brings in its train a deep sense of humility. That was why Goethe, in a memorable sentence, said something with which I will conclude this address:—"The fashion of this world passes away, and it is with what is abiding that I would fain concern myself."

THE PERSONA FICTA.

From the Juridical Review.

The discussion of the more abstract principles of corporation law has occasionally been obscured by the confusion of what are in reality separate questions.

In the first place, a confusion is sometimes created by not distinguishing clearly between the legal and the philosophical, or the legal and the historical, aspects of the matter. Thus, for example, if we ask the familiar question, "Has the corporation a real group-will as distinct from that of its individual members?" the answer will usually be for the philosopher. The lawyer is under no obligation to answer such a question, and the law does not generally provide him with an answer unless litigation has proved, or legislation has anticipated, its necessity. Now, it is almost impossible to imagine any lawsuit in which the Judge must find himself driven to pronounce upon the existence or the non-existence of a group-will. The semi-philosophical expressions we find here and there in the Reports are invariably *obiter dicta,* and the true legal method of handling, or rather refusing to handle, such questions is well illustrated by the Privy Council judgment in *Citizens' Life Assurance Co.* v. *Brown,* where Lord Lindley says[1]:—

"If it is once granted that corporations are for civil purposes to be regarded as persons, i.e. as principals acting through agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases in questions arising out of contracts and in questions arising out of torts and frauds; and to apply them to one class of libels, and to deny them application to another class of libels, on the ground that malice cannot be imputed to a body corporate, appears to their Lordships to be contrary to sound legal principals. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the acting Chief Justice in this case that if Fitzpatrick pub-

[1] [1904] A. C., at p. 426.

lished the libels complained of in the course of his employment the company are liable for it on the ordinary principles of agency."

The difficulty which such problems as these present to the mind of the philosopher may be well illustrated by a passage which we find in the well-known inaugural lecture of Professor Geldart at Oxford. He is pointing out some difficulties of the "fiction theory," and cites as an illustration a decree recently passed by the University of Oxford:—

"Not long ago this university passed a decree recording its gratitude for the munificence of another ancient corporation. Gratitude and munificence are hardly legal conceptions; our own law has probably less regard for them than other systems. Gratitude and munificence are emphatically qualities of persons. Are we to say that one personality which has no existence outside the sphere of law records its gratitude for the munificence displayed by another equally fictitious personality? Courtesy, I hope, is not fiction, legal or otherwise. Or shall we say that the decree is only a collective record of the individual gratitude of those (I fear few) members of Convocation who were present when it was passed? And how shall we attribute individual munificence to the members of a body whose gift was not derived from their private resources?"[2]

Now, the lawyer's answer to this apparent difficulty would surely be that the courteous resolution referred to was not a matter with which the law had any concern. The law is only concerned to analyse such acts as have legal value or legal consequences; it does not profess to explain every possible expression of human activity. The only legal effect of the degree in this case was that the proper Oxford official was thereby authorized to record the terms of the resolution and convey them to the proper officials of the other body. Whether the gratitude expressed was or was not "fictitious," whether it was the gratitude of the members present or the product of the "group-will," are in the eye of the law wholly irrelevant questions. In other words, they are not questions which it can ever be necessary in any possible circumstances to answer in order to decide whether John Doe is to succeed in his action against Richard Roe. Whether the fiction theory be right or wrong, it is obviously not discredited in

[2] 27 L. Q. R. 95.

the eyes of a lawyer by being unable to solve problems which do not call for any solution whatever in terms of law.

It must further be obvious that even the subject-matter of the inquiry will vary widely, according to whether the inquirer is a lawyer or a philosopher. The philosopher is concerned with groups *de facto* and not with groups *de jure*. To him it is immaterial whether the association he is considering be technically incorporated or not. The Stock Exchange or the Inner Temple call for the solution of the same problems as are afforded by a cathedral chapter or the Bank of England. On the other hand, he will disregard the "one-man company," treating it (and rightly) as a mere mechanical device by which Mr. A. B. hopes to get the better of his creditors or otherwise to promote his business interests. Here, however, as we know, the law treats the technicalities of registration as being efficacious to bring a new "person" into the world of legal being.

It need hardly be said that the purely philosophical problems are not those which this essay in any way endeavours to solve.

It is equally necessary to keep the province of the lawyer strictly apart from that of the historian. If modern legal authority tells us that some particular thing is now necessary to constitute a corporation, the historian cannot demolish that doctrine by proving that in early times corporate personality was recognised upon other terms.[3] Nor is it even relevant to prove that bodies which are now admittedly corporate have an origin in history that does not conform to the modern legal theory. If the lawyer finds that the facts of history do not fit in with his theory, he can always make them do so by a fiction. He "presumes" that something has happened which he, as well as the historian, knows to have been extremely unlikely. A modern rule of law does not cease to be a rule merely because it can only be made consistent by distorting historical facts.

The contrary view is an error into which we are sometimes led by mistaking the true functions of the "historical school" of jurists; it is an error into which Maine himself would hardly have fallen. We see it in numberless things

[3] Dr. Rashdall points out (29 L. Q. R. 79) that "it was not apparently till the fifteenth century that the idea gained ground that a corporation could be called into existence only by a definite act of the State."

besides law. For example, we are told, rightly or wrongly, that Christmas can be traced back to a pagan festival; and this apparently leads, by some devious process of thought, to the conclusion that it is not now a Christian festival, and that Christanity therefore is an error arising out of the superstition of the Middle Ages. So again it is said that clothes were originally worn not from modesty, but from the opposite motive; whence, it is argued our modern notion that it is decent to wear clothes is wholly conventional and unreasonable. Coming back to our own subject, we may find an example in Mr. Carr's book, where he attacks the "concession theory" as follows:—

"The concessionists declare that corporateness is a special privilege which is the gift of the State. . . . There must initially be some formal act indicating that permission has been given by the sovereign power. . . There can be no formless corporation. That is the language of preregistration times; it is still spoken. But it is true that there were never any corporations of formless origin? Is there never a corporation which the State does not create? For the sake of their canon the concessionists allowed themselves to be deceived by the fiction of a lost grant. But exceptions spoil their rule. The University of Cambridge is itself a corporation by prescription. Corporateness by prescription was recognized even by those Italian lawyers to whom the concessionists were most indebted."[4]

It is, of course, untrue to say that the concessionists are "deceived" by their fiction any more than Coke and Blackstone were deceived by the procedure in a common recovery. What has happened is, of course, a common tale. We have a modern principle of law, rational and consistent, and governing every new case that can arise. But we have at the same time a few cases of ancient bodies corporate which obtained recognition at a time before the modern principle was developed and applied. No definite alteration in the law can be pointed to, and the theory, in itself a fiction, that no change in law can take place except by statute compels us to bring these exceptional cases into harmony with the modern rule by a palpable fiction. But the fiction deceives no one, and the rule remains a sound rule upon which any lawyer may advise his client.

[4] Carr, *Law of Corporations*, p. 174.

Here again this essay must disclaim any intention of trespassing upon the province of the historian. It is not our function here to inquire what was the conception of a corporation held by the mediaeval lawyers, except so far as it has left any permanent impression on our system.

Nor can we aim at formulating a general theory of corporate personality which shall apply to all civilised bodies of law. It is probable, indeed, that no such general theory can be stated in terms sufficiently precise to be of any value. Whether any particular bodies shall or shall not be granted the attributes of juristic persons is a matter upon which each system of law is at perfect liberty to make —and does make—its arbitrary choice in every case. How arbitrary the choice may be can easily be seen if we take the case of a partnership. In England the partnership firm is not a legal person; cross the Tweed and it gains personality. For practical purposes it makes very little difference, and the Partnership Act of 1890 lays down the law for both countries in identical terms.[5] The very same body may indeed be treated as corporate in some jurisdictions and unincorporate in others. Thus American Courts sometimes recognise a *de facto* corporateness, independent of formalities, of a kind that can only be impugned by the State; and on this principle the Court has even gone so far as to treat as corporate an English company trading in America, although the company was not incorporated by English law.[6]

In view of such facts as these it would seem impossible to conclude that general jurisprudence can help us to determine any questions about the true nature of legal personality. If such personality depends upon any permanent or essential characteristics, every legal system will be compelled to recognise it wherever it occurs under penalty of otherwise causing grave injustice. Human personality, for example, depends upon certain natural facts, and so long as the law is content to adapt itself to those facts, the results are everywhere substantially similar, and to a certain extent necessary. Thus all systems recognise that infants and idiots must be deprived of many of the legal consequences

[5] One or two differences of detail are expressly noticed (sects. 9 and 47).

[6] *Liverpool Insurance Co.* v. *Massachusetts*, 1870, 10 Wall. U.S. 556.

of personality. But where the law refuses to recognise personality in any class of normal adult men, it produces that particular form of injustice known as slavery. This is due to the pressure upon the law of necessary natural facts beyond its control.

When, however, we come to the corporate or quasi-corporate person we find the conditions wholly different. In some cases it will be possible for the recognition of personality to be granted or withheld without substantially affecting the practical results. Thus the rights and liabilities of partners are, for almost all purposes, the same in Scotland as in England, although the former country recognises the personality of the firm, and the latter does not. Or again, it would seem in England, since the decision in the *Taff Vale* case, that for the purposes of civil liability in tort it does not very much matter whether an association possesses a personality recognised by law or not. If any body of men wishes to obtain exemption from such liability it must now get it from Parliament, as the trade unions have succeeded in obtaining it by the Act of 1906. In other words, the liability does not depend upon any theories of personality, but exists, except so far as it may be modified or removed, by the arbitrary discretion of the Legislature; and Parliament, in settling these matters, may be guided by many other motives than a desire for working out legal principles to a logical conclusion. All this is because corporate personality is not a natural and necessary fact which forces itself upon the recognition of the law.

Nor is the function of the State limited to the mere concession or withholding of personality. The amount of personality conceded may itself vary within the widest limits, and the degree to which it shall be granted is a matter of the most absolute discretion. When a corporation is created by charter, any restrictions may be inserted that the King or his advisers think fit;[1] if the proposed members do not think the charter worth having they need not accept it, but they must accept or reject it as a whole. They must take the disabilities along with the privileges. If the corporation is statutory, the right of restriction is still clearer for the corporation can have no powers save those which are to be found—expressly or

[1] Grant, p. 13.

impliedly--within the four corners of the Act. Nor is this any the less so because most of our modern corporations obtain their personality by mere compliance with the simple formalities prescribed in a general Act. This modern facility of incorporation is treated by Mr. Carr[1] as a serious objection to the "concession theory." But it does not seem that corporate personality is any less the gift of the State, merely because the State prescribes in general terms the conditions upon which it is to be granted.

If the suggestions made up to this point are sound, they seem to lead necessarily to what is known as the "concession theory" of corporate origin; that is to say, that legal personality is a gift lying in the uncontrolled discretion of the sovereign power, and always subject to whatever conditions the sovereign power may choose at the time of granting to impose. Once again, let us remember that this only professes to explain the matter from the point of view of the lawyer (that is to say, the modern lawyer). We are not here concerned to discuss the psychology of a corporate meeting, any more than the psychology of a mass meeting in Trafalgar Square. Nor is the assertion of the modern principle intended to imply that this has always been the principle of English law, or that our more ancient corporations do in fact owe their origin to any sovereign act. Nor, again, must we attempt to evade or minimise the real conflict which undoubtedly exists between the strict legal theory and the theory implied by ordinary thought and language. The man in the street may think, and think with reason, that the Stock Exchange is substantially no less corporate than the Bank of England. But the law, so long as it remains unaltered, must disregard his opinion just as much as it disregards his inability to distinguish between the assignment of a lease and a sub-demise for the whole term save one day. So, on the other hand, the law is compelled to see a legal "person" in Salomon & Co., Ltd., where the layman (and the Court of Appeal) can see only an *alias* for Mr. Aron Salomon.[2] It is, of course, unfortunate that legal theory should conflict thus sharply with ordinary ideas, especially when, as in this case, it is everyday speech which expresses accurately the facts of life, and the legal theory

[1] Carr. p. 174; see above, p. 62.
[2] [1897] A. C. 22.

which falsifies. It is probably a sense of the mischief worked by this incongruity which has led American Judges to recognise the corporation *de facto*. But it is too late now to do that in England without the help of Parliament, although the *Taff Vale* case and the Rules of Court permitting "representative actions" certainly point in that direction. At present it is best to admit candidly that the legal doctrine has, in point of fact, diverged widely from the language and ideas of ordinary life. The result, of course, is that, unless and until the two are brought into harmony by legislation we must abandon the attempt to formulate any general theory of personality which, while accurately summing up the law, will at the same time satisfy the historian, the philosopher, and the ordinary man. As an explanation of the r[illegible] of the living law, Blackstone's general principle holds good, and cannot be better stated than in his own words:—

> With us, in England, the King's consent is absolutely ...ssary to the erection of any corporation, either impliedly or expressly given." [10]

So far we have been dealing in this article only with the personality of those bodies that are corporate in the strict legal sense. When we come to ask how far the law recognises collective personality in those that are not corporate, the answer is more difficult. Technically, of course, it recognises in them no personality at all, but, as a matter of substance, we cannot ignore the fact that for some very important purposes it treats corporate and unincorporate associations practically alike. "It cannot matter in the least," said Lord Macnaghten in the *Taff Vale* case, "whether persons acting in concert be combined together in a trade union, or collected or united in any other form of association." [11] So, also, in cases of capacity we find that the contract between the members of an unincorporate body really raises the same questions of *utlra vires* as are raised by the charter or memorandum of a corporation, except only that in the former case the concurrence of all the members can extend or modify even the fundamental purposes of the association.[12] Again, although a member of

[10] I., 472.
[11] [1901] A. C., at p. 438.
[12] But even a company memorandum may, in a proper case, be altered by leave of the Court (8 Edw. VII. c. 69. s. 9).

an unincorporate body cannot contract with it as a corporator can contract with his corporation, yet he can make a contract with all the other members individually. The other members are then represented for this purpose by the secretary, or perhaps by a waiter,[13] and thus the fictitious person of corporation law is supplanted by an agent whose agency is hardly less fictitious. The device, however, has the effect of concealing for most practical purposes the gap which is left by the absence of formal incorporation. So, too, with regard to the holding of property we know that by setting up a body of trustees who are being continually renewed practically the same results are achieved as would be obtained by vesting the property in a body corporate.[14] Of course it is true that the members of an unincorporate body may upon its dissolution divide the property among them, whereas the property of a defunct corporation reverts to the grantors. But even this is only partly true in modern law. On the one hand, the members of an unincorporate body are not allowed to pocket the property where it is subject to any "purpose-trust;" and on the other hand, the statute now provides that in the commonest kind of modern corporation—the ordinary limited company—the property shall, after satisfying the claims of creditors, be distributed among the corporators. Finally, we may note that modern taxing statutes do not, generally speaking; discriminate between the property of corporate and unincorporate associations.[15]

We have now reached a point at which we may conveniently try to summarise some of our results, and see how far they can be comprehended under general statements.

In the first place, it is quite clear that much of the older theorising about corporations must go by the board. Coke, it will be remembered, laid down that a corporation can commit no crimes and cannot even be sued in tort;[16]

[13] *Graff* v. *Evans*, 1881, 8 Q. B. D. 373.

[14] The analogy is carried so far that although the members of an unincorporate association are nominally co-owners they do not enjoy the right of partition, which is a normal incident of co-ownership; they are only entitled to use the common property in so far as it is consistent with the common purposes. See *Re St. James's Club*, 1852, 2 D. M. & G. 383.

[15] See the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 40; and *Curtis* v. *Old Monkland Conservative Association*, [1906] A. C. 86.

[16] 10 Rep. 32.

nor, according to his doctrine, could it even be seised of lands to a use.[17] This language we find repeated by Blackstone, and even in quite recent times the same doctrine, so far as wrongs depending on "malice" are concerned, was preached in vigorous language by Lord Bramwell.[18] But in spite of all these great authorities, the actual law of to-day is quite different, and it is to the living law that our theories, if any, must be made to conform.

Secondly, we must recognise that the distinctions which our law draws between corporate and non-corporate bodies do not correspond to any substantial or necessary differences in the nature of those bodies. Consequently the language of the law is here widely at variance with the language of the lay-folk, which naturally tends to adapt itself roughly to the substantial facts of life. In other words, the recognition of legal personality is a subject which our law treats in a purely arbitrary manner; and further, the *quantum* of such personality is again a matter within the arbitrary discretion of the law.

Thirdly, and chiefly, we must recognise that the technical distinction between corporate and non-corporate bodies has for a large number of purposes ceased entirely to have any practical consequences.

With these main facts before us, let us turn to the chief problems which the law in its present state presents. Putting aside as purely philosophical the discussions about the "group-will" and the "reality" of the corporate person, we find that the chief theoretical problems for legal solution may be grouped under two heads. One of these is to discover the true principle upon which to decide questions of capacity. The other is to decide what is the true legal nature of corporate ownership.

First, as to capacity. Now, quite apart from any question of corporations, we start with the fact that even among natural persons different degrees of capacity are fixed by positive law. Nor do the rules of law upon this subject confine themselves to defining the incapacity of those who, like children and lunatics, are under obvious

[17] The theory that a corporation cannot be a trustee was put forward by counsel as late as 1743, but Lord Hardwicke treated the modern rule as too well settled for argument (*A.-G.* v. *Landerfield*, 9 Mod. 286). See also *Re Thompson's Settlement Trusts*, [1905] 1 Ch. 229.

[18] See *Abrath* v. *N. E. Railway Co.*, 1896, 11 App. Ca. 250.

natural limitations. We have a host of rules, many of them quite peculiar to our own system, for limiting in various ways the contractual capacity of adult and normal men. A barrister can make no contract for his fees and a workman cannot contract himself out of the Compensation Acts.[19] All men alike are incapable of binding themselves by a contract of a gambling nature, not because it is naturally impossible, nor even because it is prohibited,[20] but because it is declared by statute to be—if made in England at any rate[21]—an agreement that creates no obligation.[22]

It would then seem to lie entirely within the discretion of the Legislature to say how far the legal capacity even of natural persons shall extend. In determining the actual rules the Legislature will of course be guided by considerations of policy, and these considerations will inevitably be modified by a number of causes quite unconnected with the logical development and application of purely legal principles. If these be true of natural persons it must *a fortiori* be true of corporations or artificial persons; for the former are after all necessarily to a certain extent independent of positive law, whereas the latter are its creatures; and even if, in the eye of the philosophers, corporations have a *de facto* existence apart from the law, it is nevertheless an existence wholly dependent upon the wills and consent of their members. The conclusion, then, to which we come, is that in ascertaining the capacity of a body corporate we cannot safely rely upon any general principles as to what are the powers necessarily inherent in a corporation as such. All we are entitled to inquire is, By what considerations of policy was the Crown or Legislature guided in creating this particular corporation? When we have settled the question in this form, the answer becomes a mere matter of interpretation, for the rules of English law do not allow us to find an answer except in the actual language used. The principle is exactly the same where the body is not technically corpor-

[19] The extent to which the poorer classes are being deprived by law of the power of contracting according to their own judgment is indeed one of the most prominent features of recent legislation.

[20] Cf. *Hyams* v. *Stuart-King*, [1908] 2 K. B. 696.

[21] See *Saxby* v. *Fulton*, [1909] 2 K. B. 208.

[22] Lunatics on the other hand are in certain circumstances deemed capable (in English law) of binding themselves by contract. See *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, and *Re Walker*, [1905] 1 Ch. 160; also discussions in 17 L. Q. R. 147 (Prof. Goudy) and 27 L. Q. R. 313 (Mr. Ambrose).

ate. Here, however, we are not generally concerned with the sovereign power, for an unincorporated body usually derives any authority it may possess from the wills of those who form it; and it is in the agreemnt by which they have bound themselves together that the answer to the question must be found.

The other problem may also be approached in the same way. There can be no need to define the legal nature of corporate ownership unless we are first prepared to define individual ownership. Here the number of definitions that already crowd the books of jurisprudence might itself be a warning to the theorist. The reason is that positive law is not concerned to formulate any theory of ownership, but only to explicate as clearly as it can what individuals are entitled, and to what extent they are entitled, to the beneficial enjoyment or control of physical matter. Again, let us put corporations aside for the moment and confine ourselves to natural persons. Here we shall find that the nature of the enjoyment and control permitted by law varies not only with the individual concerned, but also with the nature of the property. The complexity of the actual rules is almost infinite. For example, I am entitled to the exclusive control of my cigarettes; but if I were under sixteen I might (for that reason only) be forcibly deprived of them by a policeman. Or again, my enjoyment of a pistol is hampered by a number of restrictions which do not apply to the enjoyment of my walking-stick. Take the right of alienation; we shall find that the sale of beer is governed by totally different rules from that which apply to the case of ginger-beer. In short, even when we are dealing with purely individual rights over material things, we find that their diversity is too great to be explained by anything but the various reasons of policy which have found weight with those who determine what the law shall be.

But carry the process a step further. The law permits two or more individuals to have concurrent rights in the same thing. From this arises the whole vast structure of trusts, joint tenancy, tenancy in common, limited interests and future estates, easements, and so on. It so happens that the first two of these doctrines are sufficient to explain nearly all the cases of ownership by unincorporated bodies.

But all that we need dwell on here is, first, that the law admits the possibility of two or more individuals having interests in the same thing at the same time; and, secondly, that the law has a number of different schemes by which particular cases of such complex ownership are governed.

Now it does not seem necessary to regard the law of corporate ownership as being anything more than another of these numerous devices by which the law regulates cases of concurrent, and therefore possibly conflicting, interests in the same property. As a matter of fact the use of so general a term as "corporate ownership" is in itself rather misleading, since the laws relating to different corporations differ so widely from one another. To ask, What is the interest of a corporator in the corporate property? is really an idle question until we have asked, What kind of corporation are you talking about? The Fellow of a college has generally a right to use the buildings and grounds within certain limits; but a railway shareholder has less right than a railway porter to set foot on the property of his corporation. Even within any one corporation the rights of individual members differ from one another. The head of a college may have access to parts of the building to which the Fellows have no key; and the scholars, who are also corporators, have still more restricted rights, and have no voice whatever in the administration of the property. So, again, the Fellow of a college transmits no interest in the corporation to his personal representatives, while the opposite is the case of the shareholder in an ordinary trading company. Once again the conclusion to which we are driven is, that it is quite impossible to frame any general statement of any value as to the interest of corporators as such in corporate property. We can do nothing more than define the interest of particular corporators in particular corporations, and to do this we must look to the positive rules of law governing the particular case.

Here it may well be said: if it be true that the corporation is merely a piece of legal machinery for achieving certain practical ends, and a machine wholly dependent for its nature and energies upon the arbitrary discretion of the lawgiver, what right have we to be talking about legal "personality" at all? All that the law is concerned with is to define capacities and liabilities, or to prescribe

the exact means by which certain classes of property shall be administered.

It may at once be admitted that if the argument advanced in this essay is sound such an objection cannot really be met. "Personality" is in fact a term which, strictly speaking, belongs to the language rather of philosophy than of positive law; and it is perhaps to be regretted that it has ever been allowed to find a place in the legal vocabulary. If we look at the matter closely, the powers of corporations are only the powers of individuals acting under certain conditions and through certain forms; and the liabilities of a corporation really mean the right of a plaintiff to claim damages (in default of performance) or of the Crown to claim a penalty out of certain specified property. When we ask whether a trade union is liable in tort, we really mean: Is *A.*, who has been wronged by union officials acting in the scope of their employment, entitled to be compensated out of certain funds subscribed by a large number of persons for certain purposes?

In short, the truth seems to be that the law is concerned, not with the difficult and elusive notion of collective personality, but with the much more comprehensible subject of individual capacity. It does not try to define the personality of a corporation, any more than it tries to differentiate between the personality of a child and that of an adult. But it is no less prepared to define the capacity of those who act on behalf of associated individuals, than it is to define the respective capacities of the adult and the child. The word "person," however frequently it may occur in statutes and judgments, is really a popular expression, for which the law is not prepared, if pressed, to offer any formal definition.[23]

Our search for general theoretic principles may perhaps seem to have produced only negative results. Yet it may

[23] It is, of course, possible, and sometimes perhaps even necessary, that those who determine the actual rules of the law should be guided in so doing by philosophical ideas of some kind; and the rules of law may vary widely according to the philosophical notions entertained—consciously or unconsc —by the law-givers. But these abstractions cannot be expre the law itself, which can only define the capacity of indivi do this or that outward act; and it is quite possible for l ors with utterly divergent theories of personality to concur in the actual wording of a statute or declsion.

still be claimed that the law has not failed to give an answer in any case where a legal answer may fairly be demanded; and further, that these answers are based on legal principles which are on the whole both reasonable and easily understood. It is no discredit to the law if it keeps to its own province, and declines to solve all the problems which the ingenuity of philosophers and historians may propound; and perhaps it is not too much to say that no problem of association law has ever presented any fundamental difficulty to the lawyer, except when it has been confused by the introduction of matters which are really alien to legal science.

HERBERT A. SMITH.

TO PROTECT IMMIGRANTS SEEKING EMPLOYMENT.

His Excellency the Administrator in Council, under the authority of section 66 of the Immigration Act of Canada, is pleased to make the following regulations for the protection of immigrants seeking employment from companies, firms, or persons carrying on the business of intelligence offices, or employment or labour agencies in Canada, and the same are hereby made and established accordingly:—

1. Every person, firm or company engaged in the business of an intelligence office, or employment or labour agency, and having business dealings with immigrants, shall first obtain a license for this purpose from the Superintendent of Immigration, Ottawa, which license shall be issued without fee upon the Superintendent being satisfied that the applicant is duly complying with the requirements of the Immigration Act and Orders in Council or regulations passed thereunder; the license, unless otherwise cancelled, shall remain in force for the calendar year during which it is issued, and shall be posted in a conspicuous place on the holder's premises.

2. Such license shall not be transferable, and shall be revocable on the written order of the Superintendent of Immigration, where the latter has been satisfied that the

holder is not complying with the requirements of the Immigration Act, or of any Orders in Council or regulations passed thereunder.

3. The Superintendent of Immigration shall keep a register of all license holders hereunder.

4. No person, firm, or company engaged in an intelligence office, or employment or labour agency business shall by advertisement, letter, poster, verbal communication or otherwise, make false representations to any immigrant seeking employment, as to opportunities or conditions of employment, with any employer in Canada.

5. Every holder of a license under these regulations shall in books provided for that purpose keep the following records of his business, viz., the full name and address in Canada, and home address, if any, elsewhere, of every immigrant with whom the holder has dealings; the port and date of the immigrant's arrival in Canada; the name of the steamship or railway by which the immigrant has come to Canada; the name and address of the immigrant's next of kin; together with the name and address of the employer for whom the immigrant is engaged; the nature of the work to be performed; the rate of wages to be paid, the rate of board, all deductions from wages, and other terms of engagement.

6. Such books of record shall be open at all times to inspection by any officer authorized for this purpose by the Superintendent of Immigration.

7. The employment fee chargeable by intelligence offices, employment of labour agencies for their services in securing employment for an immigrant shall not in any case exceed the sum of $1.00, and such fee shall be refunded in case the immigrant is unable immediately upon arrival at the place where the work was represented to be, to secure the promised employment at the wages and upon the terms represented at time of payment of fee.

8. No holder of a license under these regulations shall, in addition to the $1.00 fee above mentioned, charge to any immigrant for transportation to the point where employment is to commence, any sum more than the actual cost of such transportation.

9. No holder of a license under these regulations shall engage for any employer of labour, any immigrant, unless said holder of license has in his possession a written and

dated order from the employer of labour setting forth specifically the number of men or women whom it is the employer's desire to engage, and which written order shall also state full particulars as to the nature of the work to be performed, the rate of wages to be paid, the rate of board, all deductions from wages and other terms of engagement.

10. Every holder of a license under these regulations shall keep on fyle separate from other correspondence and numbered consecutively from one up all orders for immigrant help from employers of labour which fyle shall be produced to any immigration officer requesting to see the same.

11. No holder of a license under these regulations shall engage for any employer of labour any immigrant, where the written order for help was given over two months before the filling thereof.

12. Every holder of a license under these regulations shall post in a conspicuous place on his premises any copy or synopsis of these regulations which may be provided for that purpose by the Superintendent of Immigration, which copy or synopsis may be in any language or languages.

13. If any license holder shall be convicted of an indictable offence, his license shall *ipso facto* be deemed to have been cancelled.

14. If the holder of a license hereunder fails to comply with any of the requirements of the foregoing regulations, he shall be liable on summary conviction to a penalty not exceeding $100.00, and in default of payment, to a term of imprisonment not exceeding three months.

(Signed) RODOLPHE BOUDREAU,

Clerk of the Privy Council.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

Rules of Law and Administration Relating to Wills and Intestacies. By Charles Percy Sanger, of Lincoln's Inn, Barrister-at-Law. London: Sweet and Maxwell, Limited. Toronto: The Carswell Company, Limited. Price, $2.50.

This concise volume truly performs its function, which is to set out the essential rules for the administration of estates. The obscurities and technical nature of the law of real property in England is such that the administrator or executor is met with difficulties at every turn. The arrangement of the rules in this useful work and the annotations must of necessity afford invaluable assistance to all those, whether solicitor or otherwise, having anything to do with the administration of estates.

The June number of "Our Dumb Animals" is to hand. It is always a pleasure to receive and peruse this charming little magazine as it is edited and controlled by those who are real lovers of animals and of outdoor life. The illustrations are always splendidly executed and the reading matter interesting.

Burge's Colonial and Foreign Law, New Edition (Volume four, Part 1). New Edition under the general Editorship of Alexander Wood Renton, of Gray's Inn, Barrister-at-Law, and George Grenville Phillimore, B.C.L. of the Middle Temple, Barrister-at-Law. London: Sweet & Maxwell. Stevens & Sons.

The present volume which forms part of volume No. 4 of this very comprehensive work completes the account of the law of persons with a dissertation of the law relating

to guardianship, and then takes up with much detail the law of real property. Referring to the terms of the law of guardianship the whole question is thoroughly discussed and the various foreign systems compared with that in vogue in Great Britain. The law of guardianship as relating to in India is particularly interesting, introducing as it does so many uncommon aspects of the question. Reference is made to the differences which exist between the English law, and the Roman Dutch Law, and the law of France, and the various other states where the French legal system prevails, and also between the laws of Scotland and of the United States. Little or no comment is necessary upon the monumental nature of this work and the nature of the comparisons or changes as noted. When completed, this commentary on colonial and foreign law will rank equally with such works as Halsbury's Law of England and other works of a similar nature.

***International Institute of Agriculture*, Bureau of Economy and Social Intelligence.**

The general public have little or no knowledge of the value of the work being performed by the International Institute of Agriculture whose headquarters are at Rome, Italy. The Institute publish a monthly bulletin, which is in its fifth year. Reference is made to the economic and social events which take place in every country in the world.

The following taken at random from volume No. 39 under the headings of "Germany"—Supply of Electric Power for Country Districts by Co-operative Organizations. "Belgium," The Third Congress of Farmwcmans Club at Ghent. "Egypt," Beginning of the co-operative movement in agriculture. "Chile," Work done by the Mortgage Banks in 1912. "France," Savings Banks and the investment of their Capital. "Russia," Loans granted by the State Bank on the Security of grain and the establishment of grain elevators in Russia." The above will enable the reader to appreciate the comprehensiveness and the profundity of the work done by the institute, it will also enable one to see that all progress is not confined to what are usually considered as the great civilized countries. For instance, in

Russia loans have been made on grain as far back as 1893, which provision was only completely recognized by statute in the new Bank Act of last year. It is to be hoped that the publication of the Institute will become much more widely known and better appreciated.

Principles of the Law of Real Property. By the late Joshua Williams, of Lincoln's Inn. Twenty-second edition re-arranged and partly re-written by T. Cyprian Williams, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Limited. Toronto: The Carswell Co., Limited.

This standard work maintains its hold not only on students for whom it is primarily intended, but also on the members of the profession who find it necessary to look up any particularly involved points of law on real property. In this edition the law and the cases thereon are brought up to date. From an historical point of view the book is of a very high order, recalling in a few words the course of the law, prior to being molded in its present form. Price $5.75.

Scrutton on Charterparties and Bills of Lading. By Sir Thomas Edward Scrutton, one of the Judges of the King's Bench division of the High Court of Justice; author of "The Laws of Copyright," "The Merchant Shipping Act, 1894," Seventh Edition by Sir T. E. Scrutton and F. D. MacKinnon, M.A. London: Sweet & Maxwell, Limited. Toronto: The Carswell Company, Limited.

The seventh edition of this very valuable work has just been issued and although the ordinary practitioner comes but little in contact with Maritime Law, those living at the various shipping points, either on lake, river or ocean who continually have occasion to refer to the various statutes relating to shiping, will find this work of inestimable value. The rights and liabilities of the owner or his agents, be they broker or captain, whether interested as a shipper or otherwise in ship or cargo, are set out in minute detail. The leading cases relating to shipping of to-day, and the reasons upon which the decisions were based are fully given. This work will be a distinct addition to the working library of the solicitor.

An Analysis of the Law of Contracts and Torts for the use of students. By A. M. Wilshere, M.A., L.L.B. of Gray's Inn, Barrister-at-Law, and Douglas Robb, B.A. of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Limited. Toronto: The Carswell Co., Limited.

The analysis of the Law of Contracts and Torts for the use of students is a splendid digest of these two subjects. Each chapter is divided under appropriate heads with sufficient reading matter to enable the student to take a review of his work in a very short space of time. The various leading cases governing are given in sufficient detail that the point in each may be easily comprehended.

Commission of Conservation, Canada, Committee on Minerals, Conservation of Coal in Canada with Notes on the Principal Coal Mines. By W. J. Dick, M.Sc., Mining Engineer of the Commission of Conservation. Toronto: The Bryant Press, Limited.

The Commission of Conservation of Canada have issued the results of their investigation in one of their very valuable volumes. In view of Canada's practically entire dependence on the United States for its supply of anthracite coal and the possibility in the near future of the export of anthracite being prohibited from the United States, the Commission of Conservation very tritely points out it behooves this country to husband its resources of anthracite, of which there is but a very limited quantity in the neighborhood of Banff, Alberta, as well as to carefully look after the softer coals until some commercial substitute has been discovered. This volume is full of the most valuable information, which every merchant and any one interested in the country and its welfare, should thoroughly digest.

Philosophy of Law. By Josef Kohler, Professor of Law in the University of Berlin. Translated from the German by Adalbert Adbrecht, Associate Editor of the Journal of Criminal Law and Criminology, with an Editorial Preface by Albert Kocourek, Lecturer on Jurisprudence in Northwestern University, and with introductions by O cin M. Carter, Justice of the Supreme Court of Illinois, and William Caldwell, Professor of Logic and Moral Philosophy in McGill University, Montreal. Boston: The Boston Book Company.

Lawyers, as a rule, are more concerned with the law as it is than with the philosophy of the law. At times, how-

ever, it is a relief to deviate from well known paths of positive law to wander for a period in the realm of the speculative. The author of this volume is steeped in German philosophy, and the work gives ample evidence of the completeness of his knowledge of the subject. The chapters on "The Development of Culture" and "Culture and Law" are of peculiar interest, culture being taken in the German sense "Culture is the control of nature by science and art." The classification in the work is similar to that usual in books on Roman Law and is divided into (a) The Law of Persons, (b) The Law of the Body Politic. In the Law of Persons, treating of slavery, the author maintains that under certain conditions slavery is permissible and avers that slavery is an evidence of progress and is the means of obtaining a division of labour on a large scale.

In the preface the author epitomizes his phllosophy in the following pithy sentences:—"A unity of spirit rules mankind and evolution forces its way out of universal substance. Legal philosophy attains its high consecration in the thought of this unity," and as a modern Hegelian he sums up,—"Materialism is dead; the philosophy of spirit still lives."

DID YOU EVER?

Did you ever try a case in Court,
When you could but depend
Upon the testimony
Of one you thought your friend,
And when you put him on the stand,
And asked your questions nice,
He stripped the hide right off your case
In one neat little slice?

And did you ever try a case,
Depending on the Law,
As you had found it in the books,
Supporting without a flaw,
And when you came to argue
Your case before the Court,
Your opponent smiled, and slyly gave
A most contemptuous snort.
And when at last you'd finished
The argument you prized,
The fellow across the table
Looked up as though surprised,
And said, "Your Honor, such was the law,
But the law has been revised."
And then he read to his Honor
A statute bright and new,
While you prayed the floor to open up
And kindly let you through?

Don't answer if it pains you,
But again, I ask, "Did you?"

—GEO. A. JOHNSTON.

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THE ENGLISH JUSTINIAN.

Juris præcepta sunt hæc:—
Honeste-vivere; alterum non lædere; suum cuique tribuere.—*Ulpian.*

In the whole range of English history there cannot be found a line of sovereigns, taken in the whole, to be compared with that of the Plantagenets for ability, force of character, constructive statesmanship as well as military genius. It bore sway for a period of 331 years, from A.D. 1154 to 1485. In the list of its fourteen kings, from Henry II. to Richard III., are found the names of some of the most despicable rulers that ever disgraced a nation; notably that monster of iniquity, John, perjurer and murderer; and that no less vile and unnatural miscreant, the last of the Plantagenets, Richard III., a very demon of crime. Yet the line is rendered illustrious by the brilliant deeds of Richard of the lion heart, a perfect model of a feudal knight and known in all history as the invincible Crusader; by Henry V., the hero of Agincourt, and notable warrior-statesman; by Henry II., the great legal reformer; and by Edward I., known as the "English Justinian" and founder of the mother of Parliaments.

Blackstone, after drawing a masterly sketch of the English Juridical Constitution designed by the masterly hand of our forefathers, thus concludes: "The great original lines are still strong and visible, and if any of the minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigour; and not so much by fanciful alterations and wild experiments (so frequent in the fertile age) as by closely adhering to the wisdom of the ancient plan conceded by Alfred and perfected by Edward I., and by attending to the spirit,

without neglecting the forms, of this excellent and venerable institution."

Edward the First reigned thirty-five years, from 1272 to 1307. The reign of this sovereign, the Flower of the Plantagenets, is a "unique period" in the history of English law. Sir Matthew Hale, who was Lord Chief Justice during the Commonwealth, in speaking of it, says: "More was done in the first thirteen years of that reign, to settle and establish the distributive Justice of the Kingdom, than in all the ages since that time put together."

Edward I. re-organised the *Aula Regis*, which was established by William the Conqueror, in his palace at Westminster, as a constant Court. It was composed of his great officers of State, assisted by Justices, or men learned in the law and also the great Barons, over whom presided a Special Magistrate, called the Chief Justiciar. This high official was virtually the Premier of the State, the second man in the kingdom and guardian of the nation during the absence of the King. This great Court followed the King in all his progresses throughout the kingdom. The trial of causes consequently became exceedingly uncertain as well as burdensome, the suitors and their witnesses being compelled to move from place to place to suit the convenience of the Court.

Our great law reformer in new-modelling the ordinary Courts, that is to say, the Court of King's Bench, the Court of Exchequer, and the Court of Common Pleas, defined their several limits, so as not to encroach upon their respective jurisdictions. The Court of Common Pleas determined all pleas of land and questions merely civil between subject and subject. It was styled by Coke as the "Lock and key of the Common Law." It consisted of a Chief Justice and three Puisne Justices and sat every day during the four terms, to determine all matters of law in civil causes.

The Court of Exchequer was inferior in rank to the Court of Common Pleas. It was established by the Conqueror as a part of the *Aula Regis*, for the purpose of collecting the revenues of the Crown and recovering the debts of the King. As remodelled by Edward, it not only continued to manage the royal revenue, but was transformed into a Court of Equity and Common Law as well, by a fiction of law. This

Court was presided over by Judges called Barons of the Exchequer.

The Court of King's Bench, as constituted, retained all the jurisdiction not parcelled out to the other Courts. It had cognizance in all criminal causes. It was presided over by a Chief Justice and three puisne Justices, who were the Supreme Conservators of the peace and were charged with the whole judicial authority of the Crown. The line of Chief Justiciars, which had continued for about two hundred years, came to an end, when Edward appointed Ralph de Hengham, Chief Justice of the Court of King's Bench, the first of a long line of Chief Justices, who have continued in unbroken succession down to our own times.

In order to ensure the prompt administration of law, so as to bring justice to every man's door, Judges were appointed to hold assizes, in each county, thrice each year.

Among other legal reforms, during this reign, Ecclesiastical Courts were shorn of much of their power. They were so circumscribed as to be limited to matrimonial and testamentary causes, the non-payment of tithes, perjury, mortmain, and the infliction of public penance.

The Common Law Judges received small salaries, being principally paid by fees on the trial of causes. Many of them amassed, it is said, great riches. During the absence of the King on the Continent, from 1286 to 1289, judicial corruption became rife. So incensed was he on his return, that he caused all of them to be indicted for having wrested the law for mercenary purposes. Two only were acquitted. Chief Justice Weyland was found guilty and his property adjudged to the King. He abjured the realm. He was compelled to walk barefoot and bareheaded, with a crucifix in his hand to the sea side, and thence transported. Sir Rolf de Hengham suffered long imprisonment, and paid a fine of 54,000 marks. The taint had even affected the Court of Equity.

Edward called his first Parliament shortly after his coronation. His first statute, that of Westminster the first, was a code, rather than a statute. The King presided at the Parliament which passed this famous Act, in May, 1275, in the third year of his reign. It contained 51 chapters and was a summary of Magna Charta, a codification of many of the leading laws of the Confessor, an exposition of many

ancient laws and statutes, together with some of the administrative measures of the first Angevin King, Henry II. This celebrated statute, together with that passed in the thirteenth year of his reign, called Westminster the second, may be found *in extenso* in the second and third parts of the institutes of the laws of England, with valuable comments, by that great oracle of the common law, Sir Edward Coke, Lord Chief Justice of England. It is generally conceded these celebrated statutes gave the great Plantagenet the title of the English Justinian. Those famous statutes wrought many excellent reforms. It swept away many inveterate abuses; it simplified the administration of justice; protected the property of the church from spoliation; secured freedom of popular election; restrained the imposition of excessive fines; amended the criminal law; cheapened the administration of justice; and established the several Courts of law on a sound and equitable basis.

Scarcely less notable was the like famous statute of Winchester. By its provisions, every man, in his district or hundred, was bound to hold himself in readiness for service in case of revolt or invasion. It made more definite arrangements in regulating the "Hue and Cry;" in the pursuit of felons with "Horn and Voice." It established the "Watch and Ward," in cities and boroughs; the gates of every town were to be closed at night fall; all strangers were called upon to give an account of themselves to every magistrate of every borough they entered. Every district was held responsible for all the crimes committed within the range of its ambit. Knights of the shire were appointed, called Conservators of the Peace, commissioned to enforce the laws by calling to their aid the posse of the sheriffs, as often as it might be thought necessary. Subsequently, they became to be called Justices of the Peace, and as such are known even unto this day. Another provision of this celebrated Act directed that all hedges and underwood be cleared away to the distance of 200 feet, on each side of the high road leading from town to town, so as not to afford shelter or protection to robbers.

The ordinances for the government of the City of London were not the less remarkable, for the many excellent statutory provisions made for the welfare and comfort of its people. London, during his reign, was a cosmopolitan

city, which attracted wanderers from all countries, of whom it was said: "They nothing do, but run up and down through the streets, more by night than by day, and are well attired in clothing and array, and have their food of delicate meats and costly." These ordinances directed that taverns were only to be kept by fully qualified citizens, and were to be closed at curfew; that no roysterer or other serious disturber of the peace was to be let out on bail, without express warrant of the warden or mayor; that no one was to teach fencing within the limits of the city; that no broker was to carry on business until he had been presented and sworn before the warden or mayor to exercise his craft honestly; and that each alderman was to hold frequent enquiries as to the presence of malefactors within his ward, and to have them forthwith placed in safe custody.

Edward appreciated to the fullest extent how important was commerce to the prosperity of a nation. To this end, he secured the passage of the great Statute of Merchants. The merchant had long been held in supreme distrust. Trade and traffic had hitherto long been regarded as affording an opportunity for cheating, and as something "akin to usury." Under the provisions of the civil law, the Roman people treated commerce as dishonourable and discouraged its exercise by persons of birth or fortune.

The Canonists, likewise, looked on trade as inconsistent with Christianity. Blackstone is authority for the statement that by a Canon, passed at the Council of Melfi, under Pope Urban II., A.D. 1096, it was decreed that it was impossible, with a safe conscience, to exercise any traffic, or to follow the profession of the law.

Edward, however, held commerce to be the life-blood of a nation's prosperity, and he consequently resorted to every possible means to encourage and assist it. He, likewise, held credit to be its most efficient ally. There was no adequate means at the time to ensure the prompt payment of commercial debts. Every trick of chicane and delay was resorted to, so that the hopeless creditor, after much expense, often found himself possessed, for his pains, of only a barren judgment. By the Statute of 1283, sometimes called the Statute of Acton Burnell, merchants were given an easier way for recovering their debts. Mr. Edward Jenks, in referring to the importance of this statute, says: "Under

the cover of its technical phrases, the King dealt a death-blow at the still surviving forces of patriarchalism and feudalism, and recognized the new principles of individual responsibility and commercial probity, which were to be the watch-words of the political and social future. Like a wise legislator, he had merely interpreted and guided the overwhelming drift of evolution, and distinguished between obstruction and progress. He saw that the future greatness of England lay, not with the feudal landowner, but with the despised merchant. "His enactment is admirable in its simplicity and effectiveness."

The harsh, even cruel, treatment of the Jews by Edward subjected him to justly merited criticism. More than two hundred of them were hanged and their goods confiscated to the Crown. But few Christian money-lenders, who were partners of their guilt, shared the like punishment. In 1290, the King expelled the Jews from England, and their banishment lasted 400 years.

The Jews have been styled the "greatest miracle of time." For centuries a decree of outlawry has virtually stood recorded against them. The hand of every man seems to have been against them. Although despised and rejected, they have held steadfast to their faith through an Iliad of woes. Without national status, without a visible head, wanderers on the face of the earth, they cling to a belief of a re-union and nationhood under the promised Messiah. Whether controlling the finances of the leading European capitals and the usurers and money changers of the world, or plunged into the depths of poverty and despair, the zeal for their religion still continues as fervent as it was before Jerusalem fell under the weight of Pagan arms. Adversity seems only to have nerved them for supreme effort, in every branch of intellectual effort, and their success in many departments of industrial enterprise has been phenomenal. One of England's greatest premiers was a Jew. A Jew has been premier of Spain. To-day a Jew is Chief Justice of England, and another a member of Asquith's Cabinet. One of England's greatest Chancery Judges was a Jew, Sir George Jessel, Master of the Rolls.

If the true test of a man's work is its supremacy, then Edward, measured by such a standard, takes rank among the world's greatest law reformers. The Common Law

Courts, for a period of 600 years, down to the Judicature Act of 1873, substantially preserved the form in which he moulded them. Tout thus comments upon the eminent services rendered the State by the great King: "He is not only the 'English Justinian,' and the creator of our later constitution; he held to the best of the traditions of his youth, and his task was not one of creation, so much as of selection. His age was an age of definition. The series of great laws, which he made during the earlier half of his reign, represented a long effort to appropriate what was best in the age that had gone before, and to combine it in orderly sequence."

The whole doctrine of the law is comprehended in the three great principles of Ulpian, found at the head of this article: "To live honestly: to hurt nobody: to render every one his due." This constitutes the sum total of what was sought to be accomplished by this kingly law reformer.

This age, too, was an age of great lawyers, and this had the effect of stimulating the king in his efforts to simplify the procedure of the re-organised Courts and to select the ablest and most learned Judges to interpret the laws.

The reign was further distinguished by the first publication of the reports of the different Courts. According to Maitland, the publication of the year books was commenced in the twentieth year of the reign of Edward the First. These reports, written in French, proved highly valuable for the light they throw on the system of pleading, as well as the records of the decisions of the different Courts. They contained the arguments of counsel and the opinions of the Judges. They are extant, in a regular series from the reign of Edward I. to the time of Henry VII., a period of about 200 years. They were taken by the Prothonotaries at the expense of the Crown, and published annually: consequently called year books. During the reign of James I., at the suggestion of Lord Bacon, two salaried reporters were appointed for the like purpose. This provision, however, was soon discontinued. Subsequently, the task was performed by private hands.

The profession, also during this period, enjoyed the advantages of those inestimable treatises, learned disquisitions on the Common Law, by Glanvil, Bracton, Britton and Fleta. The term, common law, came into use during the reign of

Edward I. By common law is meant general law, its contrast being special law; and as such it is distinguished from statutes and ordinances. Being common to the whole land, it is distinguished from local customs. Being a law of the temporal courts, it is distinguished from Ecclesiastical law. And being preserved by oral tradition, it continues as such until over-ruled by Judge-made law. The Judges, in deciding the law, when not governed by precedent, do not profess to make new law, but simply declare what has always been the law. The oldest treatise on the common law of England is that of Glanvil, composed in the reign of Henry II. He was Chief Justiciar and consequently presided in the *Aula Regis*. It is the most ancient book extant upon the laws and customs of England, and was highly extolled by Coke, Hale and Blackstone. Bracton wrote his great work *De legibus et consuetudinibus Angliae*, in the reign of Henry III. He was professor of law at Oxford, and Judge itinerant in that reign. Reeves calls him, "the father of the English law, and the great ornament of the age in which he lived." He has been pronounced the best of our English writers. He is said to have copied Justinian almost word for word. He flourished during the reign of Edward I. Bracton was Bishop of Hereford and Coke said he was a man of profound judgment in the common law. The author of Fleta was wholly an imitator of Bracton. Being an abridgment it proved a valuable acquisition to the lawyers of the period. It was written in the Fleet prison, under the *nom de plume* of Fleta, the author being supposed to have been an impecunious lawyer who had fallen upon evil days.

In the eighteenth year of the reign of Edward I. was passed a most important statute, called the Writ of *Quo Warranto*, drafted by his great Lord Chancellor, Robert Burnel. It was a writ of right for the Crown against one who claims or usurps any office, right, privilege, property, franchise or liberty, to enquire by what authority he supports his claim, in order to determine the alleged right.

Its exercise by Henry VIII., in the case of Saint Thomas Becket, serves to shew to what absurd uses this famous writ has been applied. Lord Chief Justice Campbell, in sketching the career of the sainted martyr, Archbishop Thomas of Canterbury, relates the following incident:—

"Henry VIII., when he wished to throw off the authority of the Pope, thinking that as long as the name of Saint Thomas should remain in the calendar men would be stimulated by his example to brave the Ecclesiastical authority of the Sovereign, instructed his attorney-general to file a *Quo Warranto* information against him, Saint Thomas of Canterbury, for usurping the office of a saint, and he was formally cited to appear in Court to answer the charge. How he was cited does not appear. Judgment of *ouster* would have passed against him by default had not the King to shew his impartiality and great regard for the due administration of justice, assigned his counsel at the public expense. The cause being called, and the Attorney-General and the advocate for the accused being fully heard, with such proofs as were offered on both sides, sentence was pronounced, that "Thomas, sometime Archbishop of Canterbury, had been guilty of contumacy, treason, and rebellion; that his bones should be publicly burnt, to admonish the living of their duty by the punishment of the dead; and that the offerings made at his shrine should be forfeited to the Crown." A proclamation followed, stating, that "forasmuch as it now clearly appeared that Thomas Becket had been killed in a riot excited by his own obstinancy and intemperate language, and had been afterwards canonised by the Bishop of Rome as the champion of his usurped authority, the King's Majesty thought it expedient to declare to his loving subjects that he was no saint, but rather a rebel and traitor to his Prince, and therefore strictly charged and commanded that he should not be esteemed or called a saint; that all images and pictures of him should be destroyed, the festivals in his honour be abolished, and his name and remembrance be erased out of all books, under pain of His Majesty's indignation and imprisonment at His Grace's pleasure."

Edward I. is equally distinguished as the founder of the first real and free Parliament, known as the "Model Parliament." It is true, the great and good Simon de Montfort, uncle of Edward, in 1265, sketched its bold outlines, but his death, at the fateful battle of Evesham, and the restoration of Henry III., the father of Edward, delayed its practical application; yet Edward, thirty years after, in the twenty-third year of his reign, carried the grand conception to completion, and is credited as the author of the type upon which

all free Parliaments have since been modelled, wherever the Anglo-Saxon race bears rule. Parliaments were in use in Britain at the time of the Roman invasion. In fact, it is said, they were coeval with the nation itself. Under the Saxons the general council was called the great meeting. Alfred the Great re-organised it, calling it the Witenagemot, or Council of Wise Men. After the conquest and the general introduction of the feudal system, the people were simply an unknown factor in the representation of the nation. The *Curia Regis* constituted the Parliament of the nation. It was not till after the closing of the Barons War and during the closing years of Edward I.'s reign, Parliament was constituted upon the broad lines as now established, subsequently preserving the almost identical symmetry for a period of over six hundred years.

In November, 1295, Edward convened the famous Parliament called the "Model Parliament." The reasons for calling it were set forth, by the great Plantagenet, in these words:—"As common danger should be met by remedies agreed upon in common, I call a full and representative gathering of not only magnates, but also two knights from every shire, and two citizens from each city and two burgesses from every borough, to counsel as to how best to avert the danger of invasion, on the part of the King of France, who having cheated me out of Gascony, and has since wickedly retained it, and has now beset my realm with a great fleet, and a great multitude of warriors, and proposes, if his power equal his unrighteous design, to blot out the English tongue from the face of the earth." His object in calling this Parliament was to rally round him all classes of his subjects to co-operate with him in his defence of the national honour. In this Parliament of 1295 thirty-seven counties and a hundred and sixty-six boroughs were represented.

This Parliament, it was claimed, was the "complete image of the nation," representing the three estates of the realm—the clergy, the nobles, and the commons. The clergy consisted of the two archbishops, bishops, abbots, and representatives of the lower clergy; the nobles, earls and barons; the commons, two knights from each shire; two citizens from each city; and two burgesses from each borough.

Its classification was supposed to represent those who pray; those who fight; and those who work. Soon after, the

commons succeeded in establishing the three following essential principles of government.

First: That all taxation without the consent of Parliament is illegal.

Second: The necessity for the concurrence of both houses in legislation.

Third: The right of the commons to inquire into and amend the abuses of the administration.

Statutory provision was soon made for annually elected parliaments. In the reign of the grandson of Edward I. there were forty-eight sessions of Parliament during his reign of fifty years. The Division of Parliament into two Houses was not effected until the middle of the fourteenth century. Both knights of the shire and burgesses from the earliest time received wages from their constituents in payment for their expenses. A knight, four shillings per day; a burgess, two shilings per day.

Edward's successes were many; his failures few. He sought to establish national Kingship in lieu of federal Kingship, and succeeded in a remarkable degree.

In his attempt to unify Great Britain he met with only partial success 's to say in the conquest of Wales; he failed in regard to Scotland.

At the time of his death he was engaged in carrying on the war against Bruce. His dying injunction to his son was to prosecute the war till Scotland formed a part of England. To encourage his soldiers, he ordered that his bones be carried in front of the army. His son disobeyed the dying injunction of his father and withdrew the army. Seven years later at Bannockburn his successor sustained a crushing defeat, and the union of the two countries was deferred for a period of four hundred years, even until the reign of the last of the Stuarts, in 1707. Contrary to general opinion the union proved a great success. Scotland retained its own laws and its own form of church government; and in consequence of free trade between the countries shared in the general prosperity of the nation.

We need not dwell upon his career as a soldier, for peace has her victories no less renowned than those of war. We rather prefer to consider the great Plantagenet as leading the grand old nation onward in the greater triumphs of just laws and enlightened legislation.

His career cannot be better summarised than in the words following, by Edward Jenks, the historian: "Not until Edward is dead do we find in the statute book the honoured formula which describes the King as enacting "with the advice of the lords spiritual and temporal and the commons in Parliament assembled;" but this consummation became clearly inevitable, from the day on which the model parliament assembled at Westminster in November, 1295. To explain all that it means would be necessary to write the comparative history of the States of western Europe, and to shew how the history of England has been so different from the history of France, of Italy, of Germany, and of Spain. Briefly put, it meant the creation of that national and political unity which, until quite modern days, was the highest achievement of European statesmanship; it meant the appearance on the world's horizon of that new star, which was to light the nations on their march to freedom. For the ideals and principles adopted by the English people under the rule of Edward, were not merely the ideals and principles which nerved the arm of the Puritan soldier, and raised the banner of defiance against Napoleon. They were the ideals and principles which, despite the excesses of the French Revolution, struck the fetters of tyranny from the limbs of Western Europe, and breathed the spirit of justice and freedom into the mighty commonwealth of America and Australia."

Edward was happy in his domestic relations. His true and devoted wife, the beautiful Eleanor of Castile, in every respect was a model wife.

No more fitting tribute to the work and worth of the great Plantagenet has been penned than that paid by one of the great masters of our noble Saxon tongue, Goldwin Smith, in the following expressive words:—"Richelieu in his day crushed feudal anarchy and installed order in its room. But he did not call forth life, and the end was decay. Edward I. called forth life. His work did not decay. Hard by the beautiful effigy of Eleanor at Westminster her husband rests in a severely simple tomb. Pass it not by for its simplicity; few tombs hold nobler dust."

SILAS ALWARD.

St. John, N.B.

THE EFFECT OF A MORATORIUM.

The recent action of the British Parliament in passing a statute declaring a moratorium in respect of all bills and notes payable in the British Isles for a period of one month on account of the European War has brought about a situation which is unusual and of interest to commercial men, especially as similar legislation may be expected upon the Continent of Europe. The word "moratorium" is derived from the latin verb "moror" meaning "to delay" and the effect of a moratorium being created by Parliament is that payment on bills and notes is extended until the expiration of the time named in the statute creating the moratorium.

While probably there is but little likelihood of the Canadian legislature enacting a similar measure in regard to negotiable instruments in Canada, and hence there is but little likelihood of litigation arising as a result of such legislation, the recent English statute will probably cause lawyers to refer frequently to the case of *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525.

It is interesting to note that the Moratorium discussed in the above case arose as the result of the Franco-Prussian War of 1870. In *Rouquette* v. *Overmann*, the defendants (the drawers and endorsers), were merchants at Manchester who drew a bill of exchange payable to their order on a French house, Messrs. Magalhaes Freres of Paris. The bill was duly accepted by the drawers, payable in Paris. The plaintiff (the indorsee for value), was a British subject carrying on business in London, and was employed by the defendants to negotiate in London their drafts on Paris, on the terms that the plaintiff should endorse and sell their bills and remit the proceeds to them less his commission. For the purpose of selling the draft, the defendants specially indorsed it to the plaintiff who duly sold the draft and remitted the proceeds to the defendants, less his commission. On the 23rd of July, 1870, war was declared by France against Prussia, and as a consequence, the Emperor Napoleon, on the 13th of August, 1870, issued an edict in these terms: "The time within which protest and all other acts required to preserve the right of action on negotiable instruments signed before the promulgation of the present law must be effected is prolonged for a month. Payment cannot be

demanded of the endorsers or other persons bound thereby within that time." By subsequent legislation, the delay granted by the edict of 13th August, 1870, for protesting bills of exchange which would have fallen due after the date was extended for a further period. As a result of this legislation, and by means of the extended term of grace, the acceptance did not become due until 5th September, 1871, on which day it was duly presented, dishonoured and protested. Notice of dishonour and protest, according to the law of France (the place of payment) was sent to the plaintiff (the English indorsee), and a like notice was given by the plaintiff to the defendants (the drawers and endorsers). The plaintiff paid the amount due on the bill to those to whom he had indorsed it over and brought this action for indemnity from the defendants, his indorsers.

The main ground of defence was that due diligence was not used by the holders of the bill in presenting it for payment at the time appointed by the bill or in giving notice of dishonour on its non-payment, by reason of which the indorsers were discharged and accordingly the plaintiff had paid the bill in his own wrong, and, therefore, could not claim indemnity from the defendants. In other words, the defendants said that, as between the holders of the bill and the acceptors, whatever might be the effect of the *ex post facto* legislation of the French government in extending the time for payment of the acceptance, the holders, though resident in France were bound, the bill having been indorsed and drawn in England, if they desired to make the indorsers in England liable, to present the bill for payment at the time at which it fell due in the regular course according to its tenor, and if it was not then paid, to give notice of its dishonour. The defendants said that their right to insist on due diligence in these particulars, according to the law of England, as a condition precedent to fixing their liability, was a right which was not within the competency of a foreign legislature to affect, and in any event, that as the transaction between the plaintiff and the defendants occurred in England, their respective rights and liabilities would necessarily be determined by English law.

The judgment of the Court was given by Cockburn, C.J., who held that the defendants were liable upon their contract as indorsers. In speaking of the liability of a drawer or indorser of a bill drawn or indorsed in one country and

payable in another, Chief Justice Cockburn says, "All that he does is to warrant that the bill shall be accepted by the drawee, and having been accepted, shall on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by acceptance. His liability, therefore, is to be measured by that of the acceptor whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must those of the surety.

From this it will be seen that the obligations of the defendants who were indorsers for value, were to be determined by the law of France—the place of payment. And if the law of France as to protest and dishonour were complied with by the holders, the defendants (the indorsers), could not escape their liability on the bill.

The Court further decided that the proper time for payment and the proper time for notice of dishonour was the time fixed by the law of the country where payment was to have been made, which is in accordance with the present Canadian law (see Revised Statutes of Canada, Chapter 119, sections 162 and 164). Accordingly as the presentation, protest and notice of dishonour had been in strict conformity with the law of France, though eleven months after the date named in the bill, the plaintiff and his indorsers had done all that was required of them and the defendants were held liable as indorsers.

The Chief Justice pointed out that while the right of the legislature of any country to interfere with existing rights is unquestionable such interference would be contrary to the principles of sound and just legislation unless under most exceptional cases, which was the fact in the case above-considered, and applies to existing conditions on account of the European War.

The legislatures of the world only avail themselves of their right to create a moratorium in very rare instances, and hence, while it cannot be denied that parties to negotiable instruments accept their liability thereon with the common intention that any liability should be determined according to the existing law, such a rare event as a Moratorium Statute has not yet, and is not likely in the future, to impair the utility of negotiable instruments.

STANLEY C. S. KERR.

Osgoode Hall, 10th Aug., 1914.

ROYAL PROCLAMATION (MORATORIUM).

The following directions have been given with respect to practice in relation to the Royal Proclamations dated respectively the 2nd and 6th Aug. 1914:—

1. Writs of summons are to be issued as heretofore.

2. After the issue of the writ, no judgment is to be signed in default of appearance if it appears upon the writ that the claim thereon comes within the proclamations or either of them.

If in any such action judgment has already been signed, no execution shall issue in respect thereof except by leave of the master.

3. In proceedings under Order XIV., where it appears that the debt sued for is within the terms of the proclamation, no order for summary judgment ought to be made. This applies to garnishee orders.

4. Judgment debts are not within the proclamations, which are limited to contract debts.

(Signed) READING, C.J.

12th Aug. 1914.

Rules of Warfare.

We referred last week to the defiance and breach of the German Government of its treaty obligations. Events have since transpired that would seem to point to its apparent disregard of the ordinary principles of international law. The parties to the Hague Convention of 1907 would have been unanimous, with the exception of Germany, in the adoption of a convention restricting the practice of mine-laying to places which were not within the ordinary trade routes of neutral vessels. The events which first drew public attention by the sinking of a German mine-laying vessel and culminated in the sinking of H.M.S. *Amphion* by mines laid by the German ship, disclose to even the most ordinary mind the reason for Germany's refusal to accede to the proposal before the Hague Convention. We say advisedly that that refusal to subscribe to the proposal was a violation of the ordinary principles of international law because the whole code of rules regulating the conduct of warfare between belligerents,

and the conduct between belligerents and neutrals. is founded upon the necessary recognition of the existence of a body of principles known under the somewhat nebulous title of *jus gentium*. If reports which have been circulated are correct, to the effect that the German ship was disguised as a merchant vessel, the case is the more flagrant, in that all signatories to the Hague Convention of 1907, with the exception of Germany, apparently were willing to agree that ships employed by any belligerent in laying mines should bear distinctive marks. As the First Lord of the Admiralty said in the House of Commons, when commenting on the incident, the matter "should be considered by the civilised world." The whole existing body of international law came into existence by reason of the growth of civilisation and humanitarian ideals, and we cannot but feel that, whatever be the issue of the vast struggle in which Europe is now engaged, the dictates even of self-preservation will enjoin for the future upon combatants a more rigorous adherence to such principles as reduce warfare to a science governed and circumscribed by, so far as is possible, humane and generally accepted rules.—*The Law Times* (Eng.)

VIOLATION OF NEUTRALITY.

The doctrine so magnificently upheld by Belgium, that the passage of troops and war material of a belligerent through neutral territory is a violation of neutrality, is of comparatively recent origin. It is embodied in the record of Convention V. of 1907, a convention not yet ratified by Great Britain, declaring the territory of neutral powers to be inviolable, forbidding belligerents to move across the territory of a neutral Power, troops and convoys either of munitions of war or supplies, and binding neutrals to see that this rule is observed. This doctrine, however, involves a departure from the practice of the eighteenth century. Many German States consisted of parts distant from one another, so that their troops had to pass through other Sovereigns' territories of necessity for the purpose of reaching outlying parts. At the beginning of the nineteenth century the passing of belligerent troops through neutral territory still occurred, Prussia, although she had at first repeatedly refused it, at last entered in 1805 into a secret convention with Russia, granting Russian troops passage through Silesia during war with France. On the other hand, even before Russia had made use of this permission, Napoleon ordered Bernadotte to march French troops through the then Prussian territory of Anspach without even asking the consent of Prussia. In spite of the protest of the Swiss Government, Austrian troops passed through Swiss territory in 1813, and when in 1815 war broke out again, through the escape of Napoleon from the island of Elba and his return to France, Switzerland granted to the allied troops passage through her territory. But since that time it has become universally recognized that all passage of belligerent troops through neutral territory must be prohibited, and the Powers declared in express terms in the Act of the 20th Nov., 1815, which neutralised Switzerland and was signed at Paris, that "no inference unfavourable to the neutrality and inviolability of Switzerland can or must be drawn from the facts which have caused the passage of the allied troops through a part of the territory of the Swiss Confederation." The few instances in which during the nineteenth century States pretended to remain neutral, but nevertheless allowed the passage of troops of a belligerent through

their territory, led to war between the neutral and the other belligerent. It is a moot point whether passage of troops can be allowed without a violation of neutrality in case a neutral is required to grant it in consequence of a treaty previous to the war. The question arose in the South African War. A British force on its way to Rhodesia was permitted to land at Beira, in Portuguese territory. The Transvaal Government protested against the concession, which was defended by the Portuguese Government on the ground that England had stipulated for the right of passage in existing treaties. "On principle," writes Mr. F. E. Smith, "this line of defence does not appear to be satisfactory. As between one belligerent A. and a neutral C., it is either illegal for C. to give B., the other belligerent, a right of passage or it is not; if it is not, *cadit quæstio;* if it is, how can C. defend himself to A. by the plea that he was under contract to perform an illegal act?" A qualified neutrality now seems to be regarded as no longer admissible.—*The Law Times* (Eng.)

THE MORATORIUM.

At the outbreak of the present international crisis, fraught as it was with the gravest peril to our economic position, it was essential that effective steps should be taken to prevent a breakdown of our finances. The problem was urgent and unprecedented, at least in this country, and the Government were therefore compelled to adopt stringent measures without precedent in our national experience. Not the least remarkable of the methods involved was the principle of the moratorium. The term moratorium is unknown to English law, although its derivation from the Latin *morà* (delay) must sufficiently indicate its meaning. It is the enforcement of the payment of debts which is delayed, a means being thus provided of supporting the credit system on which trading is based during a period of great emergency. The debtor is legally authorized to postpone payments for a specified time, to enable him to take steps to fortify his position and thus tide over the period during which if unprotected he must inevitably have to face bankruptcy. As is well known, the whole basis of our existing financial organism is dependent upon the maintenance of the mutual credit system; it is therefore vital that it should not be allowed to collapse owing to an emergency which cannot be provided against. The debtor is given a breathing space, and no injustice is done to the creditor, who knows that his debtor will eventually prove to be financially sound; and the creditor will suffer no loss, as the debtor, as the price of the relief afforded him will have to pay a sum by way of interest in addition to the amount of his liabilities.

The efficacy of the moratorium was clearly established during the Franco-Prussian War of 1870-1871, when the French Government from time to time introduced moratory laws and thus maintained the system of French credit unimpaired during a time of grave national emergency. The working of the system is fully set out in the case of *Rouquette* v. *Overmann and Schon* (33 L. T. Rep. 333; L. Rep. 10 Q. B. 525). A moratorium enacted by the edict of the Emperor of the French had been extended from time to time by the National Assembly, and provided for a postponement of the

date of the maturity of bills of exchange accepted and payable in Paris till some months after the conclusion of the war. The delay in making presentment was excused, and the international validity of the moratory enactments was recognised by our Courts. It was laid down that the obligations of the acceptor and the indorser must equally be determined by the *lex loci* of performance—that is, the French law. As there must be countless instances at the present time of bills of exchange which have been drawn in one country and are payable in another, it is well to remember that our present Bills of Exchange Act, 1882 (45 & 46 Vict. ch. 61), sec. 72, sub-sec. 5, already provides that the due date of payment of such bills is determined according to the law of the place at which they are payable. Moreover, by sec. 46, sub-sec. 1, of the same Act delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder. The French Government having also recently declared a moratorium, holders of bills accepted by French firms are quite secure.

Our own Government, under the stress of the present national emergency, on the 3rd Aug. last passed a Bill through both Houses of Parliament conferring power on the Crown to provide for a moratorium in respect of debts by means of a Royal Proclamation. The Act enables the Crown to postpone the payment of any bill of exchange or of any negotiable instrument or any other payment in pursuance of any contract to such extent, for such time, and subject to such conditions or other provisions as may be specified in the proclamation. On the previous day, in order to meet a special emergency in the bill market, a proclamation had already been issued dealing with the postponement of payment of certain bills of exchange. This was confirmed by the Act of Parliament passed on the 3rd Aug. And on the 6th Aug. a further proclamation was issued extending the moratorium to all debts, subject to certain exceptions.

In connection with the first proclamation, a somewhat curious blunder has been made in the drafting of the statute, which provides (sec. 1, sub-sec. 4) that "The proclamation dated the 3rd day of August, 1914, relating to the postponement of payment of certain bills of exchange, is hereby confirmed and shall be deemed to have been made under this Act." Now the proclamation is in fact dated the 2nd Aug.,

but it is, of course, obvious to what proclamation the Act is intended to refer, and it is not in the least likely that the provision would be treated as nugatory. Where Acts of Parliament contain patent clerical errors, they may be read as amended. A similar point arose in the case of *R.* v. *Wilcock* (7 Q. B. 317), which turned upon a statute that in terms repealed "an Act passed in the thirteenth year" of George III., the title of the Act being set out. In fact there was no such statute passed in the year in question, but there was a statute with that title passed four years subsequently. Lord Denman, C.J., in deciding to accept the emendation, said: "A mistake has been committed by the Legislature; but, having regard to the subject-matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal 17 Geo. 3, ch. 56, and that the incorrect year must be rejected." In the present case there was no proclamation issued on the 3rd Aug.; but, seeing that the proclamation of the 2nd Aug. related to the postponement of payment of certain bills of exchange, the Courts would undoubtedly reject the incorrect date. The mistake probably arose owing to the proclamation being issued and dated on a Sunday, and the Bill being rushed through all its stages on the Monday, without a printed copy being in the hands of the members of Parliament.

The first proclamation provided that "if on the presentation for payment of a bill of exchange, other than a cheque or bill on demand, which has been accepted before the 4th Aug. 1914, the acceptor reaccepts the bill by a declaration on the face of the bill in the form set out, that bill shall, for all purposes, including the liability of any drawer or indorser or any other party thereto, be deemed to be due and be payable on a date one calendar month after the date of its original maturity, and to be a bill for the original amount thereof increased by the amount of interest thereon calculated from the date of reacceptance to the new date of payment at the Bank of England rate current on the date of the reacceptance of the bill." The form of reacceptance is then set out. The urgency of this matter will be well understood when it is remembered that there are an enormous number of bills in the hands of banks and bill brokers upon which acceptors and indorsers would be called upon for payment at a time when payment would be impossible. The holders are asked to wait a month,

subject to the acceptors being willing to reaccept their bills and pay interest for the privilege granted to them. The bank rate of interest had already fallen from 10 per cent. to 6 per cent. by Friday, the 7th Aug., so that the relief is granted on easy terms. Moreover, traders who have accepted bills in respect of goods purchased by them, though the bills have not been discounted, are also afforded a sensible relief. The debtor benefits by being granted a breathing space, and the creditor is estopped from proceeding to attempt to enforce a payment which might involve his debtor in ruin and be no benefit to himself. To adopt a well-known metaphor, he spares the goose that it may later lay the golden eggs.

The question of extending the moratorium was carefully considered by the Chancellor of the Exchequer and his legal and financial advisers during the succeeding Bank Holidays, and the results of their deliberation is embodied in the proclamation dated the 6th Aug. It provides for a very wide extension of the moratorium, and is of immediate importance to all classes of the community. By the terms of this proclamation it is provided that all payments due and payable before the 6th Aug., or to become due on any day before the 4th Sept., in respect of any bill of exchange (being a cheque or bill on demand) which was drawn before the 4th Aug. 1914, or in respect of any negotiable instrument (not being a bill of exchange) dated before that time, or in respect of any contract made before that time, shall be deemed to be due and payable one calendar month after the day on which payment originally became due, or on the 4th Sept., whichever is the later date. But payments so postponed shall, if not otherwise carrying interest, and if specific demand is made for payment and payment is refused, carry interest until payment as from the 4th Aug., if due and payable before that day, and as from the date on which they become due and payable if they become due and payable on or after that day at the Bank of England rate current on the 7th Aug. 1914. [The current rate on that date was 6 per cent.] Certain exceptions are then set out which will be explained later.

The general effect of this is that there is a moratorium in respect of all debts, payment being postponed for a month subject to the payment of interest for the period of the delay. No action can be brought on a cheque during that period, but the drawer or indorser, if he desires to have the days of grace, must pay for them at the Bank of England rate of interest on

the 7th Aug.—*i.e.*, 6 per cent. This will afford a sensible relief to all traders as well as the general community. Payments due in respect of contracts cover a very wide field. Presumably this means only payments of fixed sums—in fact, such payments as would be capable of being made the subject of a specially indorsed writ under Order III., r. 6—and does not extend to unliquidated amounts in respect of which it may be inferred that actions could still be brought. The fact that the High Court is now in vacation and that the County Courts have wide powers of postponing the enforcement of judgments will, no doubt, prevent any hardships being inflicted by harsh procedure. In view of the fact that interest will be payable from the date of demand for payment and the refusal to pay, it does not, of course, follow that all debtors will desire to avail themselves of the privilege conferred upon them, and the proclamation is stated not to prevent payments being made before the expiration of the month for which they are postponed.

To deal now with the exceptions to the general rule which are mentioned in the proclamation. It is not to apply to (1) payment of wages or salary. There is no limit to this provision, which therefore extends to all occupations at fixed remuneration. Next (2) are any payments in respect of a liability which when incurred did not exceed £5 in amount. This will probably need to be interpreted by the Courts as there must be many doubtful cases where it is not clear whether the amount to be claimed was when incurred part of a larger sum. The capital sum of a mortgage could not be recovered, but presumably the interest payable under the terms of the mortgage can be if it does not exceed £5. A point has been raised as to whether instalments under a hire-purchase agreement are recoverable. The Chancellor of the Exchequer has already expressed the opinion that where the total amount of the original liability does not exceed £5 they are covered by the moratorium, notwithstanding that the instalments may be less than £5. But this is at least doubtful. It is difficult to see how such instalments differ from the amounts of mortgage interest the liability to pay which is incurred by the instrument of mortgage. A difficulty must also arise in cases where a running account has been kept with a tradesman. In the ordinary way the debt payable is the total amount of the account, which, in the event of an action being brought, must be included in the claim. But there can

be no doubt that each item in the account, if it did not exceed £5 when incurred, can still be claimed under the terms of the proclamation. The position of the banker and his customer is certainly anomalous and not easy to estimate. Strictly the banker is the debtor to his client, and it might be held that each sum not exceeding £5 paid into his account by a customer is a debt recoverable. No doubt the point will never be raised, as, after all, the moratorium is only one of the expedients to maintain the credit system, and the use of cheques makes most drawings on banks merely paper transactions which banks will always encourage. The proclamation also does not apply to the payment of (3) rates and taxes. Maritime freight (4) is also excepted, on the ground that it was thought that otherwise it would be impossible to pay wages. It will not apply to (5) any payment in respect of any debt from any person resident outside the British Isles or from any firm, company, or institution whose principal place of business is outside the British Isles, not being a debt incurred in the British Isles by a person, firm, company, or institution having a business establishment or a branch establishment in the British Isles. This exemption therefore protects foreign firms established here, while leaving liable those situated abroad. Again, discretion would probably prevent proceedings being commenced against them if they are members of nations allied to us in the present war. Of course, trading with other neutral nations must also not be discouraged. Further, it does not apply (6) to any payment in respect of any dividend or interest payable in respect of any stocks, funds, or securities (other than real or heritable securities) in which trustees are, under sec. 1 of the Trustees Act 1893 or any other Act for the time being in force, authorised to invest. This provision will protect the income of large numbers of individuals and will be much appreciated. The anxiety which others may feel as to the receipt of dividends from companies is, after all, independent of all moratorium which could be declared by the Government. Dividends are, of course, only payable after a resolution by the company has been passed authorising the payment; nor would they be declared except upon ascertained profits. Shareholders, moreover, are masters of the situation in the affairs of the company. The liabilities (7) of a bank of issue in respect of banknotes issued by that bank are also exempted. (8) Payments to be made by or on behalf of His Majesty or any

Government department, including the payments of old age pensions, must continue to be made. Naval and military pensions are thus also secured, and the Government will meet all liabilities for stores supplied, &c. National insurance has also been maintained in being, and (9) payments to be made by any person or society in pursuance of the National Insurance Act 1911 or any amending Act (whether in the nature of contributions, benefits, or otherwise) will continue. The Workmen's Compensation Acts also continue as before, and payments (10) ordered thereunder must be paid. Finally (11) the proclamation does not apply to any payment in respect of the withdrawal of deposits by depositors in trustee savings banks. This is, of course, a valuable protection to the finances of the working classes, whose slender resources would otherwise be curtailed.

It will thus be seen that the whole mechanism of our financial existence has been carefully studied, with a view to mitigating as far as possible such hardships as the present emergency entails. And should it appear that any matters have been overlooked, additional provisions can at any time be included in a new proclamation. The duration of the present one is only a month, but before its expiration it will be possible to consider how far it is necessary to continue it. The moratorium will, however, probably be maintained during the whole progress of the war, as has usually been done by foreign countries when they have been compelled to introduce it.

Some criticism has been offered as to the non-applicability to small debts, but it is obvious that in this matter the County Court Judges will continue to exercise their discretion as they always do, and will not make orders upon judgment summonses unless there is evidence of means to pay. The small tradesman must also be protected, and it is not likely that they will act harshly, any more than they have done in the past in districts where there has been a strike in progress.

Finally, it must be remembered that in all matters appertaining to the maintenance of the credit system upon which our trade is based, the good sense and business instincts of the people are the chief safeguards. It may, therefore, confidently be hoped that, with or without the expedients contrived to meet an unprecedented emergency, in the end our national credit will prove to have safely weathered the storm.

A. W. G. in *Law Times* (Eng.)

EDITORIAL.

The War.

The world has looked aghast at the utter disregard by Germany of not only the rules of warfare as laid down by the Hague conference but also the absolute disregard of all rules of international law as practiced by nations at war for many centuries past.

The destruction of Louvain and other Belgian cities occupied only by non-combatants reminds one very forcibly of the sack of Rome by the Goths and Vandals of the fourth century. That such a thing were possible would not have been believed prior to the war, particularly as Germany was a signatory of the Hague convention and stood in the forefront of science, art and literature with the other great nations. The violation of the neutrality of Belgium, of Luxemburg and the indifference of Germany to a "piece of paper" even although it contained the signature binding the German nation, has done more to impress the public with the lack of all moral sense and the barbarism of the German people as nothing else could have done. The imprisonment of non-combatants, the outrages on women, and the placing of women and children in front of advancing German troops and the sowing broadcast of mines on the high seas is past belief and has relegated Germany to a place among the barbarians of the early centuries of the Christian era and makes it impossible for her to retain a place among the counsels of the nations as a civilized power. That payment in full will be exacted even to the last dollar and the last man lost in this war, so wantonly begun and so ruthlessly carried on, goes without saying, for with the Russians daily drawing nearer and threatening Berlin, and the Allies driving them out of France, the German Emperor and his advisers will find that the rules of humanity and civilized warfare cannot be disregarded with impunity and that as he has sown so must he reap and the harvest will be a bloody one and the indemnity demanded from the German people equally as heavy as that exacted by Germany from France in the hour of her great disaster in 1870. In the meantime the Allies are beginning to win successes and the dispatch of Gen. Sir John French to Lord Kitchener narrating the battle, or series of battles, in the neighbourhood of Mons cannot but thrill the heart of every British subject and make them

proud of the enviable record of the British soldier fighting as they did at that time against overwhelming odds.

Under the heading "Royal Proclamations (Moratorium)" quoted from the *Law Times* (Eng.), the directions therein given will be found of value to the members of the profession in the event of a moratorium coming into force in Canada. Articles on the question are also printed in this issue, one from a member of the Bar in Toronto and another from our English contemporary.

PERSONAL.

J. O. Baldwin, B.A., barrister, Swift Current, Sask., has received notification from Ottawa of his appointment as a District Court Judge. He will be stationed at Kindersley.

The death occurred recently of Fred H. White, junior member of the law firm of Porter & Carnew of Belleville. The cause was typhoid fever. Mr. White was born in Madoc 27 years ago, the son of Mr. James White, senior, who survives. He studied law for 5 years in the office of Mr. R. G. Hunter, Toronto, and was graduated at Osgoode Hall.

Calixte Aime Dugas, Chief Justice of Dawson, Yukon, and formerly Judge of Sessions for the district of Montreal, died suddenly at St. Donat, Montcalm county.

Judge Dugas was one of the best known members of the Bar and Bench in Canada, and during his residence in Montreal, he took a prominent part in all events which tended to the betterment of the community.

He was born in St. Remi, Napierville county, in 1845, and received his education at Montreal College. He began to study law in the office of the late Chief Justice A. A. Dorion in 1865.

About 1866 Mr. Dugas became associated with Messrs. Loranger & Loranger, and before completing his course studied with the late Sir John Abbott. After admission to the Bar he became a partner of the Hon. D. Girouard. In 1874 he became associated with A. B. Longpre.

Four years later he contested Hochelaga for the Provincial Legislature, and was defeated by the Hon. Louis Beaubien. Three months later he was appointed Judge of Sessions.

Messrs. Elliott, Macneil & Deacon, barristers, etc., Winnipeg, have removed their office from Suite 316 to Suite 712-722 McIntyre block.

The death occurred at Toronto following an operation for appendicitis of John Howard Hunter, barrister-at-law. Although a young man, Mr. Hunter was well known for his erudition and deep knowledge of insurance law, in addition

to which he had a personality which endeared him to all whom he met. He was legal adviser for the Western and British-American Assurance Companies, as well as for a number of other companies with branches here, and his death is widely regretted, both in a business and in a personal sense.

J. H. Nellis, K.C., for the past 21 years City Solicitor of Woodstock, has resigned.

Announcement is made of changes in the legal firms of Messrs. Macdonald, Sullivan and Tarr, and Messrs. Craig and Ross, of Winnipeg. The former firm is dissolved and Mr. Sullivan is taking offices in the Garry building. The remaining members of both firms, Sir Hugh J. Macdonald, K.C., E. J. Tarr, R. W. Craig and Geo. H. Ross, form a new partnership under the firm name of Macdonald, Craig, Tarr and Ross, with offices in the National Trust building.

After an illness of only 10 days, W. C. Languedoc, K.C., editor-in-chief of the Quebec Law Reports, died at the Royal Victoria Hospital, recently. Pneumonia developed after a minor operation. Mr. Languedoc was in his 68th year, was a recognized authority on jurisprudence, and highly regarded by the members of the Bar in the province.

He was born in Montreal in 1846, and was educated at St. Mary's College, Fordham University, N.Y., and Laval, Quebec, taking the degree of B.C.L., at the latter institution. He entered the office of the late Judge J. N. Bosse, where he pursued his law studies; and in 1888 was named K.C., being one of the last so honoured by the Tupper Government. He retired from active practice in 1906 to accept the post of editor-in-chief of the judicial reports of the province.

The young barristers and law students of the city who formed a company for enlistment in the 90th Regiment Winnipeg Rifles have been very successful in securing a good complement of men in response to the call for volunteers. They were specially honoured in being posted to "A" company of the 90th, which now numbers 85 strong. There are yet places for a number of good men to bring the company up to war strength and any who desire to enlist should attend at the Industrial Bureau.

It is the intention to go to the rifle ranges, St. Charles, Saturday afternoons, for musketry practice, and it is desirable that the company should turn out at full strength.

Those desiring to enlist with the law company should apply to J. Sutherland, 201 Garry building, telephone Main 322.

Mr. Albert J. McDonald, B.C.L., has joined the firm of Duff & Merrill, advocates, Commercial Union Building, Montreal. Mr. McDonald received his preliminary education at Loyola College, and at the Sorbonne, Paris, and completed his studies in the law faculty at McGill University, where he received a degree of B.C.L. in the spring of 1913. He was admitted to the Bar in July, 1913, and practised his profession alone since that time.

A gift of $2,000 was made to the Patriotic Fund by the Law Society of Upper Canada. This was decided at a special convocation of the benchers. "You may also say, declared one bencher, "that all students who go to the front will be allowed their time and their examinations."

A partnership has been formed between Messrs. F. W. Griffiths, D.C.L., C. Montrose Wright, Clinton J. Ford and Leo H. Miller, under the firm name of Griffiths, Ford, Wright & Miller, Calgary.

Organization of Toronto Legal Fraternity for Military Service.

The meeting held on the evening of August 27th, attended by 25 members of the legal profession, was the outcome of an after-luncheon discussion between three or four lawyers, who telephoned others easily available, to meet and consider our immediate duty as citizens in view of the present war crisis.

A full discussion by some experienced volunteer officers and by the meeting generally made quite evident the practically unanimous feeling that we should be actually doing something to shew our willingness to be prepared for any eventualities of the present situation.

A consideration of secs. 62 and 63 of the Militia Act, which forms ch. 41 of the Revised Statutes of Canada, and

the regulations issued thereunder, suggested that our main object could for the present be best attained by the immediate formation of the Osgoode Hall Rifle Association, in compliance with the regulations.

The organization is entirely simple and elastic, requiring only the enrolment in triplicate of over 30 members, after taking the oath of allegiance, and considerably more than the minimum number have already signed.

Under the standard rules set out in para. 16 of the regulations, the business of the association is to be managed by a committee, consisting of a captain, a secretary, a treasurer and two members, and such other officers (if any) as may be prescribed by the by-laws, three to form a quorum.

The committee suggests that the officers of our association be a captain, a secretary, a treasurer and seven other members.

Your committee is assured of the voluntary help in matters of drill, rifle practice, etc., of such experienced officers, or retired officers, of the volunteers as Col. D. M. Robertson, Col. John Bruce, Major R. C. Levesconte, (former) Capt. R. S. Cassels and Capt. A. A. Miller, and the services of many more will likely be available.

The armouries will be available both for the purpose of drill and for such rifle practice as is possible in the basement. The rifle butts will also be available, with free ammunition and a supply of rifles. We are also assured that proper instruction, both in musketry and in drill, will be available by a most capable sergeant-major.

Your committee suggests that for the immediate future the associations might meet one or two nights each week at the armouries for the purpose of drill and rifle instruction, and that arrangements be made for rifle practice at the rifle ranges on Wednesday and Saturday afternoons.

Your committee suggests that the objects of our association shall be declared specially to include:—

(a) Our determination and desire to take some useful part in military preparedness for all possible eventualities.

(b) To stimulate a patriotic spirit in the community which shall ensure an immediate response of sufficient recruits of the best calibre to establish all volunteer regiments at full strength, and likewise secure all necessary volunteers for service abroad.

(c) The promotion of military art and military science and literature.

(d) To assist in recruiting the existing volunteer regiments from the ranks of the profession, or assisting in the formation of some new student and professional regiment.

(e) To place the members of this association at the service of the country, qualified as far as possible for action in the hour of need.

The sections of the Militia Act, and the standard rules regulating the association are found in the regulations for rifle associations submitted herewith.

By-laws under the standard rules are submitted as follows:—

1. The annual subscription (including entrance fee) shall be the sum of one dollar.

2. Membership shall be limited to Judges, legal officials, law students, lawyers and their sons and clerks, and such others in any way associated with legal business as the committee may approve.

3. In addition to the captain, secretary, treasurer, and two other members, under the standard rule, 16 (d), there shall be five other members of the committee.

4. The annual meeting of the association shall be held at such time and place in the month of September in each year as the committee may decide.

5. The annual subscription of each member shall become due on joining, and thereafter on October 1st in each year.

6. For the purpose of carrying out the objects of this association, there shall also be elected an advisory committee consisting of ten members.

7. The practice dates of the association shall be Wednesday and Saturday afternoons, at the Long Branch Rifle Ranges, or such other days as the committee shall determine, and the association shall muster at the armouries on such evenings as may be ordered by the committee.

The necessities of the situation and the plain duty for each one of us irrespective of age is strongly put by Lord Roberts in his address to 1,300 London business men on their enrolling in the new regiment:—

"You are the pick of the nation's highly educated business men. You follow various professions and you are doing exactly what all able-bodied men in the kingdom should do,

no matter what their rank or station in life. My feeling toward you is one of intense admiration. How very different is your action to that of the men who can still go on playing cricket and football as if the very existence of the country were not at stake.

"We are engaged in a life and death struggle, and you are shewing your determination to do your duty as soldiers by all the means in your power to bring this war—a war forced on us by an ambitious and unscrupulous nation—to a successful result."

The power of the example where men of mature years are willing to submit themselves to military training for the same empire is illustrated in the following despatch from Belleville:—

"It is unique that in the Home Guard Reserves, which have been formed here for home defence, there are three colonels, one of them an ex-minister of militia and ex-Premier. of Canada, Hon. Sir Mackenzie Bowell, in his 91st year, the others being Col. S. S. Lozier, Col. W. N. Ponton and Col. Thomas Stewart. At the first drill there were 76 veterans and others in line under command of Col. Lozier. Col. Ponton on one flank and Col. Stewart on the other. Sir Mackenzie Bowell was as light of step as the youngest volunteer who had left for Valcartier."

Finally, we would accentuate the fact apt to be overlooked, viz., that when Great Britain comes to discussion of terms of peace, the power of her demands and claims must depend firstly of course upon the then condition of her fleet; secondly, upon the then condition of her active forces, but thirdly, and perhaps chiefly, upon the preparedness of the rank and file of her subjects who have not then been called out for active service.

Let us then expect a very heavy enrolment in our rifle association with every confidence that as one of the many practical results many of those more especially qualified therefor will soon find their way into the ranks of legal companies in a volunteer regiment with many volunteering as the call comes for active service at the front.

Signed by the provisional committee this 31st day of August. W. D. McPherson, chairman; C. B. Nasmith, secretary; B. Holford Ardagh, John Bruce, R. S. Cassels, J. H. Denton, H. F. Davidson, Thos. A. Reid, D. M. Robertson.

The following committees were appointed:—

Officers' Committee:—Captain B. Holford Ardagh; Secretary, C. B. Nasmith; Treasurer, R. S. Cassels; Col. John Bruce, C. A. Mars, Thos. Gibson, T. A. Reid, R. H. Green, W. D. McPherson, N. F. Davidson.

Advisory Committee:—Hon. F. Osler, K.C.; Judge Denton, H. W. Mickle, D. W. Saunders, R. McKay, W. S. Morden A. W. Anglin, R. B. Henderson, E. J. Hearn, Hugh Rose.

THE CRIMINAL: WHO IS HE, AND WHAT SHALL WE DO WITH HIM?[1]

WILLIAM N. GEMMILL.[2]

The procedure in our criminal Courts has been severely criticised. Some of this criticism has been well merited, for, in our eagerness to see that no innocent man is convicted, we have retained in our procedure many ancient rules of practice, whose chief function is to protect the guilty from just punishment. Most of the criticism, however, is misdirected, for it is aimed at the form, rather than at the substance of things.

It is important that our procedure should be simplified, in order that the innocent may be more speedily released from unjust arrest, and that the guilty may be more certainly punished. It is more important, however, that the punishment inflicted upon one who has violated the criminal laws, shall be measured by the gravity of his offence, and shall be fitted to the individual offender, not only with reference to his future welfare, but also with reference to the future welfare of the State. It is probable that in not over five per cent. of the cases brought into the criminal Courts does the method of procedure in any way affect the final outcome of the case. It is also probable that in over seventy-five per cent of the cases in the criminal Courts of the first instance, the guilt or innocence of the parties is not open for consideration, but the guilt of the accused is admitted, and the only question before the Court is, what to do with the guilty offender. If the State would do exact justice to all its citizens, it would be necessary to have as many laws as there are citizens, and each law framed and fitted to the individual. Just as no two individuals are alike, so in no two cases is the responsibility of the individual to the State and to society the same. All laws are framed to fit the average man, but no one has yet been able to find that man. It follows, therefore, that when justice is meted out to one man, injustice must be the lot of another, when

[1] Annual address of the President of the Illinois Branch of the American Institute of Criminal Law and Criminology at Hotel La Salle, on Tuesday, May 26, 1914.

[2] Justice of the Municipal Court, Chicago.

he is measured by the same law. By our laws, we define crimes, and prescribe penalties for those who commit them. The definitions of murder, manslaughter, burglary, robbery, larceny, and many other offences, have not changed in four thousand years, but the penalties for these crimes have changed, almost with each changing generation. The change in the penalties is due to our changing viewpoint. What in one age was thought to be proper punishment for an offence, was looked upon as barbarous in a succeeding age. As each generation has prescribed new penalties, based upon its conception of justice to the State, and the individual, so it has also defined new crimes to compel obedience to the higher ideals of the community. The last twenty-five years has witnessed a revolution in the criminal laws of every civilized state. More new laws have been defined and declared in the United States during that time than during all the previous history of the republic. From the days of Moses to the last two or three decades, criminal laws were nearly always negative in their character. "Thou shalt not kill." "Thou shalt not steal." "Thou shalt not bear false witness," were the formulae after which all criminal laws were drawn. The penalties for violating these laws fell automatically upon the offenders. With the broadening conception of the relationship between the individual and the State, and the duties which one owes to the other, we are no longer content with mere negative enactments, but the trend of modern legislation is in favour of positive and compelling legislation, to regulate the conduct of citizens toward each other and toward the State. So, we have our pure food laws requiring that food products which so largely affect the public health shall be healthful, and their compositions made known to the consumer. We are no longer satisfied to collect large damages from railroads as the penalty for careless operation. Nor are we content that this shall be the only remedy for the maimed employee or for the widows and orphans of those whose lives were sacrificed. But we require the exercise of the highest degree of care by these roads to equip their trains with air brakes, and with the best-known modern safety appliances.

We are not willing that our factories and workshops shall expose their thousands of employees to dangerous machinery, or require them to work in foul and unsanitary quarters. So, we have our laws for sanitation and factory inspection.

We long ago decided that it was not sufficient to enact child labour laws, forbidding children to work for long hours at difficult and burdensome tasks, but we found it necessary to supplement these laws, by enacting others requiring the compulsory education of these children. These and many other laws have come to us within a comparatively short time, and have served to revolutionize our criminal codes and change our attitude toward the person whom we call "The Criminal."

In discussing the question: "Who is the Criminal?" we must not lose sight of the fact that the majority of the persons brought into our criminal Courts to-day are not criminals primarily because of what they have done, but rather because we changed our ideas of the relation of the individual to society and the state. It will frequently be found that the communities where law and order reign, and where justice and righteousness most prevail, will have the most criminals, not because the people are more depraved, but because they have higher ideals, and insist upon higher standards of living.

The passage of the Pure Food Law made fifty thousand criminals of persons who before that time, were regarded in the community as good citizens. It was not because these people were any worse that they became criminals, but because the Government of the United States had gained a new conception of its duty toward all its citizens, and that conception compelled it to protect those who were the least able to protect themselves.

When the law was passed a few years ago forbidding the employment of women for more than ten hours in any one day, many thousands of employers were instantly made criminals. Before that time they were as respectable as any in the community. They did not change, but the public conscience changed, when it was made to realize that the burden and stress of long hours of weary employment by women could not long continue, if the race was to be kept strong and virile.

During the last year the writer tried hundreds of cases against men and women who were arrested charged with violating the laws against child labor. Most of these offenders had yielded to the urgent entreaties of mothers to employ their boys and thus give them an opportunity to earn

a little with which to buy clothes, and books and other things much desired to support needy homes. Under the law these employers were criminals. Thirty years ago they would have been hailed as benefactors. No one, however, will say that the child labor laws have not been a distinct step in advance.

Before the White Slave Law was enacted many men and women went up and down through our cities, towns and villages soliciting girls and young women, to become inmates of brothel and disorderly houses, but instantly upon the passage of this law, these men and women became the most despised of all criminals. They had not changed, but were doing only that which they and their kind had done for ages past. But the whole American people had awakened to higher ideals, and had crystallized these ideals into law.

In 1912, 15,888 persons were tried in the Chicago Municipal Court charged with misdemeanors, but 8,603 of this number were charged with violating laws that did not exist fifteen years ago. Of the total 106,369 persons arrested in Chicago in 1912, over one-half were arrested for violating laws that had no existence twenty years ago.

There are those who profess to believe that the criminal is in a class by himself; that somehow he is different from the rest of society. But through our criminal courts is moving a long line of perfectly natural, healthy, able-bodied people, who have fallen under the ban of the criminal law, and, having pleaded guilty of violating the laws, are ready to receive their sentences. What ought these sentences to be? is the most serious question with which the trial Judge is confronted.

It might not be uninteresting to inquire who were these 106,369 people: 47,824 of them were arrested on the charge of disorderly conduct. This omnibus charge includes almost everything from spitting on the sidewalk, to attempted murder. At least 20,000 of this number were brought into the police station in a helpless state of intoxication. They were not criminals, but only criminals in the making. Thousands of them were young men of good families and education. Most of them had steady employment. But periodically on pay-day they saunter forth from their homes or places of business to celebrate their emancipation from restraint and their love for personal liberty. In the morn-

ing after they have spent a night in a cell or upon the floor of the station, and have slept off the stupor, they never speak of personal liberty, but amid shame and humiliation ask the court for another chance to be decent. Their request is freely granted, and instead of inflicting the penalty prescribed by the law, the court generally substitutes a few earnest words, admonishing the victims of habit to forever shun the cursed thing which brought them to such a pitiable state. Those who think the drunkards in our courts are tramps, vagrants, and outcasts are mistaken. Most of them are as honest, as industrious and as intelligent as any in the community, but they are all at that stage where in the next step they will either recruit the army of respectable, law-abiding, God-fearing citizens, or the army of the unemployed, the tramp, the vagrant, the outcast and the criminal.

Thousands more of those who are arrested during the year are women charged with being inmates of disorderly houses. The busy world rushes on unmindful of these, content in the belief that they are outside the veil of respectability. But who are they? Do they come from some far-away place, or are they from our midst? Are they all so ignorant, feeble-minded or defective? No, most of them are as intelligent and as sane as the average in the community. But why are they here? The answer is in ten thousand tragedies in no two of which are the acts the same, but through nearly all of which there runs the story of love, betrayal, disgrace, despair, and then the final plunge where all may be forgotten. If the community could understand how many of these women are the mothers of babes, whose daily sustenance is supplied by their earnings in these brothels, it would understand how hard it is to inflict the penalties of the laws when such as these are arraigned. Not only has our conduct toward these offenders been foolish, but it has been little less than criminal. The only penalty that can be inflicted under our law is a fine, and no judge ever inflicts a fine upon one of them without feeling that by so doing, he is only driving that bit of human flesh a little harder, and hastening for her the end of all, which at best must come all too soon. In dealing with this problem the whole system of fines should be abolished, and the court be given power to commit these women to some institution where they may receive proper care, and made to feel some-

how or other that the star of hope which seemed to have forever set for them will again rise, bringing light and courage with it. This institution must not be one built alone of brick and stone, where in the darkness and the dampness all sorts of diseases may grow, and where the white plague may have a better opportunity to seize and destroy its victims, but it must be somewhere in the open fields under the broad sunlight, with fresh air everywhere, and where flowers and grass and trees and shrubs will grow, and where health and hope may have some opportunity to thrive. No other class of offenders who come before the court are as difficult of reformation as these. It is all the more important, therefore, that they be surrounded by every condition which will tend to make reformation easy.

Among the many arrests each year are thousands who belong to the army of defeat. They are not men and women, but the remnants of them only, from which have departed hope, pride, ambition, courage, self-sacrifice and all those qualities which distinguish the human from the animal world. This army of derelicts is an appalling menace to every large city. They all march under the one banner upon which is written in large letters the word "Failure." They are constantly on the move from Maine to California, and from California back to Maine. In the summer they sleep in parks, under sidewalks and along the wharfs. In the winter they hibernate in cheap lodging houses, where they are stored in tiers one above the other, upon beds of filth, vermin and disease, and from which they go to carry contagion and death to the whole community. The few clothes they wear are foul and ragged. Their weak and emaciated bodies are burned out with drugs and liquor. They are friendless and homeless and hopeless. We send them to the Bridewell because we have no other place to send them. Some of them have been there ten, twenty and fifty times. No place could be more unfit for them than these walled enclosures. They are not criminals, they are but driftwood cast upon a turbulent sea, and they have no power to beat back the waves which rock and drive them. Few of them can ever be regenerated or restored, for no foundation is left upon which to build.

In a recent report by a Royal Commission appointed in England to investigate vagrancy and unemployment it is

declared that in over fifty per cent. of the cases where an epidemic of smallpox or other serious contagious diseases were found, the cause was traceable directly to this class of offenders.

Many communities have already met this problem by purchasing large farms, upon which these people may engage in stock raising, dairying, gardening and the like. In nearly every state where such farms have been provided they have either been self-supporting or have earned a net annual income to the state. Here in the open air, amid natural scenes and surroundings, many of these abandoned human beings have been known to regain their manhood and womanhood without being either a burden to the state or to the particular community engaging them. No more reason exists why these people should be confined behind prison walls than that they should be summarily executed. The state owes to them the same duty of proper care that it does to its feeble-minded, insane and helpless wards.

Two young men on the same day invest $100.00 of their employer's money upon the stock exchange. One buys wheat and the other sells it. The purpose of both is the same, to gain something without the usual struggle to obtain it. Neither one means to defraud his employer, but both intend to make full return to him. Wheat goes up, one of them goes on to success and often to wealth, while the other goes to the penitentiary as an embezzler. This story is repeated with but few variations almost every day in a large city. Hundreds and thousands of young men, and many older ones, whose employment requires them to handle their employer's money, either under the stress of circumstances, or because they have not clearly distinguished between what is theirs, and what belongs to someone else, are tempted to use the money in their hands, not with the thought of stealing it, but with the intention of replacing it before their employers will discover the wrong. When the tide turns, and they are not able to restore the money to its lawful owner, they are brought before the Criminal Court. If the amount misappropriated exceeds $15.00, the penalty is a term in the penitentiary. If it is below that sum the penalty is a fine and imprisonment in the House of Correction for a term not to exceed one year.

Few indeed of these men are criminals at heart. Nearly all of them are hard-working, industrious and generally law-abiding persons. What they lack is moral purpose. Who, in his moments of reflection, will say that the penitentiary is the proper place for these men? They are not enemies of the state, but simply our weaker and more vacillating citizens, whose greatest need is that the state shall more fully protect them from their own weakness. To send them to the penitentiary or the workhouse in no way increases their strength, or enables them to cope more successfully with the problems they are called upon to face. To meet this problem our schools must spend less time teaching compound fractions, compound proportions, and higher percentage, and more time instilling the fundamental principles of honesty and manhood.

The world has always despised a thief. His death upon the cross with the Saviour of mankind only emphasized in the public mind the baseness of his character. Yet, there is a wide difference between the real and the imaginary thief. The Forty Thieves of Ali Baba went forth to rob and plunder whomsoever they might meet, in order that they might store up great wealth for the future. But not so with most of our modern thieves. These are generally creatures of sudden impulse, and are moved either by great stress of circumstances, or overcome by a strong temptation against which they have not been trained to fight. They are neither physical or mental defectives, but from childhood their moral training has been neglected. Those who claim that people are born criminals but little comprehend the character of the great number of those who at times have found themselves under the ban of our criminal laws. A child is never born a criminal. It may early be taught to lie, to cheat, and to steal, and the chances are that it will do all of these things, unless it has been surrounded by parents, teachers or associates who will impress upon it certain moral duties which lie at the very base of life. If a child is permitted to grow up without clearly distinguishing between right and wrong, it has a very good start toward a criminal career. Lying and stealing are the same thing. The difference is one of degree only. One always lies to gain some advantage. It may be merely to increase the importance of the liar or to gain greater recognition or social posi-

tion, but the purpose in lying is always the same, and that is to get something that you are not entitled to. To steal is simply to take something that does not belong to you, and it is very difficult for young men and women brought up amid evil surroundings, who have never learned that to tell the truth is the first law of life, to distinguish between the things that we call simply immoral and the things that we call criminal. Truthfulness in childhood means honesty in manhood. With this must go industry, courtesy and punctuality, and all the other virtues which raise up barriers against all forms of temptations that the world presents.

At least forty per cent. of the large number of persons brought into the courts charged with larceny are women. Many of these are wives and mothers, whose honesty of purpose cannot be questioned. No day passes in a great city but what many such as these leave their homes and go into the city with no thought of evil in their hearts, but are overcome by temptation, when before their eyes is presented in great abundance, and with lavish display, so many things which they long to possess, in order that they may take their places by the side of others, whom they regard as no better or wiser than themselves, but who because of better fortune are able to make a much more attractive appearance. The more reckless the display upon the counters in department stores the greater the number of those who will be daily brought before the court on the charge of larceny. Among the others whom we call thieves are many young men struggling earnestly against all sorts of adverse conditions to make a living for themselves and their families, but who fail, under a very heavy burden imposed by economic conditions. Many others are employees of railroads and other corporations, who have laboured earnestly for years to save a dollar for the future and failed. They have become thieves because the flesh was not equal to the incessant grind of daily toil, unrelieved by moments of leisure and pleasure. I have had many such who have served their employers for fifteen and twenty years and who had always before been honest, capable and earnest in the discharge of their duty, but who, in an hour of great depression, induced by anxiety for the welfare of the family, have taken from what appeared to them to be the large storehouse of their employers an insignificant part of them. In these cases, if the amount

involved is less than $15.00 the guilty person must be fined and committed to the House of Correction. If the amount taken is over $15.00 the law leaves no escape; the offender must serve a term in the penitentiary.

In the last few years an earnest effort has been made to avoid the infliction of harsh and unjust punishments. To this end our parole law was enacted, and the trial Judge given the power to do real justice to those found guilty of petit larceny. It is inconceivable, however, that an enlightened state should continue to imprison in the penitentiary one whose only offence was stealing sixteen dollars. The distinction in this state between petit and grand larceny should be abolished, and the parole law amended so as to include all cases of larceny.

The last few years have witnessed the enactment of many new laws aimed at the punishment of crimes against women. Among them are laws commonly known as pandering acts, the white slave law, and laws to punish those who contribute to the delinquency of children. Public attention has been especially centered upon the first two of these, and the public mind has been aroused to a degree never before known, in its opposition to all acts directly contributing to the immorality of women. In my judgment there is much misinformation abroad as to the number of persons guilty of violating the white slave act, and the number of victims of such persons in our large cities.

In an experience of eight years upon the bench in Chicago, two of which were spent in the heart of the worst police district in that city, I have had before me less than a half dozen cases where an innocent girl was lured into a house of prostitution and there detained against her will. This includes cases arising both from within and without the state. There is no doubt, however, but some cases have arisen in Illinois and elsewhere, where women have been taken from one state into another for purposes of commercialized vice, but these cases are comparatively rare and by no means offer an explanation for the large number of women found in disorderly resorts in the large cities. The White Slave Law, when construed according to the intention of its framers, is a valuable addition to the criminal code of the country, but when construed to cover all forms of immoral conduct taking place in two or more states, it is

questionable whether it is not more of a menace than a protection to the community.

The pandering act provides that any person who shall procure a female inmate for a house of prostitution, or who shall cause, induce, persuade or encourage a female person to become an inmate in a house of prostitution, or who shall persuade any female to come into this state or leave the state for purposes of prostitution, shall be guilty of pandering, and upon a first conviction shall be punished by imprisonment in the county jail or house of correction for a period of not less than six months or more than a year, or by fine of not less than three hundred dollars and not to exceed one thousand dollars, and upon conviction for any subsequent offence shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years.

The purpose of the act is most beneficent. It is often, however, difficult of enforcement. The inmates of houses of ill-fame are nomadic. They wander from city to city, from state to state, and seldom stop long in any place. Like persons engaged in any commercialized business they are constantly on the lookout for new places where they may better their condition. Generally when they leave the houses in which they are inmates, they inquire of the waiters, clerks, cashiers and bell boys in restaurants, lunch-counters and hotels, for more desirable locations. It frequently happens that persons whose sole desire is to help these women in a financial way are brought before the court, charged with having violated the pandering act or by persuading or encouraging them to leave their present keepers and become inmates of other houses. The letter of the law, but not its spirit, has been violated. Its purpose was to punish those who for any purpose induced or persuaded an innocent woman to become an inmate of a disorderly house.

A more serious situation frequently arises where persons are arrested charged with having committed the crime of rape. So severe has been the condemnation of the public upon all of those who have been guilty of this offence, that it is often difficult for the accused offender to secure a fair trial. The age of consent in this state is sixteen years. A bill was before the last Legislature, in which it was sought to raise the age of consent from sixteen to eighteen years.

Before any action of this kind is taken the whole problem should be carefully considered. As the law now stands, any man of the age of seventeen years or over who has carnal knowledge of a female of the age of sixteen or under, with or without her consent, is guilty of rape, and the penalty is from one year to life imprisonment in the penitentiary. Some account must be taken of the persons most frequently found guilty under this statute. No regard may be felt for the brute, who would wilfully destroy the life of a child of this age, but less than one out of ten of the men brought into court upon this charge, are of that character. But nearly all of them are boys ranging in age from seventeen to twenty years: most of them pupils of the public schools, or otherwise employed in an effort to aid in the support of the family, who have but casually met upon the public street, or in the parks, one or more of the young girls ranging in age from fourteen to sixteen, who are to be found almost every evening upon the public streets, not in the down town districts, but in the residential parts of the city. But few people realize to what extent some of these girls are a menace to the community. They either have no parents, or have gotten entirely beyond parental control, and walk in the streets at night, endeavouring to attract the attention of boys. They have already lost all sense of virtue and modesty. Their language when brought into court is unspeakable. It is but little wonder that many boys fall victims to the wiles of these creatures. To send boys of this class to the penitentiary would be a crime, committed in the name of the state. To send them to the Bridewell would be equally wrong. The law, however, leaves no discretion. What, therefore, is to be done? Certainly the probation law should be made to cover these cases.

While we have been very diligent in the last few years in passing laws for the protection of women and girls, we have entirely neglected the boys. It is not an offence in Illinois for the keepers and inmates of disorderly houses to issue their business cards, and distribute them about the schools of the city. There is no law by which such solicitors may be prevented from debauching and destroying the lives of the boys and young men of the community, and such solicitation has not been infrequent. It should be made a serious offence, punishable with imprisonment, for

anyone to solicit, induce, encourage, or admit a minor to a house of prostitution. Nor, should the age of consent be raised, unless at the same time, we raise the age of responsibility for the boys, and make it possible for them, through the parole law, to be given another chance to show what manner of men they will become.

In what has thus far been said about crimes, no mention has been made of the more serious offences against the person, such as murder, manslaughter, burglary and robbery. But these offences constitute but a very small volume of the crime in our cities. In 1912 only one case in 1,200 was for murder, one in 2,600 for manslaughter, one in 110 for burglary, and one in 100 for robbery.

With a more or less intimate view of the persons who are continually brought before the criminal courts, we may turn our attention to the other, and perhaps more important question: What ought to be done with these people? It will not be found necessary to go back very far in the history of governments to find the time when there were no penitentiaries and workhouses. Prior to one hundred years ago, prisons were merely places of detention. They were generally built underground and consisted mainly of fearfully damp and foreboding dungeons. The thought of the people at that time was that the more dismal and wretched the prisons, the more fully it performed the function for which it was intended. Its sole purpose was to punish severely those who had broken the law. Into these dungeons all prisoners, without regard to age, sex, mental or physical condition, were thrown promiscuously. Here they were herded together in places that reeked with filth and vermin. Any violation of the rules brought severe and instant punishment, and often death. A feeling of opposition gradually arose against this intolerable condition, and the penitentiary at Auburn, New York, was constructed, the first of its kind in the United States. There was at that time much criticism against those who favoured the new kind of prison.

Often thereafter bills were presented to the legislature, seeking to abolish the penitentiary at Auburn, and to return to the old underground dungeons. At one time a bill was brought before Congress, wherein it was proposed to establish a penal colony at the mouth of the Columbia river, to which all criminals might be banished. Little did the peo-

ple of that day know what a beautiful and bountiful garden nature had designed at the very spot, where they proposed to send these outcasts. Gradually, other penitentiaries were built, and each year saw a change in the general outline and plan of buildings. The dungeons in the penitentiaries were eliminated, dark cells were removed, more windows inserted, and light let in. The same impulse led to the employment of prisoners, in order to relieve them of the long monotony of silent imprisonment. It also led to the building of jails, more commodious and sanitary.

As our viewpoint has changed with reference to the purpose of punishment, we have now become opposed to the system of contract prison labour. Prisoners farmed out to contractors are little less than slaves, held by the state and delivered by it, to cruel and unreasonable task masters. Gradually, as the injustice of the whole system has been impressed upon us, it is being abolished.

A closer study of the problem of crime and its punishment has led those most familiar with the subject to the conclusion that it is not the wisest course for the state or the community that they should annually spend millions of dollars in erecting and maintaining prisons, whose sole purpose is to afford a place where the penalties inflicted under the law may be carried out. From a financial standpoint, the whole scheme of imprisonment has been a failure, and has laid upon the state a great burden of debt. From the broader standpoint of the highest interest of the state, it is still more of a failure. Few persons who have been committed to these prisons for any length of time come out of them better citizens than when they entered. Their physical, mental and moral well-being have generally suffered a shock, from which few of them recover. It is important to inquire whether there is not some better way by which the state may be relieved of this great financial burden, and at the same time the men and women who have violated the criminal laws allowed to work out their penalties in a manner which will not so completely destroy their manhood and womanhood. Many men who are heads of families are daily committed to prison, and their families, left without proper support, become a charge upon the community. When we send a man to the workhouse, and leave behind him his

destitute family, without properly providing for its care, we certainly have not strengthened the good citizenship of the state. Many of the families thus left dependent are surrounded by all sorts of evil conditions, and their natural trend is toward a violation of the criminal laws. It is of the utmost importance, therefore, that when the state takes away the head of a family it should see to it that from the earnings of such person, while in the custody of the state, there shall be paid to the dependent family at least part of such earnings. Two questions, therefore, arise in dealing with the execution of the penalty:

First: How can the state, in the best and most economical way, care for those who have been found guilty of violating the criminal laws, and upon whom penalties have been imposed?

Second: How can the state best provide for the care of the prisoners' dependent families?

These problems are not new in this country. Many states have been buying and equipping large farms, upon which prisoners, whose crimes are less grave in character, are employed. Here the prisoners work in the open at all kinds of agricultnal pursuits. Most of such farms are either self-supporting, or yield a net income to the state, and the health and morals of the prisoners much improved.

The following are some instances of successful operations:

The first convict farms were operated in the south. North Carolina has for many years conducted a farm of 6,000 acres at Tillery, where 450 prisoners are engaged in raising corn, cotton, peanuts, wheat and oats. The annual sales from this farm of produce have for several years ranged from ninety to one hundred and twenty-five thousand dollars per year, being more than enough to fully pay for the entire expense of operating the farm and caring for the prisoners.

Mississippi has had three large convict farms, one of 20,000 acres at Sunflower, another of 20,000 acres at Belmont, and another hospital farm of 1,200 acres near Jackson. Upon the latter farm the sick and invalid prisoners are kept. Upon the other two farms there are from 1,900 to 2,000 convicts. These farms were all operated at a profit, until the last two years, when the bollweevil made

it practieally impossible for successful farming in Mississippi.

Georgia has a large state farm for convicts at Milledgeville.

Texas has eleven different convict farms, seven of which are owned by the state; the others are leased and operated by prison labour. These farms aggregate forty thousand acres. Last year an average of 3,696 prisoners were cared for by the state. Of this number only 670 were confined in prisons and 3,000 were engaged in agrieultural work upon the various farms. Upon some of these farms workshops have been erected. Nearly all of the farms yielded a net profit for the state after paying all expenses of operation.

West Virginia has a convict farm at Moundsville, containing 250 acres. The prisoners there are nearly all engaged in raising vegetables and dairying. Last year the farm shewed a net profit of $5,000 to the state.

Alabama has several state farms, one at Wetumpa, and the other at Spergner. While these farms have not proven financially profitable, the superintendent reports that the prisoners have been much more contented and healthy than they were under the old system.

Louisiana has three large farms, one at Angola on the Mississippi river of 8,000 acres, 4,000 of which is under cultivation, another at St. Gabriel of 2,800 acres, another at Janerette of 4,800 acres, 2,500 acres of which is clear and under cultivation. The convicts here are engaged in raising sugareane, corn, peas and nearly all kinds of vegetables used in the markets. They are also employed in building levees on the Mississippi river and its tributaries. The superintendent reports that since the farm system was adopted, the health of the prisoners has been much better and the death rate much lower. Previous to 1912 nearly all the farms shewed a net profit to the state, after paying all expenses of operation.

Delaware has a penal farm of 1,000 acres, from which it has raised nearly all the provisions consumed in its penal institutions.

Arkansas has a state convict farm, consisting of 10,000 acres, which has been operated for a period of 10 years. During that period nearly every year has shown a large net profit to the state. In the year 1913, there was sold from

this farm $165,367.41 worth of farm produce, while the cost of operation was $61,661.12, leaving a net profit to the state of $103,706.29.

Florida has two state farms, one at Raver and the other at Ocula, to which nearly all prisoners, that have heretofore been under contract, have now been transferred, a law having been enacted in that state in 1913, abolishing contract prison labor.

The state of Virginia operates a convict farm of 1,300 acres at Lassiter. This has a capacity of 350 persons. The total cost of maintaining the institution for the year 1912 was $32,924.65. The total receipts from the products raised on the institution's farm during the year was $29,262.15. The total amount received by the institution from other sources, being for board of prisoners, etc., was $25,877.76. All kinds of agricultural, gardening and stock raising were followed upon this farm.

In the north the plan of employing prison labour upon farms has recently been given great encouragement. The state of New York has now a large penal farm at Comstock, where it is engaged in carrying on all kinds of agricultural, tree planting, dairying, etc.

Massachusetts has a convict farm of 1,500 acres at Bridgewater, where men convicted of drunkenness and vagrancy are sent, and employed in all kinds of farm labour; 1,400 prisoners are now kept upon this farm and all that are physically able are engaged in some sort of outdoor pursuits. It also has other prison farms at West Rutlands, Worchester, Plymouth and Fitchburg, upon all of which the prisoners are kept in the open air and engaged in some sort of agricultural pursuit.

The Legislature of Vermont in 1913 passed a bill providing for the purchase of a farm, upon which convict labour could be employed. The bill was vetoed by the governor.

Minnesota has given an example of successful operations. Last year the county of St. Louis, in which the city of Duluth is located, purchased 1,000 acres of land, five miles from Duluth, for the purpose of establishing a city work farm. The county and city share equally in the expense of the institution. The farm is under the supervision of a commission of five men, three appointed by the county com-

missioners and two by the city commissioners. Money appropriated by the city council is turned over to the joint commission to be used in operating the farm.

Since opening the farm on January 8, 1912, many prisoners have been employed in clearing land, erecting camps, building barns and tool sheds. In the winter the men are engaged in cutting logs. A saw mill is just being established. There is much stone upon the land, which will be worked into building material for roads. The general plan of the institution is not to build permanent buildings, but to operate the farm from camps, and after the farms have been improved to the highest possible degree, sell them in the open market, and buy other tracts of land, and repeat the operation.

At Wilmar, Minnesota, the state has established a hospital farm for inebriates. This farm contains 500 acres of good land. The men who are sent here are generally sent for a period of not less than six months, and are set to work in the open, doing all kinds of farm labour. In addition to farm labour some of them do carpenter work. Thus far the institution has been remarkably successful.

Michigan has a farm of 1,200 acres near Jackson, where 100 men are kept. This farm is not only financially successful, but is otherwise proving of great advantage to the health of the convicts who are worked upon it.

Governor Baldwin of Connecticut reports that he has recommended to all wardens of prisons in his state that prisoners be kept in the open air as much as possible.

Pennsylvania has just bought a farm of 5,262 acres in Center county, upon which it proposes to employ those of its convicts who can reasonably be trusted to work there.

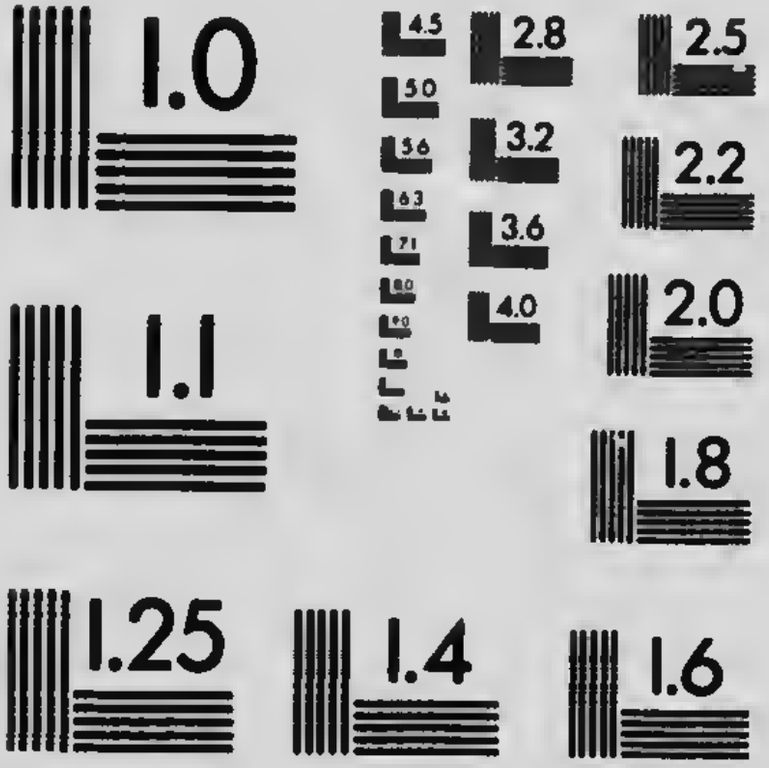
Governor Blease of South Carolina writes that the state has several farms which it has operated for some years, but that the prisoners are now nearly all being sent back to the counties from which they came, to work upon the roads.

The state of Washington has recently established "honor camps" at several points, and the men sent to these camps will be engaged for the next few years in working upon the public highway.

Idaho has just purchased a farm near Boise, to be operated by prisoners.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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Oregon has a prison farm, upon which at least fifty men are constantly engaged, and where all the dairy products used in the prison houses of correction and other institutions are raised. By this means the cost of maintaining the other prisoners has been reduced to less than six cents per man per day.

The last Legislature of Indiana voted to purchase a tract of land to be used for a convict farm.

Oklahoma has a farm of 2,000 acres at McAlester devoted entirely to the use of prisoners. Out of a total of 1,300 prisoners in the state, 500 are continually worked on this farm without guard.

The farm idea has long been accepted in nearly all European countries.

Switzerland some years ago, by federal law, established labour colonies in all of its twenty-two different cantons. These colonies were of two kinds, one where the sick and unemployed might go voluntarily, and the other where those who were guilty of minor offences against the criminal law should be committed. The largest colony of this kind is located at Witzwyl, and contains 2,000 acres. There the government keeps its vagrants and other petty offenders who are engaged in reclaiming the land and in general farm work. It has spent $300,000 upon the plant, which is now worth $550,000. In addition the farm not only has paid all operating expenses, but has annually paid a net surplus income to the state. Besides cultivating the land, the prisoners make waggons, carriages, shoes, etc. The cost of operating nearly all of the Swiss colonies has been met by the income from them. In addition to the large colony at Witzwyl there is one of 400 acres at St. Johansen, another at Appenzel of 100 acres, another at Berne of 2,000 acres, and two large colonies at Luzerne and Liesthal. The annual cost of maintaining a prisoner in these colonies is from $60.00 to $70.00.

Germany has thirty-four separate labor colonies. These accommodate over 4,000 persons. One of these colonies at Vielfield contains 2,000 acres. Admission to the colonies may be voluntary, but many persons are committed to the farms to work out minor penalties. That cost per annum for each person in the colony is about $50.00, and the earn-

ings per annum something less than that. Where detention in these colonies is compulsory it cannot be continued for a period of over two years, and by reason of the fact that many of the inmates are there voluntarily, the average earnings are comparatively small. In the large workhouse at Gros Salze the annual cost of operation and maintenance is $65 each, while for several years the annual earnings of the inmates has been about $56. In another workhouse at Montzburg the annual cost of operation per person was $66, and the annual earnings $51. Several of the workhouses in Germany last year shewed a net profit, after paying all operating expenses. This was particularly true of the one at Breslau. The inmates in these workhouses were engaged for the most part in agriculture. Many, however, worked in shops where they were taught all kinds of trades. The workhouse for the city of Berlin has connected with it a large farm upon which is continually kept about 2,000 beggars, vagrants and habitual drunkards. Most of these are engaged in agriculture, and for several years the institution has been upon a self-supporting basis, in addition to crediting to the inmates a part of their earnings.

The largest institution in Europe, devoted to the care of tramps, beggars, vagrants and the lesser criminals, is located at Merksplas, Belgium. Here there is a farm of 5,000 acres, upon which is kept an average of 5,000 inmates. The superintendent reports that the great majority of the inmates are there because of drink. They are engaged in farming, in land reclamation, and in the manufacture of all articles that may be used in the colonies, or that may be more readily disposed of outside of them. The annual cost of operation for the last four years has been about $45 for each inmate, but the receipts during that time from the labor of the inmates have exceeded the total cost of maintenance and operation.

Holland has a like institution at Veenhuisen, which contains 3,000 acres and has an average of 3,500 inmates, all of which are engaged in agriculture, forestry and gardening, and were sent to the institution after conviction for vagrancy, public begging or drunkenness. The institution is self-supporting.

It is undoubtedly a great step in advance for the state to remove its prisoners from penitentiaries, jails and work-

houses, and employ them upon large farms, where they will be more healthy, and where the expense of maintenance will be much less, and the cost to the state reduced to a minimum. Yet it is still more important that the state shall see to it that some part of the earnings of the prisoners, under its charge, in whatever character of work these prisoners may be engaged, shall be paid to their dependent families. Many states have worked out the problem more or less satisfactorily. Among them is Massachusetts, whose legislature, in 1911, passed an act providing that the master or keeper of any reformatory or penal institution, who has confined in such institution one found guilty of deserting his wife or minor child, where such wife or minor child is in needy or necessitous circumstances, may pay over to the probation officer, at the end of each week, a sum equal to fifty cents for each day's labour performed by the person in his charge. During the first year of the operation of this law $6,831.89 was paid to dependent families.

During the same year the Legislature of Ohio passed a law providing that the county from which a prisoner was sent to state prison should be required to pay out of its general revenue, the sum of forty cents per day for each prisoner confined, who had deserted his wife or minor child, and that this sum should be expended, by such county, under the direction of the county Judge, for the maintenance of such dependent wife and minor child. This law was amended in 1913, and now provides that the payment of from two to five cents per hour shall be made to the dependent family for all the time a prisoner is employed during his imprisonment. During the first month of the operation of the new law $6,931.09 was paid to dependent families. This went to 377 different persons.

The Legislature of California in 1911 passed a law providing that all persons confined in prisons, having been convicted of wife abandonment or of non-support of wife and child, and sentenced to imprisonment in the county jail or elsewhere, should be compelled to work upon public roads, highways, or other public work, and when so engaged the board of supervisors of the county so employing them should allow to the wife and dependent child, at the end of each calendar month, a sum not to exceed $1.50 per day for each day's work of such prisoner. This law has been practically

a dead letter in California, because the supervisors of the counties have refused to employ prisoners upon public roads or upon public work, upon the plea that the cost of guarding them would be greater than their earnings.

The Legislature of Minnesota in 1908 passed a law, providing that the state board of control may pay to the dependent families of prisoners such part of the earnings of such prisoners as the board may deem proper, such earnings to be paid out of the funds provided for carrying on of the work in which the prisoner is engaged, when employed on state account or by a contractor. Under this law the monthly allowance to dependent families by the reformatory at St. Cloud was $480 and at Stillwater $430.

Ever since 1898 the earnings of the Minnesota State Prison at Stillwater have exceeded the cost of maintaining and operating that institution. In 1912, the annual expense per capita for this institution was $215.15, and the earnings per capita were $396.33. The average number of inmates daily was 769. The total earnings credited to prisoners and paid out by the board of control to their dependent families at Stillwater for the year 1912, was $36,000, and for the year 1913, over $40,000. Notwithstanding this payment, the net profit to the state of the prison at Stillwater for 1910 and 1911, was $215,255. Connected with this prison at Stillwater is a farm of 160 acres, and many of the prisoners work upon this farm, where they produce in large part the vegetables, potatoes and other things consumed in the prison.

In 1912 Legislature of New Jersey passed a law providing that whenever prisoners are employed by the state or by any of its political subdivisions, they shall be credited with a sum not to exceed fifty cents per day for each working day, and these earnings paid to their dependent families.

The state of Washington in 1913 enacted a law, directing that fifty cents per day be paid to the dependent families of all prisoners working in their honor camps.

The Legislature of Utah in 1912 passed a law giving the board of prison control of that state the right to credit unmarried prisoners with a sum not to exceed ten per cent. of their net earnings, and married prisoners a sum not to exceed twenty-five per cent. of their net earnings, the same to be paid by the board of control to their families.

The state of Texas provided three years ago that ten cents per day should be allowed as a credit to each prisoner, when that prisoner has a family dependent upon him, and shall be paid to the family.

The state of South Dakota in 1913, provided that a part of the earnings of prisoners should be paid to their dependent families, and the amount to be paid was to be determined by the Board of Charities and Correction. Under this law the state penitentiary at Sioux Falls, where there are 216 inmates, has paid out a large sum of money.

Michigan has a law, which provides that the superintendents of prisons shall send to the county poor authorities, from which prisoners are sent, who have deserted their wives and children, the sum of $1.50 per week for the wife, and fifty cents per week for each minor child under fifteen years of age. Under this law the prison at Jackson paid to prisoners or their families the sum of $70,000.

The state of North Dakota in 1911 provided that the wardens of prisoners may pay a certain portion of the earnings of prisoners to their dependent families, the amount to be determined by the wardens themselves, based upon the condition of such families.

The Legislature of Kentucky in 1912, passed a law giving the state prison the power to pay a certain portion of the earnings of convicts to their dependent families.

The state of New Hampshire in 1913 enacted a law, by which the governor and his council shall decide how much should be paid from the earnings of prisoners to their dependent families, the same to be paid from any public revenue available.

The state of Delaware recently passed a law providing that all men convicted for non-support shall be allowed fifty cents per day when engaged at work, and this shall be sent to their dependent families.

The Legislature of the state of Idaho at its last session provided that the probate Judge of each county should cause to be paid to the wife, whose husband is imprisoned, a sum not to exceed $10 per month, when she has but one minor child, and $5 per month for each child thereafter under fifteen years of age.

The state of Oregon passed a law providing that twenty-five cents per day should be paid by the superintendent of

workhouses to the wife of a prisoner, and fifteen cents per day for a minor child, where such prisoners are engaged in work upon public roads. Under this law last year there was paid by the state the sum of $10,000 to dependent families.

Last year Nebraska enacted a law providing that one-half of the wages of a prisoner should be set aside, to be paid to his family, if such family is dependent.

The state of Wisconsin has just passed a law which provides for the payment of the earnings of prisoners to the dependent families, after deducting the cost of their keep. In ascertaining the cost of their keep much difficulty has arisen. It is figured this cost will be about $3.40 per week. The law has not yet been tested.

Pennsylvania has a law providing that prisoners shall receive their earnings after there has been deducted only the cost of lodging, clothing and food. Although this law has been in operation for many years, nothing has ever been paid under it.

It was provided by the Legislature of Rhode Island in 1912 that the probation officer might allow a certain part of the earnings of prisoners to be paid to their dependent families.

The District of Columbia offers a valuable experience in the direction of successful farm operation by prison labour.

In 1910 the Prison Commission of the District of Columbia purchased 1,050 acres of land in Fairfax county. On this farm the district placed its jail prisoners. Since that time buildings have been erected, six miles of road constructed, 500 acres of land cleared, and the institution provided with a water system and an electric light plant.

Since 1910, between 7,000 and 8,000 prisoners have been received at the farm. In 1906 Congress enacted a law for District of Columbia providing that fifty cents per day should be paid by the prison authorities to the families of prisoners, confined in district prisons and required to work. For the year ending June, 1910, $30,808.28 was earned and paid to prisoners under this law. In 1911, $38,648.87 was paid. In 1912, $39,205 was paid.

The amount paid directly by this institution to dependent families of prisoners has amounted to a little over $10,000 annually.

Apparently the most successfully operated prison in the country is the Detroit House of Correction. In 1909 the

Common Council of the city of Detroit passed an ordinance providing for the payment of a certain part of the earnings of the prisoners confined in the Detroit House of Correction to the dependent wives and children of such prisoners. There was no state law existing at that time touching the subject. The ordinance was as follows:—

"On July 1st of each year there shall be paid over to the Poor Commission of the city of Detroit, out of funds of the institution, the sum of $5,000, the same to be utilized exclusively by them in aiding the families of such prisoners committed to the institution from Courts of the city of Detroit, as may be found in need of assistance, the sum appropriated each family not to exceed $1 for each working day the prisoner remains in the institution."

The act went into effect July 1st, 1909. During the first year there was a daily average of 385 prisoners in the institution.

During the first year Superintendent John L. McDonald paid out to dependent families of prisoners $9,670 as compensation for their labour. After paying this amount, and paying all operating expenses, there was a net profit to the institution of $24,355.87, from which a further sum of $5,000 was paid by the Prison Board to the Poor Commission of the city of Detroit, to be used by them for the dependent families of prisoners.

In the year 1911 the superintendent of the prison paid out to the dependent families of inmates the sum of $13,976.70. In addition, $5,000 was paid to the Poor Commission of Detroit, to be used by it to relieve the distress of the families of prisoners. After making these two payments, and paying all operating expenses, there was a net profit of $15,000 paid by the superintendent of the prison to the city treasurer of Detroit.

Since the prison was established in 1909 it has not only paid back to the city of Detroit all of the original cost of the prison, but has annually paid a net income to the city of Detroit.

In sharp contrast with this is our own institution.

In 1868 the city of Chicago purchased fifty-eight acres of land, at the cost of $29,000. Upon this ground is now located the city's House of Correction. The average population of this institution, for the last few years, has been about

1,722. The capacity of the institution is about 2,300, and at frequent intervals the full capacity has been reached. The average cost of maintaining the institution per day is about $796.75. The average cost of maintenance per day per inmate is 46.2 cents. The average yearly cost of maintaining the institution from 1907 to 1914 was about $300,000.

In 1913, the cost of maintenance was $308,770.32. The total revenue received from all articles manufactured in the institution for that year was $82,785.35. It also received from other municipalities the sum of $78,357.68, for boarding prisoners, making the total revenue of the institution for that year $161,143.23, leaving a net loss to the city for the year of $147,627.09.

The brick and crushed stone industries are the most important in which the prisoners are employed. The number employed in manufacturing crushed stone averages 223 per day. The average earning of each of these men per day, based upon the sale of the manufactured product, was only 4¼ cents. The average cost of maintenance per day for each was 46.2 cents per day, leaving a net loss to the city for each of these 223 men per day of 42 cents.

The shewing in the brick industry is but little better. During the year 1913, an average of 178 men were engaged in making brick. The average daily earning of each of these men, based upon the sale of the manufactured product, was 30 cents. The average cost of maintaining them was 46.2 cents per day, leaving a net loss to the city for each man so employed in the brickyard of 16.2 cents per day.

The total net loss to the city of Chicago in operating its House of Correction from 1907 to 1913 inclusive, was about $1,000,000.

The cost of furnishing the provisions alone for the institution for the year was $75,662.20.

If, in connection with this institution, there was a large farm of from one thousand to four thousand acres, almost all of the provisions of the institution could be grown upon the farm, and the other industries now there might be enlarged and made more efficient, if operated in connection with every form of agricultural endeavour.

In our study of criminology we have always laid the most emphasis upon the question of how to determine whether or not the accused is guilty of the offense charged against him.

More recently psychopathic laboratories have been established in some jurisdictions to aid in determining the legal responsibility of persons who have violated the criminal laws.

The problems of the trial Judge are only made more difficult, after it has been scientifically determined that the accused is subnormal and possessed of a low grade of intelligence.

Usually he is all the more a menace to the community if he is of this type, and for that reason must not be set at liberty. He is, however, not insane, and cannot be committed to an institution for the feeble-minded.

All the more reason is therefore presented why there should be a readjustment of penalties, in order that they may be made to fit the particular offender, and that these penalties shall be worked out in a manner that will bring the largest good to the state and to the prisoner.

To this end the following recommendations are made:—

1st. The state of Illinois should purchase at least two farms containing from 3,000 to 4,000 acres each, and located nearest to its centers of population. Honor camps should be established on these farms, and a sufficient number of prisoners placed in them to erect the buildings necessary for proper housing; barns for the stock, and workshops for the men engaged in the various industrial pursuits.

The farms should be so divided as to permit the prisoners to engage in all kinds of agricultural work, including forestry, fruit raising, gardening and stock raising.

2nd. Every warden or superintendent of prisons should be directed to pay to the dependent family of a prisoner not less than 50 cents per day for any day such prisoner works, while incarcerated.

3rd. The system of fining prostitutes and inmates of disorderly houses should be abolished, and the Courts given the power to commit such persons to an institution where they may receive proper care.

4th. The adult probation law should be so amended as to include within its provisions every crime except murder and treason.

5th. It should be made a penal offense for anyone to solicit, induce or admit a boy under the age of twenty-one years to a house of prostitution, or to a disorderly house, for the purpose of prostitution.

PRIVY COUNCIL DECISIONS.

Present: The Right Hons. Lords Dunedin, Atkinson, and Shaw.

On appeal from the Superior Court of Quebec.

CEDARS RAPIDS MANUFACTURING AND POWER COMPANY v. LACOSTE. (a)

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

Expropriation of land—Compensation—Principle of Assessment—Value to owners.

Under a Canadian statute the appellants were authorised to develop water power in and adjacent to a part of a river which included some rapids. They also duly obtained the right to construct works in the bed of the river and to abstract water. The respondents owned two islands situate in the rapids, and rights, including water rights, over a promontory at the foot.

Held, in assessing the compensation payable to the respondents on the expropriation above mentioned, that, the property having a value above the agricultural value consisting in its adaptability for the undertaking, the value was not a proportionate part of the value of the whole undertaking but the price above the bare argicultural value which possible intending undertakers would give.

Re Lucas and Chesterfield Gas and Water Board, (99 L. T. Rep. 767; (1909), 1 K. B. 16), approved.

Appeal by special leave from three judgments of the Superior Court of Quebec (dated the 19th Feb. 1913) increasing the amount payable under two awards of arbitrators and setting aside a third award.

The facts were stated in the judgment as follows:—

The appellants are a company incorporated by a statute of the Parliament of Canada in 1904, empowered to construct and develop water powers in or adjacent to the river St. Lawrence in the parish of St. Joseph of Soulanges in the Province of Quebec, and to take by way of expropriation lands within the parish actually required for such development.

With a view to such development the appellants served notices of expropriation on the respondents, who, as executors of the estate de Beaujeu, were proprietors of the subjects to which such notices applied. These subjects were three in number, to wit (1) the Ile aux Vaches, (2) the Ile Bédard, and (3) reserved rights over the Pointe du Moulin. For these subjects the appellants by the said notices offered to pay respectively 2800 dollars, 200 dollars, and 1700 dollars, and named an arbitrator in the event of these sums not being accepted. The respondents did not accept these sums, and named on their part an arbitrator. The third arbitrator, or umpire, was named according to law by the Judges of the Superior Court.

The three arbitrators, after visiting the properties, heard witnesses and received documents, and finally, by a majority, consisting of the arbitrator appointed by the appellant and the arbitrator appointed by the Judge of the Superior Court, awarded as compensation the sums offered by the appellants. The third arbitrator appointed by the respondents dissented and intimated that he would have been prepared to award the sums of 62,000 dollars, 34,000 dollars, and 80,000 dollars respectively.

Against the findings (1) and (3), i.e., for 2800 dollars for the Ile aux Vaches and 1700 dollars for the reserved rights at Pointe du Moulin, there lay, under the Canadian law, an appeal on the merits to the Superior Court of Quebec; and an appeal was taken by the respondents.

Against finding (2), owing to the award being less than 600 dollars, no appeal lay. But a direct action, in the Superior Court, to set aside the award *in toto*, was brought by the respondents. The appeals and the direct action were heard together before Davidson, C.J., of the Superior Court. He allowed the appeal and substituted for the sums awarded the sums proposed to be awarded by the dissenting arbitrator. In the case of the Ile Béard he set aside the award and directed a new arbitration.

From these decisions the present appeal is brought by special leave to this board.

It now becomes necessary to describe generally the subjects taken.

The Ile aux Vaches is an island situated to the north of the *medium filum* of the St. Lawrence River, at a point about forty miles above Montreal, of the extent of 28¼ arpents—

an arpent representing slightly more than 1 acre. Ile Bédard is a smaller island also to the north of the *medium filum*, having an area of 3½ acres, and situated 7,600 ft. down the river from the Ile aux Vaches. Further down again, and 700 ft. from the Ile Bédard, comes the Pointe du Moulin, which is a point jutting out into the river to such an extent that approximately a straight line drawn from the southern side of the Ile aux Vaches through the Ile Bédard will cut the point in question. The whole of the river frontage land at the Pointe du Moulin originally belonged to the respondents' predecessors. They have sold all the lands at the Pointe du Moulin, subject to a reservation in the following terms:—

Le vendeur, ès qualité, se réserve—1°. Un chemin de vingt quatre pieds de largeur sur toute la profondeur du susdit terrain depuis le chemin de la Reine jusqu'au fleuve St. Laurent.

2°. Un emplacement sur la susdite terre suffisamment grand pour la construction d'un moulin, d'une manufacture ou de toutes autres bâtisses propres à des fins industrielles.

Ces deux réserves sont faites à perpétuité et l'acquéreur, ses hoirs et ayants cause seront obligés de payer toutes taxes municipales ou scolaires qui à l'avenir seront imposées sur les terrains ci-dessus réservés, sans pouvoir prétendre à aucune indemnité ou compensation.

Le vendeur ès qualité aura le droit de prendre possession des réservés susmentionnées quand il le jugera à propos, et, de plus, il se réserve tous les débris de l'ancien moulin et le droit de les enlever en aucun temps sans que son passage à cet effet sur la terre susvendue soit considéré comme l'ouverture de l'exercice de la réserve en premier lieu mentionnée d'un chemin, &c.

L'acquéreur, ses hoirs et ayants-cause n'auront aucunement le droit de se servir des pouvoirs d'eau qui se trouvent sur le bord de la grève du St. Laurent dans le voisinage de la terre susvendue ou sur icelle, le vendeur ès qualité, en faisant, par les présentes, une réserve expresse.

The river being a navigable river, the bed belongs, according to the law of Canada, to the Crown, and no riparian owner can construct works in the bed without the consent of the Crown.

The river at this place is in rapid.

The total fall measured from the top of the Ile aux Vaches down to the lowest point of the Pointe du Moulin is about 28 ft. The scheme of the appellants' works is to construct a dyke in the bed of the river from Ile aux Vaches to Ile Bédard, and then on the lowest point of the Pointe du Moulin. That will impound the whole waters of the river to the north of the dyke. To be able to do this they obtained, by agreement with the Dominion Government, a right to erect the works and to abstract the water. They further propose to submerge by cutting away all jutting-out portions of the Pointe du Moulin till the last jutting-out piece, on which they are to erect their power-station, thus providing for an uninterrupted flow of the river towards their power-house, and availing themselves of the total fall of 28 ft.

Sir R. Finlay, K.C., *Mignault*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence* for the appellants.—The Chief Justice in assessing the amount of compensation proceeded on an entirely wrong principle. He estimated it on the value to the appellant company of the lands and rights expropriated as component parts of the company's scheme. The question is not what the person who takes the land will give, but what one from whom it is taken will lose: *Re Lucas and Chesterfield Gas and Water Board*, 99 L. T. Rep. 767; (1909) 1 K. B. 16, 29; *Gillespie* v. *Rex*, 12 Ex. Ct. (Can.) 406.

The evidence upon which the compensation was assessed was also wrong in principle, for it was assumed that the respondents had a right to make works in a navigable river. The award of the arbitrators, which was necessarily rather speculative in amount, will not be interfered with unless the Court is satisfied that a wrong principle was acted upon, or that something was overlooked by the arbitrators, who heard the witnesses and examined the locality: *Reg.* v. *Paradis*, 16 Can. S. C. R. 716; *Vézina* v. *The Queen*, 17 Can. S. C. R. 1; *Lemoine* v. *City of Montreal*, 23 Can. S. C. R. 390; *Mussen* v. *Canada Atlantic Railway*, P. C. April 26, 1894, not reported.

Sir *Edward Clarke*, K.C., *Macmaster*, K.C., Sir *A. Lacoste*, K.C., and *A. Lacoste* (the three latter of the Canadian Bar) for the respondents.—The compensation awarded by the Court was not assessed on a wrong principle. The property was specially adapted for the development of water power, and this was properly taken into consideration. The Ile aux Vaches was of great value to anyone intending to develop the water power, as it formed a natural dyke at the head of the

falls. The award of the arbitrators was wrong, for it was based entirely upon the agricultural and residential value of the property, and its special adaptability for the purpose of developing the water power was not taken into consideration: *Montreal and St. Lawrence Light and Power Company* v. *Robert*, 94 L. T. Rep. 229; (1906) A. C. 196; Quebec Statute, 9 Edw. 7, c. 68.

The Court had power under sec. 209 of the Railway Act (R. S. of Can. 1906, c. 37) to enter judgment for the amount awarded.

Sir *Robert Finlay*, K.C. in reply.

Their Lordships took time to consider their judgment.

Feb. 3, 1914.—The judgment of their Lordships was delivered by

Lord Dunedin (who, after stating the facts set out above, continued:)—The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of *Lucas* v. *Chesterfield Gas and Water Board* (*ubi sup.*), where Vaughan Williams and Fletcher Moulton, L.JJ., deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker; (2) the value of the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton, L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground, which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realised possibility.

Applying these principles, it is in the opinion of their Lordships impossible to support the judgment appealed against. The greater part of the judgment of the learned Chief Justice is concerned with demonstrating that the arbitrators in the award they had given had gone on evidence which went to agricultural value alone (using that term as including the water power of the mill used as an ordinary mill). In this criticism so far their Lordships think the learned Chief Justice was right. But when he comes to fix the value to be substituted for that given by the majority of the arbitrators he accepts the figures given by the dissenting arbitrator and confessedly bases them on the evidence given by the witnesses for the respondents (appellants before him).

Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realised undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

It would be tedious to quote too much of the evidence, but the following may be taken as samples:

Exhibit A10 is a report from Isham Randolph, engineer. He was examined as a witness, and his evidence is really only a development and amplification of his report. His qualifications as an engineer are undoubted, and his opinion on engineering matters worthy of the greatest respect. But you need go no further than the first sentence to see how completely he has misunderstood the legal position: "I consider that as component parts of a hydro-electric power development having head works at Ile aux Vaches and power plant on the point indicated . . . the said Ile aux Vaches and the said point of land have very great value, and should make the owners participants in the earnings of the development, or else they should receive in advance a compensation based approximately upon the net earnings of the power development in the ratio of the head controlled by these two properties to the total head capable of being developed."

Arthur Surveyer, another engineering witness, deals separately with the different subjects. As to Ile aux Vaches, he deals with it thus: First, he says, if the island were not there and there were shoal water, it would cost 39,000 dollars to

build a dam, which would represent part of the island. Second, when that was done there would be a loss of 17 foot of head, as compared with the present works, which would mean a loss to the company of an annual rent of 1050 dollars, which, capitalised at 5 per cent., comes to 21,000 dollars. Third, he says, the protective value of the island to the works below it is absolute. To ensure the same result, if the island were not there, by means of an insurance, you would have to pay underwriters a premium, which, capitalised, amounts to 17,000 dollars; and, fourth, he estimates that the smooth water below it, which the presence of the Ile aux Vaches ensures, amounts to a saving during the construction of the works below it of 6,000 dollars. Adding these sums together, he puts the value of the Ile aux Vaches at 83,000 dollars.

It is difficult to conceive evidence more honey-combed by fallacy than this. Besides the general fallacy already mentioned, it appropriates to an island the proprietorship of which carries with it no rights over the bed of the river, and no connection with the property on the bank opposite it, the whole value of the "head" of water which is *ex adverso* of it. It measures the value of the island by the cost of an *opus manufactum*, which might be made if the island was not there; and, lastly, it values both temporarily and permanently the "protective" action of the island, totally forgetful that the works might be stopped one foot short of the island, no part of the island taken, and yet the protective value would be there all the same.

Dealing with the reserved rights at the Pointe, he bases his calculation on loss of profits to the taking company, and also forgets that the power to cut away the protruding parts of the other portions of the Pointe, which alone makes possible the unrestricted flow, is a power that flows from the Government contract and the taking of the riparian lands, and has nothing to do with the reserved water rights of these claimants.

Mr. Robertson, another engineer, when asked as to the Ile aux Vaches, gave the following evidence: "Q. You were valuing it at the value it would possess for the Cedars Rapids Manufacturing Company?—A. Yes, that in my opinion would be the value to them."

Further quotation is unnecessary. All the witnesses persist in looking at the three subjects as forming parts of a

completed whole—and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the undertakers. Their Lordships may quote the words of Vaughan Williams, L.J. in the case cited as applicable to this case: "The element which the arbitrator may take into consideratoin is not the fact that the land has in fact been taken, and that the probability (*i.e.*, of purchasers requiring the land for such purposes) has been realised by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before these promoters had obtained their powers . . . it appears that the umpire has treated the probability and the realised probability as identical for the purposes of valuation he has gone on a wrong basis and we ought to send the award back to him."

Indeed, the mistake goes further in this case even than in that. For in that case there was only one subject. Here there are three subjects detached, and the value which the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated.

The real question to be investigated was, For what would these three subjects have been sold, had they been put up to auction without the Cedars Power Company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers?

It is on account of the latter consideration that their Lordships, while unable to accept the judgment under appeal, are also unable to restore the judgment of the arbitrators. Unfortunately, the appellants led no evidence except as to bare agricultural value. Now, with regard to the Ile aux Vaches and the reserved water rights, it seems possible that there may be some value over and above the bare value. If the situation be naturally favourable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite Parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot after the event be

taken into account. And also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the appellants will be derived from the reserved water rights, but it is that a water power like that of the appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents. These considerations, however, point to the possibility of something more being given for the subjects than the bare value; or, in other words, that if they had been put up to auction as beforesaid, there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realised scheme.

As regards the Ile Bédard the board is, however, satisfied that on the materials placed before them the arbitrators' conclusion was reasonable, and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case accordingly ought to be ended now.

Their Lordships will therefore advise His Majesty to direct that with regard to the Ile Bédard the judgment complained of be reversed with costs in the Court below to the appellants, the Cedars Rapids Company; and (2) that with regard to the Ile aux Vaches and the reserved power and mill site, the judgment complained of be set aside, and the Court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth, no costs being allowed to either party in the arbitration already held or in the Court below and, further, that neither party ought to have costs before this board.

Solicitors: *Lawrence Jones* and *Co.; Blake* and *Redden.*

INTERESTING POINTS OF LAW.

Accidents to Share Fishermen.

There is ample reason for presuming what was the real intention of the Legislature when enacting that "share fishermen"—as they are commonly styled for the sake of brevity—should be excluded from taking any advantage of the Workmen's Compensation Act 1906 (6 Edw. 7, ch. 58). No provision, it will be remembered, is contained in sec. 7, sub-sec. 2, of that Act that a share fisherman shall be remunerated *solely* or *wholly* by a share in the profits or the gross earnings of the working of the vessel in which he is engaged as a member of the crew. And nothing of that nature could, of course, be imported into the sub-section, inasmuch as part of a fisherman's remuneration consists of his food and sleeping accommodation. Nevertheless, the natural conclusion seems to be that it was designed that he should, apart from such details, be wholly—or, at any rate, substantially—remunerated in the manner specified in the sub-section. Extending to the seafaring class generally, as the first sub-section of that section does, the rights accorded to every other "workman" who comes within the statutory definition of that word—see sec. 13—there is much from which to infer that before any deprivation thereof shall take place in the case of share fishermen they shall be such in the fullest sense of the term. But the entire absence of any words in sub-sec. 2 to that effect render it obligatory upon the learned Judges of the Court of Appeal, in their opinion, to hold that "remunerated" there means solely or wholly so. That was in the case of *Admiral Fishing Company* v. *Robinson* (102 L. T. Rep. 203; (1910) 1 K. B. 540. And afterwards in *Costelloe* v. *Owners of Ship Pigeon* (108 L. T. Rep. 929, the Court of Appeal followed their decision in *Admiral Fishing Company* v. *Robinson* (*ubi sup.*). The House of Lords, before whom the question came for the first time in *Costelloe's* case (108 L. T. Rep. 929; (1913) A. C. 407), in taking the same view thereon as the Court of Appeal had done—Lords Loreburn and Atkinson dissenting—declined to read into the sub-section the word "solely" or "wholly," or even "substantially." The last-mentioned word was considered by the Court of

Session in Scotland in *Woolfe* v. *Colquhoun* (1912, S. C. 1190; 47 Sc. L. Rep. 911) to be one that ought to be treated as having a place in conjunction with "remunerated" in the sub-section. Therefore, it required specially to be deliberated upon in *Costelloe's* case (*ubi sup.*). But no impression in favour of its being implied was made upon the majority of the learned Lords. The three cases that came recently before the Court of Appeal, all of which are noted in our issue for the 25th ult.—namely, *Burman* v. *Zodiac Steam Fishing Company*, *Williams* v. *Owners of Steam Trawler Duncan*, and *McCord* v. *Owners of Steam Trawler City of Liverpool* (see *ante*, p. 317)—bring to light in a peculiarly striking fashion the result to a fisherman of accepting as part of his remuneration something over and above his ordinary wages, and in addition to his board and lodging. "Stocker," being the money obtained by the sale of the tails of certain fish, roes, shell fish, &c.; "liver money," being a share in the proceeds of the livers cleaned from the fish; and "trip money," being a payment per trip of the vessel if conduct is satisfactory, are receivable by members of the crews of fishing vessels on the West Coast of England. Where not obtained in merely negligible quantities, such matters as "stocker" has, in the opinion of the Court of Appeal, to be regarded as forming part of the gross earnings of the vessel, and thus completely debars all participants therein from claiming the benefits of the Act. If, however, obtained in merely negligible quantities *de minimis non curat lex* is the maxim that applies. It is certainly a great hardship to fishermen that the receipt of even a trifling portion of their remuneration in this way should have the effect of preventing them from being compensated for injuries by accident like any other class of seamen. Sec. 7, sub-sec. 2, has ever since its inception been viewed as a most unsatisfactory enactment. And in consequence the proposal was at one time before Parliament that only those members of the crew of a fishing vessel as are interested therein as part owners or part hirers thereof, or as contributors to its equipment, should be treated as "share fishermen." Partners in a joint adventure—co-adventurers, in brief, interested in the totality of the venture and not merely in some part of it—was what a share fisherman had to be at common law: (*Wilkinson* v. *Frasier*, 4 Esp. 182; *Evans* v. *Bennett*, 1 Camp. 300; and *Haywood* v. *Kain*, Moo. & M. 311).

COMMON LAW LIEN FOR MAINTENANCE OF MOTOR-CAR.

In addition to persons who are under an obligation to receive the goods of others—such as carriers and innkeepers—those who have employed their labour and skill in the alteration and improvement of chattels delivered to them with that object have a particular lien on the same at common law for their charges. Scores of cases are cited in the text-books to establish that proposition. And the one that, perhaps, may most advantageously be referred to is that of *Bevan* v. *Waters* (Moo. & Mal. 236 3 Car. & P. 520). There Lord Chief Justice Best very clearly enunciated the principle, applying it to a livery-stable keeper for the keep and exercise of a horse sent to him for the purpose of being trained. So, also, both an artificer to whom goods are delivered for the purpose of being worked up into form and a farrier by whose skill an animal is cured of a disease have liens on the respective chattels for their charges: (per Baron Parke in *Scarfe* v. *Morgan*, 4 M. & W. 270, at p. 283). But the principle does not extend to cases where expenses have been incurred in respect of an object without effecting any alteration or improvement therein. The right which a person has to retain possession of a thing until his claim upon the owner thereof is satisfied does not then exist. What, therefore, Mr. Justice Sargant had to determine in the recent case of *Hattan* v. *Car Maintenance Company, Limited* (110 L. T. Rep. 765) was whether an agreement that the defendants should for three years "well and sufficiently maintain" the plaintiff's motor-car, supply all petrol, lubricant, tyres, tubes, and other things necessary for the proper running of the car, repair breakdowns, provide a competent driver, and keep the car in good repair and fit for use, conferred upon the defendants a lien at common law for moneys due to them under the agreement. Did the well-settled principle above mentioned apply to the case, or did it not? The decision of the Divisional Court, consisting of Lord Alverstone, C.J., and Justices Kennedy and Ridley, in *Keene* v. *Thomas* (92 L. T. Rep. 19; (1905) 1 K. B. 136) was relied upon, it will be observed from our report, to support the contention that where the owner of a car sends it to be repaired, the repairer has a lien upon it for the costs of the repairs that he has executed. Mr. Justice Sargant did not dissent at all, his Lordship remarked, from

that view of the law if, of course, the repairer got the article into his possession for the purpose of repair, and by that repair improved it as he would ordinarily do. All turned upon that single element. The learned Judge, however, had necessarily to state that there was nothing in the authorities to shew that, if what the contractor did was not to improve the article but merely to maintain it in its former condition, he got a lien for the amount spent upon it for that maintenance. Maintenance minus improvement avails the contractor in nowise when the question of setting up a lien upon the car comes into operation. Although there is no point of particular novelty in the decision in the present case, yet it is of some importance because it very effectively demonstrates the law on a subject that is of widespread interest in these days of private motor-cars left at garages. And if the learned Judge has not arrived at a true conclusion—as we entertain no doubt that he did—on the point above dealt with, at any rate he was plainly right on the second point: The existence of a lien is inconsistent with an arrangement under which the article sought to be retained is, from time to time, taken entirely out of the possession and control of the bailee—as in the case of a motor-car must invariably happen.

Debenture-Holders' Floating Security in Jeopardy.

Upon the principle that a mortgagee is entitled to the protection of his security, the Court will, at the instance of a debenture-holder of a limited company, where the debenture creates a floating charge on the property of the company, appoint a receiver of the property so charged, if the security is in jeopardy. And this the Court will not hesitate to do, even though the principal secured by the debenture is not immediately payable, and default has not yet been made in payment of interest. In brief, notwithstanding that the floating security has not crystallised, but remains dormant—a condition of affairs which we had occasion to discuss quite lately when commenting on the case of *Re Crompton and Co. Limited; Player* v. *Crompton and Co. Limited* (see *ante*, p. 339)—the Court has jurisdiction to appoint a receiver, and a manager likewise if required, and will interpose in the manner thus indicated. The proposition above set forth is contained in the headnote to our report of

Mr. Justice Kekewich's decision in *McMahon* v. *North Kent Ironworks Limited* (64 L. T. Rep. 317). His Lordship there stated that he was not aware of any direct authority on the point. But he dealt vigorously with it, guided by what he could not fail to conceive was the right principle. The decision of the learned Judge has been acted upon—as, indeed, it was bound to be—in innumerable cases since it was pronounced in the year 1891. His Lordship was perfectly right in saying that no direct authority there was for what he considered the proper and just course to pursue. That is to say, there was no reported case exactly in point. The only case was an unreported decision of Mr. Justice North in *Morrison* v. *Railway Share Trust*. The *ratio decidendi* however, was furnished by what was laid down by the Court of Appeal in *Re Panama, New Zealand, and Australian Royal Mail Company* (22 L. T. Rep. 424; L. Rep. 5 Ch. App. 318). For although there may be no actual default in the payment of the interest due under debentures, and the time for payment of the principal may not have arrived, yet a present charge always exists. As was held by Lord Justice Giffard in the case last cited, a debenture, comprising as it does, all the undertaking of a company, gives the holder a present charge on the assets of the company entitling him to priority over other creditors. In the subsequent case of *Re Victoria Steamboats Limited: Smith* v. *Wilkinson* (75 L. T. Rep. 374; (1897) 1 Ch. 158), Mr. Justice Kekewich was afforded the opportunity of elaborating very considerably what his Lordship had had previously to say on the subject. And the learned Judge saw no reason whatever to express any different opinion thereon. Then, in the recent case of *Re Tilt Cove Copper Company Limited* (109 L. T. Rep. 138; (1913) 2 Ch. 588), the view of what is "jeopardy" to a debenture-holder's floating security was extended by Mr. Justice Neville in a distinctly novel fashion; and the power of the Court to grant relief was emphasised: (see 135 L. T. Jour. 545). Lastly, we have the even more recent case of *Re Braunstein and Marporlaine Limited; Philipson* v *The Company* (noted *ante*, p. 342). There Mr. Justice Sargant followed the decisions in *Re Victoria Steamboats Limited: Smith* v. *Wilkinson* (*ubi sup.*) and *Re Tilt Cove Copper Company Limited* (*ubi sup.*) on facts which were very peculiar, but which established clearly that the floating-sec-

urity of the debenture holders was in jeopardy. Thus the management of the company's business was unsatisfactory; a branch was about to be closed, and the premises occupied by that branch were about to be let; and the company's funds and credit were exhausted. No more cogent reasons could be suggested for assisting debenture holders by the appointment of a receiver and manager. And it is satisfactory that the learned Judge did not flinch from exercising the power of the Court in so proper a case.

Parliamentary Practice and Constitutional Law.

The War Office.

The appointment of Lord Kitchener to the position of Secretary of State for War, which has been the subject of all but universal approbation, may lead to the revision of the following paragraph in the late Sir William Anson's standard work Law and Custom of the Constitution. "The Secretary of State for War," writes Sir William Anson, "is certainly not selected for that office by the Prime Minister because of his military experience or scientific attainments." Lord Kitchener's appointment is undoubtedly due to his military experience and scientific attainments proved in the gaining of that experience. There is nothing unconstitutional in the appointment of a gentleman to the headship of a great department for which his special knowledge and great experience pre-eminently fit him. The position of Secretary of State for War has thus been filled by gentlemen of military experience, such as Sir George Murray, General Fitzpatrick, General Peel, Colonel Stanley, and Colonel Seely, who was the immediate predecessor of Mr. Asquith in that office. The objection, which has been more a matter of insinuation than of direct criticism, that Lord Kitchener has had no previous Ministerial experience, may be met by recalling the fact that the late Earl of Cawdor, who had never filled any Ministerial office, was made in 1905 First Lord of the Admiralty. The old tenet that the head of a department of State is not to be a man in possession of special knowledge of the affairs within the purview of his office has been [illegible] in the case of many of the great departments of [illegible], and more particularly in the case of appointment to the Home

Secretaryship, to which there is a distinct tendency to appoint gentlemen of legal experience and accordingly more competent to deal with the problems incidental to the position. Lord Kitchener before his formal appointment to the War Secretaryship was sworn of the Privy Council, ... ng necessary that a member of the Cabinet sh uld be under the obligations of a Privy Councillor, because the oath of the Privy Councillor assumes that he is a confidential adviser of the Crown. The office of Secretary of State in the legal sense depends on the grant and delivery of the seals. The title of the holder of this office is "one of His Majesty's Principal Secretaries of State." It is an erroneous belief that a Secretary of State receives letters patent appointing him during pleasure. This is not so. Since the retirement of Mr. Disraeli's Government in 1868, patents have not been issued, nor in any case would they affect the powers of the Secretary, for these follow the seals.

Balance of Power.

The European crisis has directed attention to the doctrine of the balance of power. It has been urged that an equilibrium between the members of the family of nations is an indispensable condition to the very existence of international law. If the nations could not keep one another in check, all law of nations would soon disappear, as naturally an over powerful State would tend to act according to discretion instead of according to law. Since the Wetsphalian Peace of 1648 the principle of the balance of power has played a preponderating part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht: it was the cardinal principle of the Vienna Congress in 1815, of the Congress of Paris in 1856, of the Conference of London in 1867, and the Congress of Berlin in 1878. The States themselves and the majority of writers agree upon the admissibility of intervention in the interests of the balance of power. Mr F. E. Smith, K.C., M.P. writes in a somewhat disparaging tone of the doctrine of the balance of power in respect to intervention. "The theory of the balance of power has in the past frequently supplied an excuse, but seldom, if ever, a justification, for intervention. At the beginning of the eighteenth century the prospect of a union between France and Spain was the cause of much fighting, and Napoleon III. relied upon the

theory in his attempts, partly successful and partly unsuccessful, to increase the territory of France, but little has been heard of it in late years. The idea of preserving 'an international equilibrium of forces' must always exercise a certain influence upon diplomacy, but the world, except in certain phases of popular discussion, has apparently abandoned the notion that a State may justly be attacked and punished for becoming too strong."

Declaration of War.

The formal declaration of war signed by the Minister of Foreign Affairs of the Austro-Hungarian Government on the 28th ult. and its official notification to the Servian Government and to the foreign representatives in Vienna are in accordance with the provisions of the Convention (III.) of the Second Peace Conference at The Hague in 1907 relative to the commencement of hostilities, which was signed by all the Powers represented at the conference, except China and Nicaragua, both of which subsequently became signatories. According to art. 1 of Convention III., hostilities must not commence without a previous and unequivocal warning, and one of the forms which this warning may take is a declaration of war stating the reasons, as on the declaration of the Austro-Hungarian Government, why the Power concerned has recourse to arms. According to the former practice of the States, a condition of war, could *de facto* arise either through a declaration of war, or through a proclamation and manifesto of a State that it considered itself at war with another State, or through the committal by one State of certain acts of force against another State. History presents many instances of war, commenced in one of these three ways. Many writers, following the example of Grotius, have always asserted the existence of a rule that a declaration of war is necessary for the commencement of war, but it cannot be denied that until the second Peace Conference of 1907 such a rule was neither sanctioned by custom nor by a general treaty of the Powers. Art. 2 of Convention III. enacts that the belligerents must at once after the outbreak of war notify the neutrals, even if only by telegraph, and that the state of war shall not take effect with regard to neutrals until after they have received notification, unless it be established beyond doubt that they were in fact aware of the condition of war.

Correspondence between Sovereigns.

The personal correspondence in reference to the European crisis between the Emperors of Germany and of Russia is not in harmony with the constitutional usage which prevails in these countries. All letters or reports on public affairs must be addressed to the King's Minister, not to the Sovereign personally—that is to say, to the Secretary of State to whose department their subject-matter would probably belong. When Napoleon Buonaparte was First Consul of France he disregarded this constitutional rule and addressed a letter containing proposals of peace between France and England to the King himself, but the letter was acknowledged and answered by the Foreign Secretary. If it were fitting that the Sovereign should receive such a communication without the interposition of a Minister there would be no reason why he should not deal with it on his own responsibility. In 1847 the King of Prussia wrote a private letter to Queen Victoria relating to a political question of European affairs which he requested his ambassador to deliver to Her Majesty at a private audience. This unconstitutional irregularity was corrected; the letter was read in the presence of the Foreign Secretary, and the reply discussed with and approved by him. It is not usual for the King of England to receive from other Sovereigns letters upon public questions which do not pass through the hands of his Ministers, and sometimes such letters have been returned because copies were not sent (with the sealed letter) to the Minister. It would be still more unusual for the King to answer a letter from another Sovereign without the advice of his Minister, who, whether he advises or does not, is responsible if he knows of the letter being written.

LEGAL TRADITIONS.

"Say what you will against Tradition; we know the signification of words by nothing but Tradition." (Selden, "Table-Talk.")

Herbert Spencer maintained that "While in the course of civilization written law tends to replace traditional usage, the replacement never becomes complete."[1] Mr. Parsons asserts that "Fixed law is but the crystallization of ancient growths,"[2] and the great Gladstone mentioned the fact that "Traditive systems grow up in a course of generations."

"Time as he grows old, teaches many lessons." And why should not wholesome traditions, like the laws themselves, be followed? "Nobody can make a tradition; it takes centuries to make it,"[3] and the learned professions, based as they are upon historical research and scientific development, are dependent in no small measure upon tradition.

It is not our intention to attempt to establish, by an approved test, that tradition is an infallible guide to existing conditions, but the fact exists that, if we have faith, we cannot disbelieve traditive doctrines.

Just as the apostolic traditions, consisting in the beliefs and practices, not committed to writing, in the holy scriptures, have been handed down in an unbroken series, from the apostolic ages, to the gentlemen of the cloth,[4] so the customs, opinions and beliefs of the legal profession, of preceding ages, have been delivered over, from one generation to another, until they have acquired the force of law.

The authority for the endless Christian religion was the commands or traditions of the Fathers, handed down from the days of the Great Synagogue, through the testimony of the pious writers, who told of the messages delivered by the Almighty to Moses, on Mount Sinai.[5]

Baptism itself is but the solemn tradition of God's covenant, as an instrument signifying his donative consent to man's salvation and upon the credible testimony of the existence and practice of the adamantine ceremony, which, like

[1] Principles of Soc., sec. 529.
[2] "Legal Doctrine and Social Progress."
[3] Hawthorne's "Septimus Felton."
[4] Baxter, "Life of Faith," iii., 8; Faith of Catholics, II., 205. "Why do thy disciples transgress the traditions of the elders? for they wash not their hands, when they eat bread?" (Matt. XV., 2.)
[5] Geikie's "Life of Christ," II., 205. Renan's "Life of Jesus," p. 38.

the pyramids, has withstood the ravages of time, we accept the doctrine, as an institution of Divine origin.[6]

These traditions are the mechanical portions of Christianity, and so the procedural forms and ceremonies, connected with the enforcement of the rights of litigants, through the medium of trials, by slow processes of evolution, from the crude methods of antiquity, are likewise followed by the members of the legal profession, as traditions worthy of observation.

Millions of mankind, with bowed head and thoughtful mien, have blindly wandered through the centuries, contentedly following the lead of the humble Nazarene, and who would deny them the benefit of their faith in the traditions of Christianity? As truly said by our gifted brother of the Sunflower State, although we doubt, "half that's told, of the miracles of old," still we would not rob humanity of its faith in the traditions of the Church.

Other millions, in the generations that are past, have gone through life, like good Samaritans, true followers of the Hippocratic oath, and with promised fealty to their profession and general good conduct during life, have spent their days in ministrations for the suffering and afflicted of humanity. Who would deny mankind the effects of such beneficent conduct, which cluster round these century old traditions?

The calling of the advocate is as old as the Law itself, and from the early dawn of civilization, when the first rudimentary laws were recognized in accordance with the first custom, that by general consent of the primitive society, was enforced as law, the advocate was there, for as D'Aguesseau the great French Chancellor of the 18th century has said:

"The profession of an advocate is as ancient as the magistracy, and as necessary as Justice."

In perusing the history of mankind, we find that none of the learned professions present more interesting traditions that that of our own ancient and honorable calling.[7]

While I have no desire to unduly "magnify mine office" as an advocate, it seems to me that the traditions and char-

[6] Baxter's "Life of Faith." "The Gospels had at first an entirely personal character and much less authority than tradition." (Renen's "Life of Jesus," p. 280; Papias in Eus. *Hist. Eccl.* iii., 39. The sadduccees are said to have rejected the tradition of their ancestors. Josephus, Ant. XIII., X., 6; XVIII., 4; Renen's "Life of Jesus," 312.

[7] Josephus records that, in his day, the study of the law was the science accounted most liberal and worthy of a thoughtful man. (Antiq. XX., XI., 2.)

acter of such an order of men as our profession contains, ought to at least be of some interest to the members of the guild themselves, if not to the general community.

What more important duties could be devolved upon a citizen than those of struggling to enforce the personal and property rights of mankind, according to a scientific standard fixed by law? Our assistance is required by the greatest and meanest citizens; we are not only the defenders of the lives and liberties, the reputations and the fortunes of our fellows, but we are likewise the custodians of their most sacred confidences. Without our aid, the laws of our State and Nation cannot be properly enforced, for from our profession the incumbent of the judgment seat is called who, in the impartial performance of his sacred trust, as eloquently said by Bishop Horne:

"Goeth up to the judgment seat to put on righteousness as a glorious and beautiful robe, and to render his tribunal a fit emblem of that eternal throne of which justice and judgment are the habitation."

The tenets and principles of such a body of men should be of common interest to the general public and the immemorial traditions to which they have adhered, and which have been sufficient to preserve the great rank and file of the profession from the base and disreputable, for ages, and caused the pages of history to be adorned by names that have survived the accumulation of the ages, which will ever be revered by posterity—should be read and re-read by the members of our order.

The ancient Greeks, in the great mass of their citizenship, worshiped at the shrine of Themis, a goddess, supposed to be the personification of Law, Order and Abstract Right. The legal profession to-day constitutes the only portion of our vast population who, as a class, cultivate a respect for these virtues.

It has always been the business of lawyers to adhere to the wholesome rules of law and order and to keep the peace. Appreciating the necessity of always keeping the channels through which justice flows, clean and pure, the reputable advocate is as careful of his own and his clients' conduct, and as slow to corrupt the fountains of justice, as the honest householder would be to cast filth in his own spring.

The office of the advocate needs no defense from the shafts of jealousy and envy, for the voice of public opinion,

in every age, has endorsed the value of his services and the necessity of the advocate, and, otherwise, the pages of history would be read in vain.

The great Roman lawyers, before the Christian era, were called upon to defend their calling, while standing, without fee, for the rights of their fellow-man. Tacitus,[8] Cato and Quintilian spoke for the order and, so long as history shall endure, we can hear the voice of the mighty Cicero, through the ages which have rolled away since he stood pleading in the Courts of Rome:

"What is so king-like, so generous, so munificent, as to bestow help on those who supplicate our aid? to raise the oppressed and save our fellow-citizens from peril, and preserve them to the State? What, on the other hand, is so necessary, as to have always the command of weapons by which we may be protected from injury, or be enabled to attack the wicked or avenge ourselves, if attacked by others?"[9]

So honorable was the calling of the advocate in Rome, during the Empire, that the code of the emperors recognized his services as equally beneficial to the State with those of the soldier, for the advocate, as well as the warrior, spent his life in service for the Imperial City, in defending the lives and fortunes of the citizens and with their eloquence pleading the causes of the poor and unfortunate and enforcing the rights of the citizens.[10]

Sir John Davis has extolled the office of the advocate and counsellor, and the worth of his services to the State because "the matter and subject of our profession is Justice, the lady and queen of all moral virtues. And what are our professors of the law but her Counsellors, her Secretaries, her Interpreters and Servants?

If we must honor the physician, *propter necessitatem*, as the wise man prescribeth, much more must we honor, for the same cause, the professors and ministers of the Law. For neither do all men at all times nor any one man at all times, stand in need of the physician. . . . But all men, at all times, and in all places, do stand in need of Justice and the Law, which is the rule of Justice and of the Interpreters and Ministers of the Law, which give life and motion unto Justice."

The reputable lawyer, as well as the physician, who is true to the traditions of his calling, cannot, like the trades-

[8] De Orat. Dailogue, c. 5; Lect. Hist. Rome. ii., p. 154.
[9] De Orat. i., 8.
[10] Code, II., vii., 14.

man, advertise his business or solicit patronage. However much he may long for the gladsome sight of the "summons," he must live

"sustained and soothed
By an unfaltering trust"

in the integrity and honor of his calling and a steadfast adherence to the eternal principles of the right.

But some one asks how can you reconcile your duty to the State and these high ideals of your profession, with your employment by a guilty criminal, who customarily ignores the right? Upon this oft repeated query we have the weighty words of Lord Erskine, who, in the defense of Thomas Paine, on the charge of seditious libel, said:

"I will forever, at all hazards, defend the dignity, independence and integrity of the English bar, without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject, arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what *he may think* of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment, and, in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion, into the scale against the accused, in whose favor the benevolent principles of English law makes all presumptions and which commands the very judges to be his counsel."

This is in accord with the highest ethical conceptions of the advocate for it is for him simply to bring, through his best efforts, but one side of the controversy before the Court, in a proper and orderly manner. His opponent will do likewise and then it is the peculiar prerogative of the Court, not of counsel, to decide between them.

This conception of the service of the advocate has never been understood by the laity. From the very earliest times the law and lawyers have been railed against by outsiders and the sarcasms, criticisms and jokes that have been leveled at the profession ever since the time of Christ's denunciation: "Woe unto you, also, ye lawyers"[11] down to and including the latest squib, in the modern socialistic newspaper—that would arrogate to itself judicial func-

[11] Luke, 11. 46-52.

tions, if it could, and pass upon its own libel suits—would have utterly destroyed any institution that was not based upon such a broad and strong foundation.

Old Aristophanes, the Greek poet and satirist, who, centuries before the Christian era, in his comedy, "The Wasps," satirized the legal fraternity and loudly proclaimed because of many abuses by which the temples of justice in old Athens were then profaned, has been followed by thousands, who have imagined they were the first to abuse the legal fraternity.

The natural affinity between the lawyer and his fee has been the subject of jest and comment from the earliest time.

Nearly two thousand years ago, the satirist Juvenal ridiculed the Roman advocates, advising them to abandon Rome and go to Africa or Gaul, because:

> "If, by good luck, four briefs you chance to hold,
> And your eye glistens at the sight of gold;
> Think not to pocket all the hard-won fee,
> For the Attorney claims his share with thee."[12]

The Fool, in King Lear—and later fools have followed his example—speaks of the "breath of an unfee'd lawyer"[13] and in Romeo and Juliet, Shakespeare makes Mercutio say, in reference to Queen Mab:

> "And in this state she gallops, night by night,
> Through lovers' brains and then they dream of love; . . .
> O'er lawyers' fingers, who straight dream of fees."[14]

Perhaps, if we would regard our calling more as it was considered by the ancients and less as a business followed for the mere sake of gain; in other words, if we would subordinate the *fee,* to the truth or justice of the cause, we would merit more from society and more nearly satisfy the requirements of our office.

The peculiarity of our calling, which compels us to espouse either side of a controversy and to speak frequently for the unpopular side, necessarily results in some disfavour to the fee system, on the part of the general public. Advocacy had its origin in the most laudable human impulses, the desire of the strong to assist the weak, to render succor to the poor and the oppressed, from mere motives of charity and humanity. Such conceptions are altruistic in the extreme and thus the Roman advocate, *par*

[12] Satire, vii., 108-214.
[13] Act I., Scene IV.
[14] Act I., Scene IV.

excellence, such men as Cicero, Hortensius and Quintilian conduct themselves, for advocacy was gratuitous in their day at Rome. But while no fee or charge was agreed upon as an exaction from the client, the Roman lawyer of the time of Cicero was not above accepting a reward for his services from his client and no stronger defence of the privilege could be urged than that of Quintilian, when he said:[15]

"Nor do I see what fairer or more proper mode of getting money can be suggested, than by means of a most honourable profession, and from those to whom we have rendered the most important services, and who, if they give nothing in return, must have been unworthy of our exertions. And this is not only right but necessary, since these very exertions, and the time devoted to the affairs of others, prevent counsel from increasing their fortunes by any other means. But moderation must be observed in this and it is of the utmost consequence to observe from whom fees are received, and to what amount. For as to bargaining for fees, and then taking advantage of the necessities of clients to extort money from them, this is a practice which none but the vilest will attempt."

Considering, on the whole, the nature of the service rendered to mankind by lawyers, it is not asking too much that we should enjoy the honour and respect of the public, for is it asking too much for a man who counsels the citizen to obey the laws; who receives, in trust, the most sacred communications of his clients and is ever loyal to the trust; who conducts the grave causes effecting life and property, for his clients; who stands as the mouth-piece for the most sacred rights of persons and property and defends the citizen in his person, his honour and his fortune, that he should merit the respect of the general public? Such a man and such men, exemplifying the noble traditions of their office, devoting their lives to such honourable and sacred duties, should merit and enjoy the esteem, confidence and good will of all good citizens.

If true that the proverbial tendency of the profession to look after its fees, has always been a tradition of the Bar to be condemned, the cultivation of the breadth of character and fellow-feeling, and the total absence of profes-

[15] Forsyth's "Hortensius," p. 362; Brummer's "*Commentarius ad Legum Cinciam.*"

sional jealousy, which has ever prompted the members of our order to regard each other with the true fraternal sentiment, that from the earliest time has characterized the members of our profession, is equally as commendable, as the "sordid avidity to gain" is reprehensible.

This brotherly sentiment, of one advocate for another, with whom he has been thrown in close contact, was beautifully and touchingly expressed by the great Cicero, on the death of his friend Hortensius:

"My sorrow was increased by the reflection that at a time when so few wise and good citizens were left, we had to mourn the loss of the authority and good sense of so distinguished a man, who had been intimately associated with me through life and who died at a period when the state most needed him; and I grieved because there was taken away from me, not, as many thought, a rival, who stood in the way of my reputation, but a partner and companion, in a glorious calling. For if we are told that in a lighter species of art, noble minded poets have mourned for the death of poets, who were their contemporaries, with what feeling ought I to have borne his loss, with whom it was more honourable to contend, than to be without a competitor at all."[16]

Clearly, the same fraternal feeling obtained among the old Roman advocates, before our Christian era, that was remarked by Shakespeare in "Taming of the Shrew," when he made Tranio advise the rival suitors to Bianca, to

> "Do as adversaries do in law,—
> Strive mightily, but eat and drink as friends."[17]

A later English poet, in more modern phrases, attempted to explain the underlying reason for this fraternizing tendency of the Bar, in the following rhyme:

> "Two lawyers, when a knotty case was o'er,
> Shook hands and were as friendly as before;
> 'Zounds,' said the client, 'I would fain know how,
> You can be friends, who were such foes, just now?'
> 'Thou fool,' said one, 'We lawyers, though so keen,
> Like shears, ne'er cut ourselves, but what's between.'"[18]

Notwithstanding these jests at our expense, from the earlier period our profession has continued its struggle for the rights of citizens, striving, through the ages, to approximate the higher professional ideals.

Just as Law is the outgrowth of the necessities of man, in society, we find, in its development and culture, the

[16] Dialogue De Claris Oratoribus.
[17] Act I., Scene II.
[18] John G. Saxe.

crude customs and traditions of primitive society, heaped one upon another in confusion and disorder, with the growth of civilization, developing into a national scientific legal system.[19]

In all nations, in its early form, the law was but a body of customs not attributable to any law-giver or sovereign authority and with the adoption of a legislature or a sovereign power, prescribing what is right, the great body of the customs, which reach back to the time when "the memory of man runneth not to the contrary thereof," are preserved as a part and parcel of positive law, so that our jurisprudence is more than a mere knowledge of the law, for without a knowledge of the fundamental traditions upon which the law is based, there can be no scientific knowledge of the law.[20]

Jurisprudence is therefore so closely interwoven with the growth and history of mankind that it is entitled to claim a very important place among the historical sciences.[21]

To appreciate and understand the modern innovations and ideas of social progress, it is necessary to know something of the traditions which stood as the ideals of society in the past and since the substantive Law, as a progressive science, is ever conforming to the ideals and systematizing its rules to meet the demands of the people whom it serves, we should be sure that we want it changed, before we venture to abrogate wholesome rules of conduct that have stood the test of time.

The ancient thread connected with the primitive law or custom, if we but look for it, can often be traced, amid the maze of more progressive rules, and in studying the modern conceptions of law, the student of our jurisprudence will realize that were it not for the ancient line, which anchors the newer fabric deep in the hearts of humanity, the tangled mass would be blown away upon the contending breezes of modern fanaticism.

We trace our modern law of inheritance directly to the old custom of ancestor-worship of the ancients, preserved by the Chinese, of modern times, who bow in unlimited filial obedience to these antique ancestral institutions, when they prostrate themselves before the memorial tablets of their ancestors.[22]

[19] Lee's "Historical Jurisprudence," p. 1.
[20] Lee's "Historical Jurisprudence," p. 3.
[22] Maine's "Early Laws and Customs," pp. 53, 62, 78.

From this ancient tradition, through our primitive Church, we developed the rule for the holding of the personal property of the deceased as a primary fund for the celebration of masses for the soul of the departed, hence the jurisdiction of such property in ecclesiastical Courts, from which we derive our present law of Wills and Executors and Administrators.[23]

The roots of our law are thus firmly interwoven in the old customs and traditions of the past, developed through the amalgamations and alterations of the early religious ideas of our civilization. These are but isolated instances of the many laws that could be traced to their primary source, far back to the conditions that cluster round the transactions of a past civilization.

What a tribute it is to the learning of our profession, in reading the history and traditions of the nations of antiquity, that while their literature has perished, their culture, as crystallized into law, as an organized system of right, has survived the ravages of five thousand years.

We know the sanctity with which the ancient Babylonians regarded their contracts, sworn to before the priest or notary, in the name of the principal god or reigning prince of the country, as a solemn binding instrument between these citizens of the world, who are now but a name: we marvel at the similarity between the modern contract of bargain and sale and that of old Babylon, with the waiver of the right of redemption and are struck by the resemblance between our own mortgages and the antichretic mortgages of Babylon and Egypt, the latter, like our own, requiring the formula of a foreclosure, to pass the title, but the contract tablet of the former being sufficient, of itself, to transfer the title, on default; we read, with interest, of the banking laws of Babylon and of the drafts, checks and other commercial paper, used by the bankers of this nation 2,500 years before the time of Christ and we can know the details of their law of partnership, master and servant, the law of domestic relations ond of testamentary devises, if we will but follow the legal traditions of this ancient people.[24]

The quaint old laws of Egypt, with the four distinctions between the different kinds of property, based upon its im-

[23] *Idem*, p. 79.
[24] Lee's "Historical Jurisprudence," pp. 18. 48; John's "Babylonian Laws."

mobility, its inanimate movable characteristic, the animate movables and the abstract rights and interests, known as incorporeal possessions; the law of loans, contracts, mortgages, wills and domestic relations, as they passed through the Roman and English laws, are but forefathers of our own laws upon these subjects and the antique Egyptian procedure, in Courts of justice, is not without relation to our modern system of trials.

Imagine one of the ten Judges, selected from either of the three old cities of Thebes, Memphis or Heliopolis, presiding in the old Egyptian Court, as president, five thousand years ago. When the Judge was seated upon the judgment seat and his insignia of office assumed, Ma, the goddess of Truth, with the eight volumes of the laws of Egypt, the statutes and opinions of eminent Judges, were placed before him. The written plea of the complainant was presented, after which the answer or demurrer of the defendant, the reply of the complainant and the rejoinder of the defendant, all subject to the approval of the Court, after which the witnesses were heard, touching the issues raised by the pleadings. No arguments were permitted, but on the conclusion of the evidence a decision was given by the president of the Court, who touched the gainer of the cause with the figure of the goddess of Truth, which he wore as a badge of office.[25]

The Egyptians knew the danger of taking cases under advisement and they viewed with alarm the influences, such as oratory, that might distort the truth or clothe the unrighteous cause with the semblance of righteousness.

But no traditions of the past roused the Egyptians to noble achievements, such as those undertaken by the Greeks and Romans. They tranquilly lived their lives and their nation succumbed to the grandeur that was Rome's, because the people of the latter were true to their better traditions and loyal to the institutions of their fathers. Egypt passed before the Roman Eagles, because the race had finished its history and its laws and the pyramids alone survive the life of the old world dynasty.

We know the traditions of the nation that began its existence as a horde of wandering nomads, fleeing from the vengeance of the Egyptians, and later ending as a Roman province, the legal system of this country possessing an

[25] Diodorus, 1, 76; II. Herodotus, 160; Lee's "Historical Jurisprudence," 61, 85.

absorbing importance to us, because of its connection with the national religion and its relation, in turn, to our own Christian religion.

We gather many of the legal traditions of Israel from the different books of the old Testament, where the tribal laws were uniformly based upon rules of conduct, traced to an ancient custom, originating with early ancestors, acting under an alleged Divine command. Revenge was the mainspring which threw into action the older laws of the Jews and the *lex talionis* was the basis for the expressed legal conception of this people. According to the Deuteronomic Code, just men were selected as Judges, over the people: they sat at the gates of the city and heard the causes, upon testimony much as in the procedure of Egypt. The militant Suffragette, however, had not then made her appearance or asserted her rights and women and slaves were incompetent as witnesses, according to Josephus.[26]

Unlike the legal systems of Babylon and Egypt, in Israel the family was the foundation of the jurisprudence and the father of the family was the unit of society. The Jewish law of marriage, the property in slaves, the law of debt, loans, torts and succession is well known, as well as the entire absence of wills and testaments, the succession passing to the first born in two portions and otherwise divided between the sons, being the ordinary rule for the devolution of property.

The principal legal treatises of the Hebrew nation date from the destruction of the Jewish state, but they contain the traditional interpretations, from a very early date and are no doubt trustworthy.[27]

In the laws of the old Spartans we find legal traditions most strongly exemplified. The spirit of the Spartan constitution was the Dorian idea of reverence and fear of the laws of the forefathers and the spirit of a self-sacrificing obedience for the State. The rights of the individual were minimized and those of the State were magnified. Lycurgus would never commit his laws to writing, but maintained that laws tending toward the public good were best perpetuated by being imprinted deeply in the hearts of the young, through education by the law-givers. Each generation learned the laws and passed them on to the next generation. The Spartan colonies passed under the same

[26] Antiquities, iv., 219.
[27] Lee's "Historical Jurisprudence," 121.

laws and the law bound all who were Spartans, because they revered the law, since it was the law of their fathers.[28]

Unlike the laws which Lycurgus gave the Spartans, the laws that Solon gave Athens were not based upon customs traced to presumed divine commands but to rules of conduct prescribed directly by the supreme power of the State. The traditional law of the Athenians, prior to Solon's time, allowed the sale of debtors by the creditors, and many freedmen had been sold in bondage. He put an end to this practice and no man was liable to be sold in slavery or reduced to serfdom, because of indebtedness, under the just Solon.

The laws of Solon were the product of the philosophical Socratic school of his period, whereby the written and traditional laws were brought face to face with the abstract moral doctrines advanced for the interest of humanity and thus philosophy helped the law, in Athens, to enter the edifice where it presided so long, in this civilization, for the protection of the rights of the Athenians.

The procedure of the Athenians was very similar to our own, but unlike the Egyptians, the best orators of the city argued the causes in the dicastries; large numbers of Athenians were constantly employed as jurymen in the Helaea, or as arbitrators, and the keenest interest in the legal conflicts of their day, was felt by the unnoticed thousands of old Athens, who have passed away with the mists of the centuries.[29]

The law of Rome has been said to be the greatest product of its genius.[30] The Roman laws reflected the deepest thought and most cherished ideals of its grandeur and the transmission of these laws, into the jurisprudence of other countries has been Rome's choicest heirloom to the progress of the world.

The wisest laws of the Egyptians, Babylonians and the Greeks were adopted by the Romans, who, in the Twelve Tables, marked the beginning of scientific jurisprudence. In these tables, regulating the practice, property, liability for damages and the domestic relations of the citizens, the punishment for crimes and other legal relations, we find the first attempt at scientific codification, following the code of Hammurabi.

[28] Plutarch's "Lycurgus," 13; Lee's "Historical Jurisprudence," p. 167.
[29] Lee's "Historical Jurisprudence," p. 176.
[30] *Idem*, p. 187.

The Roman Republic and early Empire contributed many of the laws of England, from which our own jurisprudence is largely taken. The great Roman lawyers of the Empire studied the jurisprudence of their country with lofty enthusiasm. They analyzed terms, studied the rules of construction, briefed their cases and enforced their client's rights, through the same kind of forensic efforts that the lawyers of to-day attempt.

Gaius, like Blackstone, wrote the law with such elegance and simplicity, that it has survived through the centuries[31] and the Code, Digest, Institute and Novels of Justinian, written 530-554 A. D., formed the basis for the mediaeval civil law of the civilized world, until comparatively modern times.[32]

With the coronation of Charlemagne as Roman Emperor, Roman law and tradition were transplanted and revived in France and Great Britain[33] and thus the legal traditions of the Caesar's are re-enacted in the struggles for the rights of citizens by moderns.

According to Juvenal when France was known as Gaul, it was a veritable nursery for lawyers and perhaps in no other country has the profession attained a more honourable position than in the France of the past centuries.

The great Chancelors, l'Hopital and D'Aguesseau ornamented the periods in which they lived and other distinguished lawyers before and after them have left a lasting impression upon the civilization of their country. From the commencement of the 14th century, the French Bar constituted a lesser order of nobility, known as the *noblesse de la robe,* with all the rights and privileges of a noble order.

Bartelus, who attained such eminence as a jurist, in the 14th century, that he was known as "the mirror and lamp of the Law," in France and Italy, in his day, contended for the Bar of France, that "after ten years of practice in his profession, the *docteur en droit,* or avocat, became *ipso facto,* chevalier or knight.[34] The French citizenship acquiesced in the assumption of the order of nobility by the me-

[31] John's "Babylonian Laws," etc. Niebuhr's discovery of the "Commentaries of Gaius," marks a distinct epoch in our civilization, for by this work the Roman law was preserved to us. Maine's Early Laws and Customs," p. 197.
[32] Lee's "Historical Jurisprudence," p. 440.
[33] Lee's "Historical Jurisprudence," p. 440.
[34] Forsyth's "Hortensius," p. 213.

dieval Bar of France and the privilege and right continued to be exercised until the Revolution.[35]

This was no doubt permitted because of the high professional standards obtaining at the French Bar, in the 14th century, the ethics of the order, as evidenced by the following rules for lawyers, approximating the exalted standard laid down by our own National Bar Association, for we read the following, among other prohibitions:

"1. He was not to undertake just and unjust causes alike without distinction, nor maintain such as he undertook with trickery, fallacies and misquotations of authorities.

2. He was not, in his pleadings, to indulge in abuse of the opposite party, or his counsel.

3. He was not to compromise the interest of his client, by absence from Court, when the cause in which he was retained, was called.

4. He was not to violate the respect due to the Court, by either improper expressions, or unbecoming jestures.

5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

7. He was not to lead a dissipated life or one contrary to the modesty and gravity of his calling.

8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed."[36]

Space will not permit us to read the long list of distinguished French Avocats, who stood for the laws of their country and the rights of their fellow-man, in the centuries that have gone, nor to recount the many noble and heroic deeds of these and other patriotic and high-minded barristers, who have made the world better for having lived in it, but so far as they were true to the high traditions of their calling, as evidenced by this exalted standard of ethics, they deserve the affectionate remembrance of all lawyers in every clime, as well as the respect and admiration of mankind.

We well know the important part that tradition has played in the development and growth of the English law, both under the old Saxon procedure, when the judgments

[35] Fournel, Tom. i., 277, 278.

[36] Bouteiller's "*Somme Rurale*," written in 1360; Forsyth's "Hortensius," p. 215.

were recorded in the dooms-book, and subsequent to the Norman conquest. We have all read the old customs and traditions crystalized into living law by Glanville, Bracton, Britton, Coke, Littleton, Blackstone and other eminent English lawyers and law writers.

If the jurisprudence of Rome was one of its chief glories, the development and cultivation of the law, in England, can be truly said to be its greatest triumph, for far greater than its extensive navy, its colonies or its commercial supremacy, is a fact that the majesty of the Law is respected in England as it is in no other country upon the earth and that the rights of Englishmen, at home and abroad, are recognized and enforced by the most accurate system of jurisprudence that the ingenuity of man has yet devised as a remedy for the ills of weak humanity.

This result is due, almost entirely, to the fact that the legal profession, in England, has remained through the ages, true to the better traditions of the order and to the influence of the Bar upon the legislation concerning the procedure.

The tendency of the English Bar to adhere to its traditions, was commented upon by Shakspeare, centuries ago, in Richard Third, when Lord Buckingham upbraided the vacillating Cardinal Boucher, as being "too senseless obstinate; too ceremonious and traditional," because he would have saved the young Duke of York from the vengeance of his ravenous uncle, by the "holy privilege of blessed sanctuary."[37] The Cardinal was right and Buckingham was wrong. An adherence to the ceremony and tradition of sanctuary—to which the young Duke was clearly entitled—would have prevented the shedding of innocent blood and so, many of the traditions of the fathers, which modern Buckinghams would have us rashly disregard, are bulwarks, to safeguard the rights of citizens, if we would but adhere to them.

The average modern lawyer, in our country, pays little heed to the ennobling traditions of the profession, but is engrossed in the busy tumults of his professional career, struggling to make headway against the great current of commercialism.

What lawyers need in the United States is the time honoured traditions and altruistic customs that cluster round the Inns of Court, in England.

[37] Act III., Scene I.

For the past five centuries, the English Bar has steadfastly adhered to the higher traditions of the profession and for this reason it has held such a high place in the estimation of the public—not only for learning and eloquence, but for honourable conduct—that the profession has become a favourite with the English nation.

It has long been the medium by which the aristocracy and the labouring classes have become a united and homogeneous people. The humblest tradesman in England, who can afford to give his son an education, may later enter him at an Inn of Court and live to see him a famous barrister or even a Judge, or Lord Chancellor.

Maurice Van Meenan, a learned Belgian Advocate, in a paper delivered some years since, before the Junior Brussels Bar, on the English Forensic System, made these pertinent observations:

"England, as one knows, is the country of traditional institutions. These [illegible]ters of the genius of the nation have developed and [illegible] themselves in the course of centuries, together with [illegible]ation, shaping themselves in conformity to new wants, and, under the appearance of immobility, transforming themselves as completely as English civilization itself. * * *

The spirit of England rebels against systems construeted according to abstract principles. It is the enemy of abstractions. Like the man of science, who only advances prudently, step by step, by the light of experience alone, it respects that which long traditional experience has brought to it; charges that only which is manifestly insufficient or bad, and, above all things, creates nothing but what is strictly necessary for actual wants. * * *

The Bar participates in the character of all the institutions of the country. It is from the unwritten common law, from a tradition six centuries old, that it derives its strength and greatness. * * * It has remained steadfastly the defender of the rights and liberties of the people, and has, in the worst periods of history, resisted the aggressive encroachments of power, the pretentions of the Crown, and even the illegal proceedings of a parliamentary majority.

* * * * * *

The Inns of Court are societies of a truly singular character. They are not corporations, created by State authority, but purely voluntary associations; yet these voluntary associations are one of the organs of the State; they possess

exclusive rights, regulate themselves freely without tolerating the interference in their government of any authority whatever; but they have, as visitors, the Judges of the Supreme Courts of Law, sitting in Westminster."[38]

History tells us of the patriotic movement, during the reign of the Plantagenets, that gave birth to the independence of the English Bar, as a protest to the machinations of the Pope of Rome.[39] In 1254 Innocent IV. forbade the reading of the canon law by the clergy, who, up to that time, had been its chief expositors, at the universities. Laymen then had to be trained for the law and schools were opened in London for the purpose. From the men learned in the law, Edward I, in 1292, authorized the Chief Justice and other Justices of the Court of Common Pleas, to exclusively call certain men to the Bar and the sergeants at law, as they are known in England to-day, are said to owe their existence to this precedent.[40].

The English advocates and law students appear to have formed themselves into one or more societies for the study and advancement of the law, under the sanction of the Judges, as early as 1307 and in the time of Sir John Fortescue, Chief Justice under Henry VI, the four Inns of Court had come into existence and about two thousand students were then instructed at the Inns of Court and Inns of Chancery.[41] Each of the four societies had already acquired, at the expense of its members, a house called an Inn of Court, and in these several Inns, the law students were lodged, fed and instructed, not only in the science of the law, but according to a general system of discipline, applicable to their dress, demeanour and amusements.

Is it any wonder that the English lawyer, trained in these ancient institutions, known as the Inner and Middle Temple, Lincoln's Inn and Gray's Inn, where the list of readers and traditions are maintained in an unbroken line of succession back to the period of Edward III, should have gained such an enviable reputation in the world's forum of public sentiment?

[38] For reference to this interesting paper, see Quarterly Review, Vol. 138 (Jan., 1875), pp. 140, 141.

[39] I. Pollock and Maitland's History Eng. Law, pp. 18, 34, 130, 439, 457.

[40] III. Reeve's History Eng. Law, 347; V. *idem*, 167.

[41] *Ante idem.* Reared amid the century old traditions of their profession, the young English barristers unconsciously walk and daily commune with the "great dead" of their profession—with those whose names recall the inspiration of our boyhood, and who seemed to point the way to what we hoped was to be our own bright future.

Consecrated to the traditions of the profession, how sacred to the lawyers these Inns of Court should be. Here the great men, to whom we still pay tribute, spent their hours of ease, perhaps unconscious that their lightest words would eagerly be sought by coming generations. Along the dusty, dingy streets by these old halls, the great poets and dramatists of the Elizabethan period jostled with Coke and Bacon and passed many a jocund hour with the studious, witty barristers in these old haunts, learning of cases, traditions and old legal terms with which to adorn their plays and poems. Equally with the "Mermaid," the "Bear's Head," the "Falson," the "George," and other taverns of their day, these Inns of Court were frequented by the immortal Shakespeare, by "Rare Ben Johnson," by Spencer, Beaumont, Fletcher, and other gifted and congenial spirits, who found good comrades in the Benchers and Barristers at these old Inns.

Just as the ancient Greeks and Romans would draw forth the most patriotic and best impulses of the youth of antiquity, by the continuous presentation, in marble, picture and story, of the valourous achievements of their fathers, so English lawyers, by adhering to the traditions and following the precepts of such distinguished Benchers as Sir Thomas Littleton, Sir Edward Coke, Sir Robert Brooke, Sir James Dyer, Lord Guilford (Francis North), Sir Francis Bacon, and William Blackstone, have gradually developed the best traits in those called to the Bar and in the transmission of these traits, through the centuries, just as the horticulturist transmits only the better traits to accomplish the higher kinds of plants, we have to-day, as a result of the handing over of these antique customs and traditions, the *homo nobilis* of the legal fraternity, the modern English barrister, and his wonderful judicial system.

This system, in England, grew up with the nation itself and it was established by usage, which would long since have been abrogated, if it had not proven beneficial. To use the words of one of the most distinguished Benchers at Gray's Inn:

"What is settled by custom, though it be not good, yet at least it is fit, and those things which have long gone together are, as it were, confederate among themselves; whereas, new things piece not so well."

Some three hundred years ago none but a gentleman entitled to bear arms could obtain admission to an Inn of

Court. The Inner Temple library contains a list of members of the 16th century and at the end of the list is the significant remark:

"None of these gentlemen would seem to have been admitted to the Inn with a view to professional advantage."[42]

What a commentary this is upon the standing of the Bar of that period. In the United States to-day most of the members of the order are admitted with a view to professional advantage and far too many are prepared to gain this advantage in violation of the traditions of the Bar.

Yet with these exalted standards obtaining at the English Bar three centuries ago, because the liberty of the individual citizen had not kept pace with the elevation of professional ideals, cruelty and discontent in England drove to this country some of the noblest patriots that ever belonged to that great nation.

We American lawyers have no century old traditions, such as are transmitted to the students of the law at the Inns of Court in England, but just as the achievements of the best in human nature are for the benefit of the whole of mankind, we are none the less at liberty to revere and emulate, with our brothers across the water, the better traditions of their Bar, as they are handed down to us through the ages.

And American lawyers are not without the impetus of many noble examples and traditions, for our forefathers at the Bar laboured not alone for their professional ideals, but for the broad rights of humanity in this great free country of ours. Emulating the example and traditions of the ancient English lawyers and Barons, in the stirring scenes in the drama for freedom, which culminated at Runnymead, in *Magna Charta,* American lawyers, fearless, liberty-loving and true to the traditions of the past, framed and gave to the world our wonderful Constitution. The free citizens of our common country ratified this work of lawyers, which parcelled out the various powers to the different branches of government and at the same time preserved the largest measure of freedom to the individual citizen.

Our Constitution is a perpetual hindrance in the path of the demagogue and politician, who, unmindful of the wholesome traditions of the past, would ingratiate himself into

[42] "The Bar as a Trade." 22 Gentleman's Magazine, June, 1879, p. 594.

the good graces of the populace by a demand for greater individual freedom, in an attempt to break down the fetters intended by the fathers to protect the people from the covetousness and ambition of such false friends of liberty. With the terrible example of the French revolution before them, our patriot ancestors knew that the people must be protected from such false friends, as well as from the chronic revolutionist, described by Comte, who proclaim today in the name of liberty and to-morrow attempt to assume the role of the despot.

Tradition tells us that in the long winter evenings, on the bleak New England coast, when our Puritan fathers assembled to work out their principles of liberty, they were accustomed to hang above their desks the placard: "Each man shall give an account of himself to God." This is the Puritan type of liberty, and by it, the individual citizen is responsible to no one but to his conscience and his God. The lawyers of our colonial period following up the same tradition, in the establishment of our judicial system, provided, for all time, for a free and independent judiciary.

Did we but realize it, the Puritan type of manhood is the noblest heritage of our nation and if we would preserve our institutions, we must maintain our relations with the past and stand steadfast to the deep convictions of the fathers.

Never, since the Spartan days of ancient Greece, or the halcyon period of old Rome, when patriotic giants strode the earth, has the world beheld a greater galaxy of pure, brave and cultured freemen than clustered to christen the birth of our own free government. And the constructive statesmen of those old Puritan days were stern old lawyers, with few books, but deeply versed in the traditions of a liberty-loving people, who had the courage to stand by their convictions. What American lawyer but must feel a just pride in the patriotic, altruistic services of the Adamses, Hancock, Hamilton, and the Spartan-like labour of the great James Otis, who sacrificed his place and position with the crown, to champion the liberties of the American citizens, against the "Writs of Assistance," in 1761?

These men were not intoxicated with their own self interest. They were earth's chief defenders of independence and God's chosen magistrates of liberty.

Each moment in the lives of such men counted for more than whole ages in the common history of mankind.

Have we not the traditions associated with the names of John Marshall, Thomas Jefferson, Chancellor Kent, Story, Webster, Clay, Calhoun, and the illustrious Illinois lawyer, the Great Emancipator, Lincoln, who could strike the shackles from a million slaves? Have men in any country, rendered more distinguished service to mankind?

These are indeed "Venerable men, who have come down to us, from a former generation." We ought to be loyal to the traditions and institutions for which such patriots laboured, for, as said by Webster, we should rejoice that America has furnished to the world such characters, and that, "if our American institutions had done nothing else, that alone would have entitled them to the respect of mankind."[43]

These patriotic lawyers knew that knowledge and tradition were the only true fountains of human liberty; that freedom existed only in proportion to a wholesome restraint by organic law;[44] they knew that "Justice is the great interest of man, on earth" and with full knowledge of the defects in the judicial systems that helped to wreck the governments of other countries, in the past, and with hearts and minds in perfect harmony with humanity, they devised a judicial system to subserve, not thwart the interests of mankind. By the union of the aristocratic and democratic principles of government and the division of power between the administrative, legislative and judicial branches, in our organic law, they wisely sought to forever destroy the vicious seeds of discord, anarchy and socialism, that seem to spontaneously germinate in popular governments, like the weeds, which spring up unsown and destroy and devastate the cultivated fields of husbandry. The living and dying sentiments of our Colonial Fathers was "Independence now and Independence forever.' "Although no sculptured marble should rise to their memory, nor engraved stone bear record of their deeds, yet will their remembrance be as lasting as the land they honoured"[45] and, with Webster, we should all "thank God" that we are Americans. That we have the traditions of our colonial fathers and that, with such traditions, and such lawyers, the law "has honoured us and may we honour it."[46] In framing our wonderful constitution our fathers

[43] Address at Bunker Hill Monument.
[44] Speech at "Charleston Dinner" (May 10. 1847), Vol. VII., p. 363.
[45] Eulogy on Adams and Jefferson, Vol. I., p. 148.
[46] Toast at Charleston Dinner, May 10, 1847, Vol. VII., p. 394.

profited by the lessons learned by Moses, from the Egyptians, that in the act of dispensing justice the incumbent of the judgment-seat should rise superior to mere popular standards.[47]

They knew of the dreadful results, following a suppliant judiciary, effected by the hated recall of Judges, as applied under Hammurabi in old Babylon, 2285 years before Christ;[48] they understood the ill-timed law of petalism, of the Syracusans; the unjust law of Ostracism, of the Athenians, that was applied to the noble, just and patriotic Aristeides by those who tired of hearing him called "the Just." They had read the testimony of such eminent expert, trustworthy witnesses as Aristotle, touching the disastrous results of judicial recall in Greece and other antique nations and they sought, in our own immortal parchment, to avoid the error into which these shipwrecked nations of the past had fallen, by providing, for all time, for the independence of our Courts. God forbid that these traditions of our profession, which were crystallized into organic law by the wisdom and learning of our fathers, should ever be set aside.

It is useless to know what we have been unless we apply it to attain to that which we ought to be. Our ancestors are mere dust and ashes save when they speak to us of the useful lessons of the past, but if we will but heed these lessons, their voices call to us from the heavens above and by their useful experiences, we can attain our desires.

Unquestionably, every age should preserve, while improving, the benefits worked out through the institutions of preceding generations and the popular demand for change should never be pushed to the extent of undermining the corner stones of our social institutions.

While mindful of the present, the safest way to guard the future, is to revere the past. We should not discard the traditions of yesterday, until assured that they can no longer serve us to-day or to-morrow and we ought to adopt new rules with caution, lest we destroy the blessings that we now enjoy.

Self cultivation and development of the individual citizen, with due regard to the rights of others, and an adherence to past traditions, made possible the grandeur that was Greece; and military conquest, with a just system of

[47] Deuteronomy, 1-7; 17-9, 12.

[48] John's "Babylonian and Assyrian Laws;" White's "Legal Antiquities," Chapter III.

laws and a reverence for the fathers, made Rome the glory of the antique world.

I tell you, gentlemen, great institutions, like great edifices, are deep-rooted in the soil of the past. Nothing can be more important than for us to maintain, in all their strength and vigour, the institutions of the fathers.

The sanctity of the past lies not alone in the chronicles of man's progress, or the notation of the stepping-stones of social evolution, but the better lessons to be learned from our fathers, speaking through the years, is that we should not go backward, or recede, but move ever forward and our true heritage is to preserve their virtues and their institutions while avoiding their errors. These are the lessons to be learned from the "legal traditions" of the past.

The general public looks to us to maintain and carry on our high ideals of justice and legal tradition, free from the corrupting influences of commercialism and if we fail to do so, we will fail in one of our principal objects. We should therefore follow the bent of our higher traditions, without regard to consequences, and then there can be none but desirable consequences.

We have talked of lawyers, because they are the creators of the traditions of which we speak. History and tradition are not mere matters of abstractions. Renan's "Origin of Christianity" developed into a "Life of Jesus" and so our legal traditions cluster round the advocates whom we know in history. The more we read of them the more legal tradition we acquire.

In this brief consideration of the subject we cannot see and touch many of the eminent lawyers of the past, much less attain an adequate conception of their life's labours, in the still and lifeless cities of the books; but that they merited well from their fellows is apparent from the fact that they laboured to advance the cause of Justice.

The reputable, traditional lawyer, is the common honour of all who share his calling. His glory is not that he has been resurrected from his long-forgotten grave, but we render him a truer form of worship the appreciation of his monumental institutions; in the preservation of the traditions which he loved and laboured to establish and in shewing the world that all history of mankind is incomplete and incomprehensible without him.

EDWARD J. WHITE.

Kansas City, Mo.

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BY THE WAY.

We are proud to publish in a prominent place in our present issue the names of those barristers, solicitors, and students-at-law of the provinces of Nova Scotia, New Brunswick, Alberta, and Saskatchewan who are now on active service for King and Country. The Canadians already at the front have set a high standard to live up to,—or perhaps we should rather say, to die up to. Langemarck is a high [illegible]. But no one doubts that, if the occasion again occurs, the gallant Canadian soldiers who have not already reached the scene of action will attain even to it.

The sudden death of Mr. E. E. A. Du Vernet, K.C., just as we are going to press, removes a very distinguished member from the legal profession. Effective in every direction, Mr. Du Vernet's strength lay especially in cross-examination of witnesses, addressing juries, and as a tactician and practical man of business. Without any of the adventitious aids of inherited wealth, he earned for himself a position of importance in the financial world, and was a director of the Union Bank and Union Trust Company, among other institutions. He possessed a personality which interested and attracted his fellowmen, and inspired confidence in clients. Like all truly good men, he was a keen golfer. In Mr. Du Vernet the maritime provinces may add another name to their long list of distinguished sons, although his legal career was entirely in Ontario.

In connection with Mr. Silas Alward's Article in our present number on the 'Evolution of English Parliamentary

Government,' we may refer to an interesting leader in the London *Spectator* of May 1st last, in which the writer deplores the fact that the notion of individual responsibility of Ministers, as contrasted with the collective responsibility of Cabinets, has been gaining ground in the last ten years. There has been a marked tendency of late, he alleges, among the critics of the Ministry to give support to this dangerous view of individual rather than of collective responsibility by levelling their criticism by name at the heads of special Ministers personally responsible for the action taken by their departments. He instances the criticism which, fairly or unfairly, has been levelled against Mr. Winston Churchill lately because of the admitted mistake of beginning an attack on the Dardanelles with a purely naval force, and before the large land forces now in operation had been got together. The maintenance of Cabinet responsibility, that is, the responsibility of the Cabinet as a whole for the acts of individual Ministers is, the writer maintains, of the utmost importance for the welfare of the nation. If the rule of collective responsibility is properly enforced by the nation, a Minister's colleagues will feel that they have a right to demand information as to what is going on, and to express their opinion upon every great act or policy before it is put into operation; whereas the colleagues of a Minister who is solely responsible for his own acts do not trouble to exercise control over him. No doubt the increased size of Cabinets at the present day creates a difficulty; but that increased size has led to the growth—or revival—of an institution known as the Inner Cabinet. The Prime Minister and Inner Cabinet can act, as it were, as trustees for their colleagues. A Minister should at least secure the endorsement of the Prime Minister and Inner Cabinet before taking action, and it may be assumed that the rest of his colleagues will at any rate endorse the initial action. The public, the writer insists, will never obtain proper control of their affairs if they once abandon the safeguard of collective Cabinet responsibility, and allow individual responsibility to be substituted for it. If once Governments are made to feel their collective responsibility, we shall get Ministerial supervision. Without it we shall get none. The House of Commons, owing to the extremity of the party system, has become utterly incapable of controlling the persons to whom it delegates national affairs. Unless

the Cabinet control their members, it becomes a case of mere "go as you please."

The assurance given by Mr. Louis Harcourt, Secretary of State for the Colonies, in January last, when intimating to the Dominions the postponement of the Imperial Conference, which was made public on April 14th last in answer to a question in the House of Commons by Sir Gilbert Parker, is well worth putting on record in these pages. The Colonial Secretary said:—"It is the intention of His Majesty's Government to consult him (the Prime Minister of each Dominion) fully, and if possible personally, when the time arrives to discuss possible terms of peace." This is interesting as marking an advance in the development of the Constitution of the Empire which if it is to be made firm and lasting and safe must be, like that of Great Britain, a *growth* and not a *fabric*. In the great gathering held at the Guildhall in London on May 19th last to set on record—'The abiding gratitude for the unparalleled services rendered by the overseas Dominions in the struggle to maintain the ideal of liberty and justice which is the common sacred cause of the allies,' in acknowledging the resolution on behalf of Canada, Sir George Perley said:—"The announcement that the Dominions will be consulted before terms of peace are arranged produced a splendid impression in Canada. Our people would no doubt have been disappointed if such a course were not followed." Now it is suggested by Sir Lawrence Gomme, formerly Chief Clerk of the London County Council, in a letter to the Daily Telegraph, that the Coalation Ministry ought to be an Empire coalition of organizing statesmen, and he specially singles out Premier Botha of South Africa to work with Lord Kitchener. We are getting accustomed to novelties and new departures in these days, but this fairly takes one's breath away.

The British North America Act, 1915, amending the British North America Act, 1867, by authorizing the addition of nine additional members to the Senate received the Royal Assent on the 19th ult. An Imperial Act was obviously necessary because the only provision in the British North America Act permitting additional members to be added to the Senate is s. 26 which enacts:—'If at any time on the recommendation of the Governor-General the (King) thinks fit

to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly.' Whatever may have been in fact the origin of this provision, which is perhaps the only one in which the analogy of the British Constitution was not followed as much as possible by the framers of the Act, it is at least curious that by the Peerage Bill of 1719 it was proposed that the King should be allowed to make six new peers, after which new creations should only take place on the extinction of existing peerages. The Bill was rejected. The successful attempt of Queen Anne and Her Ministers in 1711 to pack the House of Lords by the creation of twelve new peers, and so secure a majority for the Parliamentary approval of the Peace of Utrecht was, as Sir William Anson tells us, probably the ground of this proposal.

The Law Journal of April 24th, 1915, in reference to the 'war babies' problem says:—"Whatever view be taken on the difficult question of altering the legal status at present accorded by law and public opinion alike to illegitimate children—a question which has become of special importance in the particular case of soldiers' illegitimate children—there is one point on which there will be a general consensus of legal opinion. Where the parents of such a child subsequently intermarry there seems no just reason why the status of legitimacy should be refused to their previous offspring. The refusal, indeed, is peculiar to the Common Law of England and Ireland; in the rest of Christendom, as in Scotland, the doctrine of *legitimatio per subsequens matrimonium* is universally adopted. The Canon Law and the Civil Law recognize this principle; but 'once a bastard, always a bastard' has been the immemorial rule of our Common Law." In truth our law on the subject is sufficiently absurd. If a child be born half an hour before the parents marry it is legitimate; if it be born half an hour after the parents marry, it is illegitimate. The fact that in the thirteenth century the Barons of England refused to alter the common law on the point, and appended to their refusal the high-sounding absurdity *Nolumus leges Angliæ mutari,* is no reason why we should still persist in the same attitude to the prejudice of countless generations of innocent children.

The *Law Notes* for May contains a paragraph commenting on Sir Edward Clark's severe article on Sir Henry Hawkins in the *Cornhill Magazine*. After agreeing with Sir Edward's criticism the *Law Notes* proceeds to say that a correspondent has sent a personal reminiscence of the late Sir Henry Hawkins which goes far to justify the attack. The correspondent writes: "I remember being before him in one case in which Sir Robert Finlay and a junior were for my client. The leader being away, the junior was bullied and browbeaten in a most shameless manner for half an hour, when Sir Robert was sent for. There was not one further comment from Sir Henry. The contrast was remarked by many—half an hour of bullying and scolding, then comparative silence. I observed the same procedure frequently in his Court—the browbeating of juniors who could be browbeaten, and the fear of resolute leaders. Of course, there was ability, well fortified by a good memory and a considerable amount of insolence and effrontery." It has been suggested to us that Ontario possesses its own Sir Henry, and that many of the younger members of the Bar would be able to point him out. At all events complaint is laid that not unfrequently members of the Bar have been prevented from laying their cases before the Court by an attitude of criticism and interruption which is wholly at variance with what might be expected from the Bench. A judge, our informant declares, does not prove his greatness by baiting those who have neither the position nor the experience to stand up to him.

LIST OF BARRISTERS, SOLICITORS, AND STUDENTS-AT-LAW NOW ON ACTIVE SERVICE FOR CANADA AND THE EMPIRE, FROM THE PROVINCES OF NOVA SCOTIA, NEW BRUNSWICK, ALBERTA, AND SASKATCHEWAN.

Nova Scotia.

Alister Fraser, New Glasgow; J. W. Margeau, Bridgewater; J. L. McKinnon, Halifax: M. A. McPherson, St. Peters; L. E. Ormond, Amherst; H. H. Pines, Waterville; W. P. Purney, Liverpool; J. E. Read, Halifax; D. C. Sinclair, New Glasgow; J. M. Slayter, Halifax; S. G. Robertson, Westville; W. E. Thompson, Halifax.

STUDENTS-AT-LAW.

E. C. Phinney, Bear River; J. H. T. Nicholson, Sydney Mines; D. D. McDonald, Bailey's Brook; E. A. Chisholm, Havre Foucher; H. R. St. C. Jones, Weymouth; C. T. McLeod, New Haven; William Noblett, Halifax; J. O. Stairs, Halifax; G. D. Young, Millsville; Kenneth Gray, Pictou; J. R. H. Harley, Windsor; J. K. McKay, Pictou; W. T. Ruggles, Middleton.

New Brunswick.

Hugh H. McLean, K.C., C. Herbert McLean, Cyrus F. Inches, W. Henry Harrison, Edward C. Weyman, Herbert J. Smith, Charles F. Sandford,—all of St. John; Harry F. McLeod, K.C., and Percy A. Guthrie of Fredericton; Arthur Neville Vince, and E. Kenneth Connell of Woodstock; George R. McCord of Sackville; A. Ernest G. McKenzie of Campbellton; and Isaac C. Spicer of Chatham.

STUDENT-AT-LAW.

Horace Hume Vanwart of Fredericton.

Alberta.

BARRISTERS AND SOLICITORS.

Stanley Livingstone Jones, K.C., (Lieut. Princess Patricia Regiment), Calgary; Daniel Lee Redman, (Lieut.

10th Battalion), Calgary; Geoffrey Grant Lafferty, (Lieut. Lincolnshire Battalion), Calgary; Reginald Stewart, (Major, 31st Battalion), Calgary; William Antrobus Griesbach, (Lieut.-Col., 49th Battalion), Edmonton; Frederick Charles Jamieson, (Major), Edmonton; Charles Arthur Wilson, Edmonton; George Thorold Davidson, Medicine Hat; Ivor Stanley Owen, Medicine Hat; James Hampton Brown Will, Athabasca; Arthur Charles Kemmis, (Lieut.-Col., 13th Mounted Rifles), Pincher Creek; William Hector McLelland, (Lieut., Artillery), Lethbridge; Robert Fulton Barnes, Macleod; David Christie Black, (Army Service Corps), Calgary; Brian LeRoy Cooke, Lloydminster; Henry Seymour Tobin, (Lieut.-Col., 29th Battalion); Henry Squires Steele.

STUDENTS-AT-LAW.

W. Roberts Lister, Edmonton; Stanley Harold Kerr, Edmonton; Herbert Austin Beck, Edmonton; Rowan Purdon Fitzgerald, Edmonton; Humphrey Burnett Phillips, Edmonton; Alfred Koch, Edmonton; Charles Yardley Weaver, (Capt. 'A' Company, 49th Battalion, C. E. F.), Edmonton; James Christian Lawrence Young, Edmonton; Desmond St. Clair George, (Corp., 31st Battalion), Red Deer; John Francis Costigan, (Capt. 50th Battalion), Calgary; John Francis Proctor, (Capt. 50th Battalion), Calgary; Joshua Stanley Wright, (Adjt. 50th Battalion), Calgary; Arthur Gardner Lincoln, (Capt. 'A' Squadron, 13th Mounted Rifles), Calgary; James Hugh Campbell, (Lieut. 'B' Squadron, 13th Mounted Rifles), Macleod; Ernest Frederick John Vernon Pinkham, (Capt. 31st Battalion), Calgary; Ross Malford Sherk, Olds.

Saskatchewan.

John Muir (Broatch, Lennox, Muir & Co.), Moose Jaw; Peter McLellan (Archer & McLellan), Arcola; M. A. McPherson (Buckles, Donald & McPherson), Swift Current; Norman Gentles (Seaborn, Taylor, Pope & Quirk), Moose Jaw; A. W. Goldsworthy (with O. D. Hill), Melfort; Robert M. Cunningham (Murray & Munro), Saskatoon; Harold E. Hartney (Russell Hartney), Saskatoon; Archibald McLean, Kerrobert; Alexander Ross, K.C., Regina; Maughan McCausland (Wood & McCausland), Regina; William S. Walker, Battleford; J. F. L. Embury, K.C., Regina; F. B.

Goodwillie, Melfort; Russell A. Carman, Balgonie; F. B. Bagshaw (Anderson, Bagshaw & Co.), Regina; Alister Fraser (Knowles, Hare & Benson), Moose Jaw; Austin S. Trotter, Melville; George C. Thomson, Swift Current; John Munro (Murray & Munro), Saskatoon; William A. Reeve, Qu'Appelle; F. G. D. Quirk (Seaborn, Taylor & Co.), Moose Jaw; E. M. Thomson (Torney & Thomson), Moose Jaw.

STUDENTS-AT-LAW.

W. B. O'Hare, Regina; Ernest J. Straker, Moosomin; Charles A. Scott, Saskatoon; Ronald W. Pearson, Saskatoon; Alfred G. Styles, Regina; Herbert Olding, Saskatoon; Roy E. Murray, Weyburn; C. B. McGregor, Weyburn; John Einarson, Yorkton; T. M. Walsh, Yorkton; V. O. Lackey, Moose Jaw.

THE EVOLUTION OF ENGLISH PARLIAMENTARY GOVERNMENT.

"The invisible point of yesterday becomes the goal of to-day;
And in turn is the starting-post of the morrow."

A great author, on Roman Civil Law, observes,—"The *Corpus Juris Civilis* stands at the goal of the history of Roman Law, summing up the results of the whole development of the law during the preceding thousand years; and, at this time, it is the starting point and basis of modern law."

With equal propriety may it be said of English Constitutional Government,—"The Bill of Rights of 1688, supplemented by the Act of Settlement of William III., (1700 and 1701) stands at the goal of statutory English Constitutional history and is the starting point and basis of modern English Constitutional Government."

On the death of the last of the Stuarts, in 1714, and at the commencement of the succession of the reign of the House of Hanover, a new era opens, and for two hundred years there has been witnessed the rapid growth of the unwritten constitution of Great Britain.

The absurd doctrines of Divine Hereditary Right, of absolute Royal power, and of the Passive Obedience of the subject had passed and forever, and henceforth commenced the growth, by the side of the great legal Codes hitherto secured, of Parliamentary government through a Cabinet Ministry responsible to the members commanding a majority in the House of Commons.

Hallam characterized the Act of Settlement as "the Seal of our Constitutional laws, the complement of the Revolution itself and the Bill of Rights, and the last great Statute which restrains the power of the Crown."

Three causes combined, after the Revolution of 1688 and the Act of Settlement (1700-1701), to hasten Parliamentary Government by means of the Cabinet system, on a settled and permanent basis.

The first was the marked division of the English people into two great parties, each contending for the control of the executive power of State—the Whigs and the Tories. For two hundred years these two great parties have struggled

for political pre-eminence with varying success. Both William III. and Queen Anne were strongly averse to party government, preferring the selection of the ablest men from either side of party politics; yet it was under a Whig Ministry, during the reign of Anne, the last of the Stuarts, Marlborough won his brilliant victories over the French.

The second cause was owing to the personal character of the first two sovereigns of the House of Hanover, George I. and George II., who were completely under the control of the then dominant party—the Whigs. "The troublesome energies of Parliament," observes Sir Erskine May, "were an enigma to them; and they cheerfully acquiesced in the ascendancy of able Ministers who had suppressed and crushed pretenders to their Crown—who had triumphed over Parliamentary opposition, and had borne all the burthen of the government. Left to the indulgence of their own personal tastes—occupied with frequent visits to the land of their birth, by a German Court, favourites and mistresses—they were not anxious to engage more than was necessary in the turbulent contests of a constitutional government. Having lent their name and authority to competent ministers, they acted upon their advice, and aided them by all the means at the disposal of the Court."

The third cause favouring government by Parliament was, likewise, personal, being the skill and ability of Sir Robert Walpole, who had been Secretary of War in the Whig Ministry of Queen Anne and was Chancellor of the Exchequer in the early part of the reign of George I., and for the period of twenty-one years, from 1721 to 1742, held the office of Prime Minister without a break, during six years of the reign of George I. and fifteen years during the reign of George II. With consummate tact and great skill in the management of men, he so entrenched his party in power, that the Tories during the reign of George III., that stubborn reactionary sovereign, did not make much headway against the reforms already secured by the great Whig leader. One of the brilliant writers of the nineteenth century, Thackeray, thus lauds this skilful Minister,—"But for Sir Robert Walpole, we should have had the Pretender back again. But for his obstinate love of peace, we should have had wars, which the nation was not strong enough or united enough to endure. But for his resolute counsels and good-humoured

resistance, we might have had German despots attempting a Hanoverian regimen over us; we should have had revolt, commotion, want, and tyrannous misrule in place of a quarter of a century of peace, freedom, and material prosperity, such as the country never enjoyed. . . . The days are over in England, of that strange religion of king worship, when priests flattered princes in the temple of God; when servility was held to be ennobling duty; while beauty and youth tried eagerly for royal favours. Mended morals and mended manners in Courts and people, are among the priceless consequences of the freedom, which George I. came to rescue and secure."

The Cabinet system as finally established, after the lapse of nearly one hundred years. may be briefly described as follows:—It is a responsible Executive under the leadership of a Prime Minister, consisting of a number of members, who are heads of several departments and members of either one of the two Houses of Parliament. These members are drawn from the party which commands a majority in the House of Commons. Collectively, they are responsible to the last named House for the administration of national affairs. The following are some of the characteristic features of the Cabinet, so called. Its members must hold the same political creed. Each minister acts in his own department as the recognized agent of his colleagues, whose concurrence he assumes. The idea of collective responsibility applies in their relations between the Cabinet and the King; in other words, the advice they tender the sovereign is their collective opinion. Strict secrecy is a marked incident of the meetings of the Cabinet. No record or minute of their meetings or proceedings is kept. The informal reports sent to the sovereign are strictly confidential and are not available for use for any other purpose. The members must also be members of the Privy Council. If the Ministry is defeated, on an important question, it places its resignation in the hands of the Crown or appeals to the Electorate. The Cabinet being a living organism, is constantly undergoing change, to meet the varied changes of time and circumstances. The informality of its proceedings has elicited much comment on the part of foreigners. Disraeli once said of it,—"That a Bill proposed by a Archangel in office would not conciliate an opposition in the majority." The head of the Cabinet

is the Prime Minister. He has been called the "Keystone of the Cabinet Arch." The Prime Minister chooses his own colleagues, subject to the approval of the Sovereign. Walpole was the first Prime Minister in the modern sense of the term. There is no Act of Parliament compelling a member of the Cabinet to hold a seat in Parliament; but by unwritten law a Minister, who could not obtain a seat in the House of Commons or did not hold a seat in the House of Lords, could not continue to hold office for many weeks. The Prime Minister receives no salary; but as first Lord of the Treasury, he receives £5,000 per annum. The Lord Chancellor, who presides in the House of Lords, receives a salary of £10,000 per annum. The duties of the Prime Minister are many and exacting. He has the supervision of several departments; he takes an active and leading part in debate; he has to watch the general trend of public opinion and assist the other members of the ministry, if so required, in the discharge of their respective duties. He is supreme among his colleagues, both in their appointment and dismissal. If he cannot work satisfactorily with a particular Minister in the business of government, he so reports to the Sovereign. The King, under such circumstances, would ordinarily dismiss the recalcitrant minister. In matters of ordinary routine, the Sovereign usually acts upon the advice of the Cabinet. While on the other hand, in matters of importance or in which a new departure of policy is proposed, it becomes the duty of the Prime Minister to inform the Sovereign fully and particularly on all points of the contemplated change. If the Sovereign refuses to accept the advice of the Cabinet, they then have to choose whether they will abandon the measure or tender their resignation. If the measure is one not materially affecting the best interests of the country they may yield to the opinion of the Sovereign or leave to him the opportunity of ascertaining whether he can find other servants who will accept his views. The following rule is laid down by Mr. Todd in his work on Parliamentary government in England:—"The right of a sovereign to dismiss his ministers is unquestionable; but that right should be exercised solely in the interests of the State, and on grounds which can be justified to Parliament. By the operation of this principle, the personal interference of the Sovereign in State affairs is restrained within appropriate limits. It is

prevented from assuming an arbitrary or self-willed aspect, and is rendered constitutional and beneficent. The Sovereign cannot, indeed, impose a policy, either upon his Minister, or his Parliament, but he can dismiss his Minister, and he can appeal to the country against the judgment of Parliament. George III. was strictly within his rights when he dismissed the Coalition (both in 1784 and 1807). William IV. was equally within his rights when he dismissed Lord Melbourne, and appealed to the country. In these several cases a great question of policy was raised, and determined by competent authority. In the one case (or, rather, in the first two cases), the action of the King was confirmed by the nation; in the other, it was reversed. Everything was done constitutionally and in order."

Mr. Gladstone in his able article, in the North American Review, entitled "Kin beyond Sea," observes:—"It is a cardinal axiom of the modern British Constitution, that the House of Commons is the greatest of the powers of the State. It is to the House of Commons that every act of government, performed by responsible ministers in the name and on behalf of the Crown, must be explained and justified, and by them that it must be ultimately approved. And the sole appeal from the verdict of the House is a rightful appeal to those from whom it received its commission."

The following extracts taken from four great authorities afford the best definition of the unwritten constitution of England, accessible.

The first is that of Lord Macaulay. "The Ministry," says the popular historian, "is in fact, a committee of leading members of the two Houses. It is nominated by the Crown; but it consists exclusively of statesmen, whose opinions on the passing questions of the time agrees, in the main, with the opinions of the majority of the House of Commons. Among the members of this committee are distributed the great departments of the administration. Each Minister conducts the ordinary business of his own office without reference to his colleagues. But the most important business of every office, and especially such business as is likely to be the subject of discussion in Parliament, is brought under the consideration of the whole Ministry. In Parliament the Ministers are bound to act as one man on all questions relating to the executive government. If one of them dissents

from the rest on a question too important to admit of compromise, it is his duty to retire. While the Ministers retain the confidence of the parliamentary majority, that majority supports them against opposition and rejects every motion which reflects on them or is likely to embarrass them. If they forfeit that confidence, if the parliamentary majority is dissatisfied with the way in which patronage is distributed, and the way in which the prerogative of mercy is used, with the conduct of foreign affairs, with the conduct of a war, the remedy is simple. . . . They have merely to declare that they have ceased to trust the Ministry, and to ask for a Ministry which they can trust."

The following description of the *modus operandi* of the "Cabinet," by Walter Bagehot, may prove, at least, interesting:—"The most curious point about the Cabinet is that so very little is known about it. The meetings are not only secret in theory, but secret in reality. The House of Commons, even in its most inquisitive and turbulent moments, would scarcely permit a note of a Cabinet meeting to be read. No Minister who respected the fundamental usages of political practice would attempt to read such a note. The committee which unites the law-making power to the law-executing power—which, by virtue of that combination, is, while it lasts and holds together, the most powerful body in the State—is a committee wholly secret. No description of it, at once graphic and authentic, has ever been given. It is said to be sometimes like a rather disorderly board of directors, where many speak and few listen—though no one knows."

That great parliamentarian, Gladstone, thus defines its powers:—"The Cabinet is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords and Commons. Upon it is concentrated the whole strain of the Government, and it constitutes from day to day, the true centre of gravity for the working system of the State, although the ultimate superiority of force resides in the representative Chamber." And upon the Cabinet "it devolves to provide that the House of Parliament shall legally counsel and serve the Crown, and that the Crown shall act strictly in accordance with its obligation to the nation."

Upon the power of the Sovereign to dismiss his Ministry that great authority states:—"There is, indeed, one great

and critical act, the responsibility for which falls momentarily or provisionally on the Sovereign; it is the dismissal of an existing ministry, and the appointment of a new one." Unconditionally entitled to dismiss the Ministers, the Sovereign can, of course, choose his own opportunity. He may defy the Parliament, if he can count upon the people. William IV., in the year 1834 (when he dismissed the Government of Lord Melbourne), had neither Parliament nor people with him. His act was within the limits of the Constitution, for it was covered by the responsibility of the acceding ministry."

The last is the greatest of all, for it is the matured judgment of a great Constitutional Sovereign, Queen Victoria. Writing to the Emperor Napoleon III., in explanation of the difference between the English and French system of government, the Queen remarked,—"I am bound by certain rules and usages. I have no uncontrollable power of decision. I must adopt the advice of a council of responsible Ministers, and these Ministers have to meet and to agree on a course of action, after having arrived at a joint conviction of its justice and utility. They have, at the same time, to take care that the steps which they wish to take are not only in accordance with the best interests of the country, but also such that they can be explained to and defended in Parliament and that their fitness may be brought home to the conviction of the nation." In this system, her Majesty proceeds to point out, she has an advantage of which the Emperor of the French is deprived:—"I can allow my policy free scope to work out its own consequences, certain of the steady and consistent support of my own people, who, having had a share in determining my policy, feel themselves to be identified with it."

With respect to the prerogative right of a Governor of a British Colony to dissolve the House of Assembly without the advice of his Council, New Brunswick affords a striking instance, in the case of the Prohibitory Liquor Act of 1855. The Hon. Mr. Tilley, at the time a member of the Government and Provincial Secretary of the Province, as a private member, and not on behalf of the Government, introduced in the House of Assembly, and succeeded in carrying through the Legislature, an Act prohibiting the importation, manufacture and sale of intoxicating liquors. It was carried in

the popular branch by the narrow majority of three. It went into operation on January 1st, 1856. Th result was what might have been expected under the circumstances. The attempt to enforce it proved a failure. Liquor was sold in all the two hundred taverns of the City and Por.. nd as openly, after the law came into force, as before. Able lawyers were retained to interpose every objection that technicality or chicane could devise to thwart its enforcement. The law was set at defiance and the people made it a matter of boast. After the lapse of a few months it became apparent the Act had become inoperative, and incapable of enforcement. The Legislatu.e had three years yet to run before its term would expire by lapse of time. The Hon. H. T. Manners-Sutton, the Lieutenant-Governor, sent a memorandum to his Min..ers, in which he stated that a continuance of the existing condition of affairs was fraught with peril to the best interests of the community, and called for immediate remedy. He further suggested a dissolution of Parliament, with a view to an expression of public opinion in favour of, or in opposition to, its repeal. The Ministers dissented and would not advise a dissolution. Further correspondence ended with like result. The Lieutenant-Governor at length said he never contemplated a dissolution of the Assembly without the concurrence of responsible advisers. He claimed that the Executive Council should either assume the responsibility for the proclamation of dissolution or that they should retire, and enable him to seek other advisers. Ministers still refused to comply with the Governor's demand. The Governor then directed the Provincial Secretary to prepare and countersign a proclamation dissolving the Assembly. The Provincial Secretary acted accordingly and in a few days after the Ministry resigned. In nine days after the Governor succeeded in forming a new Administration, who, agreeing with him in the necessity for an immediate dissolution of Parliament, decided to assume responsibility for the same.

The election that followed was the most exciting and bitter ever held in the Province. The Governor was denounced in every mood and tense. His act was characterized as tyrannical, unjust, and contrary to the principles of Responsible Government. As a result the prohibitionists sustained an overwhelming defeat. The City and County of Saint John sent six members, opposed to prohibition and for

the repeal of the Act. At an extra session of the Legislature, called immediately after, the Act was repealed in the House of Assembly, by a vote of 36 to 2, the late Hon. ~~Judge~~ Senator Wark and the Hon. R. A. McLellan, ex-Governor of the Province, voting for its continuance. Its repeal was carried by the unanimous vote of the Legislative Council. The conduct of the Governor was not only strictly constitutional, but evinced the sound judgment shown by his Honour in properly gauging public opinion, and in putting a termination to an unwise Act as soon as possible. The New Brunswick Legislature, during the session just closed, refused the passing of an Act, prohibiting the sale of intoxicating liquors, even for a temporary period, during the existing war, on the ground that public opinion had not sufficiently advanced to warrant the experiment.

In theory the King would seem to wield the powers inherent in absolute despotism. He is the source, or at least is so called, of honour and the fountain of justice; he summons, prorogues and dissolves Parliament; he appoints and dismisses Ministers; he receives, and holds, in law, the entire revenue of the State; he selects all great officers of Church and State; he declares war and proclaims peace; he makes treaties and administers justice; he pardons crime, or abates its punishment. And yet in practice every such act is done in conjunction with Ministers responsible for the act and its consequence. For all of these acts the Ministers are responsible to Parliament, and the Sovereign enjoys, in regard thereto, an absolute immunity from all consequences, under the well known maxim,—"The King can do no wrong." Regal right, by the Revolution of 1688, was expressly founded upon contract; and breach of that contract on the part of the King absolves the subject from all claims of allegiance. What might be the result, should the Crown attempt to usurp powers to which not justly entitled, is admirably emphasized by Gladstone, in 'Kin beyond Sea,' in the following terms:—"It would be an evil and perilous day for the Monarchy, were any prospective possessor of the Crown to assume or claim for himself final, or preponderating, or even independent power, in any one department of the State. The ideas and practice of the time of George III., whose will in certain matters limited the action of the Min-

isters, cannot be revived, otherwise than by what would be, on their part, nothing less than a base compliance, a shameful subserviency, dangerous to the public weal, and, in the highest degree, disloyal to the dynasty. Because, in every free State, for every public act, some one must be responsible, and the question is, Who shall it be? The British Constitution answers: The Minister, and the Minister exclusively. That he may be responsible, all action must be fully shared by him. Sole action, for the Sovereign, would mean undefended, unprotected action; the armour of irresponsibility would not cover the whole body against sword or spear; a head would project beyond the awning, and would invite a sunstroke."

On the other hand, the Sovereign is not treated as a mere instrument, an automaton, moved as he is moved. The King receives and exacts, in all important matters of State, especially in matters in connection with other nations, full information, and discusses with the Prime Minister or Minister in attendance the salient features of every important measure suggested and is enabled to express, if not to enforce, his opinion. The personal equation of the Crown is an important factor in the government of the nation. In more than one instance, during the reign of the great Queen, it has been said, she wielded an influence with her Ministers, that made for the welfare of her people as well as for international peace. In one case, it is claimed, by the legitimate exercise of "constitutional criticism" (during the Trent affair in 1861) she induced a modification in the terms of remonstrance, addressed in a despatch to the United States Government, which largely contributed to avert a threatened rupture between Great Britain and America. How admirably she discharged her duties as a Sovereign, finds expression in a speech delivered by Disraeli in 1871, at Hughenden. The great statesman said:—"A very erroneous impression is prevalent respecting the duties of a Sovereign of this country. Those duties are multifarious; they are weighty; they are incessant. I will venture to say that no head of any department of the State performs more laborious duties than those which fall to the Sovereign of this country. There is no despatch received from abroad, nor any sent from the country, which is not submitted to the Queen; the whole of the national administration of this country greatly depends

upon the sign-manual; and of our present Sovereign it may be said that her signature has never been placed to any public document of which she did not approve. Cabinet councils . . . are reported and communicated on their termination by the Minister to the Sovereign, and they often call from her remarks that are critical, and necessarily require considerable attention," . . . and "such complete mastery of what has occurred in this country, and of the great, important subjects of State policy, foreign and domestic, for the last thirty years," is possessed by the Queen, that "he must be a wise man who could not profit by her judgment and experience."

The extraordinary occasions, where the King acts wholly on his own responsibility, are thus summarized by Mr. Sydney Low:—"If the King has reasons for believing the majority in Parliament no longer represents the wishes of the majority of the Electorate, he may require the Prime Minister to seek a fresh mandate from the nation; or he can send for the leader of the opposition and appeal to the country on his behalf. On the other hand the Sovereign may refuse a dissolution. When a new Parliament meets, the King decides which of the leaders of the predominant party he will send for and ask to construct a Cabinet; while when a Ministry changes, the whole authority of the State returns into the King's hands. Over and above this, the Crown provides that "unity" which is the "soul of government." The King, in Council, is the Executive, the King in Parliament is the Legislature, the King in his Courts administers justice. Thus the Crown binds together every department in the State, while it is the strongest link which unites the Colonies to the Mother Country. Above all, the Crown is permanent, while Ministers and Parliaments come and go."

Well has it been said by Mr. Chambers,—"The sovereign is no mere figurehead; he is not unfrequently the compass of the Ship of State, without which the man at the wheel would steer in vain and the vessel run on to the rocks."

Two great evils had to be grappled with and overcome to insure the full benefit sought to be effected by the Bill of Rights, that is to say—the need of parliamentary reform, and the bribery of Members. In 1793, in a House of Commons of 558 members a majority of 354 was returned by less than 15,000 electors. A large portion of these were returned on

the nomination or recommendation of the Government and private patrons. On a particular occasion the younger Pitt, in tones of righteous indignation, exclaimed,—"This House is not the representative of the people of Great Britain; it is the representative of nominal Boroughs, of ruined and exterminated towns, of noble families, of wealthy individuals, of foreign potentates." In the early part of the reign of George III., in 1766, Lord Chatham, the elder Pitt, was a no less strenuous advocate of parliamentary reform. With the full weight of his powerful eloquence he stigmatized the Borough representation as the rotten part of the Constitution. "It cannot," he exclaimed, "continue the century; if it does not drop, it must be amputated. Either the Parliament will reform itself from within, or be reformed with a vengeance from without." Direct gifts of money to members were also freely resorted to by Ministers, and, bribery, it is said, was reduced to a system, during his tenure of office, during the reign of George II., by Sir Robert Walpole, and under the regime of Lord Bute, during the reign of George III. The time, however, was not yet ripe for parliamentary reform. It was not until 1832, the Great Statute, the Reform Bill of 1832, called by some,—"The Great Charter of 1832," was passed under the Whig Ministry of Lord Grey, who had faithfully advocated Reform for forty years. It was passed after defeats in both Houses of Parliament, and only after the threatened creation of Peers. By this Statute, 56 rotten Boroughs, returning 111 members, were swept away. For the purpose of illustration some of these Boroughs may be mentioned. At Tavistock the voters numbered only ten. At Gatton, only seven; at Old Sarum there was neither house nor inhabitant, in the Borough. At Midhurst, the constituent body consisted of 118 stones, denoting where the same number of burgage tenures were to be found. At Castle Rising two houses returned two members to Parliament. While Birmingham, Manchester, and Liverpool, with about fifteen thousand dwellings apiece, sent no representatives to Parliament. In the early part of the nineteenth century it was shown that seventy members were returned by thirty-five Boroughs, with practically no electors; that ninety members were returned by forty-six constituencies, each of which had less than fifty electors; and that thirty-seven members were returned by nineteen Boroughs

with less than a hundred voters each. Many of these Borough seats were for sale by the Burgesses, and were known as pocket or rotten Boroughs, and the purchasers could vote as they pleased. Many of the Boroughs publicly advertised themselves for sale. It became subject of complaint, that by competition of wealthy merchants and Indian Nabobs, the price of seats had risen inordinately. Lord Chatham announced publicly, that with foreign gold they had forced their way by such a torrent of competition as no private fortune could resist. Where the seat could not be secured by direct purchase enormous sums were spent in bribing the Electorate. In 1768 the contest for Northampton cost each of the candidates £30,000. In 1807 the joint expense of the two candidates for Yorkshire is said to have been £200,000. The complicity of the Crown, when bribery became a part of the science of government, is more than hinted at, in the corruption of the Electorate. In 1779, George III. wrote to Lord North,—"If the Duke of Newcastle requires some gold pills for the electors, it would be wrong not to satisfy him," and it is said, that there is abundant proof that the King put large sums at the disposal of his Ministers for this purpose. In view of what was subsequently accomplished by the Reform Bill of 1832, called by many a second Magna Charta, how factious seems the speech of Sir Robert Peel, one of its most uncompromising opponents,—"Should this Bill pass," he exclaimed, "there would be established one of the worst despotisms that ever existed. We would have a Parliament of mob demagogues—not a Parliament of wise and prudent men. Such a Parliament has brought many happy countries to the brink of destruction." And, pray, who were the demagogues that were urging forward the nation to its utter ruin and demolition? None other than Lord Grey, Lord Brougham, Lord John Russell, Lord Durham, the author of the Magna Charta of Canada, Lord Melbourne, Lord Palmerston, Sir James Graham, and Mr. Stanley, afterwards Lord Derby, all historic names, each the peer of Peel or Wellington.

Bribery, not only among the Electorate, but graft on the part of those intrusted with the sacred duty of directing the affairs of state, is the crying evil of the day, and that, too, in our very midst, permeating and corrupting all classes from the highest to the lowest. The shocking disclosures made before Public Accounts Committees, as also, before

Royal Commissions, so revolting and bare-faced, smirching the reputations of our public men, indicate the depth of infamy to which we have already fallen. If unchecked, this cankerous growth will surely sap the vitality of the body politic of our fair Dominion. Already it has caused the blush of shame to mantle the cheek of every patriotic Canadian. In the words of Lord Chatham,—"Either Parliament will reform itself from within, or be reformed with a vengeance from without."

SILAS ALWARD.

St. John, N.B.

COMPANY BY-LAWS.

"And considering the large and increasing sums which are now constantly being invested both by Canadians and by others in enterprises in this Country, organized as joint stock companies, any other rule would be so disastrous as to be intolerable. Who would invest in shares the value of which might be at any time impaired or even practically destroyed by a by-law passed from 'time to time' in the language of sec. 80 (Dominion Act) by a majority of a Board of Directors, interfering with or restricting their negotiability after the manner of other property?" Per Mr. Justice Garrow in *In re Jacob Y. Shantz.*[1]

"Had it been proven that McKain at the time he accepted the transfer of the stock had notice of the company's by-laws, the company would have been warranted in refusing to enter a transfer of the three shares to McKain on its books; but it is not questioned that McKain purchased and paid for the stock without notice or knowledge of any by-law creating a lien or charge in favour of the company to secure the indebtedness due to it by the holder of this certificate for fully paid up stock?" Per Mr. Justice Macmahon in *In re McKain and Canadian Birkbeck Co.*[2]

These comments cast such doubt upon the force and effect of a company by-law that a study of its origin and nature is worth consideration. With due respect for the learned judges who made these remarks, it is submitted that they are not supported by statute or authority. The companies, whose by-laws were considered, were incorporated under Dominion statutes. It may be stated that the by-laws of companies under statutes of the Dominion and the Provinces of Ontario, Quebec, New Brunswick, Manitoba and Prince Edward Island have similar authority. The other provinces have followed the English legislation of 1862 or later, and the regulations of companies there created are not the subject of these remarks.

There are two well defined kinds of companies under the law of England—common law companies created by letters patent, and statutory companies. The Acts of 1862, sec. 4,

[1] (1911) 23 O. L. R. 544, at pp. 552.
[2] (1904), 7 O. L. R. 241, at p. 247.

and 1908, sec. 1, recognized the possible existence of companies differing in nature from either of these, created under a deed of Settlement or Articles of Association, but these sections also provide that such companies, if composed of more than twenty persons, shall be illegal, unless registered under the Act then in force which controls their activities. By the Canadian system, companies are created by Private Acts of Parliament or letters patent issued under general Acts which have similar effect. In the United Kingdom incorporation is effected by filing a Memorandum of Association and Articles of Association which consist of the regulations for the conduct of the affairs of the company. To fully understand the control of Canadian companies, it is necessary to study the common law company as well as the existing statutory company of the United Kingdom as it at present exists.

The Canadian system is a development of the common law company by statute. The first statute authorizing the incorporation of companies by letters patent was passed in 1864 (27-28 Vict. ch. 23), and it has been followed with some modifications to the existing Dominion Companies Act and similar Statutes of the provinces referred to. Sections 80 and 81 of the Dominion Act are in similar wording to sec. 7 of the Act of 1864. That statute superseded ch. 63 of the Consolidated Statutes of 1859, which consolidate the statutes respecting trading companies prior to that time commencing with 13-14 Vict. ch. 28. The origin of the Act of 1864 is difficult to discover, but it may be safely said that it followed similar legislation of the States. The English Act of 1844 (7-8 Vict. ch. 110, sec. 25) authorized companies "to make from time to time at some general meeting of shareholders specially summoned for the purpose, by-laws for the regulation of the shareholders, Members, Directors and Officers of the Company, such by-laws not being repugnant to or inconsistent with the provisions of this Act or of the deed of settlement of the company." The word "by-law" was not used in the English Act of 1856 (19-20 Vict. ch. 47), the word regulation being adopted as it is in subsequent legislation. Support for the contention that the origin of Dominion company law must be traced to that of the common law company, is given by the use of the word 'by-law' to signify the body of regulations of the company. It is significant that this word was used with respect to common law companies, and it

is not used in the Acts of 1856, 1862 or 1908. Moreover, this word was used in the earliest Canadian legislation, and, as no definition was given, it may be inferred that the word was intended to have its then accepted meaning. The Canadian statutes now in force do not define the word 'by-law' or indicate the effect of such an enactment. The English Act (1862 sec. 16), 1908 sec. 14, declares that the articles of association when registered shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto.

In applying to a consideration of the by-laws of Canadian companies decisions of the Courts of the United Kingdom in cases which arise out of the effect of Articles of Association, an essential difference in their nature should be well in view. Articles of Association are public documents, and all persons dealing with a company so regulated are held to have notice of them. On the other hand, the by-laws of Canadian companies are not public documents. They are known only to the company, its officers and shareholders. The public documents of such companies are the statute under which the company is incorporated, the letters patent and such by-laws and statements as the company is required to file. The effect of public documents was pointed out in the *Birkbeck* case, but this difference was not noted.

Then turning to the decisions raised by the interpretation of common law company 'by-law,' we are confronted with the difficulty that in many of them the devolved bit of sovereignty which is embodied in municipal incorporation is met. The Hudson Bay Company, the East India Company and many others of that class had governmental powers as well as those of a trading company. Moreover, the cities and boroughs of England were established under Charters of the same nature, and have the usual incidents of municipal government.

The word 'by-law' is used in an entirely different sense with respect to municipal and other similar corporations. There it signifies a regulation which is a bit of devolved sovereignty and is not based on contract as a 'by-law' of a company undoubtedly is. A by-law of a municipal corporation regulates the action of all persons living in the municipality irrespective of contract. But the by-laws of a company have effect by force of the contractual relation existing between the shareholders *inter se* and the company. For this

reason the cases—*Virgo* v. *City of Toronto, A. C. Jonas* v. *Gilbert*,[3] and *Regina* v. *Flory*,[4] cited as authorities in the *Shantz* case have little application in considering company by-laws.

A consideration of the cases which arose with respect to common law trading companies with objects similar to those incorporated under the Canadian Companies Acts encounters a further difficulty. The attitude of the Courts with respect to the mutual rights and obligations constantly developed. It is fair, however, to say that these mutual rights and obligations did not change in nature. The discussion by the Courts of the relation of members to each other and to the company has refined and elaborated the legal principles underlying these subjects, and this development has taken place side by side with similar growth in other branches of the law. A contract at the time when the principle of consideration had not developed, was a contract as held by the Courts to-day, but the consequences may have been different from what they are now held to be. While the decisions of old cases may shed light on legal discussions of to-day, this growth of the law should be well in view.

The change in the decisions with respect to the interest of a shareholder is pertinent. In *Child* v. *Hudson Bay Company*,[5] it was in effect held that the legal interest in the property of the company was in the company as trustee for the several members. In *Bligh* v. *Brent*,[6] it was contended that the assets of the company being realty, the shares should be so considered. The doctrine just referred to was superseded and it was held that corporate property should be considered as that of a partnership. The modern doctrine is set out in *Borland's Trustee* v. *Steel Brothers & Co., Limited*,[7] where it is held that a share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sec. 16 of the Companies Act, 1862 (Act 1908, sec. 14.)

Blackstone (1 Commentaries 475) enumerates the incidents annexed to a corporation as soon as it is created, and

[3] (1881) 5 S. C. R. 356.
[4] (1889), 17 O. L. R. 715.
[5] (1723) 2 P. Wms. 207.
[6] (1836) 2 Y. & C. 268.
[7] [1901] 1 Ch. 279.

the fifth is as follows: 'To make by-laws or private statutes for the better government of the corporation, which are binding on themselves, unless contrary to the law of the realm, and then they are void.'

The authority to make by-laws was considered in *Bligh* v. *Brent* (*supra*), as follows: "A corporation has an implied power to make by-laws; but where the charter gives the company a power to make by-laws they can only make them in such cases as they are enabled to do by charter; for such powers given by the charter imply a negative, that they shall not make by-laws in any other case."

There can be no doubt but that the ancient cases decided that the by-laws of a corporation form part of the charter under which they were made. Grant in his work on Law of Corporations published in 1850, p. 80, dealing with *Tucker* v. *The King*,[8] states as follows:—

'Where a by-law is duly made in accordance with the provisions of the charter, in a matter within the competence of the corporation to regulate, the by-law, to some purposes, may be considered as forming a part of the charter in pursuance of which it has been made; thus where a defendant to a *quo warranto* information insisted in his plea on the charter, but in his rejoinder rested his defence upon a by-law, it was held, by the House of Lords, on the unanimous opinion of six of the judges who were desired to assist the house, that there was no departure."

Grant, p. 76, summarizes the effect of by-laws as follows: 'The by-laws of a corporation are always obligatory on all the members, and each member is bound to take notice of them: for every one within the scope of the by-laws is considered as having given his consent to them,' and reference is made to *Vinters Company* v. *Passey*,[9] and *R.* v. *Trevethan*.[10]

It is unnecessary to refer to further authorities as they indubitably held that by-laws were binding on all members of the corporation. It follows that this binding effect must arise from a contract which each member is deemed to enter into when he becomes a shareholder.

The mutual covenants entered into *inter se* between the shareholders of a company are embraced in the statute under

[8] (1742) 2 Br. P. C. 311.
[9] 1 Burr. 239. 250. T. Jones 145.
[10] 2 B. & A. 339.

which the company is created, the letters patent and the by-laws. In the case of English companies, these documents consist of the statute, the Memorandum of Association and the Articles of Association. The Memorandum may be said to be equivalent to the letters patent and the Articles to the by-laws. There is, however, one important difference, as indicated above, to be dealt with. The statute is a public document, and the company and all who deal with it are bound by its terms. The same applies to the Memorandum of Association and the letters patent. But the Articles of Association and the by-laws differ in the important feature that the Articles are public documents and the by-laws are not. While both bind all members, the by-laws do not bind strangers who deal with the company, without express notice. In *Mahony* v. *East Holyford Mining Co.*,[11] Lord Hatherley said: "Every joint stock company has its Memorandum and Articles of Association; every joint stock company, or nearly every one, I imagine, (unless it adopts the form provided by the statute, and that comes to the same thing) has its partnership deed under which it acts. Those Articles of Association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents."

This question is dealt with by MacMahon, J., in *Re McKain and Canadian Birkbeck Co.* (*supra*), and a reference is made to Buckley where it is stated that 'after much difference of opinion, it must be taken to be settled, that persons dealing with a registered company are bound to acquaint themselves with the limits imposed by the deed of settlement or articles of association on the authority of the directors; yet strangers to the company dealing with directors cannot be affected by by-laws, which under the articles be from time to time made and varied by the directors, unless notice of such by-laws is proved.' This is a comment upon Article 71 Table A. of the Act of 1908 (Buckley, 9th ed., 636), which provided that 'the business of the company shall be managed by the directors . . . subject nevertheless to any regulation of these Articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.' The 'by-laws' indicated by

[11] (1875) L R. 7 H. L. 869. at p. 893.

Buckley are the 'regulations,' referred to, 'as may be prescribed by the company in general meeting.' Such 'by-laws' or 'regulations' stand in the same position as 'by-laws' of a Canadian company.

The subject is clearly dealt with in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*.[12] Lord Halsbury:—"Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if those public documents, which everyone has the right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company, would only shew this, that by some regulations of their own, what Lord Hatherley (in *Mahony* v. *East Holford*) described as their indoor management, they were capable, if they had thought right of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document sealed with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description."

The authorities and citations referred to in the *McKain* case were cases where the questions under discussion arose between the company and a stranger not a shareholder. But by-laws are required to be passed upon by the shareholders, and they are all bound thereby. This binding effect arises out of the contract entered into by becoming a shareholder.

In the *McKain* case the shares of the company were subject to a lien in favour of the company for any amount due by a shareholder to the company. The share certificate expressly set out 'that the articles of the company are part and parcel of this contract.' A shareholder transferred shares subject to a lien of which the transferee was not aware. On an application to compel registration of the transfer, relieved of the lien, it was held that the transferee, not having express notice of the by-law, was not bound thereby.

[12] [1895] 1 Ch. 629.

This decision is open to two criticisms. The rule laid down in the above cases that shareholders are bound by mutual contracts *inter se* set out in the statute, letters patent and by-laws, is set aside. It is the logical consequence of this decision that a shareholder may relieve himself of his obligation by a transfer of his shares, and that a contract embodied in definite documents may be varied by an assignment. Moreover, a rule which is applicable to strangers dealing with the directors of a company is applied to a transaction between a shareholder and a stranger. The transaction which gave rise to the question in the case arose in the transfer of the shares. This was not between the company or the directors, or the company and a stranger, but between a shareholder and a person who by the transaction became a shareholder. Undoubtedly a stranger under such circumstances may set up an estoppel on an application to register a transfer, but no such grounds appear in the case.

In the *Shantz* case the certainty of company by-laws is reflected on because they are liable to be amended from "time to time." Section 80 of the Dominion Companies Act authorizes the Directors from 'time to time' to make by-laws as to matters therein particularly set out. And sec. 81 provides that the directors may from 'time to time' repeal, amend or re-enact such by-laws, subject to defined limitations.

It should be pointed out that while the shareholders and the company have a contractual relation which is embodied in the statute, the letters patent and the by-laws, this contractual relation is not fixed, but may be varied in the manner provided by these instruments. It is an essential element of the contract that it may be varied.

Wright v. *the Incorporated Synod of the Diocese of Huron*,[13] although not dealing with company by-laws, nevertheless sheds very considerable light upon the subject. The question in that case related to a by-law of trustees passed under the provisions of the Clergy Reserve Act. Chief Justice Ritchie says as follows: "On the other hand, may it not with much more force be said, that inasmuch as the trust was for the support and maintenance of the clergy, in such a manner as shall from time to time be declared by any by-law or by-laws to be from time to time passed for that purpose, the plaintiff had no right to assume that the disposition of the fund would not be from time to time altered as the

[13] (1884) 11 S. C. R. 95.

exigencies of the diocese, and the maintenance and support of the clergy then might, in the judgment of the synod, require." Strong, J.—"What, then, was meant by the founders of this charity, for such in law it is, when they declared that it should be applied to the purposes designated in such manner as should be declared 'from time to time' by by-laws to be 'from time to time' passed? It is plain that this must depend entirely on the meaning to be attributed to the words 'from time to time,' an expression, it will be observed, twice repeated. Did the settlors, by that expression, intend to confer on the members the power to create absolute vested interests in the fund or in its income, or must it be taken to mean that such dispositions as the synod should make, should be by by-laws at all times subject to repeal or alteration? I, therefore, come to the conclusion that the terms of this trust made it incumbent on the trustees to reserve to themselves such power as should enable them to be free to act at all times, and did not warrant any disposition of the income which should not be subject to be re-called or altered by any by-laws which the synod might think fit to pass."

The rule deducible from this case appears to be that where the contract provides for changes in its terms, such changes may be made.

This subject is also dealt with in *Allen* v. *Gold Reefs of West Africa*.[14] Lindley, M.R., at p. 671:—"The articles of a company prescribe the regulations binding on its members Act 1862, sec. 14 (1908, sec. 16). They have the effect of a contract; but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (Act 1862, secs. 50-51, Act 1908, sec. 13); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: *Walker* v. *London Tramways Co.*[15]

The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's Memorandum of Association. Wide, however, as the language of sec. 50 Act 1862 (sec. 13, 1908), is, the

[14] [1900] 1 Ch. 656.
[15] (1879) 12 Ch. D. 705. See, also, *Mallinson* v. *National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200.

power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed." Lindley, at p. 673:—"It was urged that a company's articles could not be altered retrospectively, and reliance was placed on Rigby, L.J.'s, observations in *James* v. *Buena Ventura Nitrate Grounds Syndicate*.[17] The word "retrospective" is, however, somewhat ambiguous, and the concurrence of Rigby, L.J., in *Andrews* v. *Gas Meter Co.*,[18] shews that his observations in *James* v. *Buena Ventura* are no authority for saying that existing rights founded and dependent on alterable articles, cannot be affected by their alteration. Such rights are in truth limited as to their duration by the duration of the articles which confer them."

In the case just referred to, a change of the articles giving the company a lien on paid-up as well as shares not fully paid, for debts due the company, was upheld, although there was but one shareholder holding fully paid shares, on the grounds that the change was *bona fide* and in the interest of the company.

The authority of the directors to pass by-laws has been considered in few Canadian cases, and these cannot be said to develop the subject in principle and authority. In *Re Imperial Starch Co.*,[19] may be referred to. After commenting upon the statute authorizing the directors to make by-laws to regulate 'the transfer of stock,' and inferentially deciding that authority to regulate does not include authority to restrict, the case is decided upon the authority of *Re Panton and Cramp Steel Co.*,[20] which decides quite a different question, namely, that in the absence of a by-law the transfer of fully paid shares may not be restricted, and it was held that the resolution closing the transfer books of the company was invalid. The result may have been supported on the ground that the by-law in consideration was not *bona fide* in the interests of the company.

[17] [1896] 1 Ch. 466.
[18] [1897] 1 Ch. 361.
[19] (1905) 10 O. L. R. 22.
[20] (1904) 9 O. L. R. 3.

This question was also dealt with in the *Shantz* case. The judgment in the Divisional Court,[21] appears to be based on three grounds: (1) that authority to regulate does not include authority to restrict; (2) that shares are personal property and the rule against limitation of alienation applies, and (3) distinguishing *In re Coalport China Co.*,[22] that the by-law did not create a contract as did the article of association in that case.

The first ground appears to be inconsequential. It is based on the authority of *City of Toronto* v. *Virgo*.[23] That case decided that a municipal by-law passed under a statute giving authority to regulate did not include authority to restrict. Municipal by-laws are passed and enforced under the authority of devolved sovereignty. They are not matters of contract. Different rules are laid down for their construction. They are strictly limited to the authority conferred and in no way can the intention of persons subject to them affect their force, nor may contractual obligations arise from them. Contracts on the other hand are construed to give force to the intention of the parties thereto. It may be that this is a proper legal conclusion, but the reasons given therefor are not applicable.

The second ground appears equally inconclusive. Section 45 of the Dominion Companies Act provides that 'the stock of the company shall be personal estate.' Section 22 of the English Act 1908, similarly provides that the shares or other interests of any member shall be personal estate. Section 22 of the Act of 1862 is in the same words. In numerous English cases the right to restrict the transferability of shares appears to be unquestioned, and it is strange that if the rule against the prohibition of the alienation of personal property is applicable, it was not referred to in any of these cases.

The same provision is in the Canadian Act of 1850, 13 & 14 Vict. ch. 28, sec. 10, and in the Consolidation of 1859, ch. 63, sec. 20, and in the Act of 1864, 27 & 28 Vict., ch. 23, sec. 9.

Indeed, these words may be said to have an historical origin. In *Child* v. *Hudson's Bay Co.* (*supra*), a judgment

[21] (1910) 21 O. L. R. 153.
[22] [1895] 2 Ch. 404.
[23] [1896] A. C. 88.

of Lord Macclesfield, it was held that the company was possessed of its property in trust for the shareholders, and it followed that a share was real estate or personal according as the corporate property was real or personal. Shares of the New River Water Company in several cases were held to be real property and descended to the heir. It was not until *Bligh* v. *Brent* (*supra*), that the modern view was established and corporate property was considered, as that of a partnership, personal. It seems to be apparent that this widening of the Act of 1862 was adopted to set such questions at rest and establish shares as personal property. It is pointed out by Meredith, J.A., in his dissenting opinion, that company shares cannot be considered as personal property of the nature of pigs, sheep or cows so as to make the rule prohibiting the restriction of alienation of personal property applicable. Shares are personal property as rights under a contract. There are well defined rules upon restrictions of the assignability of contracts, but it cannot be contended that they are applicable to contracts such as those existing under company documents. In *Entwistle* v. *Davis*,[24] it was decided that shares of a company incorporated in 1856 were not an interest in the real estate of the company for the purposes of a charitable bequest under the Mortmain Acts.

The third ground appears to be equally elusive. The by-law in question was passed at the organization meeting of the company. All the shares, excepting those applied for on the issue of the letters patent, were issued after it was passed, and, as the incorporators enacted the by-law, all the issued shares of the company were subject to it. In referring to the *Coalport China* case, it is stated that the Articles of Association were a binding contract. The inference is that the by-laws of a Dominion company have not the force of a contract. It may be that shares of such a company are of a different nature from those of a company under the English Act. If so, it is difficult to see the legal principles upon which this difference is based. The cases above referred to which considered the force of the by-laws of a common law company declared them to be binding on all the shareholders. How can they bind unless it be contractually.

On appeal to the Ontario Court of Appeal the only question considered was whether it was competent for a company

[24] (1867) L. R. 4 Eq. 272.

under the Dominion Act to pass such a by-law. Moss, C.J.O., did not refer to authorities and decided upon general principles, agreeing with the reasons given by the Divisional Court. Garrow, J.A., cited cases arising out of municipal by-laws, and some of the cases above referred to. The English authorities on similar questions are set aside because of the binding effect of deeds of settlement and articles of association, and company by-laws are held to be of questionable authority.

The subject was again dealt with by the Ontario Appellate Division in *Re Belleville Driving and Athletic Association*,[25] and not further advanced, the Court being bound by the decision in the *Shantz* case. However, there is a suggestion in this case which should be referred to. "If it is desired by the incorporators of a company that restrictions should be placed upon the rights of shareholders to transfer their shares, it would be a simple matter to have a provision of that nature embodied in the letters patent." This leads to a veritable *cul de sac*. Under the Ontario Act such a provision is expressly prohibited to companies other than Private. Under the Dominion Act it is nullified by the *Shantz* decision. Section 8 of that Act provides that 'the application shall be in accordance with Form A. in the schedule to this Act and may ask to have embodied in the letters patent then applied for, any provision which could under this Part be contained in any by-law of the company or of the directors approved by a vote of shareholders.' The argument before the Ontario Court of Appeal in the *Shantz* case was limited to one general question, viz., the power of the appellants, a company incorporated under the Dominion Companies Act, to restrict the transfer of fully paid-up shares in the company, and the decision was that it was not competent of the company to pass a by-law having this effect. Section 8 of the Act above quoted is the sole section authorizing such a provision in the letters patent, and the provision is limited to that which may be contained in a by-law. The *Shantz* case decides that such a by-law may not be passed. It may be that the attention of the Court was not directed to this section and the suggestion referred to was inadvertently made. However this may be, it appears that under the authorities as they now stand, in no case may the transferability of shares of a Dominion Company be limited.

[25] (1914) 31 O. L. R. 79.

The business effect of the decision seems to underlie reasons for judgment. The result, however, seems questionable. It is undoubtedly in the business interests of many companies that the transferability of their shares should be limited. Moreover, the rule of the Stock Exchanges which prohibits the listing of shares so limited is a general protection to the public. Protection to the investing public is less likely to be given by fictitious limitations of companies than by a well-defined series of decisions which shew to the investor that his best security lies in an investigation of the shares offered.

There are two principles laid down in *The North-West Electric Co.* v. *Walsh*,[26] which have general application beyond the questions there raised. "And in the third place the by-laws and resolutions were bad upon the general common law principle that a by-law must not be unreasonable or work unequally towards members of any one class affected by it." "The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, while evidence of the statement, was not conclusive evidence of it. . . . Apart from the operation of the doctrine of estoppel, I know of no reason why any holder of stock which has not been paid for in full should not be liable for the balance due in respect of it." *Bloomenthal* v. *Ford*,[27] was referred to. The first gives the test of validity of a by-law which otherwise is within the competency of the company, and the second a clear view of the law applicable in the *McKain* case. The share certificate is not the whole contract. No doubt the company may be estopped by express statements therein, but the whole contract embodied in the statute, the letters patent and the by-laws as well as the certificate governs.

A pertinent statutory provision seems to have escaped attention in the consideration of the above cases. Section 30 R. S. C. 1906, ch. 1, which is as follows:—

'30. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall

(b) vest in a majority of the members of the corporation the power to bind the others by their acts.'

This legislation first appeared in 1849, 12 Vict. ch. 10, sec. 56 (24th clause.) It was carried forward in the Con-

[26] (1898) 29 S. C. R. 33.
[27] [1897] A. C. 156.

solidation of 1859, ch. 5, sec. 6, clause 24th, and has been embodied in the consolidations since that time. The section is not applicable to private Acts incorporating companies alone. Section 2 of the Interpretation Act makes its provisions applicable to every Act of the Parliament of Canada now or hereafter passed.' Under sec. 5 of the Companies Act, a company created thereunder is expressed 'to be a body corporate and politic.' No intricate analysis of clause (b) is necessary. The word 'bind' has been interpreted as synonymous with 'charge' and 'oblige.' That is, it connotes a contractual obligation. It remains to determine what is meant by the word 'acts.' The use of the word 'majority' in this sub-clause, while it may have further extension, clearly includes those acts which are determined by the 'majority' and 'the others,' namely, deliberations in general meeting. The confirmation of by-laws passed, amended and repealed are, by sec. 81, matters for consideration at a general meeting. It follows that a contractual obligation by the members *inter se* is created by a by-law. Undoubtedly the wording of the sub-clause is not precise in leading to the above conclusion, but it is difficult to see what different result can be arrived at.

The conclusions to be drawn are obvious. Shareholders stand towards each other and the company in a contractual relation. The contract is embodied not only in the share certificate but also in the statute, the letters patent and the by-laws. Moreover, the contract may be varied from time to time in the manner provided by these documents.

Under sec. 81 of the Dominion Act, the directors have authority to repeal, amend or re-enact any by-law which may be enacted under sec. 80. Such repeal, amendment or re-enactment has force and effect immediately without confirmation by the shareholders, but it remains in force only until the next annual meeting unless confirmed thereat.

This provision may not be as wise as that of the English Act which requires confirmation before the change becomes effective. Nevertheless, unless it can be shewn that a by-law so enacted is not *bona fide*, not in the interests of the company or not undue with respect to a minority, it is in force and binding on all shareholders.

THOMAS MULVEY.

MUNICIPAL CRIMINAL LAW. A REPLY.

The learned Editor of the C. L. T. deemed it his duty to dissent from the opinion expressed in my former article on 'Municipal Criminal Law."[1] When I wrote my article I had no desire to enter into any argument over the subject therein discussed, but since the learned Editor referred the reader to certain pages of his work on Canada's Federal System, I feel justified in making an examination of the pages referred to by him.

On page 582 of the learned Editor's said work, he says, 'although the Dominion parliament has *apparently* power to prohibit and punish any act as a crime, except a mere breach of a provincial law validly made under one of the clauses in sec. 92.'

I object to the word "*apparently.*" I submit that there is no doubt that the Parliament has unlimited power to make any act a crime. It is wholly and solely for the Parliament to say what acts shall be crimes in Canada, and the Privy Council held that it is Criminal law in its *widest* sense that is reserved by B. N. A. Act (1867), sec. 91 (27), for the exclusive legislative authority of the Parliament of Canada. *Atty.-Gen. for Ontario* v. *Hamilton St. R. W. Co.*[2]

I submit that there can be no doubt as to what their lordships meant when they rendered the above decision. However, the learned Editor continues, 'and although it cannot be denied that Parliament can draw into the domain of criminal law any act which has hitherto been punished only under a provincial statute, it *does not follow* that when Parliament has drawn an act into the domain of criminal law, the right of the provincial legislatures to pass laws in regard to such an act necessarily ceases. Provincial legislatures may still, in many instances, legislate against the same act in another aspect.'

I submit that this is the very reverse of the law, and the first case[3] cited by the learned Editor on page 329 of his work so decides. There Graham, E.J., said, "When Parliament has drawn an act into the domain of criminal law, the

[1] 35 C. L. T. 406.
[2] [1903] A. C. 524.
[3] *Thomas* v. *Haliburton* (1893), 23 N. S. R. at p. 73.

right of the provincial legislature to pass laws in regard to such act necessarily ceases."

This is in perfect accord with the opinion expressed in my former article, and I submit that it is good law, notwithstanding the fact that the learned Editor says that it is impossible to accept that view.

The next case mentioned is *Dallaire* v. *La Cité de Quebec*,[4] which arose over a charge of vagrancy under a municipal by-law of the city of Quebec. Langelier, A.J.C., decided that "when the Parliament of Canada has declared an act criminal, has laid down the procedure to be followed for punishing the act and named the tribunal which shall have jurisdiction over it, a provincial legislature has no right to make a statute to punish the same act, and to name the tribunal which shall take cognizance of it, as well as the procedure to be followed in order to punish it."

His lordship also held that, "this is not a law the object of which is to maintain good order in the City of Quebec, but it is a law of a general character, and one which declares criminal all the acts which fall under the term vagrancy. It is, then, a true criminal law, and consequently one within the exclusive jurisdiction of the Federal parliament. The Quebec legislature has no power to pass laws declaring criminal all those acts of vagrancy which have already been declared such by the Criminal Code." See Code secs. 238, 239.

I now wish to make the bold statement that there is not one single case on record which has decided anything contrary to my contention. Let us examine a few cases which at first blush seem to be at variance with this statement. The learned Editor, on page 583 of his said work, quotes certain portions of the judgment of Taschereau, J., in *Huson* v. *Township of South Norwich*:[5] "There are a large number of subjects which are generally accepted as falling under the denomination of police regulation over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the Federal parliament for the dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion; but *until* it does so, the provinces have, each for itself, the same power."

[4] (1907) 32 Que. S. C. 118.
[5] (1895) 24 S. C. R. at p. 160.

Now if you will take time to read this case you will see that the above remarks were not necessary for its decision; therefore, they are merely *obiter dicta*, not a decision. You will also notice that Taschereau, J., said that *until* the Dominion parliament had legislated upon Sunday observance the provinces had power so to do. The Ontario Legislature tried it. They passed ch. 246 of the R. S. O. 1897, being "An Act to prevent the Profanation of the Lord's Day." At this time the Dominion parliament had not enacted any similar law and according to the *obiter dicta* of Taschereau, J., this Act would have been *intra vires* of the province, but the Privy Council held that it was *ultra vires*. See *Atty.-Gen. for Ontario* v. *Hamilton St. R. W. Co.*[6]

Obiter dicta are very useful to help one in arriving at an opinion of what the law is, but I submit that they are of no value when in conflict with decided cases on the exact point.

The learned Editor, also, at pages 583-585 of his said work quotes from the argument of 'Mr. Horace Davey as he then was in his argument before the Privy Council in the case of *Hodge* v. *Regina*.'[7] It is needless to say that the argument of any counsel is no authority as to what the law is. It is too well known that the greatest of counsel argue for the litigant who pays most, not for the one whose cause is more just.

The learned Editor at page 590 of his said work has apparently proved his point, that both the Dominion parliament and the local legislatures have concurrent jurisdiction to pass penal laws. Let us examine the cases cited. The statute under consideration in *R.* v. *Wason*,[8] was an Ontario Act to provide against frauds in the supplying of milk to cheese and butter factories. This Act was one which could be properly classified as dealing primarily with property and civil rights and was held *intra vires* of the local legislature. I agree that this case was properly decided, but there is one point which the learned Editor has overlooked, viz., the Ontario Act was passed on March 23rd, 1888, and it was not until May 2nd, 1889, that a Dominion statute dealing with the same subject came into effect. Then came the case of *R.* v. *Stone*,[9] which held the Dominion Act *intra vires* also.

[6] [1903] A. C. 524.
[7] Dom. Sess. Pap. 1884, Vol. 17 No. 30, p. 98.
[8] (1889) 17 O. R. 64; 17 A. R. 221.
[9] (1889) 23 O. R. 46.

There is nothing in the above cases in conflict with my contention. *R.* v. *Wason* was properly decided because the Dominion parliament had not at that time passed such an Act, but when the Parliament drew the subject into the domain of criminal law then the authority of the local Act necessarily ceased,[10] in so far as it in any way duplicated, over-lapped or conflicted with the Dominion Act, because where a field of legislation is within the competence of both the Dominion parliament and a provincial legislature, and both have legislated, in case of conflict, the enactment of the Dominion parliament must prevail: *St. Francis* v. *Continental Heat & Light Co.*[11]

On page 592 of the learned Editor's said work he gives two cases relating to prohibiting trading stamps. The first case, *Montreal Trading Stamp Co.* v. *Halifax*,[12] held that 62 Vict. (N.S.) ch. 52, sec. 2 was *intra vires*. This section amended the charter of the city of Halifax by prohibiting the sale of trading stamps. The second case was a reference by the Lieutenant-Governor of Ontario to the Court of Appeal for Ontario, for an opinion as to the validity of sub-sec. 41 of sec. 26 of the Ontario Municipal Act 1901, granting municipalities power to prohibit trading stamps. The only report of this case is to be found in 25 Que. S. C. at page 137. All four of the judges answered that the said sub-sec. was *intra vires* of the Legislature. Osler, J.A., however, was the only judge who gave any reason for his answer, which was that the subject came within property and civil rights in the province. His lordship was very careful to state: "*I must add that, I reserve my right to reconsider the question if and when it shall arise for decision in any real controversy between parties.*"

I have no fault to find with these decisions, but they were rendered prior to the enactment of Criminal Code secs. 505 to 508. And I submit that if Osler, J.A., were now asked for his opinion as to the validity of sub-sec. 48 of sec. 400 of the present Municipal Act he would avail himself of the above reservation of his right to reconsider his answer. I am satisfied that his answer would be "since the Dominion parliament has drawn the subject into the domain of criminal law

[10] *Thomas* v. *Haliburton* (1893), 23 N. S. R. at p. 73.
[11] C. R., [1909] A. C. 49.
[12] (1900) 20 C. L. T. Occ. N. 335.

the authority of the provincial legislature has necessarily ceased." [18]

The balance of the pages of the learned Editor's work which he referred to, deal with the sale of intoxicating liquors, drugs and bread and the closing of shops. None of these subjects were touched upon in my former article and the cases cited by the learned Editor have no bearing upon my contention that certain sub-sections of the Ontario Municipal Act are *ultra vires*.

Just one word in closing, I do not wish to be understood as adversely criticising the learned Editor's said work, for he has only accepted the same view as expressed by other learned writers, however, I submit that no proposition laid down in any text book can be accepted as being the law when such proposition is in conflict with cases decided on the exact point. I further submit that the cases fully support my contention that certain sub-sections of the Ontario Municipal Act are *ultra vires* and I still contend that they should be omitted from the Revised Statutes of Ontario.*

WALTER E. LEAR.

May 17th, 1915.

[18] *Thomas* v. *Haliburton* (1893), 23 N. S. R. at p. 73.

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*It is a pleasure to publish a reply to our footnote at p. 406, *supra*. We remain, nevertheless, unconvinced. Mr. Lear has been able to cite some decisions and *dicta* of provincial Courts which favour his view. Some favouring a different view are collected in Canada's Federal System, pp. 583-618. There may be added to these now—*per* Duff, J., in *Quong Wing* v. *The King* (1914), 49 S. C. R. at p. 462. It is our humble belief that when the matter comes squarely before the Supreme Court or the Privy Council, it will not be Mr. Lear's view which will be upheld. In the first place, we have the great principle enunciated by the Privy Council in *Hodge* v. *The Queen*, and quite unlimited in its application, that "subjects which in one aspect and for one purpose fall within sec. 92 of the B. N. A. Act may, in another aspect and for another purpose, fall within sec. 91;" and, secondly, there is, it is submitted, implicit in the term "criminal law" the idea of universality: the idea, to adapt words of Maclennan, J.A., in *Regina* v. *Wason*, 17 O. A. R., at p. 248, of rules universal in their scope and application, and prohibiting the forbidden acts by all persons whomsoever, under all circumstances, and in all places throughout the Dominion; and not merely of local application for the abatement or prevention of local evils. And all this, be the effect what it may, on the maxim *Nemo debet bis puniri pro uno delicto*.

ED. C. L. T.

THE MARRIAGE LAWS OF CANADA.

Chief Justice R. M. Meredith, in his judgment in *Peppiatt* v. *Peppiatt*, delivered on May 19th last, uses language which should at least lead to the question of the constitutional validity of our provincial statute, originally enacted in 1907, but now to be found in R. S. O. 1914, ch. 148, sec. 36, being carried to the Court of final resort. This enactment is as follows:—

> 36(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by sec. 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorized by law to solemnise marriage, shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into;
>
> Provided that such persons have not after the ceremony cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.
>
> (2) Nothing in this section shall affect the excepted cases mentioned in sec. 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.

Peppiatt v. *Peppiatt* is an action brought by Ruth Peppiatt, an infant, by her mother and next friend, Elizabeth Wright, against Cecil E. Peppiatt, both parties being under 21 years of age. The plaintiff and defendant went through a form of marriage on or about July 16th, 1913, without the parental consent required, in the case of Ruth, by R. S. O. 1914, ch. 148, sec. 15, she being at the time under 18. They never lived together. Ruth Peppiatt is asking for a declaration by the Court that a valid marriage was not effected, and for such other relief as the Court may deem proper. The case came on for trial before Chief Justice Meredith on

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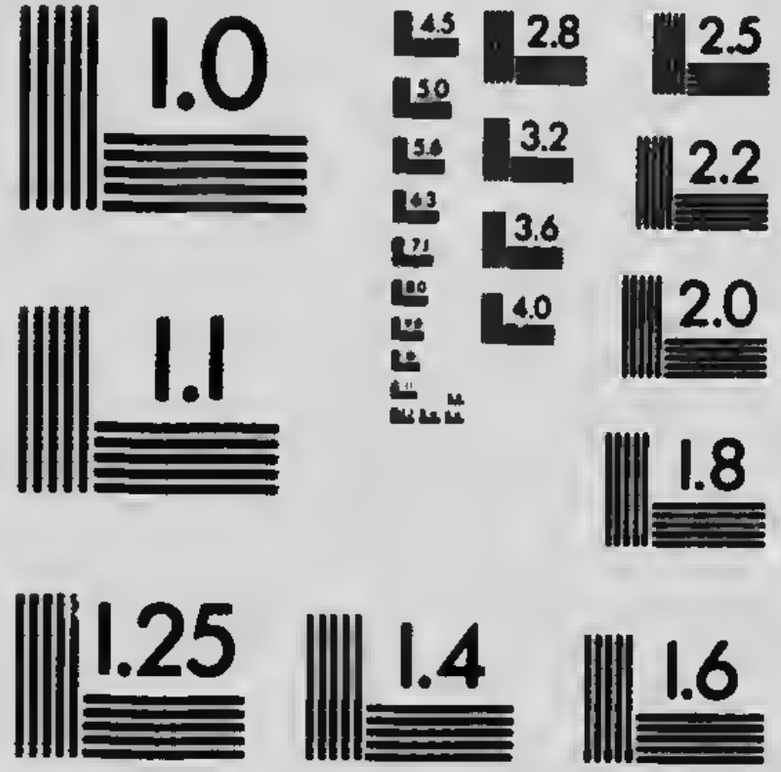

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April 9th last, who, on May 19th referred it to a Divisional Court. In his written reasons for so doing the learned Judge says:—

> "This is another of those cases which, though of infrequent occurrence in this province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the marriage and divorce laws of Canada whenever they do occur: uncertain and unsatisfactory not only in the conflicting and indecisive character of the case law upon the subjects, but equally so of the statute law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character. This case affords ample proof of all this, though other cases may afford much more. How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they were lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the question? The conflict of judicial opinion in the Courts of this province has been over the question whether its Courts have any power to decree that sort of divorce which follows a finding that the marriage was not a valid one; or to pronounce a declaratory decree as to the validity or invalidity of the marriage. The cases are very much opposed to one another, or rather, the expressions of judicial opinion in them are; and they are the less helpful as none of them was ever carried to a Court of Appeal."

That the cases as to the jurisdiction of the provincial Courts, apart from the enactment above referred to, to declare that no valid marriage has taken place, are conflicting and indecisive is unquestionable. In *Lawless* v. *Chamberlain*,[1] Boyd, C., pronounced in favour of such jurisdiction when the alleged marriage is void *de jure* by reason of the absence of some essential preliminary, as, e.g., no free consent. But on the facts, he refused to exercise such jurisdiction. In *T.* v. *B.*,[2] the same learned judge denied the jurisdiction of the Courts to declare a marriage void on the ground of impotency: obviously quite a different case. In *A.* v. *B.*,[3] Clute, J., denied all such jurisdiction to declare an alleged

[1] 18 O. R. 296.
[2] 23 O. L. R. 224.
[3] 23 O. L. R. 261.

marriage void; and so did Lennox, J., in *Prowd* v. *Spence*.[4] In *May* v. *May*,[5] a Divisional Court denied any jurisdiction in the Courts to declare a marriage void on the ground that the parties were related within the prohibited degrees, and expressed doubt as to the constitutionality of the above provincial enactment. In *Hallman* v. *Hallman*,[6] Lennox, J., followed the decision of Clute, J., in *A.* v. *B.*, *supra*. Lastly, in *Malot* v. *Malot*,[7] Lennox, J., refused to apply the provincial enactment on the evidence, and because he doubted its constitutionality.

Now in *Peppiatt* v. *Peppiatt* the constitutionality of the provincial enactment has come up fairly and squarely, and Meredith, C.J., in the above state of the authorities, has referred the case to the Divisional Court; but he expresses his own view thus:—

> "My conclusions are that the provincial legislation in question is *ultra vires;* and that, therefore, this Court has not power under it, nor has it power otherwise, to consider the matters in question in this action."

With great respect I venture to advance some considerations leading to a different conclusion. To begin with, I submit it is really begging the whole question to call the ceremony gone through by the parties in the *Peppiatt* case a "marriage." The whole object of the provincial enactment is to say that it shall not be a marriage, and to give the Court power to declare that it was not a marriage. In the same way it is strictly speaking an abuse of terms to call the judgment of the Court under the statute a "divorce." No marriage, no divorce.

Now the Privy Council in *In re Marriage Legislation in Canada*[1] has decided that the Dominion legislative power over "marriage" does not cover the whole field of validity; but that the provincial power over 'solemnization of marriage in the province, "*enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract.*" The whole question, therefore, I submit, so far as regards the constitutionality of the pro-

[4] 24 O. W. R. 329.
[5] 22 O. L. R. 559.
[6] 5 O. W. N. 976.
[7] 24 O. W. R. 884.
[1] [1912] A. C. 880. This is the case I mean to refer to in Canada Federal System, p. 319: not *Watts* v. *Watts*, although I must admit that I invite the mistake.

vincial enactment above set out, resolves itself into whether the requirement of the parental consent is to be considered as part of the marriage ceremony or not. If it is to be so considered then under the provincial power the legislature would seem entitled to exact it as part of the solemnization of marriage in the province; and to enact that there shall be no valid marriage in the province without it. Now it appears well settled that parental consent when required is to be considered part of the form or ceremony of marriage. See *Sottomayor* v. *De Barros*.[2] And so Mr. Dicey in his Conflict of Laws says:[3] 'The consents of and the notices to parents or others, necessary by many laws to the validity of a marriage are considered as part of the form or ceremony of the marriage. . . . This doctrine is now fully established by decided cases.'

In England lack of parental consent does not invalidate the marriage itself;[4] but this, of course, has no bearing on the question of the powers of our provincial legislatures under the British North America Act.

As to the general jurisdiction of the Court I would like to say this: there is one form of mistake,—a very curious form too—which all the books tell us is fatal to the validity of the marriage contract, namely, mistake as to the person whom one intends to marry. Thus Bishop on Marriage[5] says:—

> 'However difficult may be the supposition that one intending to marry A. can, without a fraud being practised on him, marry B., yet if the fact were established there is no doubt the marriage would be invalid. Lord Campbell gives the case of marriages in masquerade where the parties are entirely mistaken as to the persons with whom they are united as clearly void.'

I cannot find a concrete case anywhere referred to. Even the authentic case of Jacob and Leah was not one of pure mistake, if I remember right. There was at all events contributory negligence on Jacob's part. But the following was recently reported in the newspapers under date Pittsburg, January 5th, 1906, and it may relieve the monotony of this discussion to place it on record.

[2] (1877) 3 P. D. 1. 7.
[3] 2nd ed. p. 616.
[4] *Rex* v. *Birmingham* (1828) 8 B. & C. 29.
[5] Vol. 2. sec. 533, citing *per* Lord Campbell in 10 Cl. & F., at p. 785. See, also, *per* Sir F. Jeune in *Moss* v. *Moss* [1897]. p. 263.

'Hyde J. Summers, formerly of Pittsburg, now of Olcott, N.Y., has begun proceedings to annul his marriage, alleging he led the wrong girl to the altar.

Summers says he offered himself in marriage to Ruth Bekman and was accepted. Ruth, the complaint says, had a twin sister named Irene, and the two were identical in appearance.

Several days before the wedding, Summers avers, he requested his wife to play the piano and sing for him. She played indifferently, he alleges, and could not sing. This aroused his suspicions, as he knew that Ruth possessed a clear soprano voice.

On this statement he seeks to prove his wife is Irene, and not Ruth. The defendant denies any error has been made and declares she can sing with ability. The whole case will pivot on this point.

Summers cites an instance when Irene accompanied him to a theatre in Buffalo as a joke, he believing she was Ruth.'

Is there any reason to suppose that if such a case had arisen in England, before the establishment of a Divorce Court, the Court of Chancery would not have had jurisdiction to declare that there had been no valid marriage, though it might yield to the Ecclesiastical Courts exclusive jurisdiction as the special tribunals for matrimonial causes. So now the proceedings might have to be taken in the Probate, Admiralty and Divorce Division.

But leaving the subject of marriage for the unhappily kindred subject of divorce can it be said that the Divorce law of Canada is satisfactory? There is, I submit, a plain inconsistency in any community acknowledging through its representative Parliament that divorce is under certain circumstances, right and proper; and yet permitting the necessary procedure to obtain it to be such that the poor man is debarred from pursuing it. It is commonly supposed that the cost of contested divorce proceedings before the Senate at Ottawa is commonly between $800 and $1,000, though sometimes a little less, and sometimes considerably more. It is true that a mode of proceeding *in forma pauperis* is recognised. But I have it from Mr. R. V. Sinclair, K.C., whose recent book on *The Rules and Practice before the Parliament of Canada upon Bills of Divorce* was noticed in the CANADIAN LAW TIMES for May, that all this means is that where the applicant is in needy circumstances, and establishes that fact

to the satisfaction of the House an order will be made absolving him or her from payment of the initial fee of $200, exacted under the Rules of the Senate. But Mr. Sinclair writes:—

> "The applicant has to pay for . . preliminary advertising, and for the service of his papers on the respondent, has to pay the cost of bringing his witnesses, and has to pay his solicitor and counsel. The Senate committee does not appoint any member of the bar to represent a pauper applicant. The proceeding is not peculiar to divorce applications. Payment of the fee is quite often relieved against in other cases of private legislation, where the applicant is poor, and very often where the object of private legislation is of a benevolent or charitable nature. Where a wife is desirous of opposing her husband's application for divorce, and is without means to do so, the present practice is for the committee to determine at the hearing whether and to what extent the husband should be required to advance money to enable the wife to oppose his application. The committee usually hears the evidence on behalf of the husband up to a certain point and then requires the wife to establish by statutory declaration the nature of her proposed defence and the nature of the evidence which will be adduced by the several witnesses whom she proposes to call and upon consideration of the facts so proved by her, the committee determines the amount which the husband shall be required to contribute. The practical result is that where an indigent person seeks a divorce, the only relief which he can obtain by asking leave to proceed *in forma pauperis* is to be absolved from payment of the House fee of $200."

However, the position of matters is not so monstrous as it was in England when old Judge Maule delivered his famous judicial utterance on the subject. I will give it in full for the benefit of those readers of the CANADIAN LAW TIMES who may not be familiar with it. In 1845, when it was delivered, no one save a man of means could obtain a divorce, for it was necessary first to secure a judgment for damages against the adulterer at law, and then to take proceedings in the Ecclesiastical Court for a divorce *a mensa et thoro*. And only after this could a divorce *a vinculo* be obtained by private Act of Parliament. At the Warwick Assizes in 1845, Maule, J., tried the case of *Regina* v. *Hall*, the charge being bigamy. The jury had no difficulty in finding the prisoner

guilty, but, before sentence, it was urged in mitigation that the man had been a good husband and father, that he was an honest, sober, and industrious man,—whereas his wife was a shrew, a drunkard, and had left her home, taking her children with her, and had gone to live with another man. Nothing further remained save for the judge to do his duty, and vindicate the majesty of the law, which he did in this fashion, after some preliminary remarks:—

"Prisoner at the bar, I will tell you what you ought to have done, under the circumstances of your case. You may say you did not know what to do, but let me inform you that the law conclusively presumes that you did. Instead of going to a parson, you should have gone to an attorney, to bring an action against the betrayer of your wife for damages. That would have cost you £100. You were probably not worth as many pence; but that is what you should have done. Having proceeded thus far, you should have procured a proctor, and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro;* that would have cost you £200 or £300 more. Then when you had obtained a divorce *a mensa et thoro,* you had only to procure a private Act of Parliament for a divorce *a vinculo matrimonii.* The Bill might possibly have been opposed in all its stages in both Houses of Parliament,[6] and altogether that would have cost you £1,000. You will probably say you never had a tenth part of that sum. But sitting here as an English judge it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor. The sentence of the Court is that you be imprisoned for ..... one day."

As the prisoner had been in custody for a longer period he was at once discharged, no doubt a wiser man.[7]

In 1858 a Court of Divorce and Matrimonial Causes was established in England. May we not hope that one will be established in Canada by 1918 at all events.

A. H. F. LEFROY.

[6] So too here.
[7] Reminiscences of a K. C., pp. 159-160.

ONTARIO STATUTES 1915.

The statutes passed by the Legislature in its last session are not of much interest from a professional point of view. After the usual *Supplies Act* (ch. 1) and an Act declaring the boundaries of the Electoral Districts of London, East Middlesex, East Hamilton, and South Wentworth (ch. 2), comes the *Provincial War Tax Act, 1915* (ch. 3). This provides that in every municipality separated from the county for municipal purposes and in every County municipality and in every County there shall be levied and collected annually by a special rate an amount equal to one mill in the dollar on the total value of all the rateable property as a Provincial War Tax. *The Succession Duty Act 1915* (ch. 10), increases the severity of the Succession Duty Act by providing that all estates the aggregate value of which exceeds $5,000, (instead of $10,000) shall be liable; and property passing to ascendants, descendants, sons-in-law and daughters-in-law over $25,000 in value shall be liable, (instead of $50,000); other amendments being made in line with these. Chapter 3 amends the *Corporations Tax Act, 1914*, and provides, *inter alia*, that every Insurance Company shall pay a tax of $30,000. It also amends the clauses providing for the taxation of Gas and Electric companies. Chapter 13 amends some sections of the Mining Act; and ch. 15 some sections of the *Rivers and Streams Act;* and ch. 17 adds many supplemental provisions to the *Highway Improvement Act*, R. S. O. 1914, ch. 40. Chapter 18 is an Act incorporating the Toronto and Hamilton Highway Commission with power to survey, lay out, construct and maintain a permanent roadway from the western limits of the City of Toronto, to the City of Hamilton, and with the right to exercise within the limits of any municipal corporation along the course of the roadway all the powers which may be exercised by a municipal corporation authorised to lay out and construct a highway. The Commission may also make regulations respecting the use of the roadway by any class of vehicles or animals, and impose penalties, subject to approval by the Lieutenant-Governor in Council. For the purpose of providing for the cost of the construction of the roadway the Commission may issue debentures to an amount not exceeding in all $600,000, the payment of which

is guaranteed by the Province, and is to be met by contributions specified from the various municipalities concerned. Chapter 19, being the *Power Commission Act 1915*, makes several amendments to the *Power Commission Act*, R. S. O. 1914, ch. 39, and adds provisions for the establishment of a Commission in every city or town under contract with the Power Commission for the control and management of all works undertaken by the corporation for the distribution and supply of electrical power or energy. Chapter 20 is the annual *Statute Law Amendment Act*. The only sections of this statute which require special notice here seem to be sec. 10, by which it is provided that sec. 31 of the Execution Act be amended by adding the following sub-section:—

(3) 'Where more mortgages than one of the same lands have been made to the same mortgagee or to different mortgagees, sub-secs. 1 & 2' (which provide for sale by the Sheriff of an equity of redemption) 'shall apply, and the equity of redemption shall be saleable under an execution against the lands and tenements of the owner, subject to the mortgages in the same manner as in the case of land subject to one mortgage only;'

and sec. 16, which adds a section to *The Infants Act*, providing that:—

'The Court, if it is of opinion that such course is for the benefit of the infant or that his interest requires it or will be substantially promoted thereby, may from time to time authorise the exchange of any lands held in fee or for a term of years or otherwise by such infant, and which are unproductive, but no such exchange of lands shall be made contrary to the provisions of a will or conveyance.'

Chapter 21 amends the *Mortgages Act*, R. S. O. 1914, ch. 112, sec. 11, by adding a sub-section providing for payment into Court when payment to a mortgagee is impossible 'owing to the whereabouts of the mortgagee or of one or more of several mortgagees or other person or persons entitled to receive such payment or to give such discharge being unknown or for some other cause.' Chapter 22 is the *Moratorium Act* now figuring as *The Mortgagors and Purchasers Relief Act, 1915*. We noticed the opening sections when it was in the Bill stage (*supra*, pp. 195-6) which have been very little altered. A sub-section has been added bringing within the scope of the Act proceedings for the rescission of or for the recovery of damages for the breach of any contract involving the expenditure

of money in providing improvements or services upon lands or for the common benefit of the owners of lands laid out in building lots, upon the grounds that default has been made when the date at which such expenditure should have been made or such improvements or services made or provided is later than August 4th, 1914. It is also provided in the Act that nothing in it shall apply to or affect any right or remedy now exercisable for the enforcement of any mortgage or other security of a like nature made or entered into for the purpose of securing the bonds or debentures of any corporation. It is further provided that—

'Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed. . . .'

Chapter 23, the *Charities Accounting Act, 1915*, provides for persons administering Charitable gifts being required to account to the Attorney-General or Official Guardian for their dealings in the matter.

Chapter 24 amends sections of the *Workmen's Compensation Act* too numerous to mention here. It gives, *inter alia*, any assessment and compensation under the Act priority under the *Assignments and Preferences Act*, the *Trustee Act*, and the *Ontario Companies Act*, where the liability accrued before the date of the assignment or death or before the date of the commencement of the winding-up. Section 2 amends sec. 6 of the principal Act which provides for compensation 'where an accident happens while the workman is employed elsewhere than in Ontario which would entitle him or his dependants to compensation if it had happened in Ontario.' The constitutionality of this provision is, we think, open to some question.

Chapter 25, *The Workmen's Compensation Insurance Act, 1915*, gives a workman who has recovered damages against his employer a direct claim on insurance moneys payable to his employer and 'the insurance shall be deemed to be for and enure to the benefit of the workman.'

Chapter 33, *The Telephone Amendment Act, 1915*, makes many amendments in the *Ontario Telephone Act*, R. S. O. 1914, ch. 188; as does ch. 34 in the Municipal Act, none of

them, however, seem to require special mention here. *The Local Improvement Act*, R. S. O. 1914, ch. 193, and the *Assessment Act*, R. S. O. 1914, ch. 195, and the Liquor *License Act*, R. S. O. 1914, ch. 215, are also amended by chs. 35 & 36 & 37 respectively. Chapter 37, moreover, provides for the establishment of a Board of License Commissioners for Ontario, to be composed of five persons to be appointed by the Lieutenant-Governor in Council. The Board is to have jurisdiction throughout the Province, and subject to the provisions of the Act and of the Regulations made under the Act is to have the like powers and perform the like duties throughout the Province as those now exercised or performed by the local boards.

CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

English Decisions.

Frauds on Powers. The first case in the April *Law Journal Reports* is *Vatcher* v. *Paull*,[1] a decision of the Privy Council upon appeal from a judgment of 'the Superior Number of the Royal Court of the Island of Jersey' upon a subject not seen often up in our Courts, namely, frauds upon powers. The question was whether an appointment under a power in a marriage settlement, made in favour of proper objects of the power, but subject to a defeasance on performance of a condition by certain third parties, over whom the appointees had no control, with the intention that on performance of the condition the funds should go as on default of appointment—was invalid as a fraud on the power. The Board holds that it was not, there being no intention to secure a benefit for some person not an object of the power. Lord Parker delivering the judgment says (p. 89):—"The term 'fraud' in connection with frauds on a power, does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term, or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by the instrument creating the power. . . . It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the *quantum* of the benefit *bona fide* intended to be conferred on the appointee, and the *quantum* of the benefit intended to be derived by the appointor or to be conferred on a stranger. . . . Apart from cases of appointments made in pursuance of a bargain under which the appointor or a person not an object of the power is to derive a benefit, there is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee, but by a third party. . . . Even in the case of a condition to be performed by the appointee, the condition does not necessarily

[1] 84 L. J. P. C. 86; [1915] A. C. 372.

invalidate the appointment. . . . It can only do so if the purpose of the appointor in imposing it is to benefit himself or a third person not an object of the power."

There are three other minor points touched by the judgment. (1) The first is the general presumption which the law makes, and on which their lordships act, "in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known fact and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves:" (2) this is one of the exceptional cases in which the Board overruled concurrent findings of fact in the Courts below. There were of course special reasons, one of which was that there was no oral evidence at the trial. "All the evidence was taken on deposition, and the Courts below were in no better position to judge of its effect than is their lordships' Board": (3) the judgment states that "their lordships are of opinion that where charges of fraud are intended to be made full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose."

Government House Property. Attorney-General for New South Wales v. *Williams*,[2] terminates a curious domestic dispute of New South Wales. Since 1845, and before, a certain portion of Crown property at Sydney had been appropriated to the purposes of a Government House and grounds, first for the Governor of New South Wales, and since Federation for the Governor-General of the Commonwealth; and the question brought up upon the information of the Attorney-General of New South Wales was whether the State Government could now without legislative Act, divert the property to other uses. The Board affirm the decision of the High Court of Australia, that it could do so. Their lordships say that whether or not the Government House and its grounds were included in the 'waste lands' of the Crown in New South Wales the management and control of which were by the (Imperial) Constitution Act of 1855, vested in the legislature of the Colony,—"It cannot be said, saving always the rights of the Crown of the United Kingdom, that anything illegal or even irregular has been done *qua* the people of New South Wales

[2] 84 L. J. P. C. 92; [1915] A. C. 573.

if the Governor has exercised his authority, as the officer of the Crown, in respect of property, held by the Crown in right of the United Kingdom, upon the advice and by the ministration of the Ministry of New South Wales. There is nothing which requires him to act in such a matter by a solitary determination or by his own single effort. Though the personal intervention of the Governor is not shewn in the present case, and even if it be assumed that it was absent, the action taken is that of the Executive, and is within its competence on either hypothesis as to the construction of the Constitution Act," i.e., the Act of 1855. They point out that it was not a case of permanent alienation. In the course of their judgment their lordships make the curious remark:—"Whatever jurisdiction there may be in certain events to consider judicially the effect of ministerial acts when a Governor is not in accord with Ministers, or of a Governor's acts if Ministers have not advised them, no question of invoking such jurisdiction arises here."

Time of Essence. *Stickney* v. *Keeble*,[3] is a very important decision of the House of Lords, if, as it seems to do, it re-establishes the binding efficacy of a clause in a contract for the purchase and sale of land, expressly making the time for completion of the essence of the contract. Lawyers will remember that *Kilmer* v. *British Columbia Orchard Lands Ltd.*,[4] was a decision of the Privy Council, and therefore not binding on the House of Lords, or in fact on any English Court, in which the Board held that under the law of England a condition of forfeiture, in such a contract, for non-payment of purchase money in instalments at specified dates, was, although time was made of the essence of the contract, in the nature of a penalty from which the purchaser was entitled to be relieved on payment of the purchase money. It was on the strength of this decision, and of another case in the Court of Appeal in England, that in *Boyd* v. *Richards*,[5] Middleton, J., refused to follow the Divisional Court decision in *La Belle* v. *O'Connor*.[6] The judgment of the Privy Council will of course continue to bind our Courts, notwithstanding the House of Lords, but the result seems to be a cleavage on the point between English case law and our own.

[3] 84 L. J. Ch. 259; [1915] A. C. 386.
[4] [1913] A. C. 319.
[5] (1913) O. L. R. 119.
[6] (1908) 15 O. L. R. 519, 546.

unless the legislature intervenes. All this is on the assumption that if an express clause making time of the essence in regard to payment of purchase money can be relieved against in Equity, so can an express clause making time of the essence in regard to completion. And now as to *Stickney* v. *Keeble*, we need not deal with it so far as it turned on facts, but on the point of law, Parker, J., with whom Lord Loreburn expressly, and the other Lords impliedly, concur, says, at p. 268:—"In a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title. In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract; *but this maxim never had any application* to cases in which the stipulation as to time could not be disregarded without injustice to the parties—*when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential,* or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract. It should be observed, too, that it was only for the purpose of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time." He then explains that the Judicature Act has not affected the matter. We may, also, refer to Lord Parmoor's judgment at p. 271. But space does not permit us to dwell longer on this case.

Trust funds mixed with private moneys. The well known case of *In re Hallett's Estate,*[7] decided two clear points. First, that when a trustee mixes trust moneys with private moneys in one account the *cestuis que trust* have a charge on the aggregate amount for their trust fund; and secondly, that when payments are made by the trustee out of the general account the payments are not to be appropriated against payments into that account as in *Clayton's case,*[8] because the trustee is presumed to be honest rather than dishonest, and to make payments out of his own private moneys, and not out of the trust fund that was mingled with his private moneys. But for the purposes of tracing, which was the process adopted in *In re Hallett's Estate,* you must put your finger on some definite fund which either remains in its original shape or can be found in another shape. Thus in *James Roscoe (Bolton) Ltd.* v. *Winder,*[9] W. bought the business of the plaintiff company and agreed to get in certain debts of the business and pay them over to the plaintiff company, which, Sargant, J., held, made him a trustee for the vendors of book debts so collected. He collected £455 of these debts, and paid the money into his private general account. Within two days he drew out the whole of the money to his credit in this account except £25, 18s, and applied it to his own purposes. Subsequently he operated on the account in the ordinary way, paying in and drawing out from time to time; and on his death shortly afterwards there was a credit balance of £358. Sargant, J., held that the vendors were not entitled to more than £25, 18s. of this, that being the smallest amount to which the balance had fallen between the date of payment in of the £455 and the death of the debtor, and the only sum which could be earmarked as the proceeds of the book debts. He says (p. 289):—"Apart from tracing, it seems to me possible to establish this claim against the ultimate balance of £358, only by saying that something was done with regard to the additional moneys which are needed to make up that balance by the person to whom those moneys belonged (the debtor) to substitute those moneys for the purpose of, or to impose upon those moneys a trust equivalent to, the trust which rested on the previous balance. Of course if there was anything like a separate trust account, the pay-

[7] 49 L. J. Ch. 415; 13 Ch. D. 696.
[8] 1 Mer. 572.
[9] 84 L. J. Ch. 286.

ment of the further moneys into that account would, in itself, have been quite a sufficient indication of the intention of the debtor to substitute those additional moneys for the original trust moneys, and, accordingly, to impose by way of substitution the old trusts upon those additional moneys. But in a case where the account into which the moneys are paid is the general trading account of the debtor, on which he has been accustomed to draw both in the ordinary course and in breach of trust when there were trust funds standing to the credit of that account which were convenient for that purpose, I think it is impossible to attribute to him that by the mere payment into the account of further moneys which to a large extent he subsequently used for purposes of his own he intended to clothe those moneys with a trust in favour of the plaintiffs."

Registry Act. Gresham Life Assurance Society v. *Crowther*,[10] is a decision of the Court of Appeal under the Yorkshire Registries Act, 1884, which would apparently apply *a fortiori* to our Ontario Registry Act. The point decided is that an incumbrancer on an interest in the proceeds of sale of real estate in Yorkshire settled upon trust for sale, but with power to postpone conversion, obtains no priority over prior incumbrancers of such interest by registering his mortgage deed, and the priorities of such incumbrancers are determined by the dates of their respective notices to the trustees; and this is so, although the land in fact is not sold. The following passage from the judgment of Swinfen Eady, L.J., (p. 318), makes the whole matter clear:—"The question is whether a dealing with a share or interest in proceeds of sale of land in Yorkshire, conveyed upon an absolute trust for sale, requires registration under the Yorkshire Registries Act, 1884. Under that Act by sec. 4 'all assurances . . . by which any lands within any of the three ridings are affected may be registered under this Act,"[11] and then by sec. 14 all assurances entitled to be registered are to have priority according to the date of registration.[12] It is clear from the

[10] 84 L. J. Ch. 312.

[11] R. S. O. 1914, ch. 124, secs. 2 (*b*), 33, permits registration of certain named instruments and—'every other instrument whereby land may be transferred, disposed of, charged, incumbered, or affected in any wise affecting land in Ontario.'

[12] R. S. O. 1914, ch. 124, sec. 72—'Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument, by the person claiming under the prior registration.'

rest of sec. 14 that assurances of equitable, as well as legal, interests are within the Act. The question is whether the assurance of a share of the proceeds of sale of the land is within the Act. Land is defined thus: 'The expression "land" includes lands and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, and also an undivided share in land,'[13] and 'the expression "conveyance" includes any assignment' and so on, by which 'any interest in land is thereby conveyed.' The question is whether a share or interest in the proceeds of sale of land is an interest in land within the meaning of the Act. It is quite clear, as counsel for the appellant has urged, that it may be and is for many statutes and for many purposes an interest in land. . . It might be an interest in land within the Dower Act or within the Statute of Limitations. The question is whether it is an interest in land within the meaning of the Yorkshire Registries Act, 1884. In my opinion this statute is intended to apply to dealings both at law and equity which affect the land itself. In the present case the trustees for sale could make a good title quite independent of and without the concurrence of the persons interested in the proceeds, or entitled to any share in the proceeds, or their mortgagees; and a person entitled to a share in the proceeds of the land had, in my opinion, no interest in the land itself within the meaning of this statute."

Excavation adjoining road—Duty of possessor to fence. The matter decided in *Attorney-General* v. *Roe*,[14] may be given best in the following extract from the judgment of Sargant, J.: "It seems clear that there is a common law obligation on the possessor of a dangerous excavation by the side of the highway to keep it fenced off whether the excavation was or was not there before his possession began. . . . Again, as regards nuisance on or by the highway, the obligation of the actual occupier is clear whether he is or is not liable to his landlord, if any. And in *Attorney-General* v. *Tod-Heatley*,[15] this obligation was enforced by injunction." He cites other authorities. We may refer in connection with

[13] R. S. O. 1914, ch. 124, sec. 2 (c) '"Land" shall include lands, tenements, hereditaments, and appurtenances and any estate or interest therein.'

[14] 84 L. J. Ch. 322.

[15] 36 L. J. Ch. 275; [1897] 1 Ch. 560.

this case to the recent case in our own Courts of *Heward* v. *Lynch*.[16]

Consignment of goods at 'owner's risk'—Non-delivery of part. In *Wills* v. *Great Western Railway*,[17] a consignment note 'at owner's risk' of cattle by the defendant railway, provided that the railway company should be relieved from liability for loss (*including non-delivery*) with the exception of non-delivery of any package or consignment fully and properly addressed, unless such non-delivery were due to accidents to trains or fire. The Court of Appeal held that it was not necessary in order to make the company liable that there should be total non-delivery of the consignment; they were liable if a part of the consignment was not delivered. Phillimore, J., dissenting, held that, in the peculiar wording of the consignment note in question, 'non-delivery' meant absence of delivery, and not shortage in delivery, which he thought was otherwise provided for in it.

Infant—Necessaries—User of hired motor car beyond limit contracted for. In *Fawcett* v. *Smethurst*,[18] an infant, 20 years of age with an allowance of £80 a year, hired a motor car of the plaintiff at his own risk, as the plaintiff alleged, for the purpose of driving to a place six miles off to fetch a bag which he had left there. On arriving there he met a friend whom he drove to a place twelve miles off, and on the return journey, without any negligence on the defendant's part, the car caught fire and was injured beyond repair. Atkin, J., held the defendant not liable, and his judgment covers two points of interest: (1) he holds that though the hire of the car for the original purpose might be a contract for a necessary,—"I do not think it follows that such a contract would be one for a necessary if it contained an onerous term, such as that which the plaintiff alleges was embodied in the contract before us. The effect of the contract alleged by the plaintiff would be to impose upon the defendant an absolute responsibility in respect of this car, whether it was damaged owing to his negligence or to any other conceivable cause. In my opinion a contract containing such a term would not be a reasonable one for a

[16] 6 O. W. N. 388.
[17] 84 L. J. K. B. 449.
[18] (1914) 84 L. J. K. B. 473.

young man in the defendant's position to make in regard to a journey of five or six miles to fetch his bag, and I do not think that such a contract would be one for a necessary."

Secondly, and in reference to the total loss of the car, Atkin, J., applied the principle thus laid down in Pollock on Contracts,[19] that an infant 'cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women, the law does not allow.' Atkin, J., says: "In my opinion nothing that was done upon that further journey made the defendant an independent tort-feasor; and, if any damage was done to the car on that journey, the defendant would only be liable if he were liable under the contract made. The extended journey was of the same nature as the original one, and the defendant did no more than drive the car further than was originally intended."

Interpleader—Goods partnership property of claimant and execution debtor. The short point decided in *Flude, Lim.* v. *Goldberg*,[20] is that when on trial of an interpleader issue the jury finds that the goods claimed are not the goods of the claimant, but are the property of a partnership in which he and the execution debtors are the partners, the issue as between him and the execution creditors should be determined in favour of the claimant. As Ridley, J., says:—"Isaacs" (the claimant) "made a claim that the goods were his, and he repeated that claim in his affidavit and particulars of claim. That was a claim that they were his as against the execution creditors. . . . Execution cannot issue against partnership property except on a judgment against the firm, which, of course, this judgment was not. Therefore execution could not issue against these goods, and it follows from that that there could not be judgment in favour of the execution creditors."

Master and Servant—Suspension from work. *Hanley* v. *Pease and Partners Ltd*,[21] illustrates in a striking way the technicality necessarily inherent in law if there is to be any law at all. A workman absented himself without leave for a

[19] 8th ed. p. 78.
[20] 84 L. J. K. B. 511; [1915] 2 K. B. 157.
[21] 84 L. J. K. B. 532; [1915] 1 K. B. 698.

day. His employers, therefore, suspended him from work for the following day only. He took proceedings against them for wrongful dismissal, and the full Court unanimously decided in his favour, and that he was entitled as damages to the wages he lost by his day's suspension. Lush, J., puts the grounds of the decision very clearly (p. 534):—

> "Whether you treat the right of the master to dismiss the servant as a right to put an end to the contract, where there has been repudiation of that contract on the part of the servant, or as a right to consider the misconduct of the servant as a breach of a condition of the contract, is immaterial, because in either view the right of the master is merely to exercise an option. The contract has become voidable. The master may, if he pleases, determine it, if there has been misconduct by the employee entitling him so to do. If he chooses not to exercise that right, but to treat the contract as a continuing contract, notwithstanding the misconduct of the servant, then the contract is for all purposes a continuing contract, subject, of course, to the master's right in that case to claim damages against the servant. Here, after declining to dismiss the workman, the employers took it upon themselves to suspend him for one day and to deprive him of his wages for one day, thereby assessing their own damages at the sum which the workman would have earned on that day. They have no possible right to do that, having elected to treat the contract as continuing. They might have had a right to claim damages against the workman, but they could not justify their act in suspending him for one day."

Set-off of judgments for costs—Costs in different actions. The short point decided in *Reid* v. *Cupper*,[22] is that the Court, when exercising common law jurisdiction, has, apart from any Rules of the Supreme Court, a discretionary power, which was formerly possessed by the Superior Courts of common law, to set-off against one another judgments for costs in separate independent actions. Buckley, L.J., puts the matter thus (p. 576):—

> "Before the year 1832, when the first rule I will mention came into existence—I am speaking now only of common law jurisdiction, to the exclusion of the Court of Chancery—there was recognized what was called an equitable jurisdiction—that is to say, a jurisdiction based on

[22] 84 L. J. K. B. 573; [1915] 2 K. B. 147.

fairness—which was described by Brett, M.R., in *Edwards* v. *Hope*[23] thus: 'The Courts, however, always had an equitable jurisdiction for the purpose of preventing absurdity or injustice in cases where there had been judgments for damages between the same parties in distinct actions, to set off one judgment against the other and to allow execution to issue in respect of the balance only.'"

Railway Company—Duty towards persons coming the company's premises. In *Norman* v. *Great Western Railway*,[24] which is the last case in the April reports of English decisions requiring notice here, the question of law involved was whether the duty of a railway company towards persons coming upon their premises as of right to do business with them is any higher than, or different from, that of an occupier of private premises, towards persons whom he invites to come upon them. The Court of Appeal decided that it was not. It is not necessary to set out the facts at length. Suffice it to say that on one side of the defendant company's yard there was a steep, unfenced bank, and the plaintiff, having driven a wagon into the yard, for the purpose of taking away some goods, left his horse unattended; and the horse backed the wagon over the bank, and was killed. The plaintiff then sued the railway for breach of duty in not having fenced the bank. At p. 602, Buckley, L.J., formulates the rules of law bearing on the matter in such a way as clearly brings out the point decided:—

"The liability of a person upon whose land another comes towards the latter in respect of not exposing him to danger may be stated in an ascending scale. The liability is lowest towards a *trespasser*. If a trespasser chooses to come upon another man's land, in which the latter has dug a hole and covered it with brushwood with a view to catch a beast, or with some other object, and the trespasser falls into that hole and is injured, he cannot complain—he had no right to be there; if he goes there he must take the consequences. The next case is that of the *licensee*. He is allowed to come on the premises, and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises he must warn the licensee: he

[23] 54 L. J. K. B. 379; 14 Q. B. D. 922.
[24] 84 L. J. K. B. 598.

owes to the licensee a duty of not laying a trap for him. Next in the ascending scale is the *invitee*. The illustration commonly given is that of the shopkeeper, who tacitly invites persons, by means of the business carried on at his shop, to come in and deal with him. . . . The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it. It is suggested that there is a fourth class in this ascending scale. If the invitor be a person who is not correctly described as an invitor, it is said that because he is bound to admit persons to his premises, he therefore owes a still higher duty. A railway company is *a person* to whose stations a member of the public is *entitled to have access* if he wants to travel by or make use of the railway. . . . In such case there is not, properly speaking, any invitation. The passenger or owner of the goods comes there as of right. Is there a higher duty in that case owing to the invitee? In my opinion there is not. There is nothing either in principle or authority to shew that when a person comes reasonably and properly upon the premises of another as of right, as distinguished from by invitation, these is any higher obligation in the person on whose premises he comes than exists in the case where that person issues an invitation."

The other judges are of the same opinion, but Phillimore, L.J., at p. 605, adds the useful caution that—"in analysing the expression 'reasonably safe' you must take into account what is called in modern parlance the personal equation: what may not be safe for a certain man may be safe enough for the class of experts who frequent particular business premises."

A. H. F. L.

Canadian Cases.

Alien Enemy—Costs. In *Rystrom* v. *Krom*,[1] Macdonald, J., of British Columbia decided that successful alien enemy defendants were entitled to their costs of suit. It is clear that an alien enemy may appear and defend when proceedings have been instituted against him; the right to costs seems to follow. Possibly a distinction would be made and

[1] (1915) 31 W. L. R. 7.

costs be withheld until after the declaration of peace should the alien enemy reside beyond the King's Dominions. However as costs go to the litigant's solicitor and counsel wh cannot be alien enemies there is perhaps little value in this distinction.

Discretion of Taxing Officers. Re Phillips v. *Whitla* (No. 4),[2] is a decision of the Manitoba Court of Appeal setting at rest a solicitor and client taxation which went twice before the Taxing Officer, three times before various single judges on appeal and twice to the Court of Appeal. The solicitors who had special knowledge of the matter in question were engaged to act for a client who was suing to recover property worth $155,000. Soon after the action was commenced the client expressed a willingness to settle for $65,000 but the solicitors proceeded and recovered $90,000 additional; and also secured a reconveyance of the land with a Torrens title (which it did not before possess) in respect of which the defendants had paid $487. They further obtained a return of $3,875 claimed as commission, and succeeded in eliminating a set-off for interest of $2,100 claimed by the defendants. The solicitors' fee on settlement was $9,500. This was reduced by the Taxing Officer to $7,976.44; or about 5 per cent. on the $90,000. On appeal the bill was ordered to be itemized. This was done, but fee on settlement appeared as $8,480. The taxing officer reduced this to $3,500. The client appealed first to a single judge, then to the Court of Appeal, who allowed the appeal and referred the matter back for taxation in respect of the item of $3,500. The taxing officer heard the evidence of three of the leading practitioners in Winnipeg, Messrs. A. J. Andrews, Isaac Pitblado and E. Anderson who considered that a fee of $4,500 to $5,000 would be reasonable, and, relying on the following item of the Manitoba Tariff—"when it is proved that proceedings have been taken out of Court to expedite proceedings, save costs or compromise actions an allowance to be made therefor in the discretion of the taxing officer," he again allowed the charge of $3,500. On appeal Galt, J., refused to interfere; but on a further application to the Court of Appeal this amount was reduced to $1,000. The Court found that the actual time spent on the settlement was about 10 days, though negotiations extended over a longer period, and

[2] (1915) 25 M. R. 173.

fixed on a sum equivalent to a $100 per day counsel fee as a fair amount. It was further held that the evidence of members of the profession was not properly receivable to guide the taxing officer in the exercise of his discretion. No order was made as to costs.

General Powers—Remoteness. In a note to an article on *General Powers* by Mr. J. H. Thorndike in the Harvard Law Review for May (noticed *infra*. p. 544) the Ontario case of *Re Phillips*,[3] decided by Mr. Justice Middleton, is commented on. The learned writer states that in applying the rule laid down in *Wollaston* v. *King* and *Morgan* v. *Gronow* a strange confusion was made. The testator, who died in 1910, gave his residuary estate in trust for his wife during her life or until her second marriage, and, after her death or marriage, in trust for his children then alive in equal shares, the issue of any then deceased child standing in its parent's place, with direction to pay to each of them the income of his or her share, and on the death of each to pay over his or her share as such child or grandchild should by will appoint, and in default of appointment to the persons entitled to his or her personal estate by statute in case of intestacy. He left surviving him a wife and seven children, all of whom seem to have been still alive. Mr. Thorndike says: "It is plain that, if a grandchild born after the testator's death should become entitled to a share, the limitation of his share to objects to be ascertained by his will or otherwise at his death would be too remote, and accordingly the power would be void as to such grandchild, and the judge so held, quoting (p. 97), the passage in Halsbury's Laws of England, vol. 22, p. 355. But he went on to say that the opposite view was taken in Farwell on Powers, 2nd ed., p. 287, although in fact that book expresses exactly the same view (at p. 292) as the quotation from Lord Halsbury's book, and the passage at p. 287 relates to an entirely different subject, viz., the time from which the legal period runs in the case of an appointment under a general power to appoint by will, where the power is valid. He also thought he struck "a discordant note" in *Rous* v. *Jackson*,[4] and in *Re Flower*,[5] but those cases also relate only to this latter question, and Lord Hals-

[3] (1913) 28 O. L. R. 94.
[4] (1885) 29 Ch. D. 521
[5] (1885) 55 L. J. Ch. [illegible] J.

bury's book at p. 356, states the law exactly in accordance with them and with Farwell on Powers. It is clear, however, that, although the power of appointment would be invalid in the case of an afterborn grandchild, this did not affect its validity as to the shares of any of the children or of grandchildren living at the testator's death, for all the shares to be ascertained at the wife's death, or marriage, and the power applies to each of them separately, according to all the cases from *Griffith* v. *Pownall*,[8] to *In re Russell*.[7] The law is stated in Lord Halsbury's book at p. 346, and is the same here *Hills* v. *Simonds*,[8]; *Dorr* v. *Lovering*.[9] But the judge somehow got the impression from *In re Bence*,[10] that the clause containing the power could not be split up, and accordingly held that the power and the alternative limitation were entirely void, and that the shares of the children and grandchildren must go to them absolutely under the original gift."

Maritime Law—Tug and Tow. The Supreme Court of Canada by a three to two judgment has laid down the principle that where a tug and tow are, through the fault of the tug, in collision with another vessel, the tow having neither propelling power nor steering apparatus, and the navigation of both being controlled by the officers and crew of the tug, in such case the tug and tow must be regarded as one ship, and in proceedings *in rem* each is liable for the consequences of the collision and may be condemned. The tug and tow were both owned by the same person. Though the majority of the Court notice "*The American*" and "*The Syria*,"[11] where it is stated that the question of liability is not affected by the fact that tug and tow are the property of the same owners, we cannot but feel that if the ownership of tug and tow had been in different persons the decision of the Court might have been the other way and unanimous. "The *American*" and "*The Syria*" is distinguished; it would perhaps be going too far to say that it was ignored. The Chief Justice says (p. 42): "Both the defendant ships belong to the same owners and were at the time of the collision being jointly navigated for their benefit by the same crew. The

[8] (1843) 13 Sim. 393.
[7] [1895] 2 Ch. 698.
[8] (1878) 125 Mass. 536.
[9] (1888) 147 Mass. 530; 18 N. E. 412.
[10] [1891] 3 Ch. 242.
[11] L. R. 6 P. C. 127.

servants of the owners on board the tug had possession and control of the tow by their authority. It is true that the governing power and the navigation were in the hands of the tug, but the carrying capacity upon which the profit of their joint exploitation depended was in the tow. . . . Here we have two vessels necessarily connected for the purpose of the particular business in which both were engaged for the benefit of their common owner and both in the possession and under the control of the same crew for all the purposes of their navigation. As a result of the way in which that navigation was carried on, a collision occurred to which both vessels contributed. I fail to see how we can distinguish between the vessels: "*The A. L. Smith*" and "*Chinook*" v. *Ontario Gravel Freighting Co.*[12]

Fire Insurance—Cancellation. In *Nakata* v. *Dominion Fire Ins. Co.*[13] the point considered was the interpretation of the statutory condition relating to cancellation by notice and tender. The condition which was to the same effect as the Ontario statutory condition No. 11 read: 'The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a rateable proportion of the premium for the unexpired term. . . . Notice may be given . . . by registered letter . . . and the policy shall cease after such tender and notice aforesaid. . . .' (R. S. O. 1914, ch. 183, sec. 194). Notice of cancellation was given to the plaintiff by the Company; but no tender was made of the proportion of the premium for the unexpired term; nor was any offer made to her either directly or indirectly to return any portion of the premium. The buildings having subsequently been burnt by fire it was held by the Appellate Division of Alberta that the insured could recover on the policy; as the insurance had not been terminated. The judgment apparently suggests that if the defendant company had offered to account to the plaintiff for the premium the insurance would have been terminated. Whether the suggestion is well founded or not is immaterial for the facts in question called for no expression of opinion on that point.

Trade Marks. In the last number of the Exchequer Court Reports we have two more careful judgments by

[12] (1915) 51 S. C. R. 39, 42, 44.
[13] (1915) 31 W. L. R. 136.

Cassels, J., on the subject of Trademarks. *In re Vulcan*,[14] disposes so far as the Exchequer Court is concerned of a troublesome dictum of Proudfoot, V.C., in *Smith* v. *Fair*,[15] and we have no doubt that the rule laid down in *Gegg* v. *Bassett*,[16] that a trade mark can not be assigned in gross and adopted by Cassels, J., in *In re Vulcan* is no longer open to doubt. It is also well settled that registration confers no title; but is a mere pre-requisite to the right to sue for infringement. The applicant for registration must be the proprietor, and applying these rules we move a step forward towards a definition of a "general trademark." By registration of a mark as a general trademark no blanket right to the user of that mark in connection with every conceivable form of article is conferred, but it would seem the mark is a general and a valid trademark only so far as there has been user. The record case of *Mickelson Shapiro Co.* v. *Mickelson Drug and Chemical Co.*,[17] decides that the written application is the important part of the description and it cannot be extended by reason of something appearing on the drawing which has not been claimed in the description. We do not think the reference to patent law very happy; for specifications there are merely illustrations. In trademark cases that which is desired is the mark as represented, not as described. It is often very difficult to draft the description so as to cover all parts of a complicated mark. The second point in this case is one which has been decided before: that the Exchequer Court has no jurisdiction in passing-off cases. It is unfortunate that such is the case; for we have here divided jurisdiction: provincial Courts being seized of one phase of the subject, Dominion Courts of the other. The matter is the more difficult because not unfrequently a plaintiff may fail in an infringement action, but on the same evidence succeed in a claim for passing-off. This divided jurisdiction, will in such case, make necessary two actions and two trials.

L. D.

We append a note of a recent Supreme Court decision.

[14] 15 Ex. C. R. 265.
[15] 14 O. R. 736.
[16] 3 O. L. R. 263.
[17] Ibid. 276.

SUPREME COURT OF CANADA.

QUE.] [MARCH 15TH, 1915.

CANADIAN PACIFIC R. W. CO. v. PARENT AND CHALIFOUR.

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

Railways—Shipping contract—Carrying person in charge of live stock—Free pass—Release from liability—Approved form — Negligence — Action by dependents — Conflict of laws — "Railway Act," R. S. C., 1906, ch. 37, sec. 340.

The shipping bill for live stock, to be carried from Manitoba to its destination in the Province of Quebec, was in a form approved by the Board of Railway Commissioners and provided that, if the person in charge of the stock should be carried at a rate less than full passenger fare on the train by which the stock was transported, the company should be free from liability for death or injury whether caused by the negligence of the company or of its servants. C. travelled by the train in charge of the stock upon a "Live-stock Transportation Pass," and signed conditions indorsed in English thereon by which he assumed all risks of injury and released the company from liability for damages to person or property, while travelling on the pass, whether caused by negligence or otherwise. While the train was passing through the Province of Ontario, an accident happened and C. was killed. In an action by his dependents, instituted in the Province of Quebec, it was shewn that C. could neither read nor write, except to sign his name, and that he only understood enough English to comprehend orders in respect of his occupation as a stock-man; there was no evidence that the nature of the conditions was explained to him.

Held, FITZPATRICK, C.J., dissenting, that the railway company was liable for damages in the action by the dependents.

Per DAVIES, IDINGTON, DUFF and BRODEUR, JJ. (FITZPATRICK C.J. and ANGLIN, J., *contra*), that, as C. could not have known the nature of the conditions or that they released the company from liability, and the company had not done what was reasonably sufficient to give him notice of the conditions on which he was being carried, the company was liable in damages either under the law of Ontario or that of Quebec.

Per ANGLIN, J.—Although no action would lie in Ontario unless the deceased would have had a right of action, had he survived, and such an action would have been barred there by the contract signed by him, nevertheless, in Quebec, where there is no such rule of law, the action would lie, though the wrongful act had been committed in Ontario, as it was of a class actionable in Ontario. *Machado* v. *Fontes*, ((1897), 3 Q. B. 231), applied.

Section 340 of the "Railway Act," R. S. C. 1906, ch. 37, provides that "no contract, condition, . . . or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall . . . relieve the company from such liability unless such class of contract . . . shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case or by order or regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited." The Board made an interim order permitting the use by the company, until otherwise determined, of the shipping form used, but did not expressly authorize the form containing the conditions signed by deceased.

Held, per FITZPATRICK, C.J., and DAVIES and ANGLIN, JJ. (IDINGTON, DUFF and BRODEUR, JJ., contra), that the contract signed by deceased was one of a class authorized by the Board.

Per DUFF, J.—The contract signed by deceased could not have the effect of limiting the liability of the company because it was not in a form authorized or approved by the Board, and there had been no order or regulation made by the Board expressly determining the extent to which the company's liability should be impaired, restricted or limited as provided by sub-sec. 2 of sec. 340 of the "Railway Act."

Judgment appealed from, affirming the judgment of the Superior Court, (Q. R. 46 S. C. 319), affirmed.

Appeal dismissed with costs.

G. G. Stuart, K.C., for appellants.

R. C. Smith, K.C. and *Savard*, for respondents.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The Law Quarterly Review for April commences with a more than usually extended series of those "Notes" upon recent decisions which has been from its commencement some thirty years ago one of its most attractive and valuable features. In it we have also the second instalment of Mr. W. S. Holdsworth's *Origins and Early History of Negotiable Instruments* which he co menced in the number for January last. In the January Article he enumerated the characteristic features of negotiability in our modern law as three in number, name'y (1) negotiable instruments are transferable by delivery made payable to bearer, or by indorsement and delivery if made payable to order; and the transferee to whom they have been thus delivered can sue upon them in his own name; (2) consideration is presumed; (3) a transferee, who takes one of these instruments in good faith and for value, acquires a good title, even though his transferor had a defective title, or no title at all: and the questions he has set himself to answer are (a) what were the germs from which instruments having these qualities were developed; and (b) what were the technical processes by which this development took place? In these two Articles he discusses the early documents, first, apparently, devised by Lombard lawyers of the eighth and ninth centuries in Northern Italy, the use of which spread over Europe in the thirteenth century, whereby debtors were authorized to pay the creditor or his nominee, or the creditor or the producer of the document; and then proceeds to deal very lucidly and convincingly with the origin and development of the Bill of Exchange, finding his starting point in the mediaeval contract of *Cambium*, which he explains was a special variety of the contract of *Permutatio*; for while *Permutatio* was concerned with exchange generally, *Cambium* was concerned with the special case of the exchange of money for money. In the Article in the present number Mr. Holdsworth discusses the machinery devised for giving effect to this contract of *Cambium*, namely, the Bill of Exchange, the idea of which he inclines to think originated in the customs of Italian cities: and the legal development of which undoubtedly took place under the influence of Italian commercial lawyers. The origin is to be sought in the Italian

letter of payment which at first was merely a contract by which A. contracted with B. to transport money for B. to another place, in order that that money might be paid over to C. As to the development of the negotiable character of the bill of exchange, there is evidence that the Italian merchants were attempting to make bills of exchange completely assignable by repeated indorsements as early as 1560. "The legal position," says Mr. Holdsworth, "of the various indorsees *inter se* is really dictated by this legal reasoning which made several indorsements possible. The principal must indemnify his agent for all expenses to which the agent has been put. If, therefore, X. a payee, in consideration of a sum of money, makes Y. his procurator *in rem suam* by indorsing and delivering to him a bill, and Y. cannot get paid by the acceptor, X. must indemnify him; and clearly if Y. indorses to Z. the same principle will apply as between Y. and Z."

Another Article in the April *Law Quarterly* discusses *Covenants in restraint of trade in relation to personal services* in connection with the case of *Goldsoll* v. *Goldman*,[1] which we noticed in our February number (p. 168), and the remarks of Neville, J., therein. The writer, Mr. A. E. Randall, observes that:

> "Covenants in restraint of trade do not all stand upon the same footing, nor are they affected by the same considerations. They may arise in one of three ways, First, where a person sells or transfers a business or an interest in a business, and covenants not to compete with the purchaser. Whatever views may have been expressed regarding these, it has at last been realized that it is as much in the interest of the seller as of the buyer that effect should be given to provisions which shall secure to the purchaser the full benefit of that which he has purchased, and by reason of which an enhanced price has been obtained by the seller. A second class of case is where a person is precluded by contract from using premises in a particular way. It has never been suggested that these covenants are within the supposed mischief of contracts in restraint of trade. As a general rule they are framed as part of a building scheme, and the covenantor, and those who claim under him, usually receive the benefit of a compensating covenant which gives

[1] 84 L. J. Ch. 63, [1914] 2 Ch. 603.

them a local monopoly. The third class is the one to which the general observations of Neville, J., are more directly applicable, namely, where a person has covenanted that he will not during the period of his apprenticeship or employment or after it has ceased, engage in breach of his present engagement or in competition with his former teacher or employer, and in the latter event either on his own account or as servant of another."

After discussing the cases, Mr. Randall says:—

"If the cases relating to contracts in restraint of trade are read attentively, it will be found that they range themselves under the various heads to which I have drawn attention, but the distinct considerations which their intrinsic differences demand have not always been attended to, and the irrelevance of dicta have not been appreciated. It is unnecessary to introduce further anomalies into our law for the purpose of attaining true justice. A man is not bound to teach, and the result of the application of what some may regard as a wise rule of public policy might compel persons to learn their business from the unskilled whom competition could not affect. The public has nothing to gain by being served by a host of imperfectly trained individuals, and that result might follow if the teacher were not held to be entitled to restrict competition. We need go no further than the City of London to obtain an illustration of self-protection by refusing to take more than a very limited number of apprentices, and the rules of trade unions have long been governed by this policy."

In connection with the subject of this Article we may call attention to the recent case of *Herbert Morris Ltd.* v. *Saxelby*,[2] noticed in our April number, *supra* p. 334.

We must not omit to specially mention another Article in the *Law Quarterly Review* for April, namely, that by Mr. A. V. Dicey on *The Development of Administrative Law in England*. It has special reference to the recent decision of the House of Lords in *Local Government Board* v. *Arlidge*,[3] the effect of which was to hold that the transference by statute of jurisdiction from a Court to the Local Government Board is in itself *prima facie* evidence that Parliament intended that such jurisdiction should be exercised in accordance, not with the rules which govern judicial procedure,

[2] 84 L. J. Ch. 149.
[3] 84 L. J. K. B. 72. [1915] A. C. 120.

but with rules which govern the fair transaction of business by the Local Government Board. The learned writer points out that this decision—

> "May have far reaching consequences. It may lead to the result that any government department which is authorized by statute to exercise judicial or quasi judicial authority, may, or rather must, exercise it in accordance, not with the procedure of the law Courts, but with the rules which are found to be fair and convenient in the transaction of the business with which the department is officially concerned."

He concludes with the observation that—

> "Modern legislation and that dominant legislative opinion which in reality controls the action of Parliament, has undoubtedly conferred upon the Cabinet, or upon servants of the Crown who may be influenced or guided by the Cabinet, a considerable amount of judicial or quasi-judicial authority. This is a considerable step towards introduction among us of something like the *droit administratif* of France, but the fact that the ordinary law Courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true *droit administratif*."

Other Articles in the Number are *Alien Enemy Litigants* by Arnold D. McNair; *Companies with Enemy Shareholders* by James Edward Hogg; *More Wardour Street Roman Law* by W. W. Buckland; and *Hurst* v. *Picture Theatres, Ltd.*,[4] (in which the Court of Appeal in England decided that if A. has paid for a seat at a theatre and has been allowed to enter, the license to enter and remain during the performance cannot be revoked, provided A. behave properly and complies with the regulations of the management) by J. C. Miles, who observes that if this means that—"if A. is under B.'s license on B.'s property, and such license has been given for value, B. cannot revoke the license and treat A. as a trespasser, one could wish that so important a doctrine has been laid down a little more clearly." The number concludes with an appreciation of the late Mr. Justice Kennedy, who "will be remembered among those who knew him as an accomplished

[4] 83 L. J. K. B. 1837, [1915] 1 K. B. 1.

scholar, a broad-minded judge, an erudite jurist, and a most charming and loyal friend."

The Michigan Law Review for May opens with the first long instalment of a profound Article upon '*The nature and importance of legal possession*' by Mr. Joseph W. Bingham. We cannot pretend that even a careful reading has enabled us to clearly understand the writer's point of view. Perhaps a further instalment will do so. Most of us probably are content to understand 'legal possession' as meaning possession under such a state of circumstances that even, though the possessor be not the owner, the law will protect him in his possession by certain special remedies, called for that reason, 'possessory remedies,' and after the lapse of a certain length of time will convert that legal possession, if uninterrupted, into ownership, or the practical equivalent thereof. And we discover that the conception of possession, not only in a legal, but also in a popular sense, is a complex one, involving, on the one hand, a measure of physical control, and, on the other, a measure of mental intention to possess. These we call the *corpus* and *animus* of possession. And finally we say that to discover the precise conception of legal possession which any given system of law embraces, we must find out just what measure of physical control, and what degree of accompanying mental intention to possess, that system of law desiderates before it will recognize the possessor as entitled to the possessory remedies, even though he be not the owner. If we find in a given system of law anomalous cases which do not tally with the general conclusion at which we thus arrive, we rank them as exceptions "due to some particular juridical policy or consideration, to historical accident, to the unsystematic courses of juristic development, or to judicial error." All this is unsatisfactory to Mr. Bingham. He says: "The fault lies in the method of attacking the problem and, back of that, in a very common fundamental fallacy which treats abstract ideas, generalizations, and the language in which they are expressed, as the essential enduring substance of the law instead of only transitory, subordinate implements of technical thought and communication. What is a proper method?" We confess we have not at present been able to grasp what in the view of the learned writer the answer to this question should be. We hope the next instalment will make the matter more clear to us. The

remaining Articles in this number of the *Michigan Law Review* are on *Classes of American Religious Corporations*, and *Some Sociological Aspects of Criminal Law*.

The Yale Law Journal for May is much devoted to the subject of the regulation of Commerce. It contains one lucidly written Article by Mr. Bruce Wyman on *The Rise of the Interstate Commerce Commission* of the United States in which he traces the steps by which its jurisdiction has developed. He ends by the following prediction:—

> "As I view the evolution disclosed by this narrative, it seems to me that it is clearly indicated that in its next stage the Interstate Commerce Commission will be empowered, to give relief in particular cases of bad service brought to its attention as it has been granted over improper rates. All over the country the State Commissions are being given the same measure of power over service which they have over rates. . . . . The Interstate Commerce Commission has never been given greater power over rates than to reduce particular rates, and then only if the existing rates are in fact clearly found to be unreasonable; and it would not, therefore, be given wider jurisdiction over service than to remedy particular defects plainly shown in proper proceedings."

Later on there is an Article by Mr. Lindsay Rogers on the *Power of the States over Commodities excluded by Congress from Interstate Commerce*. It appears that the Supreme Court of Montana, in a recent case, has held that when Congress has prohibited certain subjects of interstate commerce, in the particular instance, the transportation in interstate commerce of women for immoral purposes,—the States are powerless to interfere with these same subjects; and it would seem to be immaterial that the federal and State laws might act concurrently. And so in the case cited the Court held that a State statute forbidding the entrance into the State of women for immoral purposes, and making criminal the aiding and inducing of such entrance is unconstitutional. Mr. Rogers disputes the correctness of this decision, and holds that the exclusiveness of federal authority in respect to commodities which have been prohibited from interstate commerce is not justified: and that there is no reason why the transportation in interstate commerce, and the introduction

into the State may not be two distinct crimes against two governments.

Other Articles in this Number of *The Yale Law Journal* are *Acquirement of Real Property by American Churches* by Carl Zollman, and *Tinkering with the Constitution* by Jos. R. Long. It appears from this last Article that a Society has recently been formed, with headquarters in Brooklyn, having for its object to secure an amendment to the Federal Constitution, by providing easier modes of amendment of that Constitution than those prescribed by Article V. The conditions precedent to an amendment under that Clause are so stringent that we have the authority of President Wilson himself, in his *Congressional Government*, that—'no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment of the Constitution of the United States. That must be a tremendous movement which can sway two-thirds of each House of Congress, and the people of three-fourths of the States.' Nevertheless Mr. Long does not sympathise with the objects of the Society above referred to. He reviews the history of proposed amendments to the Constitution and cites the Sixteenth Amendment of July, 1909, authorising the imposition of an income tax, which "was adopted within about three and one-half years after it was proposed by Congress" as proving that "the Constitution could be peaceably amended if the people really so desired." Then he cites the Sixteenth Amendment of May 31st, 1913, providing for the election of the Senators by the people, which was ratified in four days less than one year from the day on which it was proposed: "so that in less than four years two independent and unrelated amendments were added to the Constitution." After discussing certain amendments which have been proposed, but not carried into effect, Mr. Long concludes his interesting Article thus:—

> 'The Constitution is not perfect. The result of compromise in the first instance, it is not the embodiment of a philosophic scheme of government but a working instrument of practical statesmanship. In the hands of the Supreme Court it has been admirably fitted to the needs of successive generations of our people. When necessary, or when the people really desire it, it can be amended. The present mode of amendment assures its

stability while permitting natural evolution; a simpler mode might work its destruction.'

We have very gratefully to acknowledge our monthly bundles of legal publications from British India—*The Madras Law Times, The Madras Weekly Notes, The Calcutta Weekly Notes, The Madras Law Journal, The Madras Criminal Law Review,* and the *Punjab Law Reporter.* We notice that the *Calcutta Weekly Notes* for April 5th, 1915, notices at considerable length our Mr. Justice Riddell's recent Address on *the Administration of Justice* delivered before the *Illinois State Bar Association* at Chicago, opening it with the remark that—'this vigorous plain speaking is so obviously instinct with high purpose and sound judgment that it ought not to be missed in any place where a similar system of Judicial administration prevails.' It especially singles out the following remarks of the learned judge, the force of which, it says,—'coming from a judge of over thirty years' experience'—Is it so long!—'can hardly be over-rated':—

> "Whenever, by any hide-bound practice, a Court cannot do justice on the facts because a lawyer has made a mistake, there is a failure in the elementary duty of the Court. In an ideal state every liberty will be given to both parties to bring out the relevant facts, and judgment will be given on those facts according to the very right and justice of the case, even if the lawyers make fifty mistakes and a hundred omissions."

Of course the cases reported in these publications seldom have much application to our law. They are interesting none the less. We note one in the *Madras Law Times* of March 9th, which tells us that—'It is settled law that in families governed by Aliyasantana law the senior female if she be the senior member of the family, is entitled to manage the family properties. The management by any other member is only by sufferance. Special family custom in derogation of that rule must be strictly proved.'

The Madras Law Times has a laudable love of humour. It culls from various sources legal stories which have the peculiarity of being really amusing. The number for March 2nd has some admirable Westbury stories, amongst others Lord Westbury's remark when Bovill was made Chief Justice:—"I think that with a very little more experience Bovill

will probably make the worst judge in England." But better still is the story of how Lord Westbury, meeting Lord St. Leonards one day, said to him:

"My dear St. Leonards, why don't you come down and give us your valuable assistance in the House of Lords?"

"Ah," said Lord St. Leonards, "I should be of no use. I am old and blind and stupid."

"My dear St. Leonards," said Westbury, "that does not signify in the least. I am old, Chelmsford is blind, and Colonsay is stupid; yet we make the very best court of appeal which has ever sat in that assembly."

A. H. F. L.

The Law Magazine and Review for May contains a racy article by Arthur Cleveland on *Defamation in the Local and Ecclesiastical Courts.* Down to the close of the 14th Century, whatever may have been the reason, the King's Courts would have nothing to do with actions of defamation, and the ecclesiastical authorities who were never behindhand in extending jurisdiction entertained these actions. Their jurisdiction however was not exclusive; for the Customary and Leet Courts throughout the 11th, 12th, and 13th Centuries disposed of many such cases; even claims for defamation imputing a sin, which later on were held to be cognizable by Courts Christian only, and damages were awarded. Thus the Ruthin Court Roll contains the following: "It is found by inquest that Rohese Bindibere (3d.) called Ralph Bolay thief, and he (3d.) called her whore. Therefore both in mercy. And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohese, the said Ralph do recover from the said Rohese 12d. for taxed damages." Seeing that in these local Courts the plaintiff could obtain damages, but in the Courts Christian could only obtain the satisfaction of putting the defendant to the penance it appears surprising that the Ecclesiastical Court was resorted to. There were several reasons for this; and there was always the satisfaction such as it was, of seeing your enemy dressed in a white sheet in the midst of the congregation, and after a sermon and the third chapter of Saint James' Epistle, hearing him recite a long and abject apology in which he called himself more unpleasant names than he had called you, "promysinge before

God and you here present that I fully intend to amende my onteragious tonge and wilfull behaviour; for the obbeyninge and performing thereof I humbly beseeche you all to pray unto God as our Saviour taught us, sainge "Our Father, which art in heaven . . ." Theoretically the Ecclesiastical Courts had no jurisdiction except where the defamation imputed a sin; punishable by the Courts Christian; for after the King's Courts began at the commencement of the 15th Century, to take cognizance of libels and slanders prohibition might issue to prevent Ecclesiastical Courts dealing with cases of defamation outside this class. But probably till the close of the 16th century the Ecclesiastical Courts did pretty much as they chose, trying cases irrespective of whether they were properly cognizable or not. Then Dorothy Robinson is cited for saying Agnes Parker "caine more likely to steill a pig than to see them;" Janet Armstrong for saying John Hall had "murdered and put down his two wyfes;" John Wright for saying "Lawrence Douglas was a Scot;" Elinor Anderson for saying Leonard Taylor was "a gouse and a hen thief and all his;" and Stephen Nicholson for saying Edward Younger "did eat fyve stolen geis all upon one day in his house and kept his door spaired all tyme they were eating." After the 16th Century the jurisdiction of the Ecclesiastical Courts was limited more strictly by the King's Courts; yet it was not until 1855 that the jurisdiction of the Ecclesiastical Courts over defamation was finally abolished by Statute.

Mr. R. R. Formoy writes on *Householders Liability for Damage caused by Falling Tiles.* There is some uncertainty as to the law, arising from the decision in the case of *Tarry* v. *Ashton.*[17a] It will be remembered that in that case a heavy lamp fell and injured a passerby. The occupier of the house knew of a defect in the bracket and had employed a contractor to repair it, who however failed to effect a proper repair to the flaw in the iron. There was a unanimous judgment, by Blackburn, Lush and Quain, JJ., for the plaintiff. But the reasons of the three judges were different: Blackburn, J., appeared to rest his decision either on the ground of negligence or of nuisance; while the other two judges used language which might imply that they regarded the occupier of the house as being under an absolute duty to see that no injury befell a passerby. In a more recent Irish

[17a] (1876) 1 Q. B. D. 314.

case of *Palmer* v. *Bateman*,[18] a piece of gutter fell from the roof owing to the rusting of a screw. The occupier knew of no defect, and there was evidence of due diligence on his part. A Court of first instance, a Divisional Court, and the Irish Court of Appeal all found in favor of the defendant. It is clear that if there is negligence on the part of the occupier he is liable; and if an accident has happened the plaintiff will succeed unless the defendant can prove due diligence. Supposing, however, that the defendant can prove due diligence does that put an end to the matter? First, as regards nuisance Mr. Formoy seems to think that this will depend on the circumstances of each particular case. Secondly, as regards absolute responsibility the Irish case appears to conflict with what was said by Lush and Quain, JJ. The question may be put in this way, whether or not the principle of *Rylands* v. *Fletcher* does or does not extend to the escape of solid bodies. Mr. Formoy seems to think that the English Court will adopt the same rule as the Irish Court, should the case come before them.

The rest of the Magazine is concerned mainly with articles relating to the war. Mr. Percy H. Windfield writes on *Air Craft Attacks*. Mr. W. E. Wilkinson on *Reprisals in Warfare*, and there are also *Current Notes on International Law*. Mr. J. S. Henderson contributes a paper on the old Scottish *Law of Dealhbed*, and there is a *Review of Judicial Statistics for England and Wales in 1913*.

In Harvard Law Review for May Samuel Williston writes on *Does a Pardon Blot out Guilt?* He attacks the statement in the leading U. S. case *Ex parte Garland*,[19] that a pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." This statement is not without some warrant from English precedents. Bracton says that a pardoned man is "like a new-born infant and a man as it were lately born," and the case of *Cuddington* v. *Wilkins*;[20] decided that after a pardon the law could not see the convict's guilt. The learned writer is not satisfied with this rule; and makes a distinction: Pardon removes all legal punishment, but if *character* is a necessary

[18] (1908) 2 Ir. R. 393.
[19] (1866) 4 Wall. 333, 380.
[20] (1615) Hob. 67, 81; S. C. Browne & G. 10.

qualification for office a pardon of a convicted criminal will not make him eligible. In several cases in the States the question has arisen of disbarring lawyers who have been convicted of crime but pardoned. In general it has been held, in spite of the rule in *Ex parte Garland*, though not without some difficulty that the pardon was no defence to disbarment proceedings. An English decision, *Hay* v. *Justices*,[21] seems the other way. It was there held that a pardoned convict was entitled to engage in the business of selling liquor at retail though the Act provided "Every person convicted of felony shall be forever disqualified from selling spirits by retail."

Remoteness of General Powers, Mr. J. L. Thorndike's paper is a discussion of the statement appearing in Farwell on Powers, 1st ed., pp. 227, 257; 2nd. pp. 292, 322. "A power of appointment among children is well executed by an appointment to one of them for life, with power to dispose of the capital by deed or will, whether such children were *in esse* at the creation of the power or not; for this in effect gives the whole beneficial interest to the appointee, and does not transgress any rule against perpetuity." The authority cited is *Bray* v. *Bell*,[22] S. C. *sub nom. Bray* v. *Hammersley*.[23] Mr. Thorndike analyses this decision of the House of Lords, but finds no support for the statement. The case moreover of *London & South Western Ry. Co.* v. *Gomm*,[24] is found to be a direct authority that such a power would not be valid. The paper concludes with a reference to *Phipson* v. *Turner*,[25] *Gomm's Case*,[26] *Wallaston* v. *King*,[27] *Morgan* v. *Granow*,[28] and then follows a criticism of some points in the Ontario case *Re Phillips*,[29] decided by Middleton, J. Mr. Thorndike's observations on this case will be found under notes on Canadian cases at p. 527 of this issue.

There seems to be no authoritative English case on the question whether the Statute of Limitations runs during war to bar an alien enemy. Mr. C. N. Gregory discusses the American cases in *The Effect of War on the Operation of*

[21] (1890) L. R. 24 Q. B. D. 561.
[22] (1834) 8 Bli. 568; 2 Cl. & F. 453.
[23] (1840) 3 Sim. 513, 518.
[24] (1882) 20 Ch. D. 562, 580-2, 586.
[25] (1874) L. R. 10 Ch. 35, 40.
[26] (1882) 20 Ch. D. 562.
[27] (1869) L. R. 8 Eq. 165, 169-170.
[28] (1873) L. R. 16 Eq. 1, 9-16.
[29] (1913) 28 D. L. R. 94.

Statutes of Limitation. It is clear that though the Courts be closed by reason of civil war, yet the statute runs. *Beckford* v. *Wade.*[30] And it has been said that the same reasoning applies to the case of an alien enemy. There is a *dictum* to this effect in *DeWahl* v. *Browne.*[31] But see Pollock, *Contracts*, p. 86 n, and *Westlake International Law*, p. 49. The American rule, and justice seems to be with it, though the statute is general in its terms, is that the period does not run. The cases are ———— v. *Lewis,*[32] *Wall* v. *Robson,*[33] *Hanger* v. *Abbott,*[34] *The Protector,*[35] *Semmes* v. *Hartford Insurance Co.,*[36] *Brown* v. *Hiatts,*[37] and three or four others.

The May number of the Columbia Law Review contains an article by W. C. Dennis on *Recent United States Supreme Court Cases Relating to the Situs of Intangible Personal Property for Purposes of Taxation.* Regarding tangible personal property the rule of law appears to be clear that the property must be taxed to its owner where it is actually found and not elsewhere. The Rule as regards intangible personal property is not so clear. The writer summarizes half a dozen cases, all of them decided since 1899, and finds that they clearly establish an exception to the general rule that intangible personal property has its *situs* for taxation at the domicile of the owner. These cases hold that the owner of such property may so deal with it as to give it a *situs* for taxation in a State other than that of his domicile. In summarizing generally the effect of the cases considered in the article with respect of the *situs* of Intangible Personal Property the writer submits:—

1. That these cases show that fundamentally the situation with respect of tangible and intangible personal property is the same; namely, such property is taxable at its actual *situs* (although intangible personal property has of course no physical location).

2. For historical and practical reasons the general rule is that intangible personal property has its *situs* for taxation

[30] (1810) 5 Ves. Jr. 87.
[31] (1856) 25 L. J. N. S. Ex. 343.
[32] 1 Brunner Col. Cas. 27; 15 Fed. Cas. No. 8. 315 (1805).
[33] 2 N. & McC. (S.C.) 498 (1820).
[34] 16 Wall (U.S.) 532 (1867).
[35] 12 Wall. (U.S.) 700 (1871).
[36] 13 Wall. (U.S.) 158 (1871).
[37] 15 Wall. (U.S.) 177 (1872).

in the State in which the owner (i.e., in case of credits, the creditor) is domiciled.

3. In certain exceptional cases it has been held that the owner may so deal with his intangible personal property as to localize it for taxation in another jurisdiction than that of his domicile. In the decided cases such taxation has only been upheld where a creditor was doing business or engaged in the investment of capital as a business in the State where the debtor was domiciled.

4. If the exceptional circumstances exist, in which intangible personal property is held to have acquired a *situs* for taxation in another jurisdiction than that of the owner's domicile, then it must necessarily follow that it loses its original *situs* at the domicile of the owner, and is taxable at its new *situs* only, and not elsewhere.

Edwin C. Goddard writes on the *Liability of the Common Carrier as determined by Recent Decisions of the United States Supreme Court.* As we have before noticed in the CANADIAN LAW TIMES the rule of law in the United States is now different from that in England. Down to the present day the United States Courts have not admitted that there may be any relaxation of the strict liability of the carrier except by the shipper's consent. The result is that in the United States the common carrier is the insurer of the goods he carries, except for losses due to the act of God, the public enemy, public authority, the act of the shipper, or the inherent vice of the thing shipped. The leading case of *Hollister* v. *Nowlen*,[38] has become authority in every State of the Union for the doctrine that the carrier cannot by notice, even though it be brought home to the shipper, limit his common law liability. In spite of this all the great carrying corporations as a matter of fact have ceased to be liable according to the strict rule of common law. The writer discusses how the special contracts and statutes which have worked this apparent paradox have been interpreted and enforced by the Courts. The article is to be concluded in the next number of the Columbia Law Review.

Mr. Henry Taft discusses *State Control of Navigable Waters.* His article is mainly concerned with the case of the

[38] (1838) 19 Wend. 234.

Long Sault Company v. *Kennedy*,[39] a case which has caused considerable adverse criticism and has now been taken on Writ of error to the Supreme Court of the United States. It will be remembered that the New York Court of Appeals decided against the validity of the statute giving power to the company to build a dam across a portion of the St. Lawrence River. One of the main reasons given was as follows:—

"No matter how much the interests of the public may demand the improvement thereof in the future the State will be powerless to act either directly or by constraint on the corporation. Here the grant is objectionable on account of the abdication of the State's control over waters which are still to be preserved as navigable, but which are to be turned over wholly to the dominion of a private corporation."

With all respect we doubt whether the decision will be upheld on this ground by the Supreme Court of the United States. Certainly no statute can be declared invalid in our jurisdiction for such a reason.

Among, the notes is one on *Interest in Actions for Unliquidated Damages.*

The weekly articles of *Law Times* for April 24th, May 1st, and May 8th, are respectively, *Restraint on Anticipation, Annuities and their Anomalies,* and *Railway Companies and their customers.*

The May number of University of Pennsylvania Law Review contains an article on *Judicial Administration* by Mr. E. R. Thayer, an address delivered by him before the Law Association of Philadelphia. The "distorted form of jury trial" and other defects are attacked. Howard A. Lehman contributes *A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases;* James B. Lichbenberger writes on *The Uniform Partnership Act;* Herbert A. Howell discusses the question *Are Titles of Books Copyright?;* and Shippen Lewis gives a paper on *Eliminating Archaic Features of Execution Process in Pennsylvania.*

[39] (1914) 212 N. Y. 1.

The Canada Law Journal for this month contains a further instalment of Mr. Fraser Raney's careful paper on *Marriage and Divorce in Canada.* Parts IV. and V. dealing with Divorce Tribunals, Foreign Marriages, Dissolution of Marriage and Rights and Obligations of Parents and Children, are given. The Journal also contains the usual excellent review of current English cases.

The Illinois Law Review opens its 10th Anniversary Volume with a brilliant little paper by Mr. Justice Oliver Wendell Holmes on *Ideals and Doubts,* in which he gives more than the usual epigram: in fact he rather lavishly supplies three or four. The Article is an address to young lawyers and legislators, calling them to consider in an atmosphere cleared of convention and clap-trap first what condition or result is desirable, secondly, what are the appropriate means. To have doubted one's own first principles he says is the mark of a civilized man. To rest on a formula is a slumber that, prolonged, means death. He exhorts to action: the mode in which the inevitable comes to pass is through effort. The trouble is that our ideals for the most part are inarticulate, and that even if we have made them definite we have very little experimental knowledge of the way to bring them about. He confesses to skepticism but says "I hold to a few articles of a creed I do not expect to see popular in my day. I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinate human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law. The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug."

Other articles are *The Destruction of Neutral Prizes and the German Prize Code* by C. H. Huberich: *Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision,* by Henry Schofield; and *The Federal Trade Commission* by Michael Gallagher.

We also notice some curious statements taken from letters to the Illinois Law Review submitted on behalf of candidates

for election to the Supreme Court of Illinois. Whether it is due to severe competition or not the letters all set forth a list of virtues which would be the despair of an aspiring Rhodes scholar. Thus one letter concludes "He is a strong man physically, 58 years of age, of exemplary habits, and a member of the Christian church, and a man respected by all for his ability and integrity. He has never been in any kind of business. He has been a lawyer all his life, without any sidelines. . . ." Another in a crescendo of praise strikes this concluding note, "Mr. Bundy is in splendid physical condition and has a capacity for hard labor. He is 56 years of age and is at the high tide of his mental powers. He is without judicial experience, but has a judicial temperament."

L. D.

The following letter, signed in the well-known and esteemed initials "W. R. R.," appeared in the Toronto "Globe" lately; and is worth placing on record for the information it gives as to the early history of the legal profession in Ontario.

THE BARRISTER IN EARLY TIMES.

To the Editor of The Globe: In Prof. Grant's valuable "Ontario High School History of Canada," at p. 194, speaking of society in Toronto, especially at the time of Sir Peregrine Maitland (say the second and third decades of the nineteenth century), the learned author says: "A barrister would not shake hands with a solicitor."

The statement is accepted at its face value by the reviewers, who publish the "Review of Historical Publications Relating to Canada." In vol. 19, at p. 8, it is said: "It is amusing to read that in the early rough days of Upper Canada social distinctions were very sharp, 'a barrister would not shake hands with a solicitor.'"

I have been puzzling myself over this statement and can find no authority for it, unless, indeed, it is a joke, just as though the author had said "a barrister would not shake hands with a Queen's professor," because he could not find one to shake hands with.

Of course a member of the lower branch of the profession who practised in a Court of Equity was called a solicitor, but one who practised in a Court of law was called an attorney. There was no Court of Equity in Upper Canada before 1837 (although Chief Justice Powell once tried to get the Governor to act as Chancellor of the Province), and consequently no solicitors at that time. It is true that the Law Society Act of 1797, 37 George III., ch. 13, provided for an articled clerk becoming qualified to act "merely as an attorney or solicitor in any of His Majesty's Courts of law or equity in this Province," but it is equally true that no court of equity was erected till forty years after.

There was indeed from and after 1797 an officer called the "Solicitor-General," but he was no more a solicitor than the present Surveyor-General at Ottawa is a surveyor. Before their abolition in 1794 by the Act 34 George III., ch. 2, the Courts of Common Pleas in the Province had a species

of equitable jurisdiction, and the practitioners in these courts might not improperly be called solicitors, but they were also advocates, and in any case these courts were abolished long before "the later Lieutenant-Governors, especially Sir Peregrine Maitland."

The error, however, goes much deeper—the assertion is in substance that there were two branches of the profession composed of different individuals (as in England), and that the members of the "higher branch" would not have anything to do with those of the lower. This is wholly baseless, so far as I know.

From the beginning of the Province until 1794, 34 George III., ch. 4, all practitioners were admitted under the former system, i.e., under the ordinance of 1785, which did not distinguish barristers and attorneys; from the passing of the act of 1794 until the Law Society's Act in 1797, those admitted were admitted as "advocates and attorneys;" after the Law Society's Act the practitioner was "called" as barrister and "admitted" as attorney. But every practitioner must have been on the roll of the Law Society and under articles as well. This continued till 1822, when the Act, 2 George IV., ch. 5, removed the necessity of articled clerks, i.e., those desiring to become attorneys, being on the roll of the Law Society.

During this period about six per cent. only of those who became attorneys did not become barristers and about the same number became barristers who did not become attorneys.

After the Act of 1822 only one person became an attorney who did not become a barrister until 1832; after that time the proportion became greater, ultimately leading to the Act of 1857, 20 Victoria, ch. 636, which brought the attorney and solicitor back under the jurisdiction of the Law Society.

At the present time about four per cent. of the practitioners of law are barristers only and about 2½ per cent. solicitors only. The English system wherein the barrister is retained by the solicitor and it is thought not quite seemly for a barrister to court solicitors, never had a footing in Upper Canada.

A few errors in dates will, of course, be corrected in a future edition. The Slavery Act was not passed in 1792, but in 1793, the capital was not moved from Newark to York (Toronto) in 1794.

W. R. R.

NEW BOOKS AND NEW EDITIONS.

Notes on the Remedies of Vendors and Purchasers of Real Estate, with special reference to instalment plan agreements, rescission, determination, relief against forfeiture. 2nd edition. By C. C. McCaul, B.A., K.C., of Osgoode Hall, and of the Bars of Alberta, Saskatchewan, and British Columbia. Toronto: The Carswell Company, Limited, 1915; London: Sweet and Maxwell, Limited.

We have already noticed in our number for last April the appearance of a 2nd edition of the above book. After a careful study of its contents we are now able to speak with confidence of its merits. It is, in fact, deserving of the highest commendation for diligence and acumen in discussion of the cases, and for lucidity and style. It is in truth a new departure among Canadian text-books, and bears throughout the touch of a master-hand. It is in every respect worthy of the professional reputation of the learned author. The above heading, which is taken from the title page, admirably indicates the scope and contents of the book. To challenge adequately any of Mr. McCaul's conclusions would require one to be a past-master of the law on the subjects with which he deals, and would involve a treatise almost as long as the book itself. Evidently the prominence which dealings in the purchase and sale of land occupy in the life of our western provinces, has lead to a very special development of the law of vendor and purchaser; and Mr. McCaul's exhaustive treatment of the local decisions will render his book specially valuable to practitioners in those Courts where he has made his own high reputation. One special feature of the book is the manner in which the writer insists upon and works out the distinction between *rescission* and *determination* of a contract of sale of land, and the consequent rights, and liabilities of the parties. Another is the masterly way in which he discusses the bearing of a clause expressly making time of the essence of the contract, arriving at this conclusion (p. 114):—

'It is suggested that the effect of a stipulation making time of the essence of the contract, so far at least as it affects the power of the Court to relieve against forfeiture, cannot be expressed more strongly than that such express stipulation will be noticed by the Court among other circumstances (including the subject-matter of the contract) in considering the equity to relief against forfeiture. It would seem, too, to be, perhaps deducible from the authorities, that the Court

will not in any event strictly enforce the stipulation as to time, except in cases where it is also possible to enforce *restitutio in integrum* without injustice to either party."

Mr. McCaul also discusses and gives prominence (p. 19) in a way we have not seen done elsewhere, to the effect on this whole subject of the express statutory provisions in respect to the power of the Courts to relieve against all penalties, and forfeitures, which are found in Ontario, Manitoba, Alberta, and British Columbia. In connection with this matter we may call the attention of the learned author to the fact that since the Privy Council decision of *Kilmer* v. *British Columbia Orchard Lands, Ltd.*,[1] the Ontario Courts have not followed the decision in *Labelle* v. *O'Connor*.[2] See *Boyd* v. *Richards*.[3] At p. 516 of this number we refer to a recent decision of the House of Lords, later than the publication of Mr. McCaul's book, which seems to uphold the binding efficacy of an express agreement that time shall be of the essence. But this of course would not affect the force of *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, in Canadian Courts. We are much impressed by the suggestion of Mr. McCaul that the condition of Western Canada in respect to land-holding and the way in which land is regarded, may render the English cases as to when specific performance should be granted not really applicable (pp. 44-45); as also by his suggestion (pp. 154-5) supported by a Saskatchewan case, but which 'has not met with approval in Alberta,' that the *ratio decidendi* of *Bain* v. *Fothergill*[4] as to damages recoverable from a vendor who is unable to complete owing to defect in title, ceases to apply in countries possessing the Torrens system of Land Titles.

On the point of the right of action for each instalment as soon as it becomes payable under the contract, where the purchase-money is payable by instalments, Mr. McCaul has omitted to notice *Vivian and Co.* v. *Clergue*,[5]: and although we find the case of *Gibbons* v. *Cozens*,[6] referred to in the Table of Cases, we don't find it at the page mentioned, nor have we found it anywhere else in the book.

[1] [1913] A. C. 319.
[2] 15 O. L. R. 519.
[3] (1913) 29 O. L. R. 119.
[4] L. R. 7 H. L. 158.
[5] 15 O. L. R. 280; 16 O. L. R. 372; 41 S. C. R. 607.
[6] 29 O. R. 356.

We have received Hanson's Death Duties, 1915, being a supplement to the 6th edition, by J. S. Franey, B.A., of the Inner Temple, Barrister-at-law: London: Stevens and Haynes.

We have also received Volume XXXIX. (1914) of Reports of the American Bar Association, and the *American Bar Association Journal*, and hope to notice the contents in our next number.

THE GAZETTES.

The Canada Gazette for May 1st, 1915, contains the appointment of Mr. Justice Hodgins to be a Commissioner to enquire into and report upon certain charges preferred against His Honour Clarence Russell Fitch, judge of the District Court of the District of Rainy River.

The Canada Gazette for May 1st, 1915, contains an Order in Council of April 27th, 1915, prohibiting the exportation except to the British Dominions, the allied countries (except Russia's Baltic ports), and the United States when for consumption in the United States only, of a long list of Articles, other than munitions of war, but 'capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food by man.'

The Canada Gazette Supplement for May 8th, 1915, contains the new By-laws for the Pilotage District of Montreal, confirmed by Order in Council of April 29th, 1915.

The Canada Gazette for May 22nd, 1915, contains the new regulations as to the removal of timber in Dominion Parks confirmed by Order in Council of April 30th, 1915.

The Canada Gazette of May 29th, 1915, contains the Order in Council proroguing Parliament until July 3rd, next.

The Manitoba Gazette of May 1st, ult., contains the proclamation proroguing the Legislature until June 10th, next.

The Saskatchewan Gazette of April 30th, ult., contains the proclamation convening the Legislative Assembly for May 10th, ult.

The British Columbia Gazette for April 29th, 1915, contains the Dominion Order in Council of March 6th, 1915, giving the first authoritative definition of 'game,' as applicable to the Regulations governing the National Parks of Canada, and prohibiting expressly, for the first time, the possession of 'game' obtained within the Parks. 'Game' is now declared to mean:—'All animals and birds protected by these regulations, and the heads, skins, and every part of such animals and birds.'

LOCALS AND PERSONALS.

Corporal J. G. Thomson, of 79th Cameron Highlanders, before enlistment a law student in the firm of Thomson and Thomson of W[illegible], is reported wounded.

Mr. Justice Wallace Graham, was on April 27th last appointed Chief Justice of the Supreme Court of Nova Scotia in succession to Sir Charles Townshend, retired.

Mr. H. E. A. Robertson, of Victoria, B.C., has been appointed County Court Judge of the District of Cariboo.

Mr. Alph. Bernier, K.C., M.P.P. for Levis, has been elected Batonnier of the Quebec Bar.

The Honourable A. W. Atwater, K.C., has been elected Batonnier of the Montreal Bar.

Mr. W. A. Ewing, K.C., has been elected President of the Law Society of St. John, N.B.

His Honour Alfonso B. Klein, for over twenty years Junior Judge of the County of Bruce, has been made Senior Judge of the County. Mr. A. M. Greig, of Almonte, has been appointed Junior Judge.

We have to note with regret the following deaths among judges and members of the profession:—

The Honourable Simeon Pagnuelo, judge of the Superior Court of the district of Montreal on May 14th, at Montreal.

His Honour Alexander Finkle, judge of the County of Oxford, on May 27th, at Woodstock.

Mr. E. E. A. Du Vernet, K.C., of Toronto, on May 31st, last, at Toronto.

James Stewart Tupper, K.C., eldest son of the Right Honourable Sir Charles Tupper, on April 29th, at Oxford, England.

John J. Drew, K.C., late of Guelph, on May 8th, in Toronto.

M. E. Charpentier, K.C., the dean of Montreal lawyers, on May 6th, at Montreal.

A. E. H. Creswicke, K.C., on May 7th, at Barrie, Ont.

John Alfred Murphy, late Crown Attorney of Haldimand County, on May 8th, at Cayuga, Ont.

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VOL. XXXV. AUGUST, 1915. No. 8.

BY THE WAY.

In our issues of March and April last we had the honour of publishing the names of those Ontario lawyers and law students who are on active service, to which we have now to add the name of Mr. Arthur B. Colville of Toronto. In June we published the names of those from Nova Scotia, New Brunswick, Alberta, and Saskatchewan. We are now able to add those from Manitoba. In every case we have taken great pains to make the list accurate and complete. We shall be very grateful to those who will call our attention to any mistakes or omissions.

The doctrine of heredity is writ large in legal places in England. Lord Justice Phillimore, Mr. Justice Coleridge, Mr. Justice Lush, and Mr. Justice Bargrave Deane are the sons of Judges. It could not, however, be said of any of them, as was said of the occupants of one Court, that they succeeded to their places *per stirpes* and not *per capita*.

On July 14th last the following announcement issued from 10 Downing Street:—

> 'By the invitation of the Prime Minister, Sir Robert Borden, the Prime Minister of the Dominion of Canada, attended the meeting of the Cabinet to-day.'

This, it is believed, is the first occasion on which the Prime Minister of one of the Dominions has taken part in an ordinary meeting of 'His Majesty's Servants,' though some of them have been invited on different occasions to attend the Committee of Imperial Defence. It is well to note these

advances towards formal Imperial unity as they occur. It is the substantial and real union, however, which is all important.

We have the pleasure of giving our readers in the present issue a lucid and informing contribution by the Dean of the Law Faculty at McGill upon the Theory of Sovereignty. That theory, as found in its most extreme and definite form in John Austin's 'Province of Jurisprudence Determined,' is that there is in every independent political community, some single person, or some combination of persons, which has the power of compelling the other members of the community to do exactly as it pleases. Professor Lee shews what the genesis of this theory is, and wherein the fallacy of it lies, and compares it with the genesis of the Social Contract theory. He seems to arrive at much the same conclusion as Professor Jethro Brown in his 'Austinian Theory of Law,' namely, that we must think of the State 'as a unity, a personality, a sovereign,—a sovereign in whose presence the visible ruler can aspire to no higher title than that of sovereign-organ. The law may accept the declared will of that visible ruler as conclusive of the will of the sovereign, but the fact need not prevent us from recognizing, even as lawyers, that the visible ruler is but an organ of the organized community.' As John Stuart Mill put it, government is always either in the hands, or passing into the hands, of whatever is the strongest power in society, and what this power is, and shall be, depends less on institutions, than institutions depend upon it.

The lawyer who is "nothing but a mechanic, a mere working mason," to use an expression of Counsellor Pleydell in Scott's Guy Mannering, may despise such speculations as that on 'Sovereignty' dealt with by Professor Lee in our present issue. He may regard them as not "practical," meaning that as he looks at it, "there is no money in them." The fact remains, nevertheless, that the pursuit of these enquiries into the region of abstractions which surrounds the field of practical law, by reason of the concentration of thought, and the exercise of the logical faculty, which they involve, conduces to the highest order of legal ability. For the same reasons it has been said that the study of metaphysics is the best possible training for a lawyer. Such

enquiries, however, as those into the Theory of Sovereignty, the nature and origin of law, and the evolution of morals, have this advantage over metaphysics, that they bring the student into closer proximity to the actual field of law proper.

In speaking of Mr. Asquith in his 'Ordeal by Battle,' which everybody is reading, or ought to read, Mr. Oliver has some remarks about lawyers which are interesting and afford food for thought. After observing that in "that golden age" between the passing of the Reform Bill and the founding of the Eighty Club (1832-1880) "it was all but unthinkable that a practising barrister should ever have become Prime Minister," Mr. Oliver continues:

> "The legal profession at this time had but little influence in counsel; still less in Parliament and on the platform. The middle classes were every whit as jealous and distrustful of the intervention of the lawyer-advocate in public affairs as the landed gentry themselves. . . . A representative assembly which entirely lacked lawyers would be impoverished; but one in which they are the predominant, or even a very important element, is usually in its decline. It is strange that an order of men, who in their private and professional capacities are so admirable, should nevertheless produce baleful effects when they come to play too great a part in public affairs. Trusty friends, delightful companions, stricter perhaps than any other civil profession in all rules of honour, they are none the less, without seeking to be so, the worst enemies of representative institutions. The peculiar danger of personal monarchy is that it so easily submits to draw its inspiration from an adulatory priesthood, and the peculiar danger of that modern form of constitutional government which we call democracy, is that lawyers, with the most patriotic intentions are so apt to undo it. Lawyers see too much of life in one way, too little in another, to make them safe guides in practical matters. Their experience of human affairs is made up of an infinite number of scraps cut out of other people's lives. They learn and do hardly anything except through intermediaries. . . . Plausibility, an alert eye for the technical trip or fall—the great qualities of an advocate —do not necessarily imply judgment of the most valuable sort outside Courts of law. . . . And the misfortune is that in politics, which under its modern aspect is a trade very much akin to advocacy, there is a temptation,

with all but the most patriotic lawyers, to turn to account at Westminster the skill which they have so laboriously acquired in the Temple. Of course there have been, and will ever be, exceptions. Alexander Hamilton was a lawyer, though he was a soldier in the first instance. Abraham Lincoln was a lawyer. But we should have to go back to the 'glorious revolution' of 1688 before we could find a parallel to either of these two in our own history. Until the last two decades England has never looked favourably on lawyer leaders. This was regarded by some as a national peculiarity; by others as a safeguard of our institutions. But by the beginning of the twentieth century it was clear that lawyers had succeeded in establishing their predominance in the higher walks of English politics, as thoroughly as they had already done wherever parliamentary government exists throughout the world. During this epoch, when everything was sacrificed to perspicuity and the avoidance of boredom, Mr. Asquith's utterances led the fashion. His Ministry was composed to a large extent of politicians bred in the same profession and proficient in the same arts as himself: but he towered above them all, the supreme type of the lawyer-statesman."

In the *Canada Law Journal* for July, Mr. Labatt revives the recent controversy arising out of the case of *The Royal Bank* v. *The King*, as to the scope of our provincial power to legislate in relation to 'civil rights in the province.' We would suggest that the controversy might now be allowed to sleep until the construction of that power again comes up before the Courts. Mr. Labatt, however, reiterates and enlarges upon his contention that the power must be construed by reference to what he calls "the general principle of private international law," that "the locality of a debt is at the domicile of the creditor." It seems somewhat startling that the gift of a broad legislative power in a constitutional statute is to be restricted in its scope by some supposed rule of private international law. We, however, find no such general rule of private international law, as that "the locality of a debt is at the domicile of the creditor." So far as the determination of jurisdiction to grant letters of probate and administration is concerned, the rule is quite the other way. As Mr. Dicey says in his *Conflict of Laws* (2nd ed., p. 310) the general maxim is that 'debts, choses in action, and claims of any kind must be held situate where *the debtor or other*

person against whom a claim exists resides.' Mr. Labatt seems to be thinking of the maxim *Mobilia sequuntur personam*, but the Privy Council in the recent case of *Rex* v. *Lovitt* (1912), explained that this maxim is simply the expression of a general English rule of construction of statutes relating to legacy and succession duties, namely, that the duties are intended to be imposed only on those who become entitled by virtue of English law. Mr. Labatt cites *Wharton's Conflict of Laws* (3rd ed., p. 171, 80e), but when we look that up all we find is that—'The *situs* of a debt *for the purposes of taxation* is, in general, at the domicil of the creditor, and not at the domicil of the debtor.' With all respect to Mr. Labatt we must continue to hold the view, subject to the proper understanding of the Privy Council decision in *Royal Bank* v. *The King*, that a civil right in the province, to which the British North America Act refers, is nothing more or less than a right to invoke and set in operation the machinery of the civil Courts in that province, directly or indirectly, to gain some debt, or recover some advantage, or restrain some one who is endeavouring to do so; and that, subject of course to the powers of the Dominion parliament, the provincial legislature has exclusive authority to legislate in relation to such civil rights.

LIST OF BARRISTERS, SOLICITORS, AND STUDENTS-AT-LAW NOW ON ACTIVE SERVICE FROM THE PROVINCE OF MANITOBA.

Adamson, H., Andrews, A. H. J., Anderson, A. J., Bell, J. K., Bird, R. deB. M., Black, J. R., Blackwood, H. P., Blake, C., Brayfield, H. C. H., Brown, R. R. J., Campbell, H. R., Cameron, D. I., Carey, L. J., Curric, W. G., Cowan, H. J., Davis, S. R., Davison, F. C. S., Denistoun, J. A., Dennistoun, J. R., Dennistoun, R. M., Dick, S. E., Evans, A. E. A., Fer[illegible]. F. M., Fripp, C. A. I., Galloway, J., Garton, M. H., Gill, [illegible]. D. A., Guild, W. F., Greer, R. F., Hastings, V. J., Higginbotham, R. E., Hill, A[illegible] R., Hoskins, R., Howell, E. L., Jameson, G. W., Jamieson, C. N., Jones, T. H., Kemp, A. G., Love, J., MacAlpine, C. D. H., Maclean, R. M., Martin, W., Matheson, E. H., McBride, A., McKay, A. A. S., McKenna, D., McMeans, E. D'H., Mills, E. R. R., Milne, J. J., Montague, F. F., Morley, A. W., Munro, J., Montague, P. J., Munson, N., Naylor, L. A., Newberry, W. F., O'Grady, G. F., Ormond, D. M., Pratt, A. M., Popham, E. C., Price, J. S., Ptolemy, J. A., Patton, K. L., Reid, H. R., Reed, J. A., Lincoln-Reynolds, J. E., Richardson, R. H., Riley, H. J., Rosen, S., Ross, G. H., Rutherford, A. B., Rutherford, G. S., Ross, A. M. S., Sheringham, C. J. deB., Simpson, F. I., Struthers, R. E., Sutherland, J., Thomson, J. G., Thomson, J. S., Turner, M. H., Thomas, C. T., Tidmus, R., Williams, O. R., Ward, C. D., Wilkinson, E. B., Williams, J. L., Williams, A. C., Wallar, W. M.

CHIEF JUSTICE COCKBURN: A REMINISCENCE.

Lord Chief Justice Cockburn was the only son of Sir Alexander Cockburn, British Envoy extraordinary and Minister Plenipotentiary to the State of Columbia. He was born on the 24th of December, 1802. He entered the Middle Temple in 1825, and was called to the Bar in 1829. He practised for some time, principally as Parliamentary Counsel, before election committees. After long waiting his opportunity at length came. In 1843 he was retained by M'Naghten, a wild Scotchman, who shot Edward Drummond, private Secretary of Sir Robert Peel. It was supposed at the time the shot was intended for Sir Robert. By an eloquent and brilliant speech he succeeded in securing the acquittal of the prisoner on the ground of insanity. It was one of the most sensational trials of the day. It finally settled the law once and for all as to the criminal responsibility of lunatics. The verdict, likewise the question of the nature and extent of the unsoundness of mind, which would excuse the commission of a felony of this sort, was made the subject of a remarkable debate in the House of Lords, in March, 1843. There was so much uncertainty, in this branch of the law, it was determined to take the opinion of the judges on the law governing such cases. Consequently the law on the criminal responsibility of a lunatic, when insanity is set up as a defence, was settled by the judgment of Lord Chief Justice Tindal in these words: "In order to establish a defence, on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. . . . If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable. The course, therefore, to be adopted should be, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, accompanied with such observations and explanations as the circumstances of each particular case may require." The law thus laid down by Lord Chief

Justice Tindal, in 1843, was substantially incorporated in the Criminal Code of Canada.

In 1847 Cockburn stood for Parliament, and was elected Liberal M.P. for Southampton. Having caught the ear of the House, his opportunity, in this new theatre of action, soon occurred. It arose in this manner. In 1850, the House of Lords passed a vote of censure on the Government of Lord John Russell, for the act of his Foreign Secretary, Lord Palmerston, regarding his conduct, with respect to Greece, in the Don Pacifico matter. Mr. Roebuck, member for Sheffield, moved a counter vote of confidence, in the House of Commons, upon which hung the fate of the ministry. Don Pacifico, a British subject, resident in Athens, had been mobbed and his house wrecked, in an anti-Semitic outbreak, in which Greek soldiers took part. Compensation was demanded by the British Government and refused. Lord Palmerston despatched the British Fleet to the Piræus and seized all the Greek vessels he could find. Hence the vote of censure in the House of Lords. The gravamen of the alleged offence was the bullying of a small power. On the consideration of Mr. Roebuck's motion, Lord Palmerston's memorable speech of five hours, in defence of his Foreign Policy, concluded with the following splendid peroration:—

"I therefore fearlessly challenge the verdict which this House, as representing a political, a commercial, a constitutional country, is to give on the question now brought before it—whether the principles on which the foreign policy of her Majesty's Government has been conducted and the sense of duty which has led us to think ourselves bound to afford protection to our fellow-subjects abroad, are proper and fitting guides for those who are charged with the government of England; and whether, as the Roman in days of old held himself free from indignity when he could say *Civis Romanus sum,* so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong."

Mr. McCarthy, in his History of Our Own Times, in referring to the many able speeches made during this great debate, says that of the member for Southampton deserves particular mention: "Never in our time has a reputation been more suddenly, completely and deservedly made than

Mr. Cockburn won by his brilliant display of ingenious argument and stirring words. He defended the policy of Palmerston with an effect only inferior to that produced by Palmerston's own speech, and with a rhetorical grace and finish to which Palmerston made no pretension."

Greville, in referring to this speech, said: "It will probably secure for him the post of Solicitor-General. He was correct. Shortly after, in the same year, he was appointed Solicitor-General by Lord John Russell, and in 1851 became Attorney-General, which position he held until the resignation of the Ministry, in 1852. He again became Attorney-General, during Lord Aberdeen's Ministry. He added greatly to his reputation, when, as Attorney-General, he conducted the prosecution of the notorious Palmer poisoning case. It was his cross-examination of an Attorney, by the name of Smith, on the trial of Palmer, for taking the life of Cook by poison, which mainly contributed to the conviction of the prisoner. Mr. Justice Stephens said of it: "It was something to be heard and seen, but incapable of being described."

It was at *Nisi Prius* that Cockburn shone with brilliant effect and was generally acknowledged a great verdict winner. His courtesy and high breeding forbade his descending to the vulgar practice of badgering witnesses—a practice even at this day altogether too common. The following extract is taken from an Article of his published in a law journal showing the strong view he held on this question: "I deeply deplore that members of the Bar so frequently unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as in the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, browbeaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness-box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English Courts. Watch the tremor that passes the frames of many persons as they

enter the witness-box. I remember to have seen so distinguished a man as the late Sir Benjamin Brodie shiver as he entered the witness-box. I dare say his apprehension amounted to exquisite torture. Witnesses are just as necessary for the administration of justice, as judges or jurymen, and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen. I venture to think that it is the duty of a judge to allow no questions to be put to a witness, unless such as are clearly pertinent to the issue before the court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds."

Cockburn, however, was not one to be trifled with. When necessary he could take an impertinent witness in hand and pretty quickly lay him by the heels.

He continued as Attorney-General until 1856, when he was appointed Chief Justice of the Court of Common Pleas. In 1859, when Lord Palmerston came into power, Cockburn was appointed Lord Chief Justice of the Court of Queen's Bench, and continued as such for twenty-one years. He died in harness. On the day of his death, the nineteenth of November, 1880, he sat all day in the Court of Crown Cases Reserved, presiding with his usual dignity and vigour, walked home and taking suddenly ill, died before midnight.

Among the many important civil cases tried by Chief Justice Cockburn, a few may be mentioned. That of *Campbell* v. *Spottiswoode*[1] definitely settled the question as to the liability of defendants, in actions of libel in reference to newspaper articles. This was an action brought against the printers of the "Saturday Review" for publication of an Article, commenting on a circular issued by the plaintiff, inviting subscriptions for mission work in China. The Article was severe, bitter and caustic, and imputed to the plaintiff that he acted on sordid and base motives in soliciting subscriptions. The Chief Justice directed the jury substantially as follows: "When a writer in a newspaper or elsewhere commenting on public matters makes imputations on the character of individuals concerned in them, which are false and libellous as being beyond the limits of

[1] 3 F. & F. 421.

fair comment, it is no defence that he *bona fide* believed in the truth of these imputations." Under this charge verdict was found for the plaintiff. Bovill moved, pursuant to leave granted to move, to enter the verdict for defendant. See *Campbell* v. *Spottiswoode*.[2] In refusing the Rule the Chief Justice made further comment as follows: "If the proposed scheme were defective or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation." Such then was the considered judgment of the Court of Queen's Bench, in 1863, as to the questions of "privilege" and "fair comment" in actions of libel. Apparently these questions would seem to have been settled upon an intelligent and satisfactory basis.

In 1872 the Court of Common Pleas, however, ignored the decision in *Campbell* v. *Spottiswoode*, and held in *Henwood* v. *Harrison*,[3] that the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice. The plaintiff was nonsuited, on the ground that the publication was in the nature of a fair criticism of a proposal affecting a matter of great national importance, and, therefore, being *bona fide*, and without malice, privileged. On appeal, the Court, Grove, J., dissenting, held that the non-suit was right.

Willes, J., in delivering the judgment of the majority of the Court (Willes, Byles and Brett, JJ.), said (p. 626): "In the present case, there was no suggestion and no evidence of malice in any one. The honesty of the publication and the absence of malice were admitted; and there was nothing to be decided except the question of law, whether the occasion was privileged. The learned judge ruled that it was." In 1887, in *Merrivale* v. *Carson*,[4] the Court

[2] (1863), 3 B. & S. 769.
[3] L. R. 7 C. P. 606.
[4] 20 Q. B. D. 275.

of Appeal held that where an action of libel is brought in respect of a comment on a matter of public interest, the case is not one of privilege, and actual malice need not be proved, and that it is for the jury to determine whether the comment goes beyond the limits of fair criticism. *Henwood* v. *Harrison* was dissented from and *Campbell* v. *Spottiswoode* approved and followed. The action was brought to recover damages for an alleged libel contained in a critique published by defendant upon a play written by the plaintiff and his wife. The jury found a verdict for the plaintiff. On appeal the judgment was affirmed. Lord Esher, M.R., in delivering the judgment of the Court, at p. 279 and following, said: "What is the next question to be put to the jury? Are they to be told that a criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell* v. *Spottiswoode*, which has never been overruled."

Among the many celebrated cases in which Chief Justice Cockburn took a leading or prominent part, that of *Sugden* v. *Lord St. Leonards*,[5] from almost every standpoint, the position of the parties interested, the amount involved, the mystery surrounding a lost Will, the importance of the decision reached and the masterly judgments of Sir George Jessel, Master of the Rolls, Lord Justice Mellish and Chief Justice Cockburn, on appeal from the judgment of Sir James Hannen, President of the Probate Division, is absorbingly interesting and reads like a romance. Seldom has an abler Court met than this which sat to consider the important questions involved in this appeal. It was an action brought by the Executors of Edward Lord St. Leonards, against the Right Honourable Edward Burtenshaw, Baron St. Leonards, the grandson and heir-at-law of the deceased. The proceedings before the President of the Court of Probate Division were taken to propound the lost Will of Edward Lord St. Leonards, better known as the famous author of Sugden on Vendors and Purchasers, and pronounced by Sir James Hannen as "one of the greatest lawyers that ever lived." He was the son of a barber

[5] (1876), 1 P. D. 154.

and by the sheer force of will power, aided by transcendant ability, reached the woolsack and became the founder of a peerage. His immortal work on Vendors and Purchasers was written before he was twenty-two years of age. For one edition of the many, of this great work, he received the unprecedented sum of Four Thousand pounds. He left an estat of over Three Hundred Thousand pounds. He died in 1875 at the advanced age of 93. All his daughters were married except one, Charlotte, who for years had been the constant companion and the amanuensis for her father. Of his seven sons only one survived. His eldest son had died in 1866, leaving his eldest son, the defendant, the present Lord St. Leonards. His last Will and Testament, which was holograph, was executed in 1870, five years before his death. There were eight codicils, all holograph, written between that date and the 23rd of August, 1873, the date of the last codicil. The Will and the codicils were locked in a box by Lord St. Leonards and kept in his room, to which the members of the household had access. The custody was not a close one. It was last seen by his daughter in August, 1873, eighteen months before his death. On opening the box, after his death, it was found the Will had been abstracted, but the codicils were intact. Charlotte Sugden, one of the executors and one of the residuary legatees, was directed by her solicitor to make a written statement from memory of its contents, without reference to the codicils. This written statement drawn from memory formed the basis upon which the Court was asked to find as a fact that the Will of 1870 was duly executed and attested, and that the contents of the Will were as set out in the written statement of Charlotte Sugden. It appeared in evidence, her father read it over and carefully explained its contents to her before execution; that she had read it over, after execution, several times; that she was with her father when the different codicils were prepared and the Will was examined as each codicil was written. On the other hand it was shown the Will was a complicated one, filling nineteen pages and affecting the interests of so many who had claims upon his bounty. Miss Sugden admitted she could not recollect all of the provisions of the Will, nor the names of all the legatees, nor the amounts devised to several of them. It further appeared that if the Will as propounded should be established, no provision whatever was

made for the peerage, in the event of its devolving upon a certain other member of the family. Between the time when the last codicil was written and the day of his death, he spoke to several what satisfaction it gave him that he was able to make suitable provision for the various members of his family, who were dependent upon his bounty. To one friend, shortly before his death, he said: "I have made all the testamentary dispositions which a father ought to make for his family, and I die in peace with that conviction." On another occasion he said: "To put off making your Will until the hand of death is upon you evinces either cowardice or a shameful neglect of your temporal affairs. It is sinning . your grave." The mystery surrounding this Will has ever since been the subject of frequent com..ment. It was drawn with the greatest care by one of the ablest lawyers of the age. He endeavoured with great diligence and foresight to guard against every possible contingency of uncertainty and confusion in the disposition of the handsome estate he had accumulated by industry and the peerage he had founded, and that the objects of his bounty should enjoy the benefits he desired to bestow. It is needless to enumerate the various conjectures which the ingenuity of the profession has devised as to the fate of this Will. The riddle to this day remains unsolved. However, it is attended with this advantage that it contains several valuable lessons, and finally settled many doubtful legal questions. The case is a storehouse of law on the subject of proof of lost Wills. Before this case, there had been established the principle that the contents of a lost Will, like those of any other lost Instrument, might be proved by secondary evidence. But in such cases the Wills were short, simple and contained no intricate or conflicting dispositions and were established by written instructions and drafts. In *Wharram* v. *Wharram*,[6] Lord Penzance pointed out how necessary it was to exact the strictest proof of the contents of a lost Will as distinguished from other documents, especially since the passing of the Wills Act. Further, before this case, post-testamentary declarations of the testator could not be received, in the event of the loss of a Will, as secondary evidence of its contents. See *Quick* v *Quick*.[7]

[6] 3 Sw. & Tr. 301.
[7] 3 Sw. & Tr. 442.

Then what was really decided by this notable case?

(1) The contents of a lost Will may be proved by the evidence of a single witness, though interested;

(2) That in proof of its contents, confirmatory evidence may be given of post-testamentary declarations on the part of the deceased testator, overruling *Quick* v. *Quick* (Mellish, L.J., dissenting as to declarations made after the execution of the Will);

(3) When the contents of a lost Will are not fully established, probate will be granted to the extent to which it is proved;

(4) That Lord Penzance's dictum in *Wharram* v. *Wharram* was overruled;

(5) That a codicil may be admitted to probate, when the contents of a lost Will is incapable of proof;

(6) That all statements or declarations, written or oral, made by a testator at or prior to the execution of his Will, are admissible as evidence of its contents, as well as post-testamentary declarations;

(7) A subsequent Will is no revocation of a former one, if the contents of the subsequent Will are unknown. And the law is the same even if the later Will be expressly found to be different from the former, provided it be unknown in what the difference consists. This is upon the point as to whether probate can be granted of a Will of which only a part is known.

The able judgment of Sir George Jessel, Master of the Rolls, entirely oral and extending over seventeen pages of the law reports, so logical, conclusive and exhibiting such a firm grasp of legal principles, should be carefully studied in cases where a like question arises. Jessel was the first Jew who had ever held judicial office in England. Of him it has been said: "Next to Hardwicke he was the greatest Equity Judge of England." Cockburn's luminous judgment, elaborated with great care, distinguished for its lucidity and refined diction and the orderly manner of grouping the principal facts of the case, will for all time be regarded as an ideal exposition of the law in proof of lost Wills.

Another case of great popular interest, in which Cockburn took the leading part, was that of *The Queen* v. *Keyn*,[8] better known as the Franconia case. The Franconia was

[8] (1875), 2 Ex. D. 63.

a foreign vessel, commanded by a foreigner, and sailing for a foreign port. In passing down the English Channel, within three miles of the English coast near Dover, she ran down a British ship and drowned a passenger. The captain was indicted for manslaughter and found guilty. On appeal from this decision, the question for the opinion of the Court for Crown Cases Reserved was, whether the Central Criminal Court had jurisdiction. The judgment of Cockburn was a most learned disquisition on the powers of English Courts for the trial of criminal offences committed on the high seas and in Territorial waters; as well as the rights, private, national, and international, within the jurisdiction of the Admiralty of England. Cockburn's judgment, like most of his judgments, in important cases, and in his charges to Grand Juries, was an elaborate treatise on the leading subject under consideration. The conviction was quashed. The result of this case led to the passing of the Territorial Waters Jurisdiction Act, 1878.

The Chief Justice tried, at Bar, Orton or Castro, in the Court of Queen's Bench, for perjury committed, during the trial of the action of Ejectment, *Tichborne* v. *Lushington*. Sir John Coleridge and Sir Henry Hawkins conducted the prosecution. The prisoner was defended by Dr. Kenealy. The trial lasted 188 days, the longest on record, excepting that of Warren Hastings. His charge to the jury lasted 18 days in its delivery. It was published in 1874, in two volumes of 800 pages each. The trial of this memorable case stands an unparalleled feat in judicial annals. In 1875 Dr. Kenealy moved, in the House of Commons, for a royal commission to inquire into the conduct of the Tichborne trial. Mr. Disraeli, then Prime Minister, said of Cockburn: "He is a man of transcendent abilities, his eloquence is remembered in this House, and when he left it to ascend the highest tribunal almost within the realm, he sustained the reputation which he had attained here and in the Courts of his country with learning and majesty."

Chief Justice Cockburn represented Great Britain, under the Treaty of Washington, at Geneva, in the Alabama arbitration claims. He dissented from the Award and explained his reasons in an elaborate report, dated September 14th, 1872. He held the British Government liable for the depredations of the Alabama. He considered that in the case

of the Florida, want of due diligence was not sufficiently proved, and in the case of the Shenandoah no blame attached to the British Government at all. A majority of the five arbitrators awarded in satisfaction and final settlement of all claims, including interest, the sum of three and a quarter million pounds sterling. The Americans had preferred before the Tribunal a demand of nine millions and a half, and thus got a little more than one-third of what they had asked. Of this, the greatest of all arbitrations, John Morley said: "The Treaty of Washington and the Geneva arbitration stand out as the most notable victory in the nineteenth century, of the noble act of preventive diplomacy, and the most signal exhibition in their history of self-command, in two of the three chief democratic powers of the western world."

In the many *causes celebres* in which Chief Justice Cockburn took part, not the least notable was his charge to the Grand Jury on an indictment preferred against Col. Nelson and Lieutenant Brand for the alleged murder of Gordon, on the 23rd of October, 1865, in Jamaica. Shortly after my admission to the Bar, I spent some time in London, visiting the various Courts. It was my good fortune to hear the brilliant charge of the Chief Justice in this case. I wrote a description of it for a Saint John newspaper, a copy of which I here append, *verbatim et literatim*:—

London, April 12th, 1867.

On Wednesday Lord Chief Justice Cockburn, accompanied by Baron Channel, attended the Central Criminal Court, Old Bailey, for the purpose of charging the Grand Jury in the Nelson and Brand case. Many of the Aldermen of the City were present, as well as Earl Granville. Colonel Nelson appears to be quite a young man, with dark curly hair, and a light moustache; Lieutenant Brand is still younger, a plain, unassuming person. The circumstances of the case are simply these. Shortly after the occurrence of the riot, at the Court House in Morant Bay, in the Island of Jamaica, Mr. Gordon, who was generally believed to have been the instigator of the rebellion and an accomplice with those engaged in it, went to the commander of the British forces at Kingston, and gave himself up, warrants having been issued for his apprehension. The Governor and the

Custos Rotulorum went to the residence of Gordon, arrested him and ordered him to be sent to Morant Bay.

Colonel Nelson, one of the accused, in command of the forces of that place, instituted a Court Martial, composed of himself, Lieutenant Brand of the Navy, and two others. Mr. Gordon was arraigned before them, found guilty of high treason, and sentenced to be hung. Mr. Gordon was consequently hung, and this case arose in respect to the legality of their proceedings. The Chief Justice gave a full and graphic description of the outbreak in Jamaica, and then proceeded to state that the prosecution proceeded on two grounds; first, that those who had tried and sentenced Mr. Gordon had acted entirely without jurisdiction; and, secondly, if they had jurisdiction it had not honestly or legitimately been exercised. Governor Eyre had proclaimed martial law on the Island, except at Kingston. Mr. Gordon, although he lived a short distance out of the city, did business in it, and there delivered himself up to the authorities.

The first question he would consider was, whether the Governor had authority to proclaim martial law; the second, if such authority existed, and the Court Martial was established upon the assumption of its existenee, whether the jurisdiction had been impartially exercised. His lordship, after giving a lengthened outline of the history of the Island, since it came into the hands of the British, pronounced it not a Crown Colony, but a settled Colony, and that martial law could only be exercised by express legislative enactment. He next proceeded very elaborately to enumerate every instance of the exercise of martial law, tracing it from its fountain head, from the reign of Edward the Second till the time it was last resorted to in England, in the reign of Charles the Second. Although there had been rebellion since, in the reign of James the Second, also in 1723 and 1745, martial law was not proclaimed. When the Lord Lieutenant of Ireland proclaimed martial law in that country in 1798, he deemed it necessary to obtain bills of indemnity afterwards. So martial law was resorted to only in cases of great emergency and when every other means to suppress rebellion proved abortive. He administered a severe and cutting rebuke upon such as held that martial law was of easy application and a thing perfectly settled in this country.

After dilating at great length upon the mode of procedure in Military Courts, his lordship referred to the Jamaica statutes and said: "The Act passed by the legislature of that country, in the ninth Victoria, would seem to have given the Governor power to exercise martial law. He next proceeded to enquire whether Mr. Gordon was amenable to its jurisdiction. After the declaration of martial law, Kingston was excepted, and it appeared Mr. Gordon did business there. The authorities took him from Kingston, where there was no martial law, and took him to Morant Bay, where it was in force; this he considered an unjustifiable act, and he had arrived at this conclusion after the most careful consideration. His lordship next considered the constitution of the Court Martial before which Mr. Gordon was tried. One of its members, Col. Nelson, belonged to the Army; the other prisoner charged, Lieutenant Brand, belonged to the Navy. There was no authority for blending the two services in forming a Court Martial. He commented with severity upon the procedure before the Court Martial thus established. Nine-tenths of the evidence, he said, upon which Mr. Gordon was convicted and sentenced to death was altogether inadmissible, and would not have been received had a competent judge presided, or if those who had presided had any experience in Courts Martial. Secondary evidence had been admitted, when it was in their power to have the best. (Colonel Nelson seemed ill at ease during this part of his lordship's charge.) This brought him to the second question he proposed to consider—whether the jurisdiction, if well founded, had been honestly and impartially exercised. And in assisting them in arriving at a conclusion on this point, he would direct their attention to the moral worthlessness as well as inconclusiveness of the evidence upon which Mr. Gordon had been convicted. The depositions of certain witnesses had been received, when the persons themselves could have been called as witnesses, contrary to the spirit and justice of English law. The three points upon which his lordship most emphatically dwelt were: the removal of Mr. Gordon to Morant Bay, which was an illegal act; the illegality of the Court Martial by which he had been tried, and the admission of improper evidence.

This, in many respects, may be regarded as one of the most important cases of modern times. The charge of his

lordship lasted nearly six hours, and is pronounced to be one of the most learned and luminous expositions upon martial law ever delivered, and it is believed will rank with the most celebrated judicial expositions extant.

The Lord Chief Justice speaks in an easy, fluent style, and has the happy faculty of throwing around dull, dry facts and knotty legal points the charm of a brilliant rhetoric.

Notwithstanding the Lord Chief Justice's charge, the Grand Jury agreed in finding "No Bill"; and at the same time made a short presentment, that "martial law should be more clearly defined by legislative enactment."

Although forty-eight years have passed since I sat for nearly six hours spell-bound under this admirable charge, so vivid was the impression made it remains almost as fixed in memory as on the day of its delivery.

The lofty conception Cockburn had formed of the duty of an advocate found fitting expression in a speech delivered at a Banquet given by the Bar, in the Middle Temple Hall, in 1864, to the celebrated French Advocate, M. Berryer. Lord Brougham, in response to a toast, had said: "The first great quality of an advocate is to reckon everything subordinate to the interests of his client." Shortly after Lord Chief Justice Cockburn, in replying to the toast of "The Judges of England," said: "Much as I admire the great abilities of M. Berryer, to my mind, his crowning virtue—as it ought to be that of every advocate—is that he has throughout his career conducted his cases with untarnished honour. The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas* and not *per nefas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."

Of these words it has been said: "They are the best epitaph which can be bestowed on Sir Alexander Cockburn."

SILAS ALWARD.

St. John, N.B.

THE AMERICAN SOCIETY OF INTERNATIONAL LAW.

The April number of the quarterly *Journal of the American Society of International Law* is an unusually interesting one, even if it is judged by the high standard set by that Society in the past nine years of its existence. Nor can one help expressing his admiration of the handsome form in which the *Journal* appears. The contents of the *Journal* are grouped in several distinct departments, which are worth enumerating for the purpose of conveying some impression of the wealth of material contained in one number.

There are, in the first place, a chronicle of international events from day to day, a list of public documents relating to international law published in Great Britain and the United States, and an index to the periodical literature of international law. The assistance which these render to the student requires no comment.

The book reviews are another valuable feature. Each review is vouched for by the name of its writer, and an attempt is made to give an account of the book reviewed and to estimate its place in the literature of the subject in a way that is so far from perfunctory that it affords a very helpful guide to the reader. It is submitted that the value of a bibliographical notice would be increased if the price of the book were added to the other particulars given, especially in the case of a foreign work.

Another department consists of reports of judicial decisions involving questions of international law, and a separate quarterly supplement is also published containing official documents of an international character. The service rendered to the science of international law by the publication of unabridged reports of cases and texts of important public documents is so great as to merit a special word of commendation. It seems a pity, however, that the English prize decisions should not be reprinted from the official law reports (accompanied by the official mode of citation), rather than from some less authoritative source. For example, the following paragraph from the judgment of Sir Samuel Evans [1]

[1] Whose name, by the way, is not given in the *Journal* at the head of the judgment, he being referred to merely as "The President." He is, of course, the President of the Probate Divorce and Admiralty Division of the High Court of Justice. By the Judicature Act, 1891, the High Court was declared to be a Prize Court within the meaning of the Naval Prize Act, 1864, and all prize causes were assigned to the Division above mentioned.

in "The Mowe," as reported in [1915] P. 1, at p. 15, is reported in an incomplete form in the *Journal*, the noteworthy words which I have put in italics being omitted:—

> "For the considerations to which I have adverted, *and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions,* I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court."

Over half the contents of the *Journal* consists of leading Articles and editorial comment, and to these two departments the rest of my observations will be confined.

The first article—*An Anglo-American Prize Tribunal*, by Simeon E. Baldwin—is written in support of the suggestion made in March last by Sir John Macdonell for the establishment of a joint appellate Prize Court, similar in principle to that contemplated by the twelfth convention of the Hague Conference of 1907, but confined to the two nations whose prize law is for the most part identical. Perhaps the most interesting feature of the Article is the comparison drawn between the situation existing in 1806 and the following years as a result of the British orders-in-council forbidding trade with France and that existing to-day by virtue of the order-in-council of March, 1915, in regard to trade with Germany. In 1811, Sir William Scott held[2] that a certain order-in-council was justified as a measure of retaliation against France,[3] although it would not otherwise have been justified by international law.[4] This very question, namely, how far the conduct of one belligerent will justify another belligerent in adopting retaliatory measures to the detriment of neutrals may soon be raised in a definite form. So lately as July 14th

[2] The Fox, Edw. 311, 2 Roscoe's Prize Cases, 61.

[3] In retaliation for the British order-in-council of 1806, Napoleon had issued his famous Berlin decree, declaring the British Islands to be in a state of blockade, and had subsequently adopted other measures against British trade, against which in turn the British retaliated.

[4] But it is difficult to see how a belligerent can be entitled to retaliate as against neutrals. Sir William Scott, however, believed that the order-in-council was justified as a measure of retaliation, and that he was not deciding contrary to the principles of international law. *Cf.* Baty and Morgan, '*War, its Conduct and legal results*,' p. 360.

last, the American Ambassador at London was instructed to present to the British Government a communication, of which the following is the official summary made public by the Secretary of State of the United States:—

> "In view of the differences which are understood to exist between the two Governments as to the principles of law applicable in Prize Court proceedings in cases involving American interests, and in order to avoid any misunderstanding as to the attitude of the United States in regard to such proceedings, the Government of the United States informs the British Government that, in so far as the interests of American citizens are concerned, it will insist upon their rights under the principles and rules of international law as hitherto established, governing neutral trade in time of war, without limitation or impairment by orders-in-council, or other municipal legislation, by the British Government, and will not recognize the validity of the Prize Court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law."[5]

In this connection, James W. Garner's Article, entitled *Some Questions of Law in the European War,* is of special interest. This is the continuation of a series of Articles, of which the first instalment appeared in the January number. The dispassionate tone which is characteristic of the contributions to the *Journal* is here specially noteworthy, because in the present instalment, Mr. Garner discusses such contentious subjects as contraband, right of search, and continuous voyage. The right of search is, of course, admitted, but the Government of the United States has found fault with the manner in which the British Government has exercised the right, and, specifically, has complained of the seizure of ships on mere suspicion, the taking of them into port for examination, and their undue detention there. It is, also, argued that some of the British additions to the list of absolute contraband cannot be reconciled with the practice of the past, and that the distinction between absolute and conditional contraband has been to a great extent ignored. These, however, are matters which can be intelligibly discussed only in detail, and I can merely recommend to the reader the careful per-

[5] New York Times, July 18th, 1915. It is understood that this communication will be answered by the British Government at an early date.

usal of Mr. Garner's Article, as well as the communications which have passed between the British and American Governments. A new British note is now in the hands of the American Government, but is being withheld from publication at the request of the British Government, until the delivery of a supplementary note now in course of preparation. Both these notes will possibly be in the hands of the public before this Article appears, and it is understood that they will discuss in detail some of the questions here noted.

It is alleged against the British Government that it has unjustifiably extended the doctrine of continuous voyage to conditional contraband, that is to say, it has seized vessels bound for neutral ports with cargoes consigned 'to order' on the charge that the cargoes were really intended for German contractors in the neutral countries, so that the voyage or transit from the United States to Germany was really a continuous one. This matter of complaint by the American Government is less likely to excite sympathy outside of the United States owing to the leading part which that country took in extending the doctrine of continuous voyage during the Civil War. It is true that in most of the cases in which the question was then raised, a substantial part of the goods was absolute contraband, but the doctrine was not confined in terms to absolute contraband, or to contraband at all.

An extreme case was that of *The Springbok*.[6] A British sailing vessel was captured on its way from London, about 150 miles east of Nassau, Bermuda, when making for the latter port. The cargo was by the bills of lading consigned 'to order or assigns,' and the Master was instructed to deliver the goods to the owner's agent at Nassau. A small part of the cargo consisted of arms and munitions of war. A substantial part consisted of articles susceptible of either peaceful or warlike use, that is, conditional contraband. The larger part was non-contraband. The Supreme Court of the United States held that, although the cargo was to be discharged at Nassau, its real ultimate destination was one of the blockaded Confederate ports, and that it was rightly condemned, *whether it was contraband or not*.

In its application to non-contraband goods in case of blockade, the doctrine of continuous voyage has been the subject of much adverse criticism.[7]

[6] (1866) 5 Wall. 1.
[7] See Moore, *Digest of International Law*, vol. 7, secs. 1256-1261.

Although, by the Declaration of London of 1909,[a] the doctrine is excluded both as to blockade and as to conditional contraband, its exclusion, in the case of blockade, rests on a more solid logical basis than in the case of conditional contraband. Breach of blockade, or the attempt to break blockade, is an offence which is charged against the ship as distinguished from its cargo, and if a ship is making for a neutral port with the intention of discharging its cargo and ending its voyage there, it cannot logically be charged with breach of blockade merely because its cargo is intended to be forwarded to a blockaded port by some other means of transportation. *Ex hypothesi*, the ship has no intention of breaking blockade. On the other hand, the essence of contraband, whether absolute or conditional, is the hostile destination of the cargo as distinguished from the ship; and, apart from the compromise affected by the Declaration of London,[b] there is no logical obstacle to the application of the doctrine of continuous voyage, because that doctrine merely looks beyond the intermediate neutral destination of the cargo for the purpose of ascertaining the real ultimate destination. The fact that the ship intends to end its voyage at the intermediate neutral port, while it is conclusive evidence that the ship is innocent of attempting to break blockade, is not necessarily conclusive evidence that it is not conveying contraband of war, because the guilt of the ultimate destination may attach to the goods before their arrival at the neutral port.

The deduction drawn by the Supreme Court of the United States in the *Springbok* case from the fact that the goods were consigned 'to order,' instead of being consigned to a named consignee in Nassau, is also of special interest, in view of the complaint made by the Government of the United States during the present war, because the British Government is drawing a similar deduction as to the ultimate destination of goods from a similar wording of the bills of lading in the case of goods shipped by American merchants to neutral ports in Europe.

Another Article—*The Theory of the Independence and Equality of States*, by Philip Marshall Brown—cannot be briefly summed up, but the application to the European situation of the conclusions reached in the Article may be

[a] Which is not binding on the belligerents in the present war.
[b] Which made the doctrine of continuous voyage applicable to absolute contraband, but excluded it as to conditional contraband.

mentioned. The principle of the balance of power is condemned as having proved not only futile, but a menace to the existence of the big as well as of the little States. The basic principles suggested to be observed in the reconstruction of the map of Europe are (a) respect for the claims of nationalities so far as is compatible with the entire interests of a State taken as a whole; (b) satisfaction of the economic requirements of a State to the fullest extent, so that it may be reasonably self-sufficient and in no way a burden to the rest of the world. Finally it is argued that a common fundamental conception of rights and obligations is the first requisite for giving full effect to the reign of international law, and it is urged that less attention should be paid to the drafting of conventions governing the conduct of war, and that more attention should be paid to the drafting of laws to govern the peaceful relations of States.

In *The International Aspects of the Titanic Case* Arthur K. Kuhn discusses the question of conflict of laws arising from the various municipal statutory limitations of the shipowner's liability. Norman Bentwich contributes a second instalment of *International Law as applied by England during the War*, his particular subject being *Trading with the Enemy*.

The last Article is the first instalment of *The Diplomatic Correspondence Leading up to the War*, by William Cullen Dennis, and consists of a careful analysis of the contents of the official "papers" and "books" of various colours published by the belligerent Governments [10] relating to the period from the Austrian note to Serbia to the Declaration of war by Austria on Serbia, July 23rd-28th, 1914. The writer, after discussing the general question of the evidential value of the documents, traces the course of events between the dates mentioned, in the light of critical observations published by various advocates, chiefly in the *New York Times*, and concludes as follows:—

> "Assuming in favour of the Allies that one hundred years of history have shewn that there is an Eastern question, and that this question is admittedly a matter of common concern for the great Powers of Europe, and

[10] In the quarterly supplements to the *Journal* now under review these documents are all being reprinted unabridged in English.

concluding from the diplomatic correspondence itself that Austro-Servia relations had been recognized by all parties since 1909 as forming a part of this common concern;

"Assuming in favour of Germany and Austria that the circumstances surrounding the assassinations of Serajevo gave Austria a legitimate cause of complaint against Servia, and concluding from the *ex parte* evidence presented in behalf of Austria and included in the diplomatic correspondence that Servia ought to have offered spontaneously to start an investigation of Austria's allegations of complicity on the part of Servian officials in the assassinations;

"It is submitted that the correspondence from the Austrian note of July 23rd to the Austrian declaration of war on Servia shews that Austria and Germany assumed at the outset a provocative and inadmissible attitude and consistently declined during this period to modify that attitude; that, on the other hand, the Powers of the Triple Entente—and particularly Great Britain—during the period in question, constantly sought to preserve the peace of Europe. Up to this point, therefore, it is submitted that the onus of bringing on the war rests unmistakably with Germany and Austria. If a justification of Austria and Germany is to be made out on the official documents, it must rest on the correspondence subsequent to July 28th, which will be considered in a subsequent Article."

There remain sixty pages of *Editorial Comment*—presumably chiefly from the pen of James Brown Scott, the distinguished editor-in-chief of the *Journal*. In the first place, under the heading *American Neutrality* is reprinted the letter dated January 8th, 1915, addressed by William Jennings Bryan, the Secretary of State, to William J. Stone, chairman of the Senate Committee on Foreign Relations, answering, one by one, twenty grounds of complaint alleged by Austro-German "sympathizers" charging the United States with partiality to the Allied Powers. This document was doubtless prepared and presented to Bryan for signature by the more competent gentleman who has since succeeded him as Secretary of State. The letter is long and ably written, and ought to convince any impartial person that the Government of the United States has adhered strictly to the law of neutrality. That it has convinced the "sympathizers" is perhaps too much to expect.

Their real ground of complaint was not against the United States, but against the British fleet, to which, as it is delicately expressed in the letter, 'on the high seas the German and Austro-Hungarian naval power is thus far inferior.'

Lest I should unduly try the patience of the readers and of the editor of the CANADIAN LAW TIMES, I shall merely mention some of the other topics discussed editorially. They are *Seizure and detention of neutral cargoes—Visit and search—Continuous voyage—Mines, submarines and war zones—The absence of blockade—The use of neutral flags on vessels of belligerents—Violations of neutral waters—The internment of German vessels in the United States—The joint resolution of Congress to empower the President to better enforce and maintain the neutrality of the United States—The effect of the war on international law—The effect of Mr. Bryan's peace treaties upon the relations of the United States with the nations at war—The William P. Frye case.*

JOHN D. FALCONBRIDGE.

ON SOVEREIGNTY.

The theory of Sovereignty seems to be one of those large generalisations which in different ages of the world's history have exerted an empire over the human mind. Like the cure-all of quack salvers they succeed for a time by the sheer audacity of their pretensions. They are accepted because they seem to explain so much. They become the current medium of intellectual exchange, part of the very "form" of thought; and it is only at long last that they are rejected as ungrounded or illogical. Even when some thinker, bolder than the rest, has dealt them a lethal blow, they still spring resurgent, for an error once accepted as dogma is harder to stamp out than a plague become endemic. The history of political science records the rise and fall of many such eidola. The conception of Empire which Rome had realized subsisted in theory long after the Roman State had fallen in fragments. The political writers of the Renaissance formulated the Social Contract theory, which in one or other of its evasive forms, obsessed the human mind for more than three centuries. This in turn has given place to the theory of Sovereignty, just as evasive, just as ill-founded, just as unnecessary. Subjected to a searching analysis all such dogmas will be found to contain in them some grain or grains of truth. Thus, the Social Contract theory derives in part from the simple proposition that all obedience is in the last resort voluntary, for, "utterly without our consent we can be at no man's commandment living." It seems that in certain conditions of the political atmosphere some such grain of solid matter propagated by heat will diffuse as gas, in which state it is apt to be asphyxiating and sometimes dangerously explosive. If the Sovereignty theory has been practically innocuous, it must, none the less, be pronounced logically unfounded, and therefore an embarrassment in the sphere of political thought.

Stripped of its embellishments this theory seems to be as follows: Men, it is said, are found living together in large social aggregates called States, larger than the family, but no more than the family the conscious result of human volition. The very idea of a society postulates certain uniformities of conduct upon which the being and the well-being of

the society depend. Morality consists in the consciousness of such uniformities as rules. Law consists in their formulation and enforcement. The business of formulating and enforcing is called government, and the persons in whom such functions are vested are called the governors of the State. Now, since all States, except the most rudimentary, contain in them the element of government, it is concluded (and this, in particular, is the Sovereignty theory) that in every State (except the most rudimentary) are to be found some persons in whom the prerogative of government is vested. Such persons are commonly described as Sovereign. Law is the command of the Sovereign. Nothing can exist as Law in the State except by the authority of the Sovereign or at all events with the Sovereign's acquiescence. Thence flow as consequences the various corollaries that Sovereignty is unlimited, indivisible, inalienable, and so forth.

This theory, which is to be found in the 16th century in Bodin, and in the 17th century in Hobbes, was proclaimed as gospel by John Austin in his *Lectures on Jurisprudence*. It is therefore usually described as Austin's theory of Sovereignty, though, as we have just mentioned, Austin was in no sense its inventor. He, however, must be credited with having made it a dogma with the English jurists of the second half of the 19th century.

The Austinian theory, naturally, has not passed unchallenged. It has been pointed out that men have been, and in many parts of the world still are, conscious of rules not merely as rules of morality but as rules of law without any idea of an imposing authority. This is Sir Henry Maine's argument. The neo-Austinian replies that such rules are not law at all. This position precludes further argument. If law is to be what anyone chooses to make it, it is idle to pursue a discussion which can lead to nothing but to an elaboration of the definition. It would be more profitable to enquire whether the rules in question exhibit such fundamental resemblances to other rules which are admittedly law, that they may properly be referred to the same order of phenomena. If this is so, the true criterion of law must be found in those resemblances, and not in enactment or enforcement by authority.

The objection that the theory does not square with facts might surely have prevented its existence, or strangled it at birth, were it not that experience shows that an abstract theory, once conceived by an inventive mind, may exist for long centuries without drawing nutriment from the world of reality. The Sovereignty theory, it is now admitted, is inapplicable to Federal governments, and, indeed, to any rigid constitutions, while even in applying it to the British Constitution, Austin turns his back upon the Sovereign of the lawyers, the *Rex in Parliamento,* to find a Sovereign in the King, the Lords and the electors to the House of Commons—a solution which is hardly reconcilable with his fundamental postulates of the nature of Sovereignty. Confronted with this difficulty some modern writers have sought to distinguish the Sovereign *de jure* from the Sovereign *de facto.* The first, it is said, is the creature of legal theory, which may exhibit more or less imperfectly the attributes of Austinian sovereignty, which may again, from a shifting of the centre of political stability, be a Sovereign only in name, a *roi fainéant,* while the true seat of authority must be looked for elsewhere. This elusive presentiment, it will be observed, still asserts the sacred dogma of Sovereignty. There *must* be, we are told, in every State some ultimate and supreme authority—if not here, then somewhere else. It is astonishing that intelligent men should concede to such an argument, astonishing how hard it is to disabuse the mind of an unfounded hypothesis.

Evidently there is some reason for the persistency of such a notion. The reason will be found in the grain of truth out of which the theory has grown. It seems to be an infirmity of the mind to conceive as concrete facts distinctions which are only true as abstract ideas. We distinguish in thought the idea of rule and of obedience to rule. The conception is slightly, but only slightly more concrete, when we speak with Aristotle of the ruling element, "that which rules," and of the subject element, "that which is ruled," as essential elements in the constitution of the State. It is a short step further but a fatal one, when we incarnate this abstraction 'government' in a person or persons whom we term Governor or Sovereign, while all other persons are termed Governed or Subject. The fault lies, not in recognising the patent fact that in every State there are persons

who rule and persons who obey (though of course, the rulers are also obeyers and the obeyers are also rulers), but in predicating of the first all that is implied in the abstract notion of government, and deducing therefrom the corollaries of Sovereignty as unlimited, impartible, etc., which, if asserted of governmental functions as exercised by this man or by this body of men, are demonstrably false. In much the same way the logical necessity of viewing consent as inseparable from the idea of the State, degenerated into the error of regarding consent as historically antecedent to the State and so gave birth to the fallacious doctrine of a Social Contract.

If we are to reason correctly about politics we must disabuse our minds of such prepossessions. A better view would be to think of government or of Sovereignty (if we are to use the word) not as the attribute of a specific person or body of persons, so that we can say "Lo, here is Sovereignty, or Lo, there," but rather as the animating force, which diffused through the State, is the source of its activity. Each individual in his place and in his degree according to his powers of mind and force of character acts upon his surroundings, that is, upon the other units of the social group of which he forms a part. Sovereignty is the sum total, perhaps more correctly the combined result, of individual forces. It is a thing subtle, impalpable, infinitely volatile. In such a tumultuous conflict the forms and instruments of government, the powers of governors, are "like the bubbles on a river, sparkling, bursting, borne away." The rulers of the moment are tolerated, their powers assigned them by the Society to which they belong, which also determines the extent and nature of their functions. But the law of flux is the condition of human institutions. To predicate sovereignty of things so ephemeral and insubstantial is as if one should attribute divinity to the work of men's hands. If the conception of Sovereignty here expressed is correct, it is plain that the Austinian theory cannot stand, nor any definition of law which includes Sovereignty as one of its terms. But the definition of law lies outside the scope of this paper.

R. W. LEE.

CORRESPONDENCE.

"Costs."

DEAR MR. EDITOR,—

Even while enjoying a very welcome vacation, it seemed quite refreshing to read the ably-written article in the July number of the CANADIAN LAW TIMES on the ever-interesting subject of "Costs," and none the less so because one's views on that subject happen to differ rather widely from those to which the unnamed author has given expression; and in this connection I have thought the following observations might prove acceptable for further consideration.

It may be conceded in the first place that costs are in the nature of "an indemnity for an expense necessarily incurred in enforcing a legal right, or resisting an unfounded claim," and, in the absence of special circumstances, costs do, in fact, follow the event. But it is equally true that the very existence of the discretionary power now and for a long time vested in the Courts in regard to the disposition of the question of costs in all cases, is entirely inconsistent with the suggestion that they should be dealt with on legal principles or as a legal issue purely as this at once means the elimination of all discretion. I am aware that the author does not in terms, go this length, but he does put such a proposition coupled with the words "except in the most flagrant and exceptional cases." (See the concluding lines of the article.) It is quite conceivable that, whatever the proper basis be for the disposition of the question of costs, the cases in which costs should properly be denied the successful party may well be or become so numerous as not to be in any sense "exceptional." What cases, then, would the learned writer deem so "flagrant" as to warrant the exercise of the statutory discretion in question? In other words, what are the circumstances which should be present? The learned author, while attacking in some measure the basis or bases adopted by the judges, does not suggest any other basis, except to say that all such cases should be "flagrant" and "exceptional." How "flagrant"? and how "exceptional"? The good purpose served by the article is, no doubt, to open the way to discussion on an

important subject, and it may be that the desired result will not be soon realized.

It may be further conceded, that judges, like lawyers, make mistakes, and their errors, no doubt, occur in the exercise of this discretion in pretty much the same proportion as in the disposition of the cases that come before them. But again, the granting of a discretion presupposes a sufficient fund of common sense and capacity in the person to whom it is given, to exercise it *intelligently and in accordance with* the purpose for which it was granted; and to find the reason for which it was granted is to find what should be the governing principle as to its exercise in all cases. Surely no better principle would suggest itself than that a litigant whose conduct towards his opponent has been *inequitable*, but who has the legal advantage in the action, and, therefore, cannot be penalized in respect to its subject matter, may nevertheless, *if the judge thinks proper*, be penalized in respect to his costs. What other reason can there be? The legislature knows that the judge is the person best able to mete out practical justice in the case, and as a rule there is some material reason why he deprives a party of his costs. Sometimes, indeed, one might well surmise that the professed reason is not the real reason in the judge's mind, but that again is sometimes due to his desire in very mercy to the litigant to refrain from giving a certain degree of publicity to the facts which constitute the real reason itself. It has been well said that "money talks." and when one finds his fingers burned, as it were, as a result of some act or omission or course of conduct on his part, in some way uncommendable, the effect on himself and his future dealings is often more practical and lasting than many sermons, even including under this latter head the many terrifying admonitions that so frequently issue from the Bench itself and constitute, for the time being, the fear and dread of all, save, perhaps, that hardened and impregnable class of gentlemen known as "members of the Inner Bar" and commonly called K.C.'s.

A short time ago, one of my learned friends of the Toronto Bar appeared before His Honour Judge Denton in support of a motion for particulars, and the motion was granted. Then the following dialogue occurred:—

Counsel: Costs to the plaintiff, of course, your Honour?

His Honour: When was the demand for particulars served?

Counsel: I did not serve a demand for particulars.

His Honour: Why not?

Counsel: Because the present rules don't require it.

His Honour: Quite true, but, although the rules don't require it, it has an important bearing on the question of costs, and where a demand has not been made I will not allow costs.

No doubt, if this gentleman had served a demand for particulars they would have been forthcoming, and at any rate he could still have moved, but the judge could readily see that the other method was chosen for the purpose of making costs, and he was equally aware that the procedure was not created for the purpose of making costs, but only when necessary for the purpose of getting particulars, the costs being merely incidental.

When we consider the many actions which, though sufficiently within the letter of the law to succeed are nevertheless vindictive, frivolous, vexatious, harsh, and in the moral sense, even unprincipled, we are surely bound to agree that, however faulty the exercise of this discretionary power at times, its very existence is a stay to many an unnecessary proceeding, and it would be a sorry day for the people and a long step backwards, if the provision under discussion were repealed or if the Courts were even hampered in its administration by legislation attempting to limit or define their power, as, the moment we put into writing what shall and shall not entitle the judge to exercise his discretion, it becomes a comparatively simple matter for some, more gifted in invention than either your humble servant or the author of the said article, to bring themselves within the letter of what would amount to an imperfect definition at best, and so render the discretion, as such, a nullity, and it is to be devoutly hoped that we shall never witness any such abuse of the present power as will occasion further legislation of this kind.

Yours very truly,

ARTHUR A. MACDONALD.

CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

English Decisions.

In our last issue we had to notice a decision of the Court of Criminal Appeal (*Rex* v. *Light, supra,* p. 620), upon the subject of attempting to obtain money under false pretences, viz., that it is not an essential element in the offence that the mind of the prosecutor shall have been affected by the false pretences. Now we have to notice another decision of the same Court on the same subject, namely *The King* v. *Robinson*,[1] to the effect that a person cannot be convicted of an attempt to obtain money by false pretences, unless he made the false pretence to the person from whom the money was intended to be obtained, or to his agent; a false pretence made to a third person, although intended to be ultimately reported to the person from whom the money was to be obtained, will not suffice. The appellant who had insured his stock in trade with certain underwriters at Lloyds, had falsely reported to the police that a burglary had taken place on his premises, in the hope that the police would make a report by which the insurers might be induced to pay. Lord Reading, C.J., says (p. 348): "The real difficulty lies in the fact that there is no evidence of any act done by the appellant in the nature of a false pretence which ever reached the minds of the underwriters, though they were the persons who were to be induced to part with the money. . . The police were not acting on behalf of the underwriters. In truth what the appellant did was preparation for the commission of a crime, not a step in the commission of it. . . But there must be some act beyond mere preparation if a person is to be charged with an attempt."

Railway Company — Contract of Carriage — "Owner's Risk."—Gunyon v. *Southeastern and Chatham Railway Companies Managing Committee*,[2] is a decision of a Divisional Court on appeal from a County Court, that if a railway company enters into a contract of carriage, in this case of cherries, with a provision that in consideration of being charged a reduced rate, the consignor relieved it "from all liability for

[1] [1915] 2 K. B. 342; 84 L. J. K. B. 1149.
[2] [1915] 2 K. B. 370.

. . . delay . . . except upon proof that such . . . delay . . . arose from wilful misconduct on the part of its servants," . . . it must not depart from an essential term of the contract, if it wishes to retain the benefit of the above clause. If it does so it is no longer performing the contract and the goods will no longer be carried at the owner's risk. In other words the company will not be relieved from liability under the above clause. The grounds on which the Court proceeded, and what happened in this case, are clearly shewn in the following passage from the judgment of Sankey, J., (p. 378):

> "In my view the present contract was a contract for carriage of perishable merchandise by passenger train. The whole basis of the contract was the condition that the goods should be so carried. When the cherries were put into a goods train an entirely different mode of conveyance was substituted for that stipulated for, to which different rates and different conditions were applicable. The defendants from that moment departed from the agreement into which they had entered and substituted for it another one to which the exceptions for which they had contracted did not apply. I do not think that where a railway company has promised to perform the conveyance in a certain manner, with an attendant right to take advantage of certain stipulations made in their favour, they can put upon the consignor a mode of conveyance which he has not contracted for, and yet retain in their own favour the stipulations referable to the agreed mode of conveyance only. The result is that in this case the defendants were not entitled to rely upon the conditions in the consignment note, and the appeal must be allowed with costs."

Sale of Goods—Outbreak of War while Contract still Executory—Effect of War on Contract.—Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.,[3] consisted of two special cases stated by arbitrators on the same form of contract, and raised a question of general importance, namely: Whether when, before the outbreak of war, goods had been sold by one English firm to another on a c. i. f.,[4] contract and shipped on a German ship to a neutral port, the seller after the outbreak of war was entitled to tender, in one case the German bill of

[3] [1915] 2 K. B. 379.

[4] "Cost, insurance, freight." A c.i.f. contract signifies one under which there is included in the price of the goods all charges to the port of destination.

lading, in the other case the German bill of lading and a German policy of insurance, and claim the price.

Scrutton, J., held that he was not. The facts concisely stated were as follows: Two contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively each contained a provision that payment was to be in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from date of bills of lading or upon the posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels which on the outbreak of war between England and Germany on August 4th, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance, and in the other a German bill of lading and a German policy of insurance. The buyers in each case refused to accept the tender and pay the price.

We have not space to go into all the details of the case, but Scrutton, J., states the grounds on which he holds that the buyers were entitled so to do in the following passage of the judgment (p. 391):

> "When the seller in this case tendered documents" (namely, the bills of lading and German policy of insurance) "he tendered documents which had been contracts, but which were now, by considerations of public policy, void and unenforceable as regards any obligations of performance which would but for the war have been carried out after August 4th. To carry out their original obligations would involve entering into contractual relations with the King's enemies; and those relations were now impossible either in England or Germany, the countries of the original contracting parties."

Reinsurance (Marine) — Compromise between Original Assured and Original Insurers—Liability of Re-insurers — British Dominion General Insurance Co. v. Duder,[5] is a decision of the Court of Appeal upon a question on which Pickford, L.J., says (p. 404), there was no direct authority. The plaintiffs had insured a ship against total or constructive total loss. The insured claimed a constructive total loss, and

[5] [1915] 2 K. B. 394.

though the plaintiffs disputed that there had been one, they ultimately compromised for 66 per cent. of the claim. They had re-insured the ship for a like amount as their own risk, with the defendants, and the latter having refused to join in the above compromise, the plaintiffs now sued them on the policy of in re-insurance, and having proved that there had been a constructive total loss, claimed to recover 100 per cent. of the loss, and not merely 66 per cent. They succeeded on this claim at the trial, but the Court of Appeal reversed this decision. They held that a contract of re-insurance is a contract of indemnity; that the defendants were entitled to the benefit of the compromise made with the owner; and that, therefore, the plaintiffs were only entitled to recover from the defendants 66 per cent., and not 100 per cent. of the loss together with a proper proportion of the expense of obtaining the compromise. All the judges concurred, holding, as Bankes, L.J., puts it, (p. 409), that "it is not possible, without losing sight altogether of the root principle of insurance law that the contract of insurance is a contract of indemnity, to accept the respondent's contention that they are entitled to ignore the compromise and claim the full amount of the re-insurance policies."

It is important to notice the way *In re Eddystone Marine Insurance Co.*,[6] and *In re Law Guarantee Trust and Accident Society*,[7] were distinguished. These were cases where the original insuring company went into liquidation and either paid nothing or only a dividend on the original policy, and were held nevertheless entitled to recover the full amount from their re-insurers. Buckley, L.J., thus points out the distinction, at p. 403:

> "They are cases in which the assurer by way of bankruptcy or liquidation seems to discharge his liability by payment of a dividend to the original assured. This, however, is not the fact. Notwithstanding the payment of a dividend, the liability to the full extent remains, and out of further assets, if any, it must in law be discharged. When the estate pays only 10s. in the pound and recovers 20s. in the pound, it is not recovering in excess of a sum for which it has compromised its liability. The liability is not compromised at less than 20s. in the pound. The liability is still 20s. in the pound, and the right to recover a like sum against the re-insuring underwriter is an

[6] [1892] 2 Ch. 423.
[7] [1914] 2 Ch. 617.

asset of the estate, and its proceeds must go according to the law of bankruptcy or liquidation to all the creditors in administration."

Criminal Law—Duty of Judge to Direct Jury on Questions Arising out of Evidence, Although not Relied Upon by Counsel.—The King v. *Hopper.*[8] On the trial of Hopper for murder, his counsel relied substantially on the defence that the fatality which had occurred was the result of accident, though he indicated that in the event of the jury not accepting that view, he would ask them to find manslaughter, and not murder. The ground of this appeal to the Court of Criminal Appeal was that the trial judge in his direction to the jury told them that they must either find a verdict of murder or acquit the prisoner; in other words he told them that if they did not accept the theory put forward by the defence that the killing was accidental, there was no alternative open to them but to find a verdict of murder. The Court, as they had power to do under the provisions of the Criminal Appeal Act, 1907, entered a verdict of manslaughter, which they held the jury might, on the evidence, have found if they had been directed upon the point. The value of the case is to be found in the following passage of the judgment which was delivered by Lord Reading, C.J. (p. 435):

"We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

We may add the further short extract:—

"In a Court of Justice it is for the Court, with the assistance of the jury, to arrive at the true view of the

[8] [1915] 2 K. B. 431.

facts without paying too much attention to whether a particular witness is called by one side or the other."

Action for a Declaration Where no Cause of Action Exists.—*Guaranty Trust Co. v. Hannay & Co.*,[9] is a decision of the Court of Appeal upon the scope of Imp. Order XXV., r. 5, which is identical with section 16 (*b*) of our Judicature Act, and provides that:—

> 'No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.'

Two out of the three judges agree that under this the Court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant, but the declaration which he asks is merely that he is not liable in a possible action the defendant might bring against him, at all events if, as in this case, he asks for relief in the form of an injunction restraining the defendant from further prosecuting such an action already commenced by him in a foreign country. Pickford, L.J., goes the whole length of holding that the Rule is not confined to cases where the plaintiff has a cause of action apart from itself; but gives a general power to make a declaration whether there is a cause of action or not, at the instance of a party interested in the subject matter of the declaration. He observes, however, that a declaration that a person is not liable in an existing or possible action is one which will hardly ever be made, though it is not beyond the power of the Court in a very exceptional case to make such a declaration. Bankes, L.J., does not go quite so far as this. He agrees that an application for a declaration is not to be refused merely because the applicant cannot establish a legal cause of action; but he holds that the Rule applies where a person is seeking 'relief,' or in whom a right to 'relief' is alleged to exist; and points out that 'relief' is not confined to relief in respect of a cause of action; and that the claim for the injunction was a claim for relief to which the claim for the declaration was merely ancillary.

Buckley, L.J., dissented, holding that a declaration can only be made under the Rule where it is founded on facts

[9] [1915] 2 K. B. 536.

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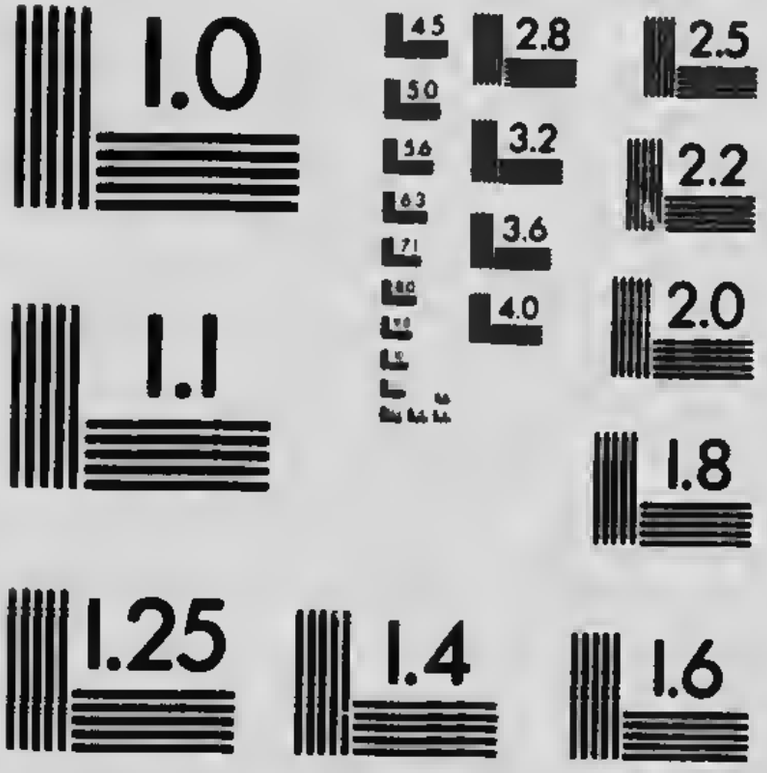

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which, if true, show a cause of action; that the Rule does not authorise a declaration as to the plaintiff's obligation, where the cause of action is in the defendant and not in the plaintiff; and that the declaration claimed in the case before the Court did not lead to, or bear upon, the injunction, which was an entirely separate matter. He says, p. 549:

"The declaration authorised is a 'declaration of right'—that is, of the plaintiff's right—'whether any consequential relief is or could be claimed or not?' It does not authorise a declaration of obligation. Where the cause of action is in the defendant, and not in the plaintiff, the declaration which the plaintiff seeks is a declaration, not of any right of his, but a declaration that his obligation is not that which the defendant alleges."

Banker and Customer—Account at one Branch—Demand of Payment at Another Branch.—Clare and Co. v. *Dresdner Bank*,[10] is a decision of Rowlatt, J., upon a point which he says "seems never to have been raised before, probably because such a thing has never been dreamed." The point decided is that if a man has an account with a branch of a bank in a foreign country, he cannot demand payment upon a branch of the bank in England, without any previous request to the former to pay, or to remit the balance to credit, to the English branch, for "there is no obligation on a bank to pay in one country a debt due to a customer on current account in another country." *Leader and Co.* v. *Direction der Disconto-Gesellschaft*,[11] is distinguished because there there had been a request to the bank abroad, where the amount was kept, to remit the money to its London branch. Rowlatt, J., while admitting that the relation of banker and customer is simply that of debtor and creditor, with a superadded obligation to honour cheques, says (p. 578):—

"It seems to me that locality is an essential part of the debt owing by a banker to his customer, and that his obligation to pay is limited to the place where the account is kept. As a rule, no doubt, a debtor has to seek out his creditor and pay him; but in the case of a bank with several branches that cannot be the true relation of the parties. Money has a different value in different parts of the world even although it may be expressed in the same currency, and I cannot conceive it possible that a man who has, we will say, £1,000 sterling to his credit at

[10] [1915] 2 K. B. 576.
[11] 31 Ti. L. R. 83.

a bank in New Zealand, on coming to London could have the legal right to demand payment of £1,000 at an office of the same bank in London without being liable to pay anything in consideration of that convenience or even to give time for the bank in London to ascertain whether he was in fact a customer of and had a credit balance at a branch in New Zealand."

Foreign Judgment—Jurisdiction of Foreign Court—Conditional Appearance.—In *Harris* v. *Taylor*,[12] we have another decision, this time of the Court of Appeal, "the precise point" in which, according to Bankes, L.J., (p. 590) "does not seem to have arisen for decision previously." That point is this: If you are served with process of a foreign Court, and enter a conditional appearance, and then apply unsuccessfully to the foreign Court to set aside its order for service out of its jurisdiction and the writ, on the ground that you are domiciled abroad, is this a voluntary submission on your part to the jurisdiction of the foreign Court, so that a judgment subsequently obtained in it against you in your absence, can be enforced by action against in your own country, although in fact the foreign Court would otherwise have had no jurisdiction? The Court of Appeal say the answer is, yes. All three judges agree. It will be sufficient to quote from Buckley, C.J., (at p. 587):

"When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it, and it became his duty to appear in the action,

[12] [1915] 2 K. B. 580.

and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so."

Company—Mortgages—Unregistered Mortgage—Notice.—The June *Law Reports* are remarkable for the number of cases of first impression which they contain. We have already noticed more than one. Another is *In re Monolithic Building Co., Tacon* v. *The Company*,[13] which decides a point which Cozens-Hardy, M.R., says (p. 66) "has never been authoritatively decided before." The Court of Appeal unanimously decide in it that sec. 93 of the Imp. Companies (Consolidation) Act, 1908, which in terms very similar to sections of the British Columbia and Yukon Companies Acts, enacts that 'every mortgage or charge created . . by a company . . . and being either . . (*d*) a mortgage or charge on any land, wherever situate, or any interest therein . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator or any creditor of the company, unless the prescribed particulars of the mortgage or charge . . . are delivered to . . . the Registrar for registration . . . within 21 days after . . . its creation . . .' avoids an unregistered mortgage against a subsequent registered incumbrancer *even though he had express notice of the prior mortgage at the time when he took his own security.* They proceed upon the principles enunciated in *Edwards* v. *Edwards*,[14] and especially refer to the words of Mellish, L.J.:

> "If the legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a Court of Equity say that in certain circumstances it shall be valid? The Courts of Equity have given relief on equitable grounds from provisions in old Acts of parliament, but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines."

Cozens-Hardy, M.R., says (p. 667):

> "If a deed is said to be void against the first and second incumbrancer, what is added by saying that it shall be void to all intents and purposes? Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going

[13] [1915] 1 Ch. 643; 84 L. J. P. C. 441.
[14] 2 Ch. D. 291, 297.

concern. It is not void to all intents and purposes, but it is void as between the two incumbrancers."

So Phillimore, L.J., says (p. 667):

"We have to construe s. 93 of the statute. It makes void a security, and not as against everybody, not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company. There are three ways in which documents, or three degrees to which instruments, may be void. They may be void altogether, like a bill of sale under £30 under the Bills of Sale Act, 1882, they may be void as to the security and good as to the obligation; and they may be void against certain parties only; but in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying 'to all intents and purposes' or any phrase of that kind."

Will—Declaration that Trustee Shall Decide any Question of Disputed Identity of Legatee — Public Policy. — In re *Raven, Spencer* v. *National Association*,[15] is a decision of Warrington, J., the nature of which cannot be better given than by the following extract from his judgment (p. 676):

"The testator bequeathed certain charitable legacies and amongst them a legacy of £1,000, to the 'National Association for the Prevention of Consumption.' He then inserts this direction: 'If any doubt shall arise in any case as to the identity of the institution intended to benefit, the question shall be decided by my trustees, whose decision shall be final and binding on all parties.' It is said that in this case a doubt has arisen whether the legacy in question ought to be given to one institution or another. The trustees desire to decide the question finally if they have power so to do . . . In my opinion it is not competent for a testator to confer certain legal rights by giving legacies and at the same time to say that the question whether that legal right is or is not to be enjoyed is not to be determined by the ordinary tribunal—in other words, it is not competent for him to deprive the person to whom that legal right is given of one of the incidents of that legal right; and, if necessary, I should be prepared to rest my decision upon the ground that the attempt to do so is an attempt to do two inconsistent things. In my opinion, the gift of a legacy to a legatee,

[15] [1915] 1 Ch. 673: 84 L. J. Ch. 489.

even if it be of doubtful construction, is in fact a gift to the person who shall be determined to be the legatee according to legal principles, and to give effect to a provision such as the provision which the testator has inserted in his will in the present case is in fact to assert the direct contrary. . . . But I also think that I may and ought to decide it on wider grounds, namely, that it is contrary to public policy to attempt to deprive persons of this right of resorting to the ordinary tribunals for the purpose of establishing their legal rights."

And he refers, as a decision upon the precise point, to the Irish case of *Massy* v. *Rogers*.[16]

Company—Appointment of Receiver and Manager—Leave for Manager to Disregard a Contract of the Company.—In re Great Cobar, Limited, Beeson v. *The Company*.[17] The company was formed in 1906 for the purpose of acquiring and working certain gold, copper, and coal mines in New South Wales. The plaintiff, a debenture holder, had obtained the usual order in a debenture-holders' action, and a receiver and manager of the assets of the company was appointed. The plaintiff now, with the acquiescence of the company, applied before Warrington, J., for an order that the receiver and manager might be at liberty to disregard a certain agreement which the company had entered into in 1906, before the issue of the debentures, with a certain firm that it should be the sole agent of the company for the sale of copper and silver from the company's mines on certain terms as to commission. The debentures were subsequently issued in the ordinary form of a charge on the undertaking of the company, but were in no way made subject to the performance of the agreement. The assets of the company were shewn to be insufficient to satisfy the claims of the debenture-holders, and the goodwill of the company's business was of no value. Warrington, J., made the order as asked upon the following grounds (p. 689):

"This agreement in no way affects the value of the goodwill of the business. There is no obligation on the receiver that I can see, morally or otherwise, to carry the agreement into effect. He is appointed to manage the business of the company, and it is for him to determine through what agents and generally in what way the produce of the company's mines should be sold. I think, therefore, I must make an order in accordance with the

[16] 11 L. R. Ir. 409, 416, 417.
[17] [1915] 1 Ch. 682.

application that the receiver be at liberty to disregard the agreement."

Company—Articles of Association—Their Effect as a Contract between the Company and its Members.—Hickman v. Kent or Romney Marsh Sheepbreeders' Association,[18] is the last case which seems to call for notice, and that for the benefit of those of our readers who belong to British Columbia, Nova Scotia, Alberta, Saskatchewan, and the Yukon Territory, whose Company Acts incorporate by memorandum and articles of association, and contain a like clause to that which came in question in this case, before Astbury, J., namely:

'The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and the articles subject to the provisions of the Act.'

Astbury, J., carefully reviews the apparently conflicting decisions and dicta on this section, and arrives at the conclusion (pp. 897, 900) that this much is clear from them:

(i) that no article can constitute a contract between the company and a third person, whether such third person is, or subsequently becomes, a member or not. Such an outsider to whom rights purport to be given by the articles, in his capacity as such outsider, whether he is, or subsequently becomes, a member or not, cannot sue on those articles, treating them as contracts between himself and the company to enforce those rights;

(ii) no right, merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, e.g., as solicitor, promoter, director, can be enforced against the company:

(iii) articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

Thus, holding that an article providing for the reference of disputes to arbitration is a sufficient admission in writing within the Arbitration Act, he granted an application by the company that all further proceedings in an action commenced against the company by a member be stayed, and that the matters in question in the action be referred to arbitration in accordance with the provisions of the article.

[18] [1915] 1 Ch. 881.

Canadian Decisions.

Judgment against Agent—Bar to Action against Principal—Final Order.—M. Brennan & Sons Mfg. Co. Ltd. v. *Thompson*,[1] shews the unwisdom of unthinkingly rushing ahead to sign a default judgment. The plaintiffs sued the three defendants for lumber sold. Two were undisclosed principals and the third, T., had ordered the goods. The writ was specially endorsed and claimed against all three without making a distinction as to principal or agent. T., the agent, did not appear and judgment for the whole claim was entered against him. The other two defendants appeared. The plaintiffs then realized the predicament they were in and moved to set aside the judgment against T. This was done by the County Court judge. The Appellate Division held that this order was "final" in its nature though in form it might be interlocutory, and that therefore an appeal lay; and set aside the judgment of the County Court judge. The case is valuable for a clear statement of the different principles applicable in the two kinds of cases of this nature. The first is where A. represents himself to be the agent of B.; the second where he makes no such representation, but is agent (or thought to be agent) for an undisclosed principal. In the second case a judgment against either is a bar to a judgment against the other because there is only one contract or cause of action: a contract for goods sold and delivered. "The contract *transit in rem judicatam*, and is merged, gone." The contract against the agent cannot then be set aside without the consent of the principal. There is no relief on the ground of mistake. The plaintiff has made his election. In the first case, there are two different causes of action: one against the principal in contract (in which case there will be no cause of action against the agent); and one against the alleged agent if in fact he were not agent, in tort, or on special counts in contract. Here likewise judgment against one will be held to bar an action against the other. The reason, however, is not that there was one contract which is now represented by a judgment; but that having succeeded in one action on alleging and proving a certain set of facts, the plaintiff will not be heard to allege a set of facts directly the reverse. He can

[1] (1915) 33 O. L. R. 465.

only succeed against the principal if there was in fact agency; he can only succeed against the ostensible agent if in fact there was no principal, and the so-called agent misrepresented the facts. In this class of case there is room for mistake where a default judgment has been entered; for it is a question of fact, not of election and merger of the contract in a judgment.

"Guardian of an Infant" — Ditches and Watercourses Act."—Healy v. *Ross,*[2] is a decision of the Appellate Division reversing the judgment of Middleton, J., in 32 O. L. R. 184. Section 8 of the Ditches and Watercourses Act, R. S. O. 1897, c. 285 (now s. 8 of R. S. O. 1914, c. 260) provides that notice in writing shall be served upon "the owners or occupants of the . . . lands to be affected by a proposed scheme"; and section 2 (*j*) defines "owner" as *inter alia*, "the guardian of an infant owner." Notice was served for two lots on William Johnston the elder; it being assumed that he owned both lots. At the statutory meeting the engineer was informed that the son, William Johnston the younger, aet. 17, owned one of the lots. The engineer verbally informed the son that proceedings were being taken, but no fresh notices were served on anyone. An infant can have more guardians than one; he may have a guardian of his person and one of his estate. As William Johnston the elder was not the guardian of the infant's estate, and as this was the guardian intended by the legislature, the notice given was held insufficient, and the whole drainage scheme fell to the ground. The objection was fundamental, as in the case of *McKillop* v. *Township of Logan.*[3]

Passing the lowered gates at a Railway Crossing—Negligence.—Garside v. *Grand Trunk Ry. Co.,*[4] is a case in which a point new to Ontario Courts, though there are American decisions, was taken. The accident took place in the City of London, the deceased having been killed by a yard engine which was backing acrossWellington Street. A freight train was passing at the time. The gates were lowered; but the deceased passed around or under them; and waiting on the

[2] (1915) 33 O. L. R. 368.
[3] (1899) 29 S. C. R. 702.
[4] (1915) 33 O. L. R. 388.

tracks for the freight train to pass was struck by the y engine. There was no watchman stationed at the crossing, and the yard engine rang no bell. At the trial judgment was entered for the plaintiff, the jury having negatived contributory negligence. It was argued on appeal that when the gates were lowered the right of the public to use the highway was suspended, and that the deceased in entering on that part of the highway was a trespasser to whom the appellant owed no duty; or that his so entering was in the circumstances of the case, as a matter of law, or *per se*, negligence disentitling the respondent to recover. As the learned Chief Justice of Ontario pointed out when giving judgment and dismissing the appeal, the contentions of the appellant are supported by decisions of the highest Courts in some of the States of the neighbouring republic, but are opposed to the view of the highest Courts of other States. The learned Chief Justice held that the railway company has not the exclusive right of user of the highway when its gates are down, at all events in the case of a Dominion railway, where it is not shewn that the erection and maintenance of the gates is authorised or required by an order or direction of the Board of Railway Commissioners for Canada. Consequently the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so; and the passing of the lowe gates was not *per se* negligence.

Reincorporation of a Company—Land held by Old Company in Trust.—Smith v. *Humbervale Cemetery Co.*,[5] is a decision of the Appellate Division on the effect of reincorporation of a company. The company was incorporated and given power to "take, hold, and convey the land to be used exclusively as a cemetery." Subsequently a majority shareholder wished to dispose of a portion of the lands, the property having increased greatly in value. To obtain power to do this, application was made for reincorporation. See R. S. O. 1914, c. 178, ss. 11-13. The Act provides for the issuing of letters patent extending the powers of the company to such other objects as the applicant may desire; but s. 13 provides that all debts, contracts, liabilities, and duties of such (the old) corporation shall thenceforth attach to the new corporation, and may be enforced against it to the same extent as if such debts, contracts, liabilities, and duties had

[5] (1915) 33 O. L. R. 452.

been incurred or contracted by it. It was held, reversing the judgment of Britton, J., that it was the plain duty of the former corporation to hold the land upon the trusts declared by the statute. In two of the judgments of the Appellate Division it seems to be assumed that s. 13 overrides and limits the very wide powers conferred on the Provincial Secretary by s. 12, permitting the extending of the powers of the company to such other objects as the applicant may desire. Kelly, J., however, puts the matter differently, and it is submitted preferably: that the removal of the restriction upon selling could only be effected by the clearest and most unequivocal language; that in the absence of such language there was no assumption that the former liability no longer existed; and that therefore the reincorporation did not relieve the new company from the duties and liabilities of the earlier corporation.

Affidavit—Statutory Declaration.—*Rex* v. *Marshall*,[6] is a decision from British Columbia. It was there held that a statutory declaration expressed to be made under the Canada Evidence Act (1893) and stated in the jurat to be "sworn," is not an "affidavit" within the meaning of the Game Act, B. C. 1914, c. 33, s. 56. The "affidavit" read as follows:

"I, J. B. Marshall, solemnly declare that I have not sold deer meat on or about January 25th, 1915, to any person or persons, and deny the charge. And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act, 1893.

"Sworn before me at Mount Olie, this 1st day of June, 1915. J. B. Marshall.

"Alexander Seibel, J.P."

In *Doe d. Bruton* v. *Clarke*,[7] Wightman, J., after consulting Denman, C.J., Williams, J., and Coleridge, J., refused to accede to the argument of Sir Fitzroy Kelly and Crompton that the omission of the word "oath" is cured by the jurat "sworn before me, etc.," following *Oliver* v. *Price*.[8] *Allen* v. *Taylor*,[9] and *In re Newton*,[10] are decisions to the same effect. Consequently the appeal, based as it was on this "affidavit," was dismissed.

[6] (1915) 31 W. L. R. 702.
[7] (1842) 12 L. J. Q. B. 69.
[8] 3 Dowl. P. C. 261.
[9] (1870) L. R. 10 Eq. 52.
[10] (1860) 2 DeG. F. & J. 3.

SUPREME COURT OF CANADA.

SASK.] [MARCH 15TH, 1915.

LINDE CANADIAN REFRIGERATOR COMPANY v. SASKATCHEWAN CREAMERY COMPANY.

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

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Company—Dominion corporation—Provincial registration — Juristic disability—Right of action—Contract—Carrying on business within province—Legislative jurisdiction—R. S. Sask., 1909, c. 73, ss. 3, 10—Costs.

A company, having its chief place of business in the Province of Quebec and incorporated under the Dominion statute with power to trade and carry on its business throughout the Dominion of Canada, did not comply with the provisions of the "Foreign Companies Act," R. S. Sask., 1909, ch. 73, requiring registration previous to carrying on business within the Province of Saskatchewan. In the ordinary course of its business, it sold and brought certain machinery into the province, and did the work of installing it therein for a price which included setting it up and starting its working. An action for the contract price was dismissed by the judgment of the trial court (6 West. W. R. 1159), and this judgment was affirmed by the Supreme Court of Saskatchewan, on the ground that the unregistered extra-provincial company was denied the right of action in the courts of the province by the tenth section of the "Foreign Companies Act."

On appeal to the Supreme Court of Canada, the judgment appealed from (7 West. W. R. 89), was reversed.

Per IDINGTON, J.—The mere setting up and starting the working of the machinery by the extra-provincial company did not constitute the carrying on of business in the Province of Saskatchewan within the meaning of the "Foreign Companies Act."

Per ANGLIN, J.—The installation of the plant was a substantial part of the consideration of the contract and, consequently, the unregistered extra-provincial company was denied the right of enforcing its claim by action in the Courts of the province under the provisions of the tenth section of the "Foreign Companies Act," but, inasmuch as the legislation in question had the effect of depriving the extra-provincial company of the status, capacities and powers which were the natural and logical consequences of its incorporation by the Dominion Government, it is *ultra vires* of the provincial legislature and

inoperative for the purpose of depriving the company of its right to maintain the action in the provincial courts. *John Deere Plow Co.* v. *Wharton* [1915], A. C. 330, applied.

Costs were refused the appellant, on allowance of the appeal, for failure to comply with rule 30 of the Supreme Court of Canada in respect of the printing of statutes regarding which questions were raised.

Appeal allowed without costs.

Atwater, K. C., for appellants.

The respondents were not represented at the hearing of the appeal.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The July number of *The Journal of the Society of Comparative Legislation* is a mine of information and of learning. We don't think we have ever seen an issue of a legal periodical of which this might more truly be said. Our Sir James Aikins holds the place of honour with a photograph and a short biographical sketch. Then come two appreciations of the late Lord Justice Kennedy. Sir Courtenay Ilbert says of him:—

> "It was the international aspect of law that attracted him most—the aspect which is reached by a comparative study of different systems. He always sought, he never wearied of seeking, he never despaired of finding the immutable and fundamental principles of law which underlie differences of history, race, creed and country. Faith in the possibility of discovering and establishing these principles permeates all his work."

There follow no less than nineteen separate articles on various subjects; notes of certain recent decisions (a new feature) in England, Canada, Australia, South Africa, and India; short reviews of fifteen new publications; and the usual concluding Notes *de omnibus rebus et quibusdam aliis* of interest to lawyers. We must, in passing, dissent from the statement on p. 242, that the Privy Council decision in the John Deere Plow Co. case decided that the Dominion parliament could incorporate companies under its power to legislate for the regulation of trade and commerce.

It is obviously impossible even to notice the names of all the subjects dealt with in this remarkable number, no less than eight of the articles dealing with questions of international law, or the law of war. Amongst these is pre-eminently worthy of special notice a very perfect production in the form of a sketch of the life and works of Franciscus a Vitoria (1480-1546) by Mr. Coleman Phillipson. Vitoria, we are told, for we don't wish to conceal our ignorance, was the earliest noteworthy representative of that group of Spanish scholars—

> "who, endowed with logical acumen, legal spirit, remarkable impartiality, and signal independence of opinion, analyse some of the fundamental questions of international

law, extend its field of inquiry, fearlessly investigate the jurisdiction of the Pope, the arrogant claims of contemporary sovereigns relying on the might of the sword, condemn the unrestrained barbarities of warfare and propose regulations for combatants, determine the essential character of a society of states, define the rights and obligations of the constituent members with regard to each other and also to barbarian communities. Thus they stimulate the judicial consciousness of nations, and prepare them for the recognition and acceptance of an enlarged body of international law."

The great merit of Mr. Phillipson's article, in our humble opinion, lies in the lucid and complete, though concise, statement which he gives of the contents of the actual writings of Vitoria, and the principles and arguments advanced therein. We would also select for special mention a careful article by Mr. Edwards on *Common Law Naturalisation and Expatriation;* a timely and useful article by Mr. G. G. Phillimore on *Contraband of War;* and a long and painstaking article by Mr. Samuel Rosenbaum of the University of Pennsylvania, on *Rule-making in the Courts of the Empire,* wherein the writer states that —

"The rule-making system developed by the English Parliament for the regulation of civil procedure was an experiment in legislation which has met with unbounded success. Not only has it been the opening wedge for an ever-increasing delegation of quasi-legislative powers to executive and judicial authorities (thus relieving Parliament of a multitude of statutory details), but it has been copied in the judicial system of practically every law-making unit in the widespread British Empire. Its general adoption shows that it has the merit, not only of making procedure flexible and responsive wherever it is in force, but also of being suited to the most widely divergent local conditions. . . . The rule-making powers now reposed in the Courts have laid for ever the ghost of technicality; procedure is now no longer a game or mystery, and throughout the Empire "reality has been given to the legal rights of individuals."

In our *Current Commentary on Cases* in this issue we have referred to a recent case of *The King* v. *Hopper*, in which the Court of Criminal Appeal holds that whatever may be the line of defence adopted by counsel for a prisoner

at the trial, the judge is bound to put to the jury such questions as appear to him properly to arise upon the evidence, even though involving some point which counsel may not himself have raised. *The* (English) *Law Journal* for July 10th observes that the recent bride drowning case in England raised the question whether a judge at a criminal trial is entitled to suggest to the jury a theory of guilt which has not been put forward by the prosecution. Mr. Marshall Hall, K.C., it appears, protested against Mr. Justice Scrutton making a new suggestion as to the method in which the brides were drowned; but, the *Law Journal* says, precedent does not support his protest. It then tells the following story:—

> "At the trial of a gang of card-sharpers, over which Chief Justice Jervis presided, a pack of cards was produced, which even the detectives had to declare to be a perfectly fair one. The Chief Justice, one of the keenest men that ever sat on the Bench, scrutinized the cards narrowly, but said nothing until he addressed the jury. 'Gentlemen,' he said, 'I will engage to tell you, without looking at their faces, the name of every card in the pack.' He had discovered on the back of every card, which was figured with flowers, one small flower in the right-hand corner with a number of tell-tale dots."

The *Law Journal* of July 17th contains another interesting little paragraph with reference to a case which came before the Court of Appeal the week before of *Neville* v. *Dominion of Canada News Co.* In it Pickford, L.J., emphatically endorsed the view of the judge in the court appealed from (Atkin, J.), that, "for a newspaper company to stipulate for a consideration that it will refrain from commenting upon fraudulent schemes, when it is the ordinary business of the company to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a court of law." As the *Law Journal* remarks, this is an important extension of the doctrine of public policy. To agreements to do that which it is the policy of the law (or of the State) to discourage, we must now add: "Agreements *to refrain from* doing that which it is the policy of the law (or of the State) to encourage." The *Law Journal* says:—

> "In the case under consideration, the proprietors of the newspaper had agreed for an advance of money not to

comment on a land company, of which the plaintiff was a director, or on any of its capital investments, with a provision that a certain proportion of the advances was not to be called in so long as the agreement was observed. It was because of alleged breaches of this honourable understanding that the plaintiff now claimed repayment of his advances, but Mr. Justice Atkin held, and the Court of Appeal confirmed his view, that, the agreement being invalid, there had in law been no breach of contract by the defendants and the events had not happened upon which the advances became repayable under the agreement. In this indirect way, the superior claims of a free press over freedom of contract were established, and the interest of the public in the preservation of the journalistic 'right to defame'—in proper cases, of course—was triumphantly vindicated."

In an Article on *Cotton as Contraband* the *Law Journal* for July 24th observes:—

"Why, it is asked, does the Government hesitate to add to the list of contraband one of the chief ingredients of shells and ammunition? The legal answer is not difficult to find. Cotton is not an article exclusively or principally used for war, even in the present circumstances, and, according to the rule of the Declaration of London—enunciating the principle of the older law—it is only such articles that may be proclaimed absolute contraband. It would not help, on the other hand, to put cotton in the list of conditional contraband, because an apparently good neutral destination might always be supplied for consignments which would cover a market between the neutral and the enemy country. But if there is some legal objection to the inclusion of cotton in the category of absolute contraband, it is questionable whether the consideration of national policy should not prevail over it, on the ground that at this moment, *Salus reipublicæ suprema lex*. The United States Government has already declared that it will not respect the decision of the English Prize Courts given under the Retaliatory Order in Council, so far as they are not consistent with international law; and, therefore, we should hardly be in a worse position in relation to the United States if, following the precedent of the Federal States in the great Civil War, we boldly stated that we would treat all cotton as a forbidden commodity, unless it were proved to have an innocent destination. In order to prevent cotton reaching the

enemy, we have, anyhow, to develop the law, and any development short of a new and thorough revision of the list of contraband is likely to be ineffective."

The Law Quarterly Review for July, apart from its usual excellent "Notes" on recent cases, does not contain so much as usual of interest to the practitioner. After a long Article by Mr. J. G. Pease on *Market Overt in the City of London,* and another, in French, on *Alien Enemies and Their Position in Regard to the Exercise of Their Civil Rights,* by Ch. de Visscher, we get a short Article by Mr. Courtney Kenny, on the recent decision of the Court of Criminal Appeal in *Rex* v. *Ahlers.*[1] There the Court appears to have decided that, though a treasonable act be done, and done with treasonable intent, yet the doer's guilt may be affected by considerations as to his purpose—that ulterior consequence of his act which he contemplates and desires, and which is the motive that induces him to act. Mr. Kenny evidently regards this as a departure from the long-established principle of English criminal law that a man is answerable for the probable consequence of his act, as much as if it were his actual object. Sir Frederick Pollock adds a note that the argument that "mens rea" is requisite for a conviction has been used without success in a case decided by the same Court where the offence was trading with the enemy: *Rex* v. *Kupfer;*[2] and leaves the learned reader to reconcile the reasoning in the two cases if he can. Mr. Samuel Rosenbaum, who we have seen has expatiated at great length, in the *Journal of Comparative Legislation,* upon *Rule-Making in the Courts of the Empire,* follows with an Article on *Rule-making in the County Courts.* Then came Articles on *Interest on 'Hotchpot' Advances* by Mr. Walter Strachan; on *The St. John Peerage Claim* by Mr. W. Paley Baildon; and on *Traces of a Township Moot* by Mr. Adolphus Ballard. The number concludes with an interesting Notice of the new edition of *Dicey's Law of the Constitution* by Mr. H. J. Randall, who says of that brilliant work:

"Any review, in the ordinary sense, would be an impertinence, because it ranks among the greatest law books produced in England in the nineteenth century. We do not know to what extent it is read by the general public,

[1] [1915] 1 K. B. 616.
[2] [1915] 2 K. B. 321, 340.

but its main ideas have permeated legal and political theory, and are ordinarily used, without acknowledgment or reference, as part of the current coin of such thought, understanded of all people. It is above everything a legal work, written by a lawyer for lawyers, and its profound handling of the legal aspects of the Constitution is its special mark of distinction, as compared with the works of the numerous political theorists, such as Bagehot, Hearn, Lord Courtney, and Mr. Sidney Low."

Mr. Randall confines his attention to what is the distinguishing feature of this final edition, the introduction of nearly ninety pages, 'whereof the aim is to compare our Constitution as it stood and worked in 1884 with the Constitution as it now stands in 1914.' There are three comments of Mr. Randall which we note with special interest. The first is on Mr. Dicey's remark that the Parliament Act, 1911,—under which it will be remembered a Bill passed in the Commons in three successive sessions is presented for the Royal assent despite the House of Lords—enables a majority of the House of Commons to resist or overrule the will of the electors, or in other words, of the nation. Mr. Randall says:

"As to the majority of the House of Commons overriding the will of the nation, there is no denying that this will be possible, but we are inclined to think that if this does happen, the tacit convention that a subsequent Parliament does not repeal the Acts passed by its predecessor will become a thing of the past. So long as democratic government remains a reality, the 'general will' is likely to prevail in the end."

The second is where Mr. Randall says:

"We venture to think that the widespread distrust of parliamentary institutions, the lessening respect for law, passive resistance, the demand for a business government, and so forth, are all symptomatic of a general protest, as yet but faintly articulate, against the tyranny of the machine. But there has been a concurrent movement (*sc.* to the tightening of party bonds since 1884) that must not be lost sight of. The thirty years since the first publication of Professor Dicey's Lectures have witnessed a marked tendency to separate governmental matters from the strife of party, and to confine that to proposals for legislation. Since Lord Rosebery's tenure of office from

1892 to 1894, foreign affairs have been treated as definitely non-party, and similarly the army, the navy, the India Office, and to a considerable extent, the other executive departments, have been placed in the same category."

Lastly, we welcome, and, if we may be allowed to say so, heartily concur in Mr. Randall's remarks in reference to that part of his introduction in which Mr. Dicey deals with 'The Characteristics of Federal Government in Relation to Imperial Federation.' Mr. Randall says:—

> "There is one historical point that the framers of such schemes should especially remember. It may perhaps be expressed thus,—that the loosening of the legal bonds that bind the Dominions to the mother country has proceeded concurrently with the strengthening of the political and sentimental ties. In the middle of the nineteenth century, Parliament not only claimed to, but did actually, legislate for the Dominions in a way that would never be seriously contemplated at present, but as the exercise of the legal powers has gradually faded into obscurity, what may be called the contractual and consensual co-operation—colonial conferences, consultation on matters of policy, participation in Imperial defence, and the like—has grown apace. Again, the initiative towards co-operation has come more and more strongly from over the seas."

Finally we have in this issue of the *Law Quarterly Review* a short Article on the late Professor John Chipman Gray, with special reference to his writings, by Mr. Charles Sweet. From this we will cull the following paragraph:—

> "To see Gray at his best, we must turn to his delightful little Socratic dialogue on future interests in personal property (which appeared some years ago in the *Harvard Law Review*, and is printed in one of the appendices to the Rule against Perpetuities), or to his essay on *The Nature and Sources of the Law*. Its learning, the charms of its literary style, and the acuteness of the author's reasoning combine to make this a most attractive book, and an admirable cure for mental dyspepsia, caused by swallowing the crude and innutritious theories to be found in Austin and the writers of his school."

In a footnote, Sir Frederick Pollock says that he wholly agrees with Mr. Sweet's high estimate of *The Nature and Sources of the Law*.

A. H. F. L.

The first Article in this month's *American Law Review* is by Jacob Trilber on *The National Employer's Liability Act;* an Act which with the Safety Appliance Acts is intended to protect those employed in railroad transportation by imposing on the employer the duty of exercising a higher degree of diligence in the management of the roads than was required by the common law. The power under which Congress passed this law was 'To regulate commerce with foreign nations, and among the several States and with the Indian tribes.' The second is a remarkable paper, entitled *A Lesson in Equity,* contributed by Mr. Robert H. Rogers of Waco, Texas. After quoting Aristotle, Story, and Bacon, the learned writer refers to Mr. Bispham's work. But Story's conception of Equity, as well as the system spoken of by Mr. Bispham, "is nevertheless pregnant with more than one error as applied to the equity of the early chancellors in the exercise of their extraordinary jurisdiction." "Story, like the great majority of the earlier lawyers who wrote on this subject, seems never to have appreciated the truth expressed by King Ahasuerus in the words: 'The writing which is written in the king's name, and sealed with the king's ring, may no man reverse.'" The rest of the Article is concerned with chancellors and seals and rings. "But there never was a time as far back as history goes when kings did not have rings. . . . When Pharaoh took off his ring from his hand and put it upon Joseph's hand . . . he made him the keeper of his seal." Story's fault it seems lay in not making use of his authorities. "Fond as he is of ancient authorities he entirely overlooks the Bible, from which we get first information as to the powers of him who has the use of the king's seal," and so on. Mr. E. A. McCulloch contributes a clear paper on *Hugh Cairns, Lord Chancellor of England.* The career of that very eminent lawyer is treated in an interesting way. We are reminded of his parliamentary life, and of the "frozen oratory" for which he was celebrated; and are told about the leading members of the bar in his day, Sir Roundell Palmer (afterwards Lord Chancellor Selborne), Mr. Mellish, Sir John Rolt, and a little later Sir George Jessel. Mr. O. C. Semple writes on *Issue of Securities by Public Service Corporations for Refunding of Debts and Reimbursement of Income Expenditures,* and Mr. O. L. Waller on *Right of State to Regulate Distribution of Water Rights.*

Several of the English periodicals notice the recent decision of the Divisional Court in *Williams* v. *Moss Empires Limited*.[1] *The Solicitors' Journal and Weekly Reporter* of June 19th writes on the topic of *Novation of Written Contracts*, and *The Law Times* of June 12th has an Article on *Parol Variation of Contracts within the Statute of Frauds*. In both Articles the earlier cases are referred to: *Cuff* v. *Penn*,[2] *Goss* v. *Nugent*,[3] *Stead* v. *Dawber*,[4] *Price* v. *Dyer*,[5] *Stowell* v. *Robinson*,[6] *Giraud* v. *Richmond*,[7] *Sanderson* v. *Groves*,[8] *Marshall* v. *Lynn*,[9] *Moore* v. *Campbell*,[10] *Noble* v. *Ward*,[11] and *Vesey* v. *Rashleigh*.[12] The effect of the decisions in so far as they are pertinent to the points involved in *Williams* v. *Moss Empires Limited* are summed up in *The Law Times*, as follows:—Where the agreement is within the Statute of Frauds, and has been reduced to writing, and there has been a subsequent variation by parol, it is incorrect to say that there is only one contract, and that the variation may be regarded as a substituted performance not affecting the contract itself. In such case there are two contracts. It is difficult to say whether the slightest variation makes a new contract. Probably it does though the line will have to be drawn somewhere. If the new contract is invalid for want of writing there is no implied rescission of the original one; but the original contract may be expressly rescinded verbally; and if the new contract be valid, as not falling within the statute, the old contract is rescinded and the new one takes its place.

The current numbers of *The Law Times* contain the following papers: June 19th, *Articles of Association, How far Binding on a Company*, in which the case discussed is *Hickman* v. *Kent or Romney Marsh Sheep Breeders' Association*.[13] This decision of Mr. Justice Astbury, says *The Law Times*, would seem at last to settle the law, and the result

[1] (1915) 139 L. T. 93.
[2] 1 M. & S. 21.
[3] 5 B. & Ad. 58.
[4] 10 A. & E. 57.
[5] 17 Ves. 363.
[6] 3 Bing. 928.
[7] 1 C. B. 835.
[8] L. R. 10 Ex. 254.
[9] 6 M. & W. 109.
[10] 10 Ex. 323.
[11] L. R. 2 Ex. 135.
[12] [1904] 1 Ch. 634.
[13] 138 L. T. Jl. 540.

is that ordinary articles of association are binding as between the company and the members, as well as between the members *inter se;* June 26th, *Permission to Deviate from Trusts;* July 3rd, *Covenants for Title;* July 10th, *Resulting Trusts;* July 17th, *Rights of Minorities of Shareholders in Companies;* and July 24th, *Executors and Compromises,* and *Investment of Infants' Legacies.*

In *The South African Law Journal* for May 14th, S. B. Kitchin continues his Article on *The Effect of War on Contracts.* The first instalment dealt with contracts between alien enemies and others. This instalment illustrates the rules laid down in the first instalment, and briefly discusses the effect of the war on contracts to which the parties are either citizens or neutrals. The rules in South Africa are the same as those in the other portions of the Empire not under Roman-Dutch law. All the recent English decisions are noted, including *Leader, Plunkett & Leader* v. *Direction der Discontagesellschaft,*[14] which has since been reversed. Contracts to which citizens or neutrals are parties are treated under the headings *Impossibility of Performance, Legal Impossibility* and *Principal and Agent.* Other articles are *Sale by Auction in Holland* and *Parate Execution.*

The Solicitors' Journal and Weekly Reporter for June 12th has a paper on *The Jurisdiction in Divorce.* The cause of the paper is the overruling by the Court of Appeal of the case of *Dickinson* v. *Dickinson,*[15] where it will be remembered Sir Samuel Evans granted a decree of nullity on the ground of the wilful refusal to consummate. It was thought at the time that that case carried the law a step further than precedents warranted. Now *Napier* v. *Napier*[16] declares *Dickinson* v. *Dickinson* bad law; and the jurisdiction is again limited to cases where there is incapacity to consummate.

The coming of age of the Prince of Wales is made the occasion of a paper on *Nonage and Some of its Incidents* by the same journal, June 26th; and the application of a private relator for a *Quo warranto* information directed against Sir Edward Speyer and Sir Ernest Cassel to question the

[14] 31 L. T. 83.
[15] [1913] P. 198.
[16] Times, June 7th, 1915.

right of naturalized British subjects to become members of His Majesty's Privy Council gives us a paper on *Quo Warranto Informations* in the issue of July 3rd.

The *Irish Law Times* for June 19th contains a note on the *Responsibility of a Master for the Wilful Misstatement of his Servant*, the most recent case being *Department of Agriculture and Technical Instruction* v. *Burke* [17]; and for July 3rd on *Requisitions on Title as to the Debts of a Deceased.*

In *The Australian Law Times* for June 26th we note a discussion of the cases on *Sale of Reversions at an Undervalue.*

L. D.

[17] (1915) 2 I. R. 128.

NEW BOOKS AND NEW EDITIONS.

A selection of Leading Cases on various branches of the law with notes. By John William Smith. The twelfth edition by Thomas Willes Chitty, John Herbert Williams, LL.M., and Walter Hussey Griffith, M.A., in two volumes. Vol. 1, 1915; London: Sweet and Maxwell, Limited: Toronto, The Carswell Co., Ltd.

Smith's Leading Cases is a book which needs no commendation. It is perhaps the best known English text-book after Blackstone. It is sufficient to welcome a new edition published this year.

In the present edition the editors have thought that the work will be improved and made more generally useful by the omission of some more of the old cases and the introduction of some new ones. Accordingly they have eliminated *Crepps* v. *Durden*, which dealt with proceedings before justices, but necessarily at insufficient length; *Bickerdike* v. *Bollman* (notice of dishonour), which has ceased to be of use since the Bills of Exchange Act, 1882, and *Horn* v. *Baker*, on the subject of possession, order, and disposition in case of bankruptcy, which is more adequately treated in special treatises on the law of bankruptcy. In the place of these cases they have brought in *Indermaur* v. *Dames* and *Hadley* v. *Baxendale*, both of which have long attained the rank of leading cases.

Carnegie Endowment for International Peace. Division of international law. The Hague Conventions and Declarations of 1899 and 1907, accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations. Edited by James Brown Scott, director. New York, Oxford University Press.

This is a very handsome and useful production of the International Law Division of the Carnegie Endowment for International Peace. In view of the very great interest at the present time in the Conventions and signed Declarations of the First and Second Hague Conferences, and because of the need of accurate information as to ratifications of and adhesions to the Conventions and Declarations relating to war, the Endowment prepared a series of pamphlets in order that the public might learn from reliable sources the status of these international agreements and the extent to which the powers at war are bound by their provisions. These pamphlets have now been brought together and issued in this

volume, to which there have been added introductory matter and a carefully prepared and elaborate index.

In order that the reader may have a clear idea of the origin and nature of the Hague Conferences, some remarks of a general nature are pref and some documents relating to the call, the nature, and the scope of the Conferences have been printed by way of introduction.

The provisions of the final Acts of the first and second Hague Peace Conferences of 1899 and 1907 respectively are printed in parallel columns in excellen type and spacious clearness, to the great advantage of the student.

The American Journal of International Law. A Quarterly. Volume 9, Number 2, April, 1915. Published for The American Society of International Law, by Baker, Voorhis & Company, New York; and Supplement.

We have devoted a special review to these publications in our present issues, in which we hope we have paid adequate tribute to their value and to the interest and merit of the Articles contained in them.

We have also received the following:—

'British and German Ideals. The meaning of the ır.' These are Articles reprinted from the numbers of he "Round Table" for September and March last. As all our readers kn w, the Round Table is a quarterly review of the polities of the British Empire and stands as high as, if not higher than, any other periodical dealing with similar matters. As will be seen by the contents of the present reprint, the Round Table construes the expression "The politics of the British Empire" in the broadest possible way. Those contents are:—The Schism of Europe; Germany and the Prussian Spirit; and the Austro-Serbian Dispute. These Articles are already so famous and well known that it would be a work of supererogation on our part to say anything further about them.

Fourth Annual Report on Labour Organization in Canada for 1914, published by the Department of Labour at Ottawa.

Express Statistics of the Dominion of Canada for the year ending June 13th, 1914, by A. W. Campbell, Deputy Minister of the Department of Railways and Canals, printed by order of Parliament, Ottawa. This is the report of the Comptroller of Statistics in relation to the operations of Express Companies in the Dominion of Canada.

Ninth Report of the Board of Railway Commissioners for Canada for the year ending March 31st, 1914. Printed by order of Parliament, Ottawa.

Dominion of Canada Report of the Department of Trade and Commerce for the fiscal year ended March 31st, 1914. Part VII. Trade of British and Foreign Countries. Printed by order of Parliament, Ottawa.

Calendar of the Faculty of Law of Dalhousie University, Halifax, Nova Scotia, 1915-6.

We note that the curriculum treats of law mainly on its practical side, but includes Constitutional Law and Constitutional History, and International Law. The Faculty is a very strong one, including not less than three judges of the Supreme Court, and two County Court judges. The Dean, Dr. A. MacRae, at one time practised law in Toronto as a member of the late Mr. Bicknell's firm. The degree conferred is Bachelor of Laws; and the Nova Scotia Barristers' Society exempts from its Intermediate and Final Examinations the holder of that degree, but requires that the examinations passed by the student must have included one on Procedure and Practice.

Calendar of the School of Law of King's College, Windsor, Nova Scotia, 1914-5.

The Dean of the Law Faculty of King's College, Windsor, is well-known to the readers of the CANADIAN LAW TIMES, and contributes a brilliant Article in this present number. The degree conferred is Bachelor of Civil Law. The curriculum though mainly devoted to practical law, includes, also, Constitutional History and Law, and Roman Law. The school may be congratulated upon not allowing its cult of the practical to banish Roman Law, the study of which not only introduces the student to the fundamental conceptions of the Civil Law, prevailing in Quebec, and practically all over Europe, except England and Ireland, but, from the acute analytical tendencies of the Roman lawyer, has much of the advantages of a study of Analytical Jurisprudence. We notice that under the local Attorneys Act, those students who have obtained the degree of Bachelor of Civil Law are thereupon entitled to be admitted as Attorneys without further examination.

THE GAZETTES.

The Canada Gazette for July 3rd, contains a Dominion Order in Council respecting Section 19 and Appendix A of the Canadian Rules and Regulations governing the examination of masters and mates of coasting and inland vessels, and containing new regulations respecting sight tests.

It also contains an Order-in-Council of June 19th last providing that the time during which an entrant on Dominion lands within the Railway Belt of British Columbia is absent from his homestead, whether he be an alien or a British subject by birth or naturalization, who has been serving or is now serving, or who may hereafter serve as a member of any military force or regiment of Great Britain, or of the Allies of Great Britain in the present war, and also a period not exceeding three months after his discharge as a member of such force or regiment, may be counted as residence spent on his homestead within the meaning of the regulations; while if he is disabled by wounds or illness during such service from resuming occupation and completing the conditions of entry, the Minister may forthwith issue letters patent for the homestead in his favour.

It also contains an Order-in-Council of June 19th last amending the regulations for the leasing and administration of Dominion lands containing limestone, granite, marble, gypsum, marl, gravel, clay, sand, or any building stone.

The Canada Gazette for July 10th contains an Order-in-Council of June 26th last, containing regulations creating a calorific standard for the determination of the heating value of manufactured gas throughout the Dominion.

Also an Order-in-Council of June 19th last, containing amended Regulations for the use of Motor Vehicles in the Rocky Mountains Park.

Also an Order-in-Council of the same date that Penticton, in British Columbia, shall be henceforth established as an Outpost of Customs and a Warehousing Port, under the survey of the Port of Greenwood, B.C.

The Canada Gazette of July 17th records the Royal approval of the grant of the Victoria Cross to Captain Francis Alexander Caron Scrimger, of the Canadian Army Medical Service, 14th Battalion Royal Montreal Regiment; and to Colour-Sergeant Frederick William Hall, 8th Canadian Battalion.

The Canada Gazette of July 24th contains an Order-in-Council of July 16, amending sections 3, 5, 6, 7, 15, 20, 22 and 23 of the Miners' Lien Ordinance pursuant to section 8 of the Yukon Territory Act.

The Ontario Gazette of June 26th last contains a provincial Order-in-Council directing that all instruments affecting land in that part of the City of Toronto which formerly constituted the City of West Toronto shall from August 1st, 1915, be registered in the Registry Office of the Registry Division of West Toronto.

The British Columbia Gazette of June 17th contains a provincial Order-in-Council changing the name of the "City of Fort George" to the "City of Prince George."

The Manitoba Gazette of July 10th contains a proclamation further proroguing the legislature to August 19th.

The Alberta Gazette of July 15th contains the appointment of Arthur Allan Carpenter, Judge of the District Court at Calgary, as a Commissioner to make enquiry into the promotion, incorporation, management and operation of the companies incorporated under the provincial Companies Ordinance with the object of acquiring, working, or selling of mining properties, and into the operation and management of the various stock exchanges in the province, including the expenses of management, investment of funds, nature of properties or claims held, the manner and cost of any sale or other disposal of stock and other allied questions.

The same issue also contains some new rules of Court, and a tariff of solicitors' costs on proceedings on sale or foreclosure of mortgages under the Land Titles Act; and allowing for all proceedings before a Judge or the Court of Appeal the same fees as would be allowed by the tariff of costs of the Supreme Court for similar services.

The British Columbia Gazette of July 29th contains a despatch of the Secretary of State, dated June 24th, 1915, containing information for the guidance of persons desiring to record (a) debts (including bank balances) due to British subjects from persons residing in enemy countries; (b) other property in enemy countries (including securities) belonging to British subjects; and explaining that a Foreign Claims Office has been set up at the Foreign Office for the purpose of dealing with all claims for the settlement of which no satisfactory machinery has existed hitherto, and which are foreign in the sense that they are claims by British subjects against a foreign Government or by foreign nationals against His Majesty's Government.

The Manitoba Gazette of July 31st contains a number of regulations of the Provincial Board of Health, approved by Order-in-Council, governing the plumbing, heating and lighting and ventilation, and sanitary equipment and condition of hotels, lodging houses, boarding houses, and stopping places, and providing for the periodical inspection of all such places.

WITNESS TOO MUCH FOR LAWYER.

"Did he hit you in the poolroom or in the backyard?" asked Crown Prosecutor Hannesson, of the complainant witness, a Swede named Nelson.

"Val, ay say he hit me in the eye," said the Swede.

"Yes, I know, but what location or position were you in when you were struck?"

"Ay ain't got no position, or no job either."

"I don't care whether you have or not. I want to know whether it was outside or inside you were struck."

"Val, outside of course."

"Outside of what?"

"Outside of me."

The lawyer was desperate. "Now listen to me," he shouted. "Where were you when he struck you?"

The Scandinavian was buried in deep thought. The Court waited patiently. A pin-drop would have sounded like an explosion. Nelson looked at the prosecuting attorney and slowly said:

"Val, ay was on my back."

Mr. Hannesson gave up. Magistrate Macdonald sighed. Constable Samson, Court officer, swallowed his tobacco.

The case was one of assault in which Fred. Orr, a bartender at the National Hotel, was charged in the city Polic Court this morning with beating up Nelson. Orr was found guilty and fined $20 and costs.—Winnipeg Telegram, July 13th, 1915.

LOCAL AND PERSONAL.

Robert E. Harris, K.C., of Halifax, has been appointed to the Supreme Court of Nova Scotia.

Charles S. McInnes, K.C., of Toronto, has taken over the duties of assistant adjutant-general at headquarters in Ottawa, being anxious to serve in some capacity during the war, and above the limit of age for active service at the front.

Lieutenant G. C. Thomson, formerly police magistrate and a leading barrister at Swift Current, Sask., is reported dangerously wounded while leading his company in an engagement at the Dardanelles, and now in hospital in Malta.

Mr. E. W. Beatty, chief counsel of the Canadian Pacific Railway Company, has been made a Dominion K.C.; and Mr. J. W. Blair, of the firm of Blair, Laverty, and Hale of Montreal, has been made a provincial K.C.

We have to note with regret that the following deaths are reported among Judges and members of the profession:—

The Honourable Honore A. Gervais, Justice of the Court of Appeal, at Westmount, Montreal, on August 8th inst.

Elie Moreau, of Montreal, on July 5th last.

Lieutenant George R. Kappele, of Toronto, accidentally killed on July 14th last at Toronto, while endeavouring to shoot a bat which had flown into his house. He was a son of the late George Kappele, K.C., and had recently received an appointment with the cavalry battalion formed under Major S. T. Beckett.

William John Code, of Ottawa, on July 24th last, at Ottawa.

William Hoyt Cutten, of Guelph, on July 4th last, at Guelph.

Harry H. Britain, of St. John, N.B., on July 4th last at St. John.

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 [illegible] our consciousness, which fills us all with joy and pride [illegible]ttitude, the fact that in this war we have obtained suppor[illegible] whole-hearted and enthusiastic than we could have dared to [illegible]ect 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 Mr. 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, says, 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 another 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 an 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 congratula 's 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 (*Keech* 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, November 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. Althongh 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 straightened 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 o

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 expa. (of its principles." It has been called the great "1 ry to which advocates and judges have had recou se 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 rests 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 drunk 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 Mi

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 originally 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 has 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

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 thousand 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 expen

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, 1882*, c. 59, Sec.

[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 contract, 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 orporate 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*[27] 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.*[28]

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.

[27] 13 U. C. R. 638.
[28] (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 branch 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 un

[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 substa

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,[8] 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

[8] 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."[1] 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

[1] 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 on

[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. 85

per Viscount Haldane, L.C.; Stair, *Institutions of the Law of Scotla*

1.10.5.

[18] Planiol, t. 2 § 1211.

[19] See *Belanger* v. *Montreal Water & Power Co.* (1914), 50 (Ca

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 hypothee 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."[22]

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.

[22] Lemieux, *Les Origines du droit Franco-Canadien*, p. 369.

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 Canada.

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 immovables 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.[*] 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.

[*] 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 ... systems of Law are similar and tend to becom... tical.

4th. This tendency exhibits itself in uniformity of legislation."

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

" 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 1651, 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.

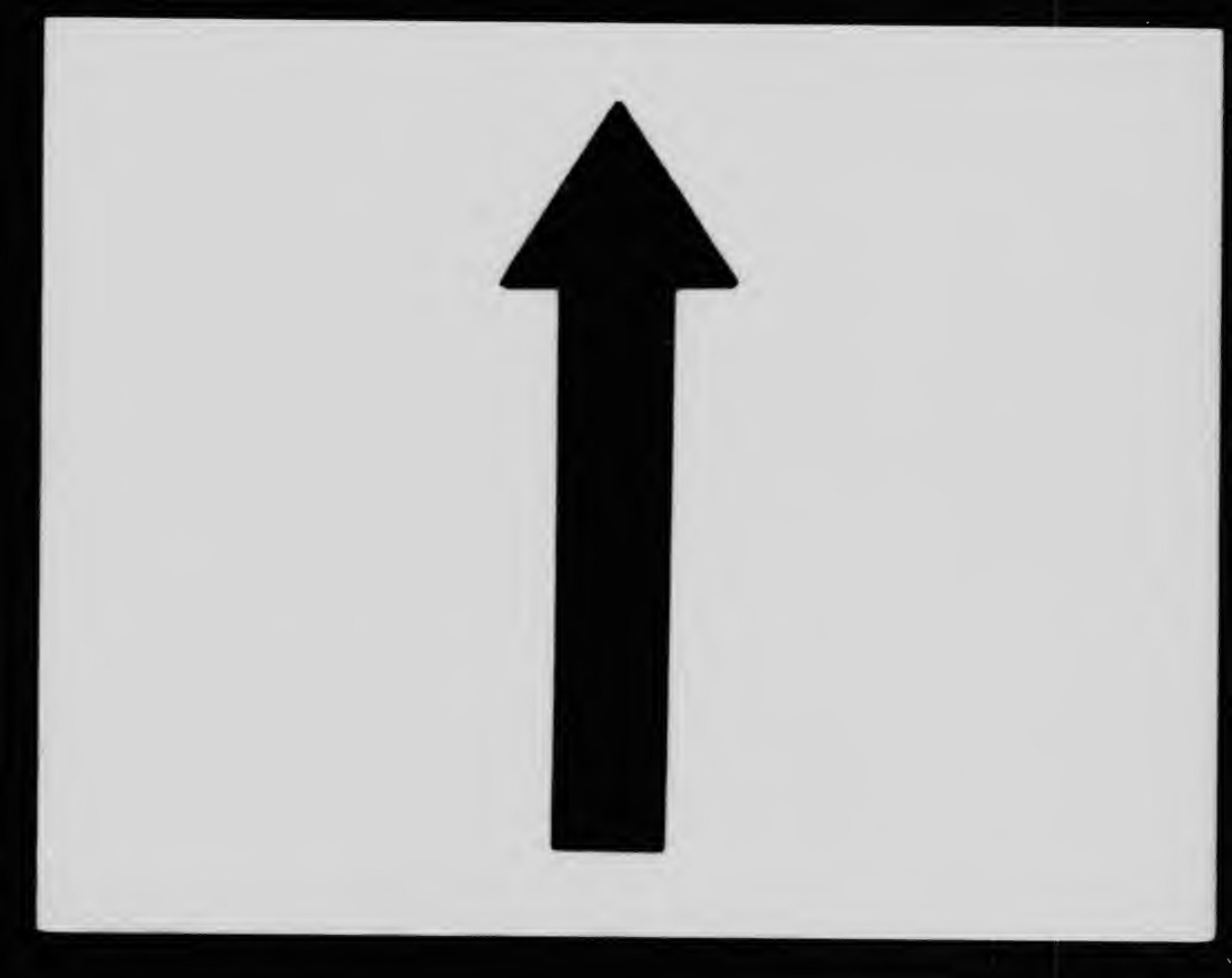
Held, that, on the proper construction of the contract, the intention of the parties was to pre-estimate a reasonable indemnity as liquidated damages for delay in the execution of the contract; that effect should be given to their intention by allowing the deduction of the amount so estimated from the 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.



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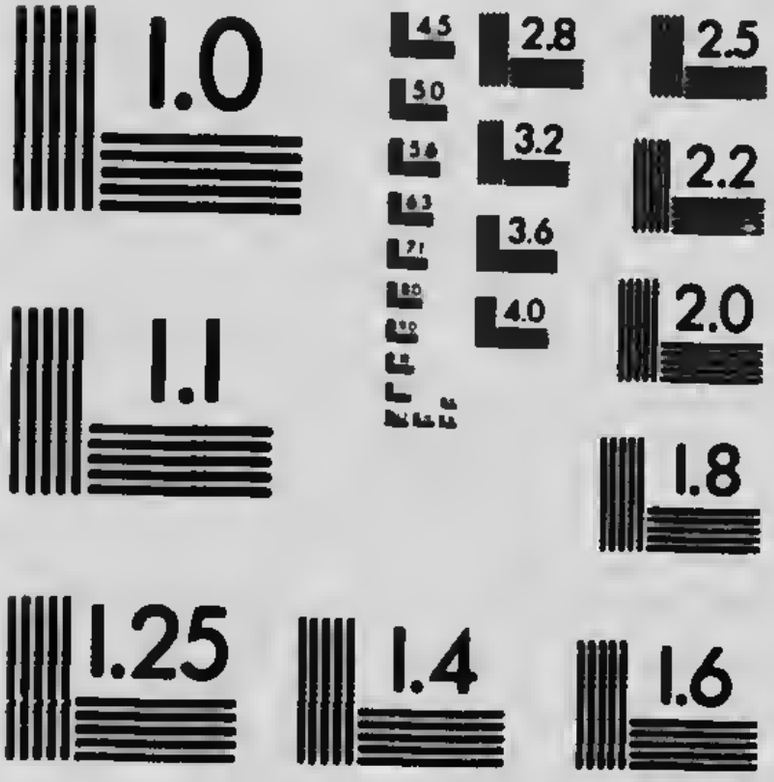

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SUPREME COURT OF CANADA.

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 (3 Ont. L. R. 278), reversed in part.

Appeal allowed in part without cos

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 IDINOTON, DUFF, ANOLIN 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 the Commission in our issue for October last (Vol. 35, 795). It sits under the Treaty between Great Britain and the United States, signed on January 11th, 190 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: *sem.* that a step ladder would signify its own use to every beholde.

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 rendered 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 ad[illegible]able *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 i

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

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

The same number of the *Law Times* contains r of the first two of a series of three lectures rec delivered by Sir John Macdonell Quain, Profe of Comparative law at University College, Lon upon "*The Law of Pro[illegible]dure: a Compar Study.*" They are evidently so interesting that to be hoped they will soon be published. Am other things Sir John says—

> Lawyers were too prone to speak of procedure as if it co of no more than the artificial rules of a game. They had n in its history what it really was—a continuous effort to do j . . . the genius of a people asserting itself in its ow Nothing was more characteristic of a race, nothing revealed fully its true nature, not even its literature, or its art, or its than procedure rightly understood. He who followed clos course of an action from its inception to its close in a German, or English Court would know more than could b ered from long travel or much reading of the genius of the iar people. One side of procedure has been too little noted. as De Tocqueville had pointed out in impressive words, safeguard against arbitrary conduct on the part of the legal formalism was the twin sister of liberty.'

The second lecture of Sir John Macdonell with the Athenian system of procedure, in conn 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 Sumner 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 Culler "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 law 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 grant of a mining concession to large European interests, has finished his work in this connection. Th Imperial mandates now officially announce that M Lindsey has been asked to undertake and has accepte the task of drafting new mining laws for China.

G. H. Aikins, only son of Sir J. A. M. Aikins, a a well-known barrister, and Freer Brock, son of t late J. H. Brock, of the Great West Life Insuran Company, have joined the 184th Battalion, now bei 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.

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.

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