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ACTIONS BY ALIEN ENEMIES.

In Halsbury's Laws of England it is said: "An alien enemy had no rights at all at common law: he could be seized and imprisoned, and could have no advantage of the law of England, nor obtain redress for any wrong done to him": vol. i. 310: see *Sylvester's* Case (1702), 7 Mod. 150; and it is said in Dyer 26 that "An alien enemy shall have no benefit of the King's laws." This, though merely a dictum, agrees with what is said in Comyn's Dig. Abatement (E. 4): "Alien enemy is a plea in abatement Co. Lit. 129*b*, Art. Ent. 11, 9 E. 4, 7, or to the action, Co. Lit. 129*b* in actions, real, personal, or mixed, and though the suit is in another right as executor: R. Cro. Eliz. 142. So alien enemy in the testator at the time of his death is a plea to an action by his executor on an obligation: Semb. Lut. 34; Skin. 370."

"An alien enemy cannot have any action, real personal or mixt: Dy. 2*b*; 19 Ed. 4, 6; Q. 1 Rol. 195*b*; Semb. Ow. 45*n*": Com. Dig. Alien *c* (5).

In the Doctrina Placitandi, a work of an anonymous King's Sergeant (said to be Sampson Ever), published with the imprimatur of Lord Chancellor North, in 1677, and said to have been highly approved by no less a legal luminary than Chief Justice Willes, it is said: "If an alien bring a personal action, or a mixed one in his own right, the defendant can plead in abatement in disability of the person, or in bar of the action, with this difference that in action personal or trespass of his house, the defendant ought to aver that the plaintiff is an alien, born of such a place, under the allegiance of such a prince, that is an enemy to our Lord the King, for an alien friend may traffic, and have a house for habitation, therefore may have a personal action, and for his house broken (as also he may have a writ of error for

necessity), and the opinion of Lord Coke, in his Com. Sur. Lit., p. 130 *b*, is that if any alien friend bring action, that ought to be pleaded in disability of the person and not of the writ. *But if he be an alien enemy the defendant may conclude to the action:* Doct. Placit. 9. We have italicized the last words, from them it appears that, according to Lord Coke and the author of the Doct. Placit., the plea of alien enemy is not a mere dilatory plea, but a plea in bar of the action.

In Bacon's Ab.—Tit. Abatement N. it is also laid down that "Alienage can only be pleaded in abatement to an alien in league, *but may be pleaded in bar to an alien enemy, because the cause of action is forfeited to the King as a reprisal for the damage committed by the dominion in enmity.*" And in Rolles' Ab. 195 it is said, "Le Roy ces avera": 19 E. 4, 6. But the note in Rolles is followed by "Mes quære," and in the annotation to Bacon's Abridgement, Aliens (E), note *a*, it is said: "Where the plaintiff is an alien enemy at the time of the cause of action arising, this may be given in evidence on the general issue, *or pleaded in bar;* but when he became so subsequently to the accruing of the cause of action it only goes to his disability to sue and must be pleaded in abatement: Doug. 649, note 132; 6 Term. R. 24; 15 East 260; 3 Camp. 152; and it is said: "The plea of alien enemy is a *bar* to a bill for relief in equity, as well to an action at law"Bacon's Abridg. Aliens (D.) 183.

The reason for the above distinction would appear to be this, that, where the plaintiff is an alien enemy at the time of the alleged cause of action arising, he is in fact unable to acquire any right, and therefore the defence of alien enemy is a bar, but where he becomes so subsequently according to modern law his right of action is merely suspended because "On the restoration of peace, one lately an enemy may sue for rights acquired when in amity": 6 T.R. 28, 1 Taunt. 29. And in bankruptcy, therefore, an alien enemy will be admitted, reserving the dividend: 13 Ves. 71." Com. Dig. Alien (C) 5 note. The case referred to in Vesey is *Re Boussmaker* 13 Ves. 71. That was an application by an alien enemy to be admitted to prove a debt in bankruptcy. Percival, in arguing, said: "But clearly

other creditors ought not to be permitted to take the dividends accruing upon this debt; for the Crown will be entitled;" and see 19 E. 4, 6, where it is said by Brian, though a debt be void against the party, the King shall have it; and Lord Eldon, in giving judgment, remarks: "If this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void. But if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue; and the contract being originally good, upon the return of peace the right would survive. It would be contrary to justice, therefore, to confiscate the dividend. Though the right to recover is suspended, there is no reason why the fund should be divided among the creditors." His judgment, therefore, was, "Let the claim be entered; and the dividend be reserved."

In *Rex* v. *Depardo*, 1 Taunt. 26 it was said by Lord Mansfield, C.J.: "If the Crown did not enforce a contract to which an alien enemy was entitled, the prisoner (an alien enemy) might enforce it after the conclusion of a peace." There is also a dictum of Lord Ellenborough, in *Harmer* v. *Kingston*, 3 Camp. 153, that where persons interested in the subject of an action become alien enemies, "that only goes to suspend the remedy." So also Story says: "The rights of an alien to sue in the Courts of a foreign country upon a contract made during peace, are suspended during war, but they revive upon the recurrence of peace": Story Con. Laws, s. 19, citing *Houriet* v. *Morris*, 3 Camp. 303, but the case does not seem to bear out the text.

It is possible that the statements above quoted may be harmonized in this way, viz., that, where the cause of action is alleged to have arisen after a state of war existed, in that case the objection of alien enemy is a bar to the action; but where it arose before war, then the objection is in abatement and in the nature of a dilatory plea, the right of action being merely suspended during the continuance of the war.

But if the true principle why an alien enemy cannot sue in the King's Courts is because his rights are forfeited to the Crown, as stated in Bacon's Ab., *supra*, then, as the forfeiture would

attach to all rights of property which the alien had acquired before hostilities commenced, and after hostilities he is incapable of acquiring any rights, from this it necessarily follows that the plea of alien enemy would in all cases be in bar of the action and not merely in abatement; but it seems that, according to modern opinion, the declaration or existence of a state of war does not *ipso facto* have the effect of vesting in the Crown all the property and rights of action in respect of property of alien enemies, but under the common law as modified by international law, although the Crown has now, as it always had, a right to confiscate the property of alien enemies within its territories, yet, except as regards ships and their cargoes, this is a right that is now rarely exercised by belligerents, and it would now seem that, unless some overt act of confiscation actually takes place, the rights of action of the alien enemy owner as to any property acquired before war are merely suspended and will revive on the restoration of peace.

That the right of confiscation of the property of alien enemies still exists, however, is admitted by modern writers on international law. In the latest edition of Hall on International Law, we find it stated that:—

"Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and, although seizure would always now be looked upon with extreme disfavour, *it would be unsafe to declare that it is not generally within the bare rights of war*": Hall's International Law (6th ed.), p. 431.

Money loaned to a belligerent state by an enemy and the interest thereon are said to be exempt from confiscation: *Ib.* 430. But the author goes on to say: "Real property, merchandise and other moveables and incorporeal property, other than debts due by the state itself, stand in a less favorable position. Although not appropriated under the usual modern practice, *they are probably not the subjects of a thoroughly authoritative custom of exemption*": *Ib.* 432. The author goes on further

to observe: "During the eighteenth century the complete appropriation of real property disappeared, but its revenues continue to be taken, or at least to be sequestrated; and property of other kinds was sometimes sequestrated and sometimes definitely seized": *Ib.* 433. *This right of sequestrating the private property of enemies was asserted by an act of Congress of the Confederate States in 1861, but Lord Russell remarked that, "Whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilized times are so rare and have been so generally condemned, that it may be said to have become obsolete": *Ib.* 434.

This writer, therefore, concludes: "Upon the whole, although subject to the qualification made in reference to territorial waters, the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was, until lately, too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom, as a matter of strict Law; *and as it is sanctioned by the general legal rule, a special immunity can be established by custom alone.* For the present, therefore, it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of confiscation in the more recent European Wars, no less than the common interest of all nations, and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse": *Ib.* 435. See also Wheaton International Law, s. 303 *et seq.*; Woolsey International Law, s. 124.

These writers all concede that the right of confiscation exists, but Hall and Wheaton both express the opinion that it will not be exercised; but before it can be positively affirmed that the

*It has been recently said in the public press that it is the intention of the Italian Government to confiscate a number of German vessels interned in Italian ports prior to the outbreak of the present war.

right of confiscation of the property of an alien enemy does not now exist at Law, some statute would be necessary to relieve alien enemies from the penalties and disabilities which the Common Law imposed on them, and we are not aware of any statute which does so.

It would, therefore, seem that, as a matter of strict law, all the property, and rights of action in respect of property, of alien enemies within the King's Dominions, are liable to forfeiture, subject to the modification of International law, that if the forfeiture is not actually enforced, on the restoration of peace, the alien's rights will revive.

If this be the legal aspect of the matter, it would seem to rest entirely with the executive of a nation whether or not the forfeiture of enemy's property shall, or shall not, be exacted, and it, therefore, may be open to question whether the judiciary can properly assume as a matter of course that such forfeiture will, in any case, much less in all cases, be waived.

This seems to have an important bearing on the proper course to be pursued where the objection of alien enemy is set up as a bar to the further prosecution of an action. Such an objection, as we have seen from what was said *In re Boussmaker*, *supra*, is not intended to benefit third parties or the defendant in the action. It was really originally founded on the fact that the right had become vested in the Crown, and even now the Crown is interested, and entitled, if it sees fit, to possess itself of the alien enemy's rights. The question of what the Courts should do in the case of an objection of alien enemy being raised does not, therefore, appear to be a private question concerning merely the parties to the action; and it does not seem proper, in such circumstances, that the question should be dealt with, without notice to the Crown. It is for the Crown to say whether it will, or will not, exact a forfeiture; and that is a matter a Court of Law cannot deal with. Moreover, it is proper that the Crown should be informed of the cause of action in order that it may determine whether or not it is willing that the action should proceed. The action of the Crown would probably be governed more or less by what is done by the enemy's government in

regard to like cases where British subjects are concerned: see Wheaton's International Law, s. 301; but, in order that the government may have a free hand, it seems desirable that the judiciary should refrain from assuming that the Crown will, or will not, take any particular line of action, and on all such applications should require the Crown to be notified. Under the former practice at law there might have been some technical difficulty in the way of doing this, but under our present system of procedure there seems to be none.

By attainder all the personal property and rights of action in respect of property accruing to the party attainted, either before, or after, attainder, are vested in the Crown without office found, and, therefore, attainder may be pleaded in bar to an action on a bill of exchange, but not in respect of a claim for uncertain damages: *Bullock & Dodson*, 2 B. & A. 258: and the same rule would seem applicable in the case of an alien enemy, except in so far as the rule has been, or may hereafter be, modified by statute, or International law.

In a recent case in Ontario, of *Luczycki* v. *Spanish River Pulp Co.*, 9 O.W.N. 136, which was an action by an alien enemy to recover damages for tort alleged to have been committed before the present war commenced, the learned Chancellor held that the action ought not to be dismissed because the right of action was merely suspended by reason of the war, and, therefore, the objection of alien enemy was in that case in the nature of a merely dilatory plea, and not a bar to the action. This ruling appears to accord with what is said in Bacon's Abridgmt. and Comyn's Dig., *supra*; but where the action is for unliquidated damages it might probably sometimes be more in the interest of the Crown that the action should be allowed to proceed The payment of any judgment recovered in the action would, by the statutes, and Orders in Council, be suspended during the war, and it would be open to the Crown, if it should see fit, to confiscate the judgment; whereas, if the action is suspended till after the conclusion of peace, this right of confiscation would be lost.

From what has been said, we conclude that where an action

by an alien enemy is based on a cause of action alleged to have accrued after the war began, the objection was, and still is, a bar to the action. As to torts committed against an alien enemy or contracts made with him after hostilities began, the alien enemy, as we have seen, is entitled to no redress, and the objection is a bar to the action. But as to all rights of action, whether in contract or tort, which accrued before war, the objection of an alien enemy is only in the nature of a dilatory plea, and not a bar; and the right of action, therefore, is merely suspended by the war, unless the Crown shall see fit to exercise its right of confiscation.

If an action by an alien enemy were allowed to proceed, it would be subject, like any other action, to be dismissed for want of prosecution, if not carried to trial in due course. If dismissed for want of prosecution, the dismissal would not be a bar to another action for the same cause, but the Statute of Limitations might run in the meantime so as to bar any further action.

If the Crown definitely waives its right in respect of a forfeitable cause of action, there does not seem any good ground why the action should not be allowed to be prosecuted notwithstanding the war; and it would also seem reasonable that if the Crown did not choose to waive its rights, an action should be allowed nevertheless to proceed, and in case judgment should be recovered by the alien enemy, the amount might very properly be ordered to be paid into Court to abide the pleasure of the Crown.

THE ENFORCEMENT OF INTERNATIONAL LAW.

The impotence of international law arises from the fact that it lacks some coercive power behind it to meet out due punishment to those who wilfully violate it. And it must be perfectly clear to anyone that international law becomes a mere farce if those who have agreed to be bound by it may with impunity, nevertheless, if it suits them, wholly disregard it, when the time for carrying it out arrives. It is, therefore, an obvious fact that, in order to make international law a real and living rule of conduct, some means must be devised whereby punish-

ment may be adequately administered to those who undertake to counsel, or aid in, its violation. At the same time it must be recognized that a whole nation cannot very well be brought to judgment any more than you can hang a whole mob engaged in a riot. In such a case as you cannot bring all who have been engaged in it to the bar of justice, the ringleaders are selected, and they have to bear in their own persons the punishment for the crimes which they have incited.

The knowledge that this penalty awaits riotous proceedings has a wholesome deterrent effect, and in the same way the existence of a court for the trial of the violators of international law would have the like effect. If sovereigns, statesmen, and military leaders, placed their necks in jeopardy whenever they counselled the violation of international law, they would be slow to incur the penalty which might possibly overtake them; an ambitious monarch, statesman, admiral, or general, would not look forward to the possibility of being hanged as a desirable termination of his career. Such tribunals have, it is true, never before been known in history, and yet, if the cause of law and order is to be advanced in the world, the necessity for such a tribunal seems imperative, for it is plain that it is only by giving to international law a coercive effect that it can be made a reality.

In the present war, at its very beginning, we had the frank admission of the leading statesman of Germany that that country was about to do, what it recognized to be, a wrongful act. Everything done, therefore, in furtherance of that wrongful act was also itself wrongful. Every person killed in defence of his country thus wronged was murdered, every outrage committed was a felonious act and a violation both of international law and the civil law of the aggrieved nation.

What, therefore, more just and fitting than, at the conclusion of this war, that the Emperor of Germany, his general staff and chancellor by whom all this abominable wickedness was designed and under whose authority it was carried out should be handed over to an International Court to be convened for the occasion and tried for their lives as international criminals. It might be said that for the breach of international law no penalty has ever been prescribed, and to impose a penalty after the com-

mission of the offence would be, in effect, seeking to punish the guilty by *ex post facto* law. But such an objection would not be reasonably tenable. It is not necessary to the validity of any law that those who violate it should have a warning as to the precise measure of punishment they are liable to incur for their offence, and, though it is usual in the enactment of criminal laws to lay down some indication of the nature of the punishment to be inflicted on offenders, it is by no means necessary on any legal or moral ground that that should be done. Breaches of international law may involve various degrees of injury or guilt. For some a money compensation may be adequate, but for others death itself would be entirely inadequate. No doubt nations would do their utmost to protect their rulers from the consequences, and it might not always be feasible to execute the judgments of an International Court unless the criminals were in hand; and it will always, therefore, be a necessary preliminary to any effective administration of international law that offenders should either submit or be compelled in some way or other to submit, to the jurisdiction of the Court. Ordinarily this could only be done by the seizure of their persons.

It is almost needless to say that the hanging of a crowned head and his advisers found guilty of sanctioning flagrant violations of international law would do more to make that law a reality than any Hague Conference that ever has been or ever could be held. We confess, however, that we have not much hope that our suggestion will be put into practical operation. Proverbs about "catching your hare," etc., and "putting salt on a bird's tail," etc., naturally occur to one's mind. But, by pacifists of the Hague Conference and by members of the International Conciliation Association, who desire that law should triumph over violence, our proposition ought to be sincerely welcomed and advocated.

IS CHRISTIANITY A PART OF THE LAW?

How are the mighty fallen! A writer in the *Canadian Law Times*, referring to a recent article in this journal entitled "Is Christianity a Part of the Law?" says:—"No authorities for the proposition is (*sic*) to be cited, but for this the writer of the

article is not to be blamed. There are none." This is oracular, but, like many other oracular utterances, not well founded. In vol. 46, page 83, of this journal, are to be found citations from Hyde, J., Raymond, C.J., Kenyon, C.J., Hardwicke, L.C., Patteson, J., Kelly, C.B., and Harrison, C.J., all affirming the proposition that Christianity is a part of the law of the land: and, on page 82, there are citations from Bracton, which can have no other meaning. To describe Bracton and the above array of learned judges as of "no authority" seems to savour of the confidence of youth, but not of matured experience. The writer's *ipse dixit* reminds us of a favourite aphorism of the late Sir John Hagarty: "We are none of us infallible, not even the youngest barrister." Perhaps, in spite of the off-hand judgment of our learned friend, the mighty may survive his criticism.

LAW OFFICERS OF CROWN AS CABINET MINISTERS.

The *Law Times* thus refers to the retirement of the late Attorney-General of England:—"Owing to a disagreement on a question of policy, Sir Edward Carson has retired from the Cabinet. We trust that the precedent created in the case of Lord Reading, and continued in the cases of successive Attorneys-General, will not be resorted to in the future. The proper place for the Law officers of the Crown is outside the Cabinet, and their proper duties are to advise the Government in legal matters. A combination of the positions of Cabinet Minister and Law officer makes for efficiency in neither place, and the opinions of a Law officer would certainly carry more weight when he is advising the Cabinet not as a colleague, but purely and simply as legal adviser. Similar views are expressed in the *Solicitors' Journal*.

It is stated by Todd, writing in 1887, that in England an Attorney-General is never admitted to the Cabinet. Lord Reading, however, more recently, when Attorney-General was made a Cabinet Minister. Since Bacon's time an Attorney-General had not been sworn in as a member of the Privy Council until Sir Robert Finlay was appointed a member of that body.

Mr. Balfour, when speaking on the subject, said:—"The Law officers have no control over the legal action of the Government. A Minister is not obliged to take his law from the Attorney-General, but he goes to Law officers of the Crown because he thinks he will get better advice from them than he would get elsewhere."

MILITARY SERVICE.

THE FREEMAN'S PRIVILEGE.

The following interesting and admirable sketch of a subject much in evidence at the present time, copied by us from the *Morning Post* of August 20th, is from the pen of Professor Hearnshaw:—

The military system of the Anglo-Saxons is based upon universal service, under which is to be understood the duty of every freeman to respond in person to the summons to arms, to equip himself at his own expense, and to support himself at his own charge during the campaign.

I. Universal Obligation to Serve.

With the words quoted at the head of this article Gneist, the German historian of the English Constitution, begins his account of the early military system of our ancestors. He is, of course, merely stating a matter of common knowledge to all students of Teutonic institutions. What he says of the Anglo-Saxons is equally true of the Franks, the Lombards, the Visigoths, and other kindred peoples. But it is a matter of such fundamental importance that I will venture, even at the risk of tedious repetition, to give three confirmatory quotations from English authorities.

Grose, in his "Military Antiquities," says:—

"By the Saxon laws every freeman of an age capable of bearing arms, and not incapacitated by any bodily infirmity, was in case of a foreign invasion, internal insurrection, or other emergency obliged to join the army."

Freeman, in his "Norman Conquest," speaks of—

"the right and duty of every free Englishman to be ready for the defence of the Commonwealth with arms befitting his own degree in the Commonwealth."

Finally, Stubbs, in his "Constitutional History," clearly states the case in the words:—

"The host was originally the people in arms, the whole free population, whether landowners or dependents, their sons, servants, and tenants. Military service was a personal obligation . . . the obligation of freedom"; and again: "Every man who was in the King's peace was liable to be summoned to the host at the King's call."

There is no ambiguity or uncertainty about these pronouncements. The old English "fyrd," or militia, was the nation in arms. The obligation to serve was a personal one. It had no relation to the possession of land; in fact it dated back to an age in which the folk was still migratory and without a fixed territory at all. It was incumbent upon all able-bodied males between the ages of sixteen and sixty. Failure to obey the summons was punished by a heavy fine known as "fyrdwite."

There is another point of prime significance. Universal service was, it is true, an obligation. But it was more: it was *the mark of freedom*. Not to be summoned marked a man as a slave, a serf, or an alien. The famous "Assize of Arms" ends with the words: "Et præcepit rex quod nullus reciperetur ad sacramentum armorum nisi liber homo." A summons was a right quite as much as a duty. The English were a brave and martial race, proud of their ancestral liberty. Not to be called to defend it when it was endangered, not to be allowed to carry arms to maintain the integrity of the fatherland, was a degradation which branded a man as unfree.

II. The Old English Militia.

This primitive national militia was not, it must be admitted, a very efficient force. It lacked coherence and training; it was deficient both in arms and in discipline; it could not be kept together for long campaigns. The Kings, therefore, from the first supplemented it by means of a band of personal followers,

a body-guard of professional warriors, mounted, well and uniformly armed, and practised in the art of war. Nevertheless, the main defence of the country rested with the "f. d." The Danish invasions put it to the severest test and revealed its military defects. It was one of the most notable achievements of Alfred to reorganize and reconstitute it. Thus reformed, with the support of an ever-growing body of King's thegns, it wrought great deeds in the days of Alfred, Edward, and Athelstan, and recovered for England security and peace. In the days of their weaker successors, however, all the forces that England could muster failed to keep out Sweyn and Canute, and, above all, failed to hold the field at Hastings.

The Norman Conquest might have been expected to involve the extinction of the English militia. For feudalism as developed by William I. was strongest on its military side, and William's main force was the levy of his feudal tenants. But quite the contrary happened. The Norman Monarchs and their Angevin successors were, as a matter of fact, mortally afraid of their great feudal tenants, the barons and knights through whom the Conquest had been effected. Hence, as English Kings, they assiduously maintained and fostered Anglo-Saxon institutions, and particularly the "fyrd," which they used as a counterpoise to the feudal levy. They even called upon it for continental service and took it across the Channel to defend their French provinces. Thus in 1073 it fought for William I. in Maine; in 1094 William II. summoned it to Hastings for an expedition into Normandy; in 1102 it aided Henry I. to suppress the formidable revolt of Robert of Belesme, Earl of Shrewsberry; in 1138 it drove back the Scots at the Battle of the Standard; and in 1174 it defeated and captured William the Lion at Alnwick. So valuable, indeed, did it prove to be that Henry II. resolved to place it upon a permanent footing and clearly to define its position. With that view he issued in 1181 his "Assize of Arms."

III. Mediæval Regulations.

Into the details of the "Assize of Arms" it is unnecessary here to enter. Are they not written in every advanced text-book

of English history? Three things, however, are to be noted. ***First, that the duty and privilege of military service are still bound up with freedom;*** no unfree man is to be admitted to the oath of arms. Secondly, that upon freemen the obligation is still universal. "all burgesses and the whole community of freemen (tota communa liberorum hominum) are to provide themselves with doubtlets, iron skullcaps, and lances." Thirdly, that, closely as freedom had during the centuries of feudalism become associated with tenancy of land, the national militia had not been involved in feudal meshes; the obligation of service remained still personal, not territorial.

In 1205 John, fearing an invasion of the Kingdom, called to arms all the militia sworn and equipped under the Assize, i.e., all the freemen of the realm. Short-shrift was to be given to any who disobeyed the summons: "Qui vero ad summonitionem non venerit habeatur pro capitali inimico domini regis et regni." (He who does not come shall be regarded as a capital enemy of the King and Kingdom.) The penalty was to be the peculiarly appropriate one of reduction to perpetual servitude. The disobedient and disloyal subject would ipso facto divest himself of the distinguishing mark of his freedom.

Henry III. in 1233 and 1234 made similar levies. In 1252, in a notable writ for enforcing Watch and Ward and the Assize of Arms, he extended the obligation of service to villans and lowered the age limit to fifteen. Edward I. reaffirmed these new departures in his well-known Statute of Winchester (1285), in which it is enacted that "every man have in his house harness for to keep the peace after the ancient assize, that is to say, every man between fifteen years of age and sixty years." Further, he enlarged the armoury of the militiamen by including among his weapons the axe and the bow.

The long aggressive wars of Edward I. in Wales and Scotland, and the still longer struggles of the fourteenth century in France, could not, of course, be waged by means of the national militia. Even the feudal levy was unsuited to their requirements. They were waged mainly by means of hired professional

armies. Parliament—a new factor in the Constitution—took pains in these circumstances to limit by statute the liabilities of the old national forces. An Act of 1328 decreed that no one should be compelled to go beyond the bounds of his own county, except when necessity or a sudden irruption of foreign foes into the realm required it. Another Act, 1352, provided that the militia should not be compelled to go beyond the realm in any circumstances whatsoever without the consent of Parliament. Both these Acts were confirmed by Henry IV. in 1402. But the old obligation of universal service for home defence remained intact. It was, in fact, enforced by Edward IV. in 1464, when, on his own authority, he ordered the sheriffs to proclaim that "every man from sixteen to sixty be well and defensively arrayed and . . . be ready to attend on His Highness upon a day's warning in resistance of his enemies and rebels and the defence of this his realm." This notable incident carries us to the end of the Middle Ages, and shews us the old English principle in vigorous operation.

IV. Tudor and Stuart Developments.

The Wars of the Roses, so fatal to the feudal nobility, left the national militia the only organized force in the country. The Tudor period, it is true, saw the faint foreshadowing of a regular army in Henry VII.'s Yeomen of the Guard, and the nucleus of a volunteer force in the Honourable Artillery Company, established in London under Henry VIII. But these at the time had little military importance, and England remained dependent for her defence throughout the fifteenth century, that age of unprecedented prosperity and glory, upon her militant manhood. Hence the Tudor Monarchs paid great attention to the maintenance and equipment of the militia. The practice (which had grown up in the later Middle Ages) of limiting the normal call to arms to a certain quota of men from each county was revived. If the required numbers were not forthcoming compulsion was employed. Statutes were passed making discipline more rigid. Lords Lieutenant were instituted to take over the

command, with added powers, from the sheriffs. An important Mustering Statute (1557) was enacted, graduating afresh the universal liability to service, and making new provision for weapons and organization. William Harrison, writing in 1587, said:—

"As for able men for service, thanked be God! We are not without good store; for by the musters taken 1574-5 our numbers amounted to 1,172,674, and yet were they not so narrowly taken but that a third part of this like multitude was left unbilled and uncalled."

This from a population estimated at less than six million all told! Such was the host on which England relied for safety in 1588, if by chance the galleons of Spain should elude the vigilance of Drake and should land Parma's hordes upon our shores. Well might the country feel at ease behind such a fleet and with such a virile race of men to second it.

The Stuarts did not take kindly to the English militia. It was too democratic, too free. James I., in the very first year of his reign, conferred upon its members the seductive but fatal gift of exemption from the burden of providing their own weapons. As he himself took care not to provide them too profusely, the force speedily lost both in efficiency and independence. The Civil War hopelessly divided it, as it did the nation, into hostile factions. The Royalist section was ultimately crushed, while the Parliamentary section was gradually absorbed into that first great standing army which this country ever knew, the New Model of 1645. For fifteen years the people groaned under the dominance of this arbitrary, conscientious, and very expensive force. Then, in 1660, came the Restoration, and with it the disbanding of the New Model and the re-establishment of the militia. The country went wild with joy at the recovery of its freedom. Charles II., however, was bent on securing for his own despotic purposes a standing army. Hence he obtained permission from Parliament to have a permanent body-guard, and he gradually increased its numbers until he had some 6,000 troops regularly under his command. James II. increased them to 15,000, and

by their means tried to overthrow the religion and the liberties of the nation. He was defeated and driven out; but his effort to establish a military depotism made the name of "standing army" stink in the nostrils of the nation. "It is indeed impossible," said one of the leading statesmen of the early eighteenth century, "that the liberties of the people can be preserved in any country where a numerous standing army is kept up." The national militia continued, as of old, to stand for freedom and self-government. The voluntarily enlisted standing army was regarded as the engine and emblem of tyranny.

V. The Last Two Centuries.

The eighteenth century saw a constant struggle on the part of constitutionalists to get rid of the standing army altogether. Army Acts were limited in their operation to a year at a time, and were passed under incessant protest. Grants to maintain the army were similarly restricted. Every interval of peace witnessed the rapid reduction of the regular forces. But the times were adverse. Wars were frequent, and on an ever-increasing scale of magnitude and duration. The standing army had to be maintained, and, indeed, steadily enlarged.

But the militia for home defence was never allowed to become extinct, and it enjoyed an immense popularity. In 1757 it was carefully reorganized by statute. The number of men to be raised was settled, and each district was compelled to provide a certain proportion. The selection was to be made by ballot, to the complete exclusion of the voluntary principle. During the Napoleonic war, when invasion seemed imminent, the militia was several times called out and embodied. In 1806 the principal of universal obligation on which it was based was clearly stated by Castlereagh in the House of Commons. He spoke of "the undoubted prerogative of the Crown to call upon the services of all liege subjects in case of invasion."

At the moment when he spoke, however, the imminent fear of invasion had been removed—removed, indeed, for a century—by Nelson's crowning victory at Trafalgar. From that time forward the military forces of the Crown were required not so

much for the defence of the United Kingdom itself as for the provision of garrisons for the vast Empire which had grown up during the eighteenth century. These Imperial garrisons had necessarily to be drawn from professional troops voluntarily enlisted. Thus the militia declined. An effort was made in 1852 to revive it, and again the underlying principle of compulsion was explicitly recognized. The Militia Act of that year contains the provision:—

"In case it appears to H. M. —— that the number of men required . . . cannot be raised by voluntary enlistment . . . or in case of actual invasion or imminent danger thereof, it shall be lawful for H. M. —— to order and direct that the number of men so required . . . shall be raised by ballot as herein provided."

The effort at revival was unfortunately vain, and when in 1859 international trouble again seemed to be brewing, instead of appealing once more to the immemorial defence of the country, the Government weakly and with most deplorable results allowed the formation of a new body, the volunteers—a body whose patriotism was noble, whose intentions were admirable, but whose inefficiency became and remained a by-word. The militia continued ingloriously, mainly as a nursery for the regular army.

Finally, in 1908, Mr. (now Lord) Haldane absorbed both volunteers and militia into the new Territorial and Reserve Forces, the militia becoming a special reserve. It is much to be regretted that the Act of 1908 did not expressly reaffirm the continued validity of the compulsory principle of service which from the earliest times has been the basis of the militia. But, though it did not expressly reaffirm it, it left it absolutely unimpaired and intact. Said Mr. Haldane himself in the House of Commons on April 13, 1910: "*The Militia Ballot Acts and the Acts relating to the local militia are still unrepealed, and could be enforced if necessary.*"

VI. Conclusion.

Such is the condition of things at the present time. The principle of compulsory military service, obligatory upon every

able-bodied male between the ages of sixteen and sixty, is still the fundamental principle of English law, both common law and statute law. It has been obscured by the pernicious voluntary principle, which, in the much-abused name of liberty, has shifted a universal national duty upon the shoulders of the patriotic few. But it has never been revoked or repudiated.

It is not national service, but the voluntary system, that is un-English and unhistoric. The Territorial army dates from 1908; the volunteers from 1859; the regular army itself only from 1645. But for a millennium before the oldest of them the ancient defence of England was the Nation in Arms. When will it be so again?

EMPLOYMENT OF PRISONERS OF WAR.

A statement in an Amsterdam newspaper that the French prisoners of war working in the coal mines have gone on strike, on the ground that the work which they had been ordered to perform was against the interest of their country, will call attention to the principles of international morality in reference to the employment of prisoners of war. It is indisputable that such prisoners may be employed at work not unsuited to their condition and not directly hostile to their own army or country, and this Bluntschli construes into an authorization for their employment on distant fortifications—a claim properly condemned on principle. Prisoners should not be employed to strengthen their captor's military position, for this tends to release a corresponding number of his soldiers for service at the front. The more modern practice confines their labour to what contributes to their own welfare. The Hague rules authorize a State to utilize the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive and shall have nothing to do with military operation. Prisoners may be authorized to work for the public service for private persons, or on their own account and work done for the State shall be paid for according to the tariffs in force for soldiers of the national

army employed on similar tasks. When the work is for other branches of the public service or for private persons the conditions shall be settled by agreement with the military authorities. The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance: Hague Conference, 1899, Second Convention, art. 1. It has been sometimes the practice, now sanctioned by the Hague Conference, for officers to receive their regular pay or some proper pay from their captors, who in their turn balance accounts on this score with the enemy. Thus in 1870 the Germans paid French officers and the French paid captive officers and men also: Hague Conference, 1899, Second Convention, art. 17.—*Law Times.*

It is sometimes said by thoughtless people that there is a preponderance of lawyers in legislative and executive offices. It must be remembered, however, that the Government of a country not only makes, but interprets and enforces laws. It is clear, therefore, that the most competent class would be those who are familiar with laws, and their working out. A contemporary referring to this subject quotes an ancient Act, passed in the 6th year of Henry IV, by the "Parliamentum Indoctum," which parliament was elected under an ordinance requiring that no lawyer should be chosen knight, citizen or burgess. "By reason whereof" says Coke, "this parliament was fruitless, and never a good law was made thereat:" 4 Inst. 48.

REVIEW OF CURRENT ENGLISH CASES.

PRIZE COURT—EVIDENCE IN PRIZE CASES—CONTRABAND ABSOLUTE AND CONDITIONAL—CONTINUOUS VOYAGE—DECEITFUL DESCRIPTION OF GOODS—ULTIMATE HOSTILE DESTINATION—ORDERS IN COUNCIL OF AUG. 20 AND OCT. 29, 1914.

The Kim (and 3 other vessels) (1915) P. 215. This was a proceeding in the Prize Court for condemnation of the "Kim" and three other vessels which had been captured by the British forces. The vessels in question were under time charters to an American corporation, the president of which was a German, and the general agent of the company in Europe was also a German. The four vessels started from New York, after the war began, for Copenhagen, with large cargoes of lard, hog and meat products; oil, stocks, wheat and other products. Two of them were laden with rubber, which in the papers was styled "gum," and one of them was laden with hides. The Court (Sir Samuel Evans, P.P.D.) found on the evidence that the cargoes of all the vessels (other than the portions thereof acquired by persons in Scandinavia, whose claims were allowed) were not destined for consumption in Denmark or intended to be incorporated in the general stock of that country by sale or otherwise, and that Copenhagen was not the real *bonâ fide* place of delivery, but that the cargoes were by the intention of the shippers on their way at the time of capture to German territory as their actual and real destination, and that, therefore, the cargoes must be condemned as lawful prize, and that, even if the conclusion arrived at was only accurate as to a substantial proportion of the goods, the whole would be affected, because contraband articles are said to be of an infectious character and contaminate the whole cargo belonging to the same owners. The learned Judge found that the use of the word "gum" instead of "rubber" was intended to mislead, and said that any such attempts at deception will weigh heavily against claimants guilty of them while he sits in the Prize Court. He said, quoting the American Supreme Court, "Belligerents are entitled to require of neutrals a frank and *bonâ fide* conduct." A recent decision of a German Prize Court in the case of "The Maria" the learned Judge refers to as a "shocking example," shewing how

a Prize Court in Germany can "hack its way through" *bonâ fide* commercial transactions when dealing with foodstuffs carried by neutral vessels.

MASTER AND SERVANT—CONTRACT OF SERVICE—NOTICE OF BREACH OF CONTRACT TO SUBSEQUENT EMPLOYER—CONTINUATION OF SERVICE AFTER NOTICE OF BREACH OF PRIOR CONTRACT—LIABILITY OF SUBSEQUENT EMPLOYER.

Wilkins v. *Weaver* (1915) 2 Ch. 322. This was an action brought by a company against Weaver, who had been a servant of the plaintiffs, and had committed a breach of his contract with the plaintiffs, and the defendant company, who had continued Weaver in their employment after notice of his having committed a breach of his contract with the plaintiffs. Joyce, J., who tried the action, found that the defendant Weaver had committed a breach of his contract with the plaintiffs, and that the defendant company had continued him in their employment after notice of such breach, and he declared that both Weaver and the defendant company were liable to the plaintiffs for the damages they had thereby sustained, following *De Francesco* v. *Barnum*, 63 L.T. 514.

MONEY LENDER—TRANSACTION HARSH AND UNREASONABLE—EXCESSIVE INTEREST—COMPOUND INTEREST—PAYMENT BY INSTALMENTS—DEFAULT CLAUSE—MONEY LENDERS ACT, 1900 (63-64 VICT. c. 51) s. 1—(R.S.O. c. 175, s. 4).

Halsey v. *Wolfe* (1915) 2 Ch. 330. This was an action to reopen a money lending transaction as being harsh and unreasonable under the Money Lenders Act, 1900. (see R.S.O. c. 175, s. 1). The defendant (a money lender) had on four occasions advanced money to the plaintiff (a tradesman), upon what the defendant himself described as a fair average risk. The first advance was £100 at what amounted to 72 per cent., and the second advance was £50 at what amounted to 120 per cent., and the other advances were made at equally extortionate rates. The advances were repayable by instalments, secured by promissory notes, which were subject to a proviso that, if default were made in any of them, all should become due. After six instalments were paid, the action to reopen the transaction was commenced. Joyce, J., held that, in the circumstances of the case, the charges made by the defendant were exorbitant and excessive; and that the whole course of dealing with the plaintiff in respect

of interest and otherwise was harsh and unconsionable within the meaning of the Money Lenders Act, 1900 (see R.S.O. c. 175), and that the plaintiff was entitled to relief, and that, in taking the account, the rate of interest should be 15 per cent. per annum.

COMPANY—MANAGER—REMUNERATION BY A PERCENTAGE ON ANNUAL NET PROFITS—PRIOR DEDUCTION OF INCOME TAX.

Johnston v. *Chestergate H.M. Co.* (1915) 2 Ch. 338. In this case the plaintiff was the manager of the defendant company at a fixed salary and a percentage of the annual net profits of the company. The agreement provided: "For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries" and other items, which did not include certain items which would be deducted before arriving at the net profits, or the income tax payable by the company. In fixing the net profits for the purpose of computing the percentage payable to the plaintiff the auditors deducted the income tax, but Sargant, J., held that they erred in so doing, and that their certificate, being based on a wrong principle, was not binding on the Court.

MORTGAGE—EXPECTANT SHARE AS ONE OF NEXT-OF-KIN OF LIVING PERSON—ASSIGNMENT BY WAY OF MORTGAGE—BANKRUPTCY AND DISCHARGE OF MORTGAGOR BEFORE FALLING INTO POSSESSION OF SHARE.

In re Lind, Industrials Syndicate v. *Lind* (1915) 3 Ch. 345. This was a contest between assignees of an expectant share of one of the next-of-kin of a living person in such person's estate. In 1905 one Lind, one of the next-of-kin of his mother, who was insane, and had never made a will, mortgaged his presumptive share in her estate to the N. Society. In May, 1908, he made a second mortgage of the share to one Arnold. In August, 1908, he was adjudicated bankrupt, and subsequently obtained his discharge; neither the N. Society nor Arnold proved in the bankruptcy. In 1911 Lind made an assignment of his expectant share to the plaintiffs, and in 1914 the mother died and the share fell into possession. The plaintiffs claimed, as assignees, to be entitled to the share free from the mortgages, which they contended only amounted to a covenant, the liability on which had been discharged by the discharge in bankruptcy, but the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.) agreed with Warrington, J., that the prior mortgages constituted an

equitable charge on the share, which took effect on the share falling into possession, and that this charge was unaffected by the discharge in bankruptcy.

COPYRIGHT—RAILWAY GUIDE—INDEX OF RAILWAY STATIONS—MONTHLY PUBLICATION—COPYRIGHT ACT, 1911 (1-2 GEO 5 c. 46), ss. 1, 2, 7-35.

Blacklock v. *Pearson* (1915) 3 Ch. 376. This was an action for infringement of copyright. The plaintiffs were the proprietors of the well-known Bradshaw's Railway Guide, which was published monthly and copyrighted. It contained a list of all the railway stations in the United Kingdom, and the list, though it might vary in some particulars as occasion might require, was reproduced in each monthly publication. The defendants, for the purpose of a newspaper competition, published for sale to intending competitors a list of railway stations, and, for the purpose of compiling the list resorted to, and used the list contained in the plaintiffs' railway guide. The plaintiffs claimed that they were entitled to copyright for the whole and every part of each number of their guide, notwithstanding some parts may have appeared in their prior publications. The defendants claimed that the plaintiffs' guide was not the subject of copyright at all, and that, at all events, the reproduction in a later edition of matter which had appeared in a former edition conferred no new copyright in respect of that old matter. Joyce, J., who tried the action, upheld the plaintiff's contention that each monthly number was properly as to its whole contents properly subject of a new copyright each month.

LIQUOR LICENSE—SALE OR CONSUMPTION OF INTOXICATING LIQUOR IN PROHIBITED HOURS—GRATUITOUS SUPPLY TO FRIENDS OF LICENSEE.

Blakey v. *Harrison* (1915) 3 K.B. 258. On a case stated by magistrates, it was held by a Divisional Court (Lord Reading, C.J., and Ridley and Scrutton, JJ.) that where a landlord of licensed premises gratuitously supplied his friends with beer, which they drank on the premises, during a period when the sale or consumption of liquor on such premises was suspended by order of the licensing Justice, this treating of his friends was not a contravention of the order; the Court being of the opinion that the consumption of liquor by the licensee, or members of his family, or his friends, while the premises were closed to the public, was not a consumption within the meaning of the Act authorizing the making of the order, or the order, and therefore that the complaint was properly dismissed.

MARINE INSURANCE—RUNNING DOWN CLAUSE—DAMAGE IN CONSEQUENCE OF COLLISION.

France Fenwick & Co. v. *Merchants Marine Insce. Co.* (1915) 3 K.B. 290. The Court of Appeal (Lord Reading, C.J., Eady, L.J., and Bray, J.) have affirmed the decision of Bailhache, J. (1914) 3 K B. 827 (noted ante p. 33), but on somewhat different grounds to those relied on by that learned Judge.

PRACTICE—LIBEL—JUSTIFICATION—CHARACTER AND REPUTATION—PARTICULARS OF JUSTIFICATION — ACTS OCCURRING AFTER DATE OF PUBLICATION.

Maisel v. *Financial Times* (1915) 3 K.B. 336. This was an action for libel, charging that the plaintiff, a managing director of a company, was of bad reputation, and was likely to have misappropriated the funds of the company. The defendants pleaded justification, and, being ordered to deliver particulars of their defence, set out facts which supported and justified the words of the alleged libel which had taken place after the publication of the alleged libel. The Master, on motion in Chambers, had struck out so much of the particulars as related to events subsequent to the libel, but Ridley, J., reversed the order, and the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) affirmed the order of Ridley, J. As Pickford, L.J., puts it: To the question whether, where there is a plea of justification, it is possible to give, in support of the plea, particulars alleging facts which occurred after the libel, it is impossible to answer yes or no, because it depends on the nature of the libel, and also on the nature of the acts relied on. Here the libel was published in the middle of January and the acts relied on were done about the middle of the following February, and continued, as alleged, systematically until the following May, on all which occasions, as was alleged, the plaintiff, having the opportunity, had acted fraudulently. Such particulars were considered therefore admissible.

SHIP—CHARTER PARTY—SALE OF SHIP, AND RIGHT UNDER CHARTER PARTY—REFUSAL OF CHARTERER TO LOAD SHIP.

Fratelli Sorrentino v. *Buerger* (1915) 3 K.B. 367. The Court of Appeal (Eady, Phillimore, and Bankes, L.JJ.), have affirmed the judgment of Atkin, J. (1915) 1 K.B. 307, noted ante p. 242. The case is not any authority that as a general rule a ship which is the subject of a charter party can be sold so as to transfer to the purchaser the vendor's duty of performing the charter

party, but merely that the sale does not *ipso facto* put an end to the charter party, as the defendant contended in this case, because, as Bankes, L.J., points out, it is quite possible that the terms of sale may provide that the vendor is still to perform the charter party notwithstanding the sale.

INSURANCE (MARINE)—PERIL OF MEN-OF-WAR, RESTRAINTS OF PRINCES—SHIP PUTTING INTO NEUTRAL PORT TO AVOID CAPTURE—LOSS OF VENTURE—PROXIMATE CAUSE OF LOSS.

Becker v. *London Assurance Co.* (1915) 3 K.B. 410. This was an action on a policy of marine insurance on goods shipped on board a German ship for carriage from Calcutta to Hamburg. The policy insured against the usual perils, including men-of-war, enemies and restraint of princes. After the vessel started on its voyage war was declared between Germany and Great Britain, and, to avoid capture, the vessel put into a neutral port, where it had ever since remained and was intended to remain until the termination of the war. The plaintiffs endeavoured to get possession of the goods, but the captain of the vessel refused to deliver them up. In November the German Government issued a prohibition against the delivery to their owners of any goods belonging to British subjects on board German ships. In consequence of that prohibition, the plaintiffs gave the defendants notice of the abandonment of the goods, and brought the action as for a total loss. The action was tried before Bailhache, J., who held that the goods were not lost by any peril insured against. In his opinion, the ship went into the neutral point to avoid the commencement of the peril insured against, and although the goods were just as effectually lost to the plaintiffs as if they had in fact been captured, yet he held that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—CONVICTION—SENTENCE OF DEATH—PETITION FOR LEAVE TO APPEAL—STAY OF EXECUTION OF SENTENCE.

Balmukand v. *The King-Emperor* (1915) A.C. 629. This was a petition for leave to appeal from a conviction for criminal conspiracy to murder to the Judicial Committee of the Privy Council, the applicant having been sentenced to death. The counsel for the applicants not being able to proceed with the application, owing to the non-arrival of the record, asked the Judicial Committee to make a recommendation to the Govern-

ment of India that the carrying out of the sentence should be postponed pending the hearing of the petition, but the Committee refused to make any recommendation or to express any opinion, holding that it was a matter for the Executive Government to deal with.

NUISANCE—COLLIERY COMPANY—LESSEES FROM COMMON LESSOR —PERMISSION TO CARRY ON TRADE OF MINER—IMPLIED RIGHT TO COMMIT NUISANCE—DEROGATION FROM GRANT.

Pwllbach Colliery Co. v. *Woodman* (1915) A.C. 634. The plaintiffs and the defendants were lessees of adjacent properties from the same lessor. The defendants' property was a coal mine; the plaintiffs' property was used for carrying on the business of a butcher and slaughterhouse. Subsequently the defendants erected on the land demised to them screening apparatus near the plaintiffs' trade buildings, and, as a result of their screening operations, coal dust was deposited on these buildings. The action was to restrain this nuisance, and, at the trial, the jury found that a nuisance was caused by the defendants, but that their screening operations were carried on in a reasonable manner and in a way that was usual in the district and without negligence. The Court of Appeal, reversing the decision of Horridge, J., held that the grant of the right to carry on the business of miners did not authorize the committal of a nuisance, and, in the absence of proof that the trade could not be carried on without creating a nuisance, the plaintiff was not precluded by the terms or circumstances of the grant from obtaining relief, and the House of Lords (Lords Loreburn, Atkinson, Parker, Sumner and Parmoor) affirmed the decision.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME C[illegible]

DORCHESTER ELECTRIC [illegible] v. KING.
DORCHESTER ELECTRIC Co. v. THOMSON.
DORCHESTER ELECTRIC Co. v. INDUSTRIAL SECURITIES Co.
Lane, J.] [24 D.L.R. 373.

1. *Specific performance—Agreement for subscription of bonds—Right to remedy.*

An underwriting agreement providing for subscriptions to an issue of debentures, whereby subscribers agree to give money by instalments or otherwise in exchange for debentures or bonds is tantamount to an agreement to borrow and loan money, and hence is not susceptible of specific performance.

2. *Corporations and companies—Bonus stock—Illegal issue—Effect on bond subscription.*

Where a company as a special inducement to subscribers for its debentures offers a bonus of common stock such inducement is an essential and important consideration of the contract; and therefore if such issue of stock is null and illegal the underwriting agreement itself becomes void.

3. *Corporations and companies—Issue of stock before payment—Watered stock—Illegality.*

Under the Quebec Companies Act, stock issued direct from the treasury of a company without being paid for in cash is watered stock and therefore illegally issued and void, even though it be claimed that such stock represents the increased value of the company's property.

4. *Corporations and companies—Issue of stock—Mode of payment—Statutory requirements.*

Under the Quebec Companies Act no issue of stock not paid for in cash is legal unless a contract be filed with the Provincial Secretary at or before the issue thereof shewing that payment in a form other than cash had been sanctioned.

ANNOTATION ON ABOVE CASE FROM D.L.R.

Etymologically it is nothing more than Latin word "debentur." The word was the first in the form of acknowledgment used by the Crown in old days, and given by it to creditors of the Crown, to soldiers and to the King's servants for payment of their wages. (Parliamentary Rolls, 3 Henry V. 1415.)

The word is used in the same sense in the Pasten Letters in 1455: "debentur made to the said Falstaff with him remaining." The word was employed to describe an instrument under seal evidencing a debt.

The essence of a debenture was an admission of indebtedness, and this is still its essential characteristic.

Edmonds v. *Blaina Company* (1887), 36 Ch.D. 219, gives this definition: "The term itself imports a debt—an acknowledgment of a debt—and speaking of the numerous and various forms of instruments which have been called debentures, without anyone being able to say that the term is incorrectly used, I find that generally—if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day, accompanied by some charge or security."

The authorities appear to agree in the view that any instrument other than a covering deed, which either creates or agrees to create a debt in favour of one person or corporation, or several persons or corporations, or acknowledges such debt, is a debenture.

"Debenture stock," says Lord Lindley, at p. 195, "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of a large loan."

The contract to take up debentures or debenture stock is usually made by application followed by allotment. When a subscriber for debentures makes default in paying up any instalments, he cannot be compelled specifically to perform a contract by paying up the instalments, for the Court will not grant specific performance in such a case. (Palmer's Company Precedents, 8th ed., part 3, p. 151.) The company's remedy is to sue for damages for breach of contract and such damage has been held to be the difference between the rate of interest payable by the company to the allottee of the debentures, and the rate of interest which the company would have to pay in order to put the company in the same position as if the contract had been performed. *Bahamas Sisal Plantation, Ltd.* v. *Griffin*, 14 T.L.R. 139.

If the sole reason why the company is unable to raise money, or is compelled to raise money on onerous terms, is that it has fallen into disrepute and bad financial odour, the company will not be entitled to recover damages from a defaulting subscriber to debentures or debenture stock. (Simonson, 3rd ed., p. 66.)

The leading case on this question is *South African Territories Limited* v. *Wallington* (1 Q.B. 692, [1898] A.C. 309). In this case the applicant for debentures sent his cheque for £80, being a deposit of £5 per debenture on 16 debentures of the company, and required it to allot him that number of debentures, and agreed to pay the instalments due in accordance with the terms of the prospectus. The debentures were duly allotted. The defendant never paid any further instalments. The company sued for specific performance of the contract and the balance of price of the debentures. The Court of Appeal dismissed the action holding that no action for specific

performance would lie, or to compel the lending of the money contracted for. The House of Lords confirmed this judgment, and Halsbury, L.C., stated:—

"The forms which have been contrived for the business of Joint Stock Companies, and which, when applied to their proper purpose, are convenient, are somewhat calculated to mislead when their mere language is recorded. The application for debentures on the face of the instrument, asks to pay something. But the real nature of the whole transaction is an agreement of the applicant to lend money at a certain interest, and the action in this case was, in truth, mainly, if not altogether, instituted to compel the intending lender to perform his contract to lend, which, doubtless, he had refused and neglected to do. With respect to the claim for specific performance, a long and varied course of decisions has prevented the application of any such remedy, and I do not think that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge to grant a decree for specific performance was perfectly right." ([1898] A.C. 312.)

See, to the same effect. *West Waggon Company* v. *West* ([1892] 1 Ch. 271); Parker & Clarke, Company Law, p. 119; Mulvey, p. 94; Masten, p. 165.

Art. 1065 of the Civil Code, Que., lays down a similar rule: "Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages."

It has always been properly held that a plaintiff cannot come into Court for the purpose of having the defendant constituted his creditor, and this is virtually what a demand to enforce specific performance of a contract of loan amounts to. The only remedy, under Quebec law, is an action in damages, because, in that event, the plaintiff is properly bringing his claim as creditor of the defendant, who, by his breach of covenant, has become liable in damages, if any result, and therefore has become the debtor of the plaintiff.

In England, following the Wallington decision of the House of Lords, the law was amended, specifically giving companies the right to enforce specific performance of subscriptions for debentures. At the present day an action of the nature of the case just reported would lie, but, as the law has not been changed in Canada, or in the Province of Quebec, such an action cannot be recognized.

It may be noted that the different Companies' Acts in this country provide for the specific performance of the contract whereby a subscribing shareholder agrees to take stock in the company.

Issue of Bonus Stock.

The provisions of the Quebec Companies Act are much more drastic than those of the Federal Act.

Art. 6036 R.S.Q. 1909, enacts as follows: "The capital stock of the company shall consist of that portion of the amount authorized by the charter, which shall have been *bonâ fide* subscribed for and allotted, and shall be paid in cash, unless payment therefor in some other manner has been agreed upon by a contract filed with the Provincial Secretary at or before the issue of such shares. . . .

No stock shall be issued to represent the increased value of any property. Any such issue shall be null and void.

The practice commonly known as watering of stock, is prohibited, and all stock so issued shall be null and void.

The capitalization of surplus earnings, and the issue of stock to represent such capitalized surplus are also prohibited, and all stock so issued shall be null and void, and the directors consenting to such issue of stock shall be jointly and severally liable to the holders thereof for the reimbursement of the amount paid for such stock.

Every form and manner of fictitious capitalization of stock in a company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented, with the exception mentioned in paragraph 1 of this article, by an amount in cash paid into the treasury of the company, which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void."

This legislation is in line with leading English decisions. It is universally conceded that shares cannot be issued at a discount. Under the Federal Act they may be paid for either in cash or the equivalent of cash, but, under the Quebec Act, any payment in manner other than cash, requires to be evidenced by contract filed with the Provincial Secretary, at or prior to the issue of the shares.

In *North-Western Electric Co.* v. *Walsh*, 29 Can. S.C.R., Sedgewick, J., p. 46, lays down the general rule, basing himself on the *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125, as follows: "It is elementary law that no joint stock company can issue stock below par, unless authorized to do so by the legislature under whose authority it was created."

The principle laid down by sec. 6036 R.S.Q., has been approved by the Supreme Court in *Morris* v. *Union Bank*, 31 Can. S.C.R. 594.

"It is impossible," said the Chief Justice, "in the teeth of the statute which requires that when shares are contracted to be paid for, not in money, but in money's worth, there must be an agreement in writing, to otherwise dismiss this appeal."

The issue of bonus stock by companies has been condemned in many decisions: *Eddystone Marine Ins. Co.*, [1893] 3 Ch. 9. See also *Bury* v. *Famatina Development Corp.*, [1910] A.C. 439.

"The public are sometimes induced to take debentures of a company,

by an offer on the part of the directors to give to the person advancing money on such securities, one or more fully paid up shares in the company, by way of bonus, for every debenture which he takes. The holders of shares so allotted as fully paid up, will, on the company being wound up, be placed on the list of contributories for the full amount of their shares, for the company cannot so allot shares as fully paid up by way of bonus." (Simonson on Debentures, 3rd ed., p. 90.)

Palmer, 7th ed., part 1, p. 808, states that formerly it was not uncommon to offer debentures for subscription on the footing that the company would give to the subscribers not only debentures for the amount advanced, but paid up shares of the company by way of bonus; but as this in effect amounts to issuing shares at a discount, it is *ultra vires*.

In *Railway Time Table Publishing Co.*, [1895] 1 Ch. 255, the holder of such shares was held liable on winding up. See also *Almada* v. *Tirito Co.* (1888), 38 Ch.D. 415, and *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66; *Re Veuve Monnier et Fils, Ltd.*, [1893] 2 Ch. 525.

In *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. 108, it was held that bonus certificates issued with debentures and made payable out of profits only, could not be made the consideration for the issue of paid up shares.

Apart from the liability of the shareholders who have accepted such bonus stock, as paid up, when, as a matter of fact, no valid consideration has been given whatever, to be placed upon the list of contributories in the event of winding up, the directors who are party to the allotment of the bonus shares may be liable to contribute to the assets of the company by way of compensation in respect of their breach of trust.

In *Hirsche* v. *Sims*, [1894] A.C. 654, where the directors improperly issued shares at a discount, it was held that they were answerable to the company for the discount allowed, but that they were not liable beyond the discount, in the absence of proof of fraud or of further resulting damage.

In *Re Wiarton Beet Sugar Co.* (1906), 12 O.L.R. 149, a director, party to the allotment of bonus shares, was held liable to contribute by way of compensation for his breach of trust.

The usual course adopted by careful directors, or financial agents who obtain subscriptions for debentures, consists in their obtaining for these, from the company, in return and in consideration for their promotion services, a certain amount of shares of the company, issued to them as fully paid up and non-assessable, in accordance with the memorandum of agreement and the powers conferred upon the company by the charter. Then, in order to facilitate the placing of the bonds, holders of these promotion shares, legally issued, give and transfer to the subscribers to the bonds, a certain quantity of these shares, proportionate to the amount of the subscription. And in this case the holder of the debenture or debenture stock becomes, at the same time, a shareholder of the company without being in any way liable for calls.

War Notes.

We are glad to record what may be said to be the true sentiment of the best people of the United States, speaking of them as a whole, as to this present war. It is set forth in the letter of Colonel Roosevelt to Professor Dutton, of Columbia University, Secretary of the American Committee of the Armenian and Syrian Relief, in answer to a request for the ex-President to speak at a meeting in behalf of that object. The letter is partly as follows:—

"If this people, through its Government, had not shirked its duty for five years and this people in connection with the world for the last 16 months, we would now be able to take effective action on behalf of Armenia. Mass meetings on behalf of the Armenians amount to nothing whatever if they are mere methods of getting a sentimental but ineffective and safe outlet to the feelings of those engaged in them. Indeed, they amount to less than nothing. The habit of giving expression to feelings without following the expression by action is, in the end, thoroughly detrimental both to the will power and to the morality of the people concerned.

"As long as this Government proceeds, whether as regards Mexico or as regards Germany, whether as regards the European war or as regards Belgium, on the principles of the peace-at-any-price-man, or the professional pacifist, just so long it will be absolutely ineffective for international righteousness as China itself. The men who act on the motto of 'safety first' are acting up to a motto which could be appropriately used by the men on a sinking steamer who jumped into the boats ahead of the women and children, and who, at least, do not commemorate this fact by wearing buttons with 'safety first' on them as a device. Until we put honour and duty first, and are willing to risk something, in order to achieve righteousness, both for ourselves and for others, we shall accomplish nothing; and we shall earn and deserve the contempt of the strong nations of mankind.

"The American pacifists, the American men and women of the peace-at-any-price type, who join in meetings to 'denounce war,' or with empty words 'protest' on behalf of the Armenians or other tortured and ruined peoples, carry precisely the weight that an equal number of Chinese pacifists would carry at a similar meeting."

Colonel Roosevelt's views are, of course, not the views of President Wilson, but they are the views of a large portion of the citizens of their country, and some of them are now putting their principles into practice. An Overseas Battalion is being organized in the City of Toronto, under the name of the "American Legion," composed of American-born and nationalized American citizens living in Canada. Already some 500 have enlisted, and recruits are coming in rapidly. The officers, we are told, are all American born subjects; two of them from West Point and two Naval officers from Annapolis Naval Station. The senior Major is an ex-United States army officer; and a number of the men have been soldiers in the regular army of that country. Colonel Clark, formerly of New York, is in command, and has his headquarters at the Exhibition Park Camp in Toronto. We may be sure that these enthusiastic men will give a good account of themselves when they get to the front, which they are anxious to do as soon as possible.

And still they come, to fight for their King and Country. We have British born and those from the Dominion and outlying dependence: white, black, yellow and red. And now we shall have a good representation of the North American Indians, descendants of the braves, who fought so well for their English friends when old France was our enemy and not our ally, and in the War of 1812. They will all be attached to the Haldimand Battalion; the Colonel of which is one of our legal officials, his second in command being of the legal profession, and his name appearing as the second name on the front page of this journal.

Book Reviews.

The Law Quarterly Review, Edited by the Rt. Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D. London: Stevens & Sons, Limited, Chancery Lane.

The October number of this, the greatest of our legal magazines gives an interesting menu to its readers. It consists of:—Notes of Cases—The origins and early history of negotiable instruments—Norway's integrity and neutrality—Notice of fraud in registration of title to land—Registration of title on business lines—The King's Chamber; and it may be well here to explain that "The King's Chamber" means a space of water

lying within a straight line drawn from one point of land or adjacent island to the next point of land or island upon the English shores. The prowess of the British Navy has happily made all the waters of this planet (except the Kiel Canal) "The King's Chamber,' and to this agrees the words of the poet: "The sea is merrie England's and England's shall remain." Other articles are:—The apportionment of annuities between tenant for life and remainderman—Hindu Wills—Domicile in countries granting ex-territorial privileges—The effect of war on the German legal mind; as to this it may safely be said that the German legal mind now appears to be in the same distorted condition as their lay mind it remains to be seen how long it will take to bring them back to a normal condition.

Crustula Juris: Being a Collection of Leading Cases on Contract done into Verse by MARY E. FLETCHER and B. W. RUSSELL. With a preface by HUMPHREY MELLISH, K.C., and an Introduction by Mr. Justice RUSSELL.

This comes to us from Nova Scotia, whose foremost statesman was also a poet. Poetry is still a passion there with men and women of affairs. Had not information been vouchsafed us in the book itself, many would have gone in ignorance of the real meaning of its title, for, notwithstanding the unmistakable Horation savour of "Crustula" in the nostrils of the learned, to most of us the word is a dark saying, and, coupled with "Juris," is not apt to connote an enterprise of mixing the dry flour of English case-law with the waters of Aganippe, and so producing legal sweetmeats. But let us quote Mr. Justice Russell's reading of its meaning in his clever metrical introduction to the book:—

"Crustula, dear Horace calls them—
'Little cakes' for youngling's jaws;
When the stronger food appals them
Stuff these in their tender maws!

"In our modern poets' pages
Rhyme and reason seldom blend,
But the wisdom of the sages
Here to you in verse we send."

Bolingbroke, quoting Cicero, declares that a lawyer must be something more than a mere *cantor formularum*. He must sing the eternal principles of right. So, as we have hinted above, the enterprise of putting law into poetry could hardly be new. Pittacus, one of the Seven Wise Men of Greece, wrote his laws in

verse. The bards of ancient Erin officiated as judges, chanting their dooms for the hanging of many a man whose deeds did not respond to their notions of justice, poetic though it was. In our own times, Sir Frederick Pollock and the lamented Irving Browne have forestalled these new singers by the sea in marrying the blind goddess to Apollo. But "Crustula Juris" is worthy of a place on the shelf where the meistersingers of the Law are wont to abide.

There is an inimitable "Foreword" by Humphrey Mellish, K.C., the acknowledged *homme de génie* of the Nova Scotian Bar. We have his word for it that "the verses can do no harm" —and what a benison of the book is implied in that remark! Lastly, the whole of both authors' and publishers' profits are to be given in aid of the children rescued from the ruins of Ypres and other Flemish towns. The book merits a ready sale for all these reasons.

Bench and Bar.

Judicial Appointments.

The vacancy on the Bench of the Chancery Division of the High Court of Justice in England caused by the retirement of Mr. Justice Joyce has been filled by the appointment of Mr. Arthur Frederic Peterson, K.C., who was for several years leader in the Court of Mr. Justice Neville. It is said that he will be a valuable addition to the English Bench.

John Leslie Jennison, of the city of Calgary, Alberta, K.C., to be Judge of the District Court of the District of Calgary, Alberta, vice Arthur A. Carpenter, resigned. (November 17.)

Law Officers of the Crown—England.

The Right Hon. Sir Frederick Smith, K.C.M.P., who was appointed Solicitor-General on the formation of the Coalition Government last May, has been appointed to be Attorney-General, in succession to the Right Hon. Sir Edward Carson, resigned. The Right Hon. George Cave, K.C.M.P., is now to be Solicitor-General, in succession to Sir Frederick Smith. Mr. Cave took high honours in classics at Oxford; was called to the Bar at the Inner Temple in 1880, and took silk in 1904. He is a member for the Kingston Division of Surrey, and has been for many years a leading member of the Conservative Party.

Lord Alverstone.

As we go to press we hear of the death of this distinguished Englishman, who for 13 years was Lord Chief Justice of England, and who died on the 15th inst., at the age of 73 years.

In earlier days, he was known to the public as Sir Richard Webster, K.C. To his college chums and intimate friends he was Dick Webster, an all round sport and athlete; a warm friend and a fine specimen of an English gentleman. He was subsequently made Baron Alverstone, G.C.M.G. He became a prominent figure in Canadian history in connection with the Alaska Award in 1903. The part he took in that arbitration is fully discussed in a previous volume of this Journal (ante Vol. 40, p. 3). Want of space forbids any further reference to his career in this issue.

Ontario Bar Association.

The annual meeting of this association will be held at Osgoode Hall, Toronto, on January 11th and 12th. The annual banquet will be given on the evening of the first day.

The notice calling the meeting is accompanied by the report of the Committee on Legal Ethics. As this report will come up for discussion at the meeting and will doubtless be fully considered, we need not at present examine it. We might say, however, that it seems to state briefly the main rules on this important subject and other noteworthy suggestion. We shall look forward with pleasure to the annual message of the retiring President, Mr. Field, K.C. He will, doubtless, give an interesting resumé of professional matters during the past year, meagre though it must of necessity be, owing to the engrossing fight for freedom in which our own country and our Allies are engaged.

A circular letter from the corresponding secretary gives details of the proposed proceedings, and will already be in the hands of the profession. We are glad to note that all County Court Judges and other officials are invited to attend the meetings.

At a meeting of the Judges of the Supreme Court of Ontario, held on the 6th December, 1915, the following Judges were selected to constitute the Second Divisional Court for the year 1916: Hon. R. M. Meredith, Chief Justice of the Common Pleas; Mr. Justice Riddell Mr. Justice Lennox, Mr. Justice Latchford and Mr. Justice Masten.

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beginning to end?' 'It was a work of fiction,' 'Fiction or not, was there a word of truth in it from beginning to end?' 'Well,' said Trollope, if you put it in that way, there was not.' Codd said: 'Thank you, Mr. Trollope,' and sat down. He called no witnesses, but made a violent speech to the jury, in which he asked them how they could possibly convict the prisoner on the evidence of the principal witness when the principal witness was a man who was obliged to admit that he had written a book without a word of truth in it."—*American Law Review.*

CARRIERS—COMPULSORY TREATMENT OF PASSENGER—LIABILITY.—A carrier which, after injury to a boy upon its car, takes him, against the protest of his guardian, to its own surgeon for treatment, is held liable in the South Carolina case of *Easler* v. *Columbia R. Gas & Electric Co.*, L.R.A. 1915D. 884, for an injury which the surgeon may inflict upon him through malpractice, whether it used care in the selection of a surgeon or not.

BURGLARY—OPENING BUILDING WITH KEY LAWFULLY ACQUIRED.—An employee opening a building at a time when his duties did not require him to do so, by means of a key furnished him by the employer for the limited purpose of opening the store for business in the morning, followed by his taking property of his employer therefrom with intent to convert it to his own use, is held a sufficient breaking to constitute burglary, in *State* v. *Corcoran*, L.R.A. 1915D. 1015.

ANALYTICAL INDEX