Canada Law Journal.

VOL. LI. TORONTO, MARCH, 1915 No. 3

*MARRIAGE AND DIVORCE IN CANADA.**

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* The scope of this article, prepared by Fraser Raney, M.A., LL.B., Barrister, with an introduction by W. E. Raney, K.C., appears by the following summary. Part I. is given in this number. The other parts will appear subsequently.

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PART I.

1. INTRODUCTION.

By common consent of all the civilized countries of the world, the most important relationship known to society is that of marriage. And by the like common consent, monogamy is the only foundation upon which it is possible to build the institution of the home, and therefore, the only form of the marriage relation consistent with the true happiness of men and women, and the well-being of the race. It is therefore just and right that marriage, as we in Canada approve of it, should be surrounded by the highest legal sanctions. But it is also important that the laws with relation to this fundamental subject should be clear, consistent and generally understood.

The divided jurisdiction between the Parliament at Ottawa and the local Legislatures does not lend itself to simplicity of treatment, and the matter is still further complicated by the relationship of the laws of the different provinces to the laws of England (depending in each case upon the date when the laws of England were introduced) and by the further fact that the civil laws of Quebec, founded as they are upon the laws of France, are fundamentally different on this subject from the laws of the other provinces.

No effort has, so far as known to the writer, ever been made to simplify and harmonize the marriage laws of Canada. For the most part they just grew, and as there were ten or a dozen gardens far removed from each other, it will not be surprising if the growth presents some forms of contrast and some features that are not in harmony with the generally received social standards.

Take, for example, the law with reference to the prohibited degrees of affinity and consanguinity. These were declared by the Parliament of England at the Reformation, and were introduced into this country with the laws of England. Under the statute of Henry[1] a marriage forbidden by these prohibitions was voidable at the suit of one of the parties in the lifetime of the other. This law remained unchanged in England until 1835, when by Lord Lyndhurst's Act[2] such a marriage was made "absolutely null and void." The preamble to this Act recites that "Whereas marriage between persons within prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable," etc.

1. 28 Henry VIII. c. 7.
2. Imperial Statutes, 5 & 6 William IV. ch. 54.

But the same objections which existed in 1835 to the then state of the law in England, exist in Canada to-day. For instance, if a man marries his brother's or his nephew's widow, the marriage is voidable, and in the Provinces where there are Courts having jurisdiction in matrimonial causes, such a marriage will be set aside, and the children of the union thereby made illegitimate. The same will be true of the marriage of a woman with her deceased husband's brother, or deceased husband's nephew. Furthermore, there appears to be nothing in the law of Canada to render void even a marriage within the prohibitive degrees of consanguinity, except that no Christian country would recognize an incestuous marriage, that is to say, a marriage in the direct line of descent, or a marriage between brother and sister. In other words, the marriage of a man with his aunt or his niece is, under the laws of Canada, not like a bigamous marriage, void, but only voidable, and the status of the children of such a union or of any other union forbidden by the rule with reference to prohibited degrees, will remain "unsettled" so long as both parents live or until the judgment of a competent legal tribunal.

One scarcely knows whether to approve less of Lord Lyndhurst's Act, which, with the late modification in favour of a deceased wife's sister, is still the law of England; or the statute of Henry, which, with the modifications imposed by the Parliament of Canada in favour of a deceased wife's sister and a deceased wife's niece, is still the law of Canada. Under the law as it is in England the marriage of a man with his brother's or his nephew's widow would be equally void with his marriage with his aunt or his niece, and in either case the children of the union would be illegitimate. Under the law as it is in Canada a man's marriage with his brother's or nephew's widow would also be on the same footing precisely as his marriage with his aunt or his niece, but here either would also be equally good or equally bad at the option of either party to the marriage contract during the life of both, and in either case the children of the union would be legitimate or illegitimate at the like option.

Regarded historically, it is not altogether easy to determine which statute has the more reputable parentage. Indeed, both

may be said to be illegitimate in the strict etymological sense of the word. It is quite true that the prohibited degrees were recognized by the Church for centuries before the reign of Henry the Eighth, but the historical venerableness of the ecclesiastical rule loses most of its value when it is remembered that it was for these centuries a prolific source of Church revenue, a permit in a case of affinity being always to be had for a consideration. Indeed, Henry's own marriage to Catherine was under a papal dispensation. It is also true that the Parliament of Henry declared all such marriages to be "prohibited by God's laws." But a less subservient age has discerned that when Henry's obedient lawmakers enacted this statute the monarch, violently smitten of the charms of Anne Boleyn, was eager to divorce Catherine, who had been his brother's widow, and that it was under this statute that Catherine actually was divorced. So that in truth the prohibited degrees as we have them in Canada are based upon the matrimonial vagaries of an English monarch of the Sixteenth century.

The motive underlying Lord Lyndhurst's Act was scarcely more respectable. The Duke of Bedford had married his deceased wife's sister and the descent of his estates was in jeopardy. His friend, Lord Lyndhurst, came to his assistance with an Act which provided that all voidable marriages then existing were to be valid and that no such union was in future to be assailed after two years from the date of the marriage. The Bill passed both Houses and was in its final stage in the Lords without material alterations when the Bishop of London insisted upon an amendment providing that for the future all such marriages should be absolutely and *ipso facto* void. A deadlock ensued with the Commons until an understanding was reached that a supplementary measure would be introduced early in the next session, and, with that understanding, the Bill, with the amendment of the Bishop of London, became law. The supplementary measure never was brought down. As has been suggested, the situation lends itself to the remark of a famous jurist that "An Act of Parliament can do no wrong, but it can do several things that look very odd."

There are also certain other phases of the subject in which there will be common agreement that the time has come for the adoption of important changes in the law.

Two or three instances will serve.

The law, as interpreted in Ontario, which tolerates polygamy in practice among nominal monogamists, but punishes polygamists who are also Mormons in name, is by common consent a scandal; and however doctors of law may differ as to the advisability of a divorce court for Canada they will all agree in reprobating divorce by special Act of the Parliament of Canada.

There will not be a unanimous request for full legal recognition of the science of eugenics, as applied to the marriage relation, but all will probably agree that the presence of certain communicable diseases in one of the parties ought to be an impediment to marriage, and there will be a disposition to give a respectful hearing to the arguments of those who urge that feeble-minded persons ought not to be permitted to marry.

Though the Dominion Parliament is authorized to legislate on the entire subject of marriage and divorce (excepting only the solemnization of marriage, which is assigned to the Provincial Legislatures), the federal field remains almost wholly uncultivated, the entire body of Dominion legislation on the subject, apart from the Criminal Code, being comprised in three lines in the Revised Statutes of Canada, the effect of which is to legalize the marriage of a man with his deceased wife's sister or his deceased wife's niece.

Ought it to be too much to hope that at no very distant date the Parliament of Canada will turn its attention seriously to this subject and enact legislation that will remove existing anomalies and bring the law abreast of public sentiment and of modern social conditions?

W. E. RANEY.

2. Jurisdiction—Dominion and Provincial.

In the distribution of subjects of legislation between the Dominion and the Provinces under the British North America Act, the Dominion Parliament is empowered to legislate on the subjects of marriage and divorce[3] and the Provincial Legislatures on the subject of solemnization of marriage.[4]

Additional jurisdiction with regard to marriage is conferred by the Act upon the central government by the sub-section dealing with Criminal Law procedure[5] and upon the local assemblies by the sub-section dealing with property and civil rights.[6] Two other sections of the Act are also of importance. One of them[7] empowers the Parliament of Canada to provide "for the establishment of any additional Courts for the better administration of the laws of Canada"; this has been interpreted to give power to create a Divorce Court.[8] The other[9] provides that existing laws and Courts "shall continue in Ontario, Quebec, Nova Scotia and New Brunswick, as if the union had not been made," subject to repeal or abolition by the Imperial Parliament, the Parliament of Canada or by the Legislature of the Province in question. Provision was also made for the admission into the Dominion of Prince Edward Island and British Columbia[10] and when these Provinces were afterwards taken into the Dominion their existing laws and Courts were also continued. Consequently, the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, which had enacted legislation on the subject of marriage and divorce prior to Confederation, and Ontario and Quebec, which had legislation on the subject of marriage, including provisions as to capacity to contract marriage, are still under those Acts, except as they may have been repealed or amended.

3. Sec. 91, sub-sec. 26.
4. Sec. 92, sub-sec. 12.
5. Sec. 91, sub-sec. 27.
6. Sec. 92, sub-sec. 13.
7. Sec. 101.
8. Todd—"Parliamentary Government in the British Colonies," 2nd ed., at p. 595.
9. Sec. 129.
10. Sec. 146.

The limits of the respective jurisdictions of the Dominion Parliament and the Provincial Legislatures have recently been more clearly defined by the Judicial Committee of the Privy Council, affirming a judgment of the Supreme Court of Canada,[11] and it is now settled beyond controversy that the Parliament of Canada has no right to legislate in regard to the solemnization of marriage.

The specific point decided was that the power of the several Provinces to legislate as to the solemnization of marriage entitles them to say if they choose that only certain ministers shall be competent to perform the ceremony of marriage for certain persons; for example, for members of the church to which the minister belongs; and that non-compliance with this formality will render the marriage invalid. The Federal Government, moreover, cannot deprive the Provinces of this power by a law providing that any minister may marry anybody whether belonging to his church or another, because this would be legislation dealing strictly with the subject of solemnization of marriage.

3. Dominion Legislation.

It is noteworthy that since Confederation the Dominion Parliament, apart from the provisions of the Criminal Code, has passed only two statutes dealing with marriage and divorce. In 1882 marriage between a man and his deceased wife's sister was legalized[12] and in 1890 marriage with a deceased wife's niece was legalized.[13] It was not until the Act of 1907[14] that marriage with a deceased wife's sister was legalized in England, and marriage has never been legalized in England with a deceased wife's niece.

The Criminal Code of Canada deals with offences in relation to conjugal rights. A bigamist is liable to imprisonment for seven years, and in case of a second offence to imprisonment for fourteen years.[15] The going through the form of a bigamous

11. *In re Marriage Legislation in Canada* (1912) Appeal Cases, p. 880.
12. Statutes of Canada, 45 Vict. ch. 42, sec. 1.
13. Statutes of Canada, 53 Vict. ch. 36.
14. Imperial Statutes, 7 Edw. VII. ch. 47.
15. Criminal Code, R.S.C. ch. 146. sec. 308.

marriage, not the relationship afterwards, is the indictable offence. There is no crime if the accused on reasonable grounds believed his lawful wife or husband to be dead; or if the wife or husband has been continually absent for seven years and has not been heard of during that time; or if the accused has been lawfully divorced from the bond of the first marriage; or if the former marriage has been declared void by a Court of competent jurisdiction. To constitute a crime punishable before a Canadian Court the general rule is that the offence must have been committed in Canada. Bigamy is an exception to this rule to this extent, that if the accused person, being a British subject resident in Canada, contracted the bigamous marriage in another country, having left Canada "with intent to go through such form of marriage," the offence is one cognizable in a Canadian Court. This provision has particular application to the cases of Canadians who go to the trouble to procure so-called divorces from Dakota or other easy-going States, founded on a pretended domicile, and having procured these worthless papers afterwards go through the form of a marriage ceremony in the United States. Neither the Dakota bill of divorcement, nor the fact that the marriage ceremony was performed outside of Canada, will avail as a defence in a Canadian Court if the accused left Canada "with intent to go through such form of marriage."[16]

The Criminal Code prohibits the practice "of any form of polygamy or of any kind of conjugal union with more than one person at the same time, or what among persons commonly called Mormons is known as spiritual or plural marriage," under penalty of imprisonment for five years and a fine of five hundred dollars.[17] The teeth of the polygamy section of the Code were, however, drawn in 1893, when it was held by Chief Justice Armour of the Ontario bench that this section was intended to apply only to Mormons.[18] Under the laws of Canada as interpreted by this decision it would appear to be no offence for a resident of Canada

16. Sec. 307, sub-sec. 4.

17. Sec. 310.

18. *The Queen* v. *Liston;* article on Bigamy and Divorce by W. E. Raney, 34 Canada Law Journal, p. 546.

to occupy the relation of husband to two or more women at the same time, so long as he is not a Mormon and so long as he is careful not to contravene the bigamy sections. In other words, he may be a polygamist in practice, but must not be also a Mormon in name.

But the language of the polygamy section is wide and it is worth noting that the view of Chief Justice Armour was not followed by a Quebec Judge in a more recent case.[19] An authoritative pronouncement on the subject by an appellate Court is to be desired.

Procuring a feigned marriage is punishable by seven years' imprisonment,[20] while a penalty of two years' imprisonment is imposed on anyone who solemnizes a marriage without lawful authority or procures such a marriage to be performed.[21] Solemnization of a marriage contrary to law renders the offender liable to a penalty of one year's imprisonment.[22]

A husband is criminally liable for the death of his wife if her death occurs through his failure to supply her with necessaries,[23] and by an amendment of 1913 a husband who neglects to provide such necessaries when his wife and children are destitute is liable to a fine of five hundred dollars or to imprisonment for one year.

4. Sources of the Provincial Laws.

Generally speaking, the sources of the law now enforced by the various Provincial Courts are as follows:—

(1) *British Columbia.*—British Columbia is subject to the law of England as of the 19th of November, 1858, in so far as such law is not rendered inapplicable by local circumstances, and in so far as not repealed or varied by federal or provincial legislation. This is by virtue of a proclamation of that date subsequently confirmed by Provincial statute.[24]

19. *The King* v. *Harris* (1906) 11 Canadian Criminal Cases, p. 254.
20. Sec. 309.
21. Sec. 311.
22. Sec. 312.
23. Sec. 242, sub-sec. 2.
24. Sir James Douglas' Proclamation of November 19th, 1858, confirmed by the English Law Ordinance (1867), now Revised Statutes of British Columbia (1911) ch. 75.

With regard to marriage, the Marriage Act of British Columbia[25] first enacted as the Marriage Ordinance of the 2nd of April, 1867, provides that in all matters relating to the mode of celebrating marriage, the validity thereof, the qualifications of parties about to marry, and the consent of guardians or parents—the law of England shall prevail—subject to the provisions of the Act.

After there had been conflicting decisions in the British Columbia Courts, the Judicial Committee of the Privy Council finally decided that the English Divorce and Matrimonial Causes Act of 1857 was not rendered inapplicable to British Columbia by local circumstances, and that jurisdiction to pronounce decrees of divorce was vested in the Supreme Court of that Province.[26]

(2) *North West Territories, Alberta, Saskatchewan and Manitoba.*—The North West Territories Act of 1886[27] enacts that the laws of England relative to civil and criminal matters as they existed on the 15th of July, 1870, shall be in force in the North West Territories[28] in so far as the same can be made applicable and in so far as not repealed, and "subject to the provisions of the Act." The laws of the Provinces of Manitoba, Alberta and Saskatchewan and the Territory of the Yukon are founded upon the laws of the North West Territories as so derived.[29] The North West Territories Act would seem to be wide enough to bring into force the laws of England with regard to marriage and divorce,

25. Rev. Stat. B.C. (1911) ch. 151.

26. *Watt* v. *Watt* (1908) Appeal Cases, p. 573, approving of the judgment of Mr. Justice Martin in *Shepherd* v. *Shepherd*, 13 B.C. Rep. (1908) p. 487.

27. R.S.C. (1906) ch. 62, sec. 12, re-enacting Statutes of 1886 ch. 25, sec. 3, embodying Imperial Order-in-Council of the 23rd of June, 1870.

28. The North West Territories now comprise the territories formerly known as Rupert's Land and the north-western territory except such portions thereof as form the provinces of Manitoba, Saskatchewan, Alberta and the Yukon Territory, together with all British territories and possessions in North America, and all islands adjacent thereto not included within any province except the colony of Newfoundland and its dependencies [North West Territories Act, R.S.C. 1906 ch. 62, sec. 2 (a)]; that is, the districts of Mackenzie, Keewatin, Ungava and Franklin. In 1870 the provinces above excepted still formed part of the Northwest Territories.

29. The Yukon Territory Act, 61 Vict. ch. 6, sec. 9; The Saskatchewan Act, 4 & 5 Edw. VII. ch. 42, sec. 16; The Alberta Act, 4 & 5 Edw. VII. ch. 3, sec. 16; Con. Stat. Man. 1880 ch. 31, secs. 3 and 4.

in the Territories and the Provinces formed out of them, when these subjects have not been dealt with by subsequent provincial or federal legislation. This point has not, however, been judicially determined.[30]

The Manitoba Marriage Act, 1906, as amended in 1910, is broader than the British Columbia Act and deals with consent, non-age and impotency.

(3) *Ontario.*—The law of Ontario is based on the English Common Law and Statute Law of the 15th of October, 1792, in so far as applicable.[31] The statute of 1792 provides that in matters of controversy relative to property and civil rights, and as to testimony and legal proof, the law of England as of that date shall be binding, except as repealed by any Act of the Imperial Parliament having force in Upper Canada, or by Act of the Province of Upper Canada.

As there was no law in England permitting the dissolution of marriages except by Act of Parliament until 1857[32] the Province of Ontario has not now and never has had any Court with jurisdiction to grant a divorce. For some time it was held, following a dictum of the Chancellor of Ontario,[33] that the Supreme Court of Ontario had jurisdiction to declare the nullity of a marriage which had been procured by fraud or duress. In a very recent case, however, this decision has not been followed, and it appears now to be well settled that the Ontario Courts have no such jurisdiction.[34]

(4) *Quebec.*—In Quebec the law of marriage rests on the Civil Code which came into force on the 1st day of August, 1866, the year preceding Confederation.[35] The Civil Code codifies the

30. See Eversley & Craies—"Marriage Laws of the British Empire," London, 1910, p. 247 (Note).

31. Statutes of Upper Canada, 32 Geo. III. ch. 1; Con. Stat. Can. (1859) ch. 9.

32. The Matrimonial Causes Act, Imperial Statutes, 20 & 21 Vict. ch. 185.

33. *Lawless* v. *Chamberlain* (1890) 18 Ont. Rep., p. 296.

34. *Reid* v. *Auld* (1914) 7 Ont. Weekly Notes, p. 85.

35. Proclamation of Governor-General Lord Monck of the 26th of May, 1866. See Sharp's Civil Code, p. xix.

old French law of Quebec as modified by the conquest and by subsequent provincial statutes. The provisions of the code dealing with marriage, tutorship and property are wholly of French origin.[36]

The Civil Code deals not only with Solemnization of Marriage but with the capacity to contract a marriage. Dissolution of marriage, according to the code, can only be by death, although separation from bed and board may be granted. It is maintained by some writers that the Imperial Parliament could not have intended to grant to the Federal Parliament jurisdiction over divorce in the Province of Quebec, where divorce is not permissible according to the tenets of the Roman Catholic Church. This position, however, is not tenable.[37]

(5) *The Maritime Provinces.*—Nova Scotia and New Brunswick, although acquired by conquest in 1713, have been treated by the Courts as planted colonies and subject to the law of England as of that date. New Brunswick enacted legislation on marriage and divorce long before Confederation;[38] indeed, its divorce legislation was prior to English legislation on the subject. Nova Scotia had also before Confederation established a Court with jurisdiction "over all matters relating to prohibited marriages and divorce," and with authority to nullify marriages for impotence, adultery, cruelty, pre-contract or kinship within the prohibited degrees.[39]

Prince Edward Island, like New Brunswick, was originally part of Nova Scotia, from which it separated in 1770, and has also been treated as a planted colony. Its Divorce Court was established in 1835.[40]

(*To be Continued.*)

36. Walton—"The Scope and Interpretation of the Civil Code of Canada." Montreal (1907), at pp. 23 and 133.

37. *Ib.* pp. 63-64; and cf. Loranger, Commentaire sur le Code Civil, Montreal (1879), vol. 2, No. 81 *et seq.*; Mignault, Droit Civil Canadien, vol. 1, p. 551.

38. Statutes of New Brunswick, 31 Geo. III. ch. 5.

39. Revised Statutes of Nova Scotia (2nd Series, 1851) ch. 128.

40. Statutes of Prince Edward Island, 5 Wm. IV. ch. 10.

THE MINISTER OF JUSTICE.

Some misapprehension has existed as to the right or propriety of a salaried Minister of the Crown receiving, at the same time, superannuation allowance as a retired Judge. The Hon. C. J. Doherty, Minister of Justice of Canada, and formerly a Judge of the Superior Court of the Province of Quebec, was recently charged, in Parliament, with having resigned his Judgeship on the ground of ill-health, and having—five years afterwards—accepted the active duties, and the salary, of a Minister of the Crown. The Minister, from his place in the House, denied that he had resigned by reason of incapacity to fulfil his duties as Judge, and shewed that he was entitled to retirement, and therefore to superannuation, under the terms of R.S.C. c. 138, s. 20. This enactment provides (*inter alia*) that, "if any Judge of . . . any superior Court in Canada, who has continued in the office of Judge . . . for fifteen years or upwards, . . . resigns his office, His Majesty may . . . grant unto such Judge an annuity equal to two-thirds of the salary annexed to the office he held at the time of his resignation." There is no qualification as to infirmity coupled with the above provision. It is an absolute right (under His Majesty) to superannuation, and is given as a return for a continuous service of fifteen years.

There is, moreover, a further point, which the critics have failed to note. When a lawyer of high standing and in large practice accepts a Judgeship, he makes a sacrifice of income by so doing. This applies to the whole period of time that he is on the Bench. In other words, he commutes his income for hat period; and the Act fixes fifteen years as being a reasonable time for such commutation. Why, then, after fifteen years of public service, at a comparatively small income, should he not feel himself free to take up any work he desires. He might, following distinguished precedents, have gone back to the profession, but, instead, he went forward to the very highest legal position.

The country had previously been, and is again now, well served by having as Minister of Justice and Attorney-General one whose judicial experience is of very great value. In the

case of the present Minister, mature judgment is aided by a keen acumen most necessary in the official legal adviser of the Governor-General and the legal member of His Majesty's Privy Council for Canada.

"THE LAW OF THE CASE."

Whether wisely or unwisely, the system of Anglo-Saxon jurisprudence is built upon precedent rather than upon principle, and a decision of a court of last resort once made, whether in conformity with well-recognized principles of law supposed to guide courts in arriving at their conclusions, or in flagrant violation of all known principles, becomes the "law of the land" for that jurisdiction, especially where the court conceives that it may have become a "rule of property;" and we seem to be fast arriving at that stage in the development and decline of the Roman civil law when in its decadence the "Law of Citation" was enacted, and which, in the time of the Glossators, degenerated into the "Rule of Thumb;" when the lawyers, chained by tradition and cramped by the demands of daily practice, were quite satisfied with a stale rehashing of well-known ideas, and sought only for illustrative cases which were supposed to explain some legal principle—but which frequently leave the ruling doctrine as much muddled and uncertain as ever. The legal profession and the bench, alike, becoming blind victims of the fetish of authority-worship, developed the rule of taking for law whatever some authority had once asserted, and, when there were opposing opinions on record, deciding by the mere number of opinions upon one side or the other, without giving any consideration to the learning and rectitude of the man or the justness of the opinion. Dogma and authority worship having superseded reason and science, the doctrine of "*communis opinio*," or the weight of opinion, that is, the rule that the recorded opinion which had the greater number of adherents was the sound one, prevailed. Under this rule the judge decided, not by the aid of his own knowledge and reflection and reasoning, but by following that opinion which numbered amongst its adherents a majority of

accredited names, and when the number was even, Papinion's name controlled. Later, when Accussius rose to fame, while his star remained in the ascendant, his opinion was treated as the law, in the absence of an express statute or established custom on the subject; and a statute was enacted that Dinus' opinion should stand as the law in all those cases where, on a given point, Accussius had expressed two opposite opinions. Afterwards Bartolus came into fame, and his opinion supplanted that of Accussius.

At this time, when the product of Roman juristic thought had passed its prolific and brilliant stage, the law schools of the time, the sole aim of which was to prepare practitioners, followed the trend of the times and filled the minds of their students with the "rule of thumb." The law schools of this country to-day seem to have fallen into the same decadence and, with a single exception, chained to blind precedent, seek to teach the law by the study of "selected cases"—which at best can apply fundamental principles and general rules of law in a limited degree only, dependent upon the particular facts and restricting circumstances in each particular case—instead of seeking to have their students master those fundamental principles in the various branches of American jurisprudence which must, or should, control all cases, however variant the facts; concentrate the entire time and attention of the students upon the "stupendous accumulation of judicial detritus which threatens our entire legal system with a menace that must not be underestimated," instead of endeavoring to develop in the minds of the students a comprehensive knowledge of the science of the law logically by inculcating fundamental principles and the method of their proper application to a given state of facts.

In this country a decision in a cause submitted to the highest court of a jurisdiction—state or nation—once made is as unalterable as the laws of the Medes and Persians, so far as that cause is concerned, for it is the invariable rule, in states and nation, alike, that a question once considered and decided by a final appellate court, cannot be re-examined at any subsequent stage of the same cause; such decision becomes the "law of the case" and is final, so long as the facts remain unchanged and the evidence substan-

tially the same; a second appeal is authorized where the cause is remanded and a new trial ordered, but such second appeal brings up for consideration by the appellate court such things only as occurred subsequently to the order of remand, and does not authorize an inquiry into and an examination anew into the merits of the original judgment, decree or order, or into any questions which were properly before the court on the first appeal, or could have been properly presented to the court on that appeal.

Concisely stated, the doctrine of "the law of the case" is that an adjudication by a final court of appeal becomes the law of the case upon all subsequent trials thereof and proceedings therein, and is regarded as a wholesome rule and should be enforced, where no new proof is introduced at the retrial on remand; but questions of fact are not within the rule, and anything an appellate court may have said in respect thereto on a former appeal cannot bind the trial court on a retrial. From this it follows that where an appellate court states a principle or rule of law necessary to the decision—and some of the cases go even farther than this; but they are not thought to be sound in so holding—that principle or rule of law must be adhered to in all subsequent proceedings in that cause, unless the facts on the retrial are substantially different from those on the first trial, and such former decision is to be followed in its spirit as well as its letter, even though in a subsequent consideration of the case the judges of the appellate court are convinced that their former decision was fundamentally erroneous.

This rule, in all its strictness, applies, however, it seems, in those cases only in which the judges of the appellate court agree upon questions of law; for if they fail to so agree the decision does not become the law in the case, and cannot serve as a rule or guide to the lower court upon the retrial of the cause.

On second appeals the final court of appeals is subject to and bound by this rule the same as the trial courts, and must apply and enforce the decision in the first appeal in its spirit as well as its letter, even though additional assignments of error are made raising, upon the second appeal, questions which were not presented on the first appeal. The rule, however, is inapplicable

in all those cases in which the facts proved at the retrial, and presented on the subsequent appeal, are materially different from those proved at the first trial and presented on the first appeal and on which the decision was founded: *e.g.*, where on the retrial after remand the issues were changed and much of the evidence admitted on the first trial was excluded on the retrial, in which case the decision of the appellate court on the first appeal is not the law of the case on the second appeal.

The rule of the law of the case does not apply in all its force to inferior appellate courts, and hence a decision of a district court of appeal, or other intermediate appellate court, is not the law of the case on appeal to the superme court or other higher court of appeal; it is binding on the trial court and other inferior courts, only.

In a California case, where the cause had been appealed to the district court of appeal, was remanded for a retrial, again appealed to the district court of appeal, and taken from there to the supreme court, the latter court held that the decision of the district court of appeal on the first appeal was not the law of the case on a subsequent appeal to the supreme court. Among other interesting things the California Supreme Court say: "Appellate's contention is that upon the former appeal the evidence then and there before the appellate court was reviewed and declared to be sufficient to sustain certain findings; that upon the same evidence the trial court again made the same findings, when in point of law it should have been controlled in its determination upon these matters by the utterances of the appellate court in discussing the evidence upon the former appeal. In this, the appellant mistakenly seeks unwarrantably to extend the doctrine of the law in the case. The doctrine of the law of the case presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal. It presupposes error because, if the governing principle of law had been correctly declared, there would be no occasion for the intervention of the doctrine. The sole reason for the existence of the doctrine is that the court, having announced a rule of law applicable to a retrial of facts, both parties upon that retrial are assumed to have con-

formed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal. But, since the rule owes its very existence to error, it is not one whose extension is looked upon with favor. The ruling is adhered to in the single case in which it arises, is not carried into other cases as a precedent, and the doctrine is rarely, and in a very limited class of cases applied to matters of evidence, as distinguished from rulings at law. The narrow class of cases in which the doctrine will be held to apply to evidence and the rigid limitation upon the application of the doctrine, will be found well expressed in *Wallace* v. *Sisson*. It is there said: 'But when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, on the weight to which their testimony is entitled or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision. . . . And if, in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not the finding of that fact.'"—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

APPEAL TO KING IN COUNCIL—COSTS—APPEAL IN FORMA PAUPERIS—COSTS OF PETITION FOR SPECIAL LEAVE.

Levine v. *Serling* (1914) A.C. 665. This was a case in which an application was made for special leave to appeal to His Majesty in Council in *formâ pauperis*, which was granted. The appeal proved successful, and the appellant was awarded costs, and the question arose whether he was entitled to divers costs of the application for leave to appeal incurred prior to the making of the order allowing him to appeal in *formâ pauperis*, and the Judicial Committee (Lords Haldane, L.C., Moulton, and Sumner) held that he was.

"ACCIDENT"—MEANING OF—WORKMEN'S COMPENSATION ACT—PREMEDITATED ASSAULT.

Board of Trin. District School v. *Kee* (1914) A.C. 667. This was an action brought under the Workmen's Compensation Act by the representatives of a deceased assistant master in the defendants' school, who had been killed, while discharging his duties, as the result of a preconcerted attack made on him by some of the pupils. The question was whether his death was due to "accident" within the meaning of the Act. A majority of the House of Lords (Lords Haldane, L.C., Loreburn, Shaw, and Reading) held that it was; but Lords Dunedin, Atkinson, and Parker, dissented. In the result the decision of the Irish Court of Appeal was affirmed.

WILL — CONSTRUCTION — DEVISE "NEAREST MALE HEIR" "NEAREST AND ELDEST MALE RELATIVE"—VESTING—POSTPONEMENT OF VESTING—INTESTACY.

Lightfoot v. *Maybery* (1914) A.C. 782. This was an appeal from the decision of the Court of Appeal (1913) 1 Ch. 376 (noted *ante* vol. 49, p. 302) affirming a judgment of Joyce, J. (1912) 2 Ch. 430 (noted *ante* vol. 48, p. 693). In the Courts below the case was known as *In re Watkins*, *Maybery* v. *Lightfoot*. The case turns upon the construction of a will whereby the testator, a bachelor, devised land in trust for his brother Herbert for life, and after his decease to convey it to his (the testator's) "nearest

male heir, and should there be two or more in equal degrees of consanguinity to me . . . then to convey the same unto the eldest of my male kindred" for life, "with remainder to the heirs of the body of my said eldest male relative." The testator bequeathed his residue to Herbert for life, and expressed a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value, and keeping up the remainder in trust for "my nearest and eldest male relative" who should be such at the death of Herbert. The defendant was the heiress at law of the testator both at his death and at the death of Herbert. The nearest male relative of the testator at his death was the son of a female first cousin, and at the time of Herbert's death was the plaintiff, a son of a daughter of the same cousin. The majority of the Court of Appeal held that the person entitled in remainder must be ascertained at the testator's death in accordance with the established rule in favour of early vesting. Buckley, L.J., on the contrary, was of the opinion that "my nearest male heir" meant the testator's nearest male relative at the time of the death of Herbert. The House of Lords (Lords Loreburn, Atkinson, Shaw, and Moulton) hold that the words "nearest male heir" were not used in a technical sense as meaning the testator's heir being a male, but meant the testator's nearest male relative, and they agreed with Buckley, L.J., that the person to take in remainder was to be ascertained at the death of the tenant for life, and that the plaintiff's grandfather, being at that time the testator's nearest male relative, was entitled in remainder. The judgment of the Court of Appeal was therefore reversed. It was argued for the defendant that the words meant the "heir if a male," and, there being no such person, there was an intestacy, but this view failed to commend itself to their Lordships.

SOLICITOR AND CLIENT—CLAIM FOR INDEMNITY—MISREPRESENTATION — IMPROPER ADVICE — FRAUD — NEGLIGENCE — PLEADING—CAUSE OF ACTION.

Nocton v. *Ashburton* (1914) A.C. 932. This was an action brought by the plaintiff (Ashburton) against the defendant, who had acted as his solicitor, claiming indemnity for a loss occasioned by following the advice of the defendant in releasing certain property from a mortgage held by the plaintiff. The statement of claim charged misrepresentation and fraud. At the trial, Neville, J., found that the charge of fraud had not been made out, and, on that ground, dismissed the action. The Court of Appeal

found that fraud had been made out, and gave relief on that basis. The House of Lords (Lords Haldane, L.C., Dunedin, Atkinson, Shaw, and Parmoor) came to the conclusion that the Court of Appeal was not justified in reversing the finding of Neville, J., on the question of fraud; but their Lordships also held that although fraud had not been established yet that the plaintiff was not thereby precluded from claiming and getting relief on the footing of breach of duty arising out of the relationship of solicitor and client, and on that ground they affirmed the judgment of the Court of Appeal, being of the opinion that the evidence established that the defendant had as a solicitor failed in his duty to the plaintiff in advising the release of the property in question.

COVENANT IN RESTRAINT OF TRADE—CONSTRUCTION—BREACH OF COVENANT—BUSINESS OF HOUSE AGENT—"CARRYING ON BUSINESS."

Hadsley v. *Dayer-Smith* (1914) A.C. 979. This action was to restrain the breach of a covenant in restraint of trade. The plaintiff and defendant had formerly carried on business together as house agents in partnership under articles which provided that an outgoing partner should not, for a period of ten years after dissolution, carry on or engage or be interested directly or indirectly in any similar business within a radius of one mile of the partnership business. The defendant withdrew from the partnership and started a similar business on his own account at an office outside of the prohibited radius. In the course of his business he endeavoured to let two houses within the prohibited radius, on which he placed boards directing intending tenants to apply to him at his office, and also inserted advertisements relating to the letting of such houses in newspapers. The Court of Appeal held, reversing the judgment of Eve, J., on a motion for an injunction, that these acts amounted to a breach of the covenant; and the House of Lords (Lords Dunedin, Atkinson, Shaw, Sumner, and Parmoor) affirmed the decision of the Court of Appeal.

CANADIAN RAILWAYS—TRAFFIC BETWEEN CANADA AND UNITED STATES—TARIFFS—RAILWAY COMMISSIONERS—JURISDICTION —DECLARATORY ORDER—DOMINION RAILWAY ACT (R.S.C. c. 37), ss. 26, 321, 336, 338.

Canadian Pacific Ry. v. *Canadian Oil Co.* (1914) A.C. 1022. This was an appeal from the Supreme Court of Canada affirming a judgment of the Railway Commissioners. The facts were, that in respect of railway traffic carried by a continuous route

from points in the United States into Canada a joint tariff was filed with the Railway Commissioners, under s. 336 of the Railway Act (R.S.C. c. 37) making use of a classification in use in the United States as permitted by s. 321 (4) of the Act; and the Railway Commissioners had made an order declaring that such tariff could not be altered or superseded by a tariff using a classification neither in use in the United States nor sanctioned by the Railway Commissioners; which order the Supreme Court affirmed, holding that the Commissioners had authority to make it under s. 26 of the Railway Act, as to a rate illegally charged, even though the company had withdrawn the objectionable tariff before the order was made. The Judicial Committee of the Privy Council (Lords Haldane, L.C., Dunedin, Moulton, Parker, and Sumner) affirmed the judgment of the Supreme Court.

NEGLIGENCE—DEATH—ACTION FOR BENEFIT OF FAMILY OF DECEASED—TIME FOR COMMENCING PROCEEDINGS—FATAL ACCIDENTS ACT—(R.S.O. c. 151), s. 6.

British Electric Ry. Co. v. *Gentile* (1914) A.C. 1034. This was an action brought under the British Columbia Act, which is the equivalent of the Fatal Accidents Act (R.S.O. c. 151), against a railway company to recover damages for the death of an employee. The defendants operated a tramway under power conferred by a provincial statute which provided that actions against the company for indemnity for any damage or injury sustained by reason of the tramway or the operations of the company were to be brought within six months from the act complained of. The statute under which the plaintiff sued required (as does the Ontario Act, s. 6) that the action should be commenced within twelve months after the death of the deceased. The action was brought within the last mentioned period, but more than six months after the accident. The Judicial Committee of the Privy Council (Lords Dunedin, Moulton, and Parker, and Sir George Farwell) agreed with the Court of Appeal of British Columbia that the action was brought in time, and in doing so disapproved of *Markey* v. *Tolworth* (1900) 2 Q.B. 544. This decision, therefore, supports the opinion expressed in *Zimmer* v. *Grand Trunk Ry.*, 19 Ont. App. 693. Their Lordships hold that the causes of action under the two Acts are different.

RAILWAY—EXPROPRIATION OF LAND—COMPENSATION FOR LANDS TAKEN—MINERALS—RIGHT OF SUPPORT—RAILWAY ACT (R. S.C. c. 37), ss. 155, 170, 171.

Davies v. *James Bay Ry.* (1914), A.C. 1043. This was an

appeal from the judgment of the Court of Appeal for Ontario reducing the amount awarded by arbitrators for land expropriated for the purpose of a railway. The land expropriated included a bed of shale, and if the owners were entitled to compensation therefor it was agreed the award was to be for $230,820, and if not then only for $119,831. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Loreburn, Moulton, and Sumner, and Sir Geo. Farewell) point out that the provisions of the Canadian Railway Act differ from those of the English Railway Clauses Consolidation Act (1845) in that under the Canadian Act a company acquiring the surface has a right to support from minerals under and adjacent to the land expropriated, whereas under the English Act the expropriators do not acquire a right to support unless such right is expressly bought and paid for. Their Lordships therefore dissented from the judgment of the Court of Appeal, and held that the owner was entitled to the larger sum.

COMPENSATION—GRANT OF LAND TO SOCIETY SUBJECT TO A CONDITION FOR RESUMPTION—LIMITATION OF RIGHT TO CONVEY—RESUMPTION—VALUE OF LAND.

Corrie v. *MacDermott* (1914) A.C. 1056. This was an appeal from the judgment of the High Court of Australia given on an appeal from an award in the following circumstances. The Crown had granted to trustees for the Acclimatization Society of Queensland certain land, to be used only for the purposes of the society, but with power to sell the land only to the local authority for a park or to a certain agricultural association the proceeds to be invested and the income used for the purposes of the society. The grant also provided that the Government might resume possession, "paying the value of the land." The Government exercised this right, and the question was on what basis the value of the land was to be ascertained. The Australian Court held that the trustees were entitled to be paid the full value of the land without regard to the restrictions on the trustees' rights in the land, but the Judicial Committee of the Privy Council (Lords Dunedin, Atkinson, and Sumner, and Sir Joshua Williams) dissented from this view, and held that the value must be ascertained having regard to the restricted rights on which the trustees held the land.

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lord Moulton, Lord Sumner, Sir Chas. Fitzpatrick, Sir Joshua Williams.] [November, 1914. 18 D.L.R. 353.

JOHN DEERE PLOW CO. *v.* WHARTON.

1. *Constitutional law—Construction—Application of federal constitution to provinces—Self-executing provisions—B.N.A. Act.*

The British North America Act being founded upon a political agreement, the judicial interpretation of sections thereof stating the distribution of legislative power between the provinces and the Dominion should be limited to concrete questions which are in actual controversy from time to time without entering upon a general interpretation of the Act, the form of which shews that it was intended to leave the interpretation of seemingly conflicting provisions to practice and judicial decision.

Citizens v. *Parsons*, 7 A.C. 109, and *Attorney-General* v. *Colonial Sugar Refining Co.*, [1914] A.C. 254, applied.

2. *Constitutional law—Federal and provincial rights—"Civil rights in the province"—Construction of B.N.A. Act.*

The expression "civil rights in the province" as used in the confirming of provincial powers in sec. 92 of the British North America Act is to be construed as excluding cases expressly dealt with elsewhere in secs. 91 and 92.

3. *Corporations and companies—Franchises—Federal and provincial rights to issue—B.N.A. Act.*

The power of legislating with reference to the incorporation of companies in Canada with other than provincial objects belongs exclusively to the Parliament of Canada as a matter affecting the "peace, order and good government of Canada" under sec. 91 of the British North America Act.

4. Corporations and companies—Governmental regulation—Companies with objects extending to the entire Dominion—Federal and provincial powers—Right to sue, whence derived.

The legislative power to regulate trade and commerce which by sec. 91 of the British North America Act belongs to the Dominion Parliament enables the latter to prescribe to what extent the powers of trading companies which it incorporates with objects extending to the entire Dominion should be exercisable and what limitations should be placed on such powers; and secs. 5, 29, 30 and 32 of the Companies Act (Can.) and sec. 30 of the Interpretation Act, 1906 (Can.), purporting to enable any federal company incorporated under the Companies Act of Canada to sue and be sued and to contract in the corporate name and establishing the place of its legal domicile and declaring the limitations of personal liability of the shareholders are within the legislative powers of the Parliament of Canada.

5. Corporations and companies—Creation; franchises; Government regulation—Federal company, how affected by provincial law—Companies Act of Canada—B.C. Companies Act.

The provisions of British Columbia Companies Act in so far as they purport to compel a trading company incorporated under the Companies Act of Canada with powers extending throughout the whole of Canada to take out a provincial license as a condition of exercising such corporate powers in British Columbia, and of suing in the courts of that province, are *ultra vires*.

Wharton v. *John Deere Plow Co.*, 12 D.L.R. 422, reversed: *John Deere Plow Co.* v. *Duck*, 12 D.L.R. 554, reversed; *Re Companies Act*, 48 Can. S.C.R. 331, 15 D.L.R. 332, considered.

6. Corporations and companies—Federal company—How affected by provincial laws of general application—B.N.A. Act.

A company incorporated by the Dominion with powers to trade is not the less subject to provincial laws of general application enacted under sec. 92 of the British North America Act.

Union Colliery Co. v. *Bryden*, [1899] A.C. 580; *Colonial Building Association* v. *Attorney-General*, 9 A.C. 157; *Bank of Toronto* v. *Lambe*, 12 A.C. 575, and *Citizens* v. *Parsons*, 7 A.C. 96, referred to.

These were consolidated appeals from judgments of B.C. Supreme Court, *Wharton* v. *John Deere Plow Co.*, 12 D.L.R. 422, and *John Deere Plow Co.* v. *Duck*, 12 D.L.R. 554.

The appeals were allowed.

E. L. Newcombe, K.C., for Attorney-General of Canada. *Sir Robert Finlay*, K.C., and *Geoffrey Lawrence*, for Attorney-General for British Columbia. *F. W. Wegenast*, for appellant company. *E. Lafleur*, K.C., and *Raymond Asquith*, for respondents.

Annotation on above Case, taken from Dominion Law Reports.

Ontario was the first province to put in force an Act requiring extra-provincial corporations to obtain a license before carrying on business within the province and imposing disabilities for non-compliance with its provisions. This Act, passed in 1900, was followed by similar Acts in all of the other provinces, excepting Prince Edward Island, in which province provision is made for an annual tax upon all such companies, but non-payment of the tax does not involve disabilities. Of the Acts of these provinces it is to be noted that every one excepting that of Quebec includes within its terms companies incorporated by the Dominion, and requires such companies to obtain provincial authority before being allowed to carry on business within the province or sue in the provincial Courts. Such provincial authority was provided to be given by way of a license, upon complying with certain formalities and payment of certain fees, and in most cases it was discretionary whether or not the license should issue. Nova Scotia was the last province to impose disabilities for failure to comply with the provisions of the Act. Quebec expressly excepted Dominion companies from the operation of the Act.

From the time that the earliest Act was passed great doubt has been expressed by lawyers as to the validity of the provisions which denied to Dominion companies the right to exercise within the province the powers conferred upon them by the Dominion until they complied with the licensing provisions imposed by the province. But the provincial Courts have been unanimous in upholding their validity, as in cases such as *Ireland* v. *Andrews* (1904), 6 Terr. L.R. 66; *Rex* v. *Massey-Harris* (1905), 6 Terr. L.R. 126, 9 Can. Cr. Cas. 25; *Waterous Engine Works* v. *Okanagan Lumber Co.* (1908), 14 B.C.R. 238; *Semi-Ready* v. *Hawthorne* (1909), 2 A.L.R. 201.

Although the matter was one of great importance to the business community, it was not until the case under consideration reached the Judicial Committee that that Committee had an opportunity of considering the respective powers of the Dominion and the provinces as to the incorporation of companies. The case itself is fortunate in its facts as they were such as to bring the question of provincial licensing of Dominion companies squarely before the Courts for decision. The appellant company, incorporated as it was by the Dominion, had applied to the Registrar of Joint Stock Companies in British Columbia for a license under the Provincial Act, had offered to pay all the required fees, but was refused a license on the ground that the name of the company unduly conflicted with the name

of a company already registered in the province. So that we have the case of a company empowered by the Dominion to transact business throughout Canada under a certain name, and yet prohibited by one of the provinces from transacting its business within that province and from using its Courts unless it changed that name (and paid fees, etc.). Here, then, was undoubted interference of the province with the powers given by the Dominion.

The gist of the Judicial Committee's decision is to be found in the following words: "The province cannot legislate so as to deprive a Dominion company of its status and powers." It is to be carefully noted that all the Acts of the type of the British Columbia Act provide, in effect, that obtaining a license is a condition precedent to the right of the company to carry on business within the province, or to sue in the provincial Courts. Obviously this deprived Dominion companies both of their status and their powers, and the Judicial Committee, accordingly, proceeds to find all such legislation beyond the power of the provinces.

The case is the first one in which the Judicial Committee has given its opinion respecting the power of the Dominion over the incorporation of companies, and it finds in a very clear and logical manner that the Dominion has full power to incorporate companies with objects other than provincial, and with power to trade throughout the Dominion. The second point in the decision is that no province can impose upon such companies any conditions, restrictions, or taxes *as a condition precedent* to trading within the province.

But it is submitted that the judgment does not go so far as to hold that it is beyond the power of the province to impose a tax upon Dominion companies as such. The legislation under consideration was a prohibition to Dominion companies from trading in the province until they complied with the provincial requirements, and the payment of a fee was only one of those requirements. The provinces have express and exclusive power under sec. 92(2) of the B.N.A. Act to make laws in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes," and it is submitted that it is competent to the provinces under this decision to impose a tax for revenue purposes upon Dominion companies. But that tax must be clearly for revenue purposes and not for the purpose of requiring Dominion companies to obtain provincial sanction for the exercise of their corporate powers. This was the view of Mr. Justice Anglin in *Re Companies*, 48 Can. S.C.R. 331 at 460, 15 D.L.R. 332 at 340, 341. And it is submitted that the ordinary methods of recovering payment of the tax such as by suit or distress can be adopted. But payment of the tax must not be a condition upon which the company is allowed to trade within the province.

It is to be noted that the Judicial Committee again expresses disapproval of the consideration of any abstract questions under sections 91 and 92 of the B.N.A. Act. Appreciation is expressed of the careful judgments delivered by the Supreme Court in the *Companies Case*, 48 Can. S.C.R. 331,

15 D.L.R. 332, but the significant remark is made that their Lordships' task was an impossible one. In view of this it is doubtful whether an appeal from the judgment of the Supreme Court will be of any substantial value.

Apart from the importance of the judgment in relation to Dominion corporations the case itself takes a leading position in the long line of cases decided by the Judicial Committee upon the difficult questions arising under the B.N.A. Act. And the decision appears to depart in no particular from the rules laid down by the Committee for the construction and interpretation of the apparently interlocking sub-sections of sections 91 and 92.

G. M. CLARK.

Dominion of Canada.

SUPREME COURT.

N.S.] CITY OF HALIFAX *v.* TOBIN. [Nov. 10, 1914.

Negligence—Municipality—Misfeasance.

The corporation of Halifax in laying a concrete sidewalk on a street broke up a portion of the asphalt sidewalk of a street crossing it and filled the hole made with earth and ashes. The rain washed away the filling and T. was injured by stepping into the hole.

Held, affirming the judgment appealed from (47 N.S. Rep. 498), that the corporation was guilty of misfeasance and a verdict in favour of T. should stand.

Appeal dismissed with costs.

J. H. Bell, K.C., for appellant. *Newcombe*, K.C., and *Kenney*, for respondent.

Man.] [Nov. 30, 1914.

GRAND TRUNK PACIFIC RY. CO. *v.* PICKERING.

Operation of railway—Transfer of cars—Interswitching—Duty of train crew—Negligent coupling—Scope of employment—Employers' liability—Practice—Questions for jury—Judge's charge.

A train crew of defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars in the yard. In order to do so it was necessary to shunt several cars placed in front of the car to be transferred,

and the train crew switched these cars to certain tracks on which there was then standing a train of the other railway company, headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the Judge had charged them, and they returned a general verdict in favour of the plaintiff.

Held, affirming the judgment appealed from (24 Man. R. 544), that in so proceeding to couple the cars they had switched on to the standing train the defendants' train crew were still acting within the scope of their employment, and, as they performed the work in a negligent manner, the defendants were liable in damages for the injuries caused to the plaintiff.

Per ANGLIN, J.:—As counsel for defendants requested certain questions to be put to the jury only after the Judge had charged the jury and having regard to the scope and character of the questions suggested and to the Judge's charge, there was no miscarriage of justice resulting from the Judge's failure to require the jury to answer specific questions.

In charging the jury the Judge made no reference to evidence by which it was attempted to shew that the plaintiff had been guilty of contributory negligence in disregarding an operating rule of the company by which he was employed respecting signals to be used on engines about which workmen were employed; no objection was taken to the charge on this ground, nor was the Judge asked to direct the attention of the jury to the rule.

Held, *per* ANGLIN, J.:—There was no reason why the judgment appealed from should be disturbed on this ground.

Appeal dismissed with costs.

J. B. Coyne, for the appellants. *W. H. Trueman*, for the respondent.

Ont.] [Nov. 30, 1914.

CAMPBELLFORD, ETC., RY. CO. *v.* MASSIE.

Expropriation—Agreement to fix compensation—Arbitration or valuation—Powers of referees—Majority decision.

Where the land was expropriated for railway purposes the railway company and the owner agreed to have the compensation

determined by refereene to three named persons called "valuers" in the submission; their decision was to be binding and conclusive on both parties and not subject to appeal; they could view the property and call such witnesses and take such evidence, on oath or otherwise, as they, or a majority of them, might think proper; and either party could have a representative present at the view or taking of evidence, but his failure to attend for any reason would not affect the validity of the decision.

Held, FITZPATRICK, C.J., and DUFF, J., dissenting, that this agreement did not provide for a judicial arbitration but for a valuation merely by the parties to whom the matter was referred, of the land expropriated.

The agreement provided that a valuator should be appointed by each party and a County Court Judge should be the third; if one of those appointed would or could not act the party who appointed him could name a substitute; if it was the third the parties could agree on a substitute, in which case the decision of any two would be binding and conclusive without appeal; if they could no so agree a High Court Judge could appoint. There was no necessity for substitution.

Held, that the decision of any two of the valuators was valid and binding on the parties.

Appeal dismissed with costs.

W. N. Tilley, for appellants. *H. Cassels*, K.C., for respondent.

Ont.] HALTON BRICK CO. *v.* MCNALLY. [Dec. 29, 1914.

Negligence—Industrial company—Defective system—Knowledge of managing director—Liability of company.

M., an employee of the defendant company, was engaged in wheeling bricks into a kiln where he had to hand or throw them to men engaged in piling. When the pile became high a quantity of the bricks fell on M., who was killed. In an action by his widow against the company, it was proved that the floor of the kiln was very uneven, and that planks used to brace the pile when it was high were not in place when the accident occurred.

Held, that as it was shewn that the managing director of the company was aware of the condition of the floor his knowledge was that of the company; on which ground, and because he had not directed the prop to be maintained which the jury found as negligence, the company was liable.

Appeal dismissed with costs.

DuVernet, K.C., for appellants. *Guthrie*, K.C., and *Dick*, for respondents.

Que.] [Dec. 29, 1914.

CANADIAN NORTHEN RY. CO. *v.* SMITH.

Appeal—Expropriation—Application to appoint arbitrator—Persona designata—Amount in controversy.

A railway company served notice of expropriation of land on the owner, offering $25,000 as compensation, It later served a copy of said notice on S., lessee of said land for a term of ten years. On application to a Superior Court Judge for appointment of arbitrators, S. claimed to be entitled to a separate notice and an independent hearing to determine his compensation. The Judge so held and dismissed the application, and his ruling was affirmed by the Court of King's Bench. The company sought to appeal to the Supreme Court of Canada.

Held, per FITZPATRICK, C.J., and IDINGTON, J., following *Canadian Pacific Ry. Co. v. Little Seminary of Ste. Thérèse*, 16 S.C.R. 606, and *St. Hilaire v. Lambert*, 42 S.C.R. 264, that the Superior Court Judge was *persona designata* to hear such applications as the one made by the company; that the case, therefore, did not originate in a superior Court and the appeal would not lie.

Held, per DAVIES, DUFF, ANGLIN, and BRODEUR, JJ., that there was nothing in the record to shew that the amount in dispute was $2,000 or over, and no attempt had been made to establish by affidavit that it was the appeal failed.

Appeal quashed with costs.

Casgrain, for the motion. *Rinfret*, K.C., contra.

Book Reviews.

Words and Terms Judicially Defined. By HIS HONOUR JUDGE WIDDIFIELD. Toronto: The Carswell Co., Limited. 1914.

A very timely and useful collection. The words and terms are to be found in the judgments of Canadian and Provincial Courts, from which they have been dug out and placed in accessible form. As far as possible the exact language of the judgment has been followed, and enough of the context of facts set out to enable the reader to judge how far the definition may apply to his own case. The book shews great industry and research on the part of the learned Judge, and will be a useful addition to a lawyer's library.

The Formal Bases of Law. By GIORGIO DEL VECCHIO, Professor of Philosophy of Law in the University of Bologna. Translated by JOHN LISLE of the Philadelphia Bar. Boston: The Boston Book Company. 1914.

This is Volume 10 of the Modern Legal Philosophy Series. The editorial preface by Joseph H. Drake of the University of Michigan and an introduction by Sir John Macdonell and Shepard Barclay are valuable aids to the study of an abstruse subject which is in the nature of things theoretical. The writer has a wide reputation as a writer on philosophical subjects; but whilst one might regret that so few have the ambition to study such books, their sale must be limited to the few.

Polarized Law. Three lectures on Conflicts of Law. By T. BATY, D.C.L., LL.D. London: Stevens & Haynes, 13 Bell Yard. 1914.

These lectures were delivered at the University of London. There is also given an English translation of the Hague Convention on private International Law. The author apologizes for what he thinks some may consider a fanciful name. It certainly does not convey much to the ordinary reader. Other descriptive names which he suggests are "Interlocking Laws," "The Harmonization of Law," "The Corelations of Law." These may help to give an idea of what the volume contains. International Law is not of much consequence at present. We trust that it may be again when Germany has been divided among the Allies; a consummation devoutly to be wished for.

Mens rea or Imputability under the Law of England. By DOUGLAS AIKENHEAD STROUD, LL.B. London: Sweet & Maxwell Ltd., 3 Chancery Lane. 1914.

The author states that the book has been written with the double object of presenting a comprehensive view of the main principles of imputability, and of furnishing a practical guide to the statute and case law in which those principles have been applied. The subject is largely one dealing with intention, and has, of course, a most important bearing upon criminality in law.

The statement that the maxim means "no more than that a definition of all, or nearly all crimes contains not only an outward and visible element but a mental element," has been severely criticized by Stephen, J., in *R.* v. *Tolson*, 23 Q.B.D. 185. The subject is really too complicated and extensive to be embraced

in one sentence. Stephen, J., says that the principle amounts to no more than that "the full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime as defined is not committed, or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

This book is one that should be read carefully by every lawyer who, in his practice, has to do with any branch of criminal law. It is, moreover, a treatise interesting even to the general reader.

A Summary of the Law of Companies. By T. EUSTACE SMITH, Barrister-at-law. 12th Edition by the author and CHARLES HUBBARD HICKS. London: Stevens & Haynes, 13 Bell Yard. 1914.

The popularity of this summary is shewn by the appearance of a new edition every few years since 1878. It was at first intended for students, but is now largely used by solicitors and company officials. It forms an epitome of Company Law supplemented with a full index. Something of this sort adapted to our Company Law would be useful in this country.

Obituary.

JOHN ANDERSON ARDAGH, LATE SENIOR JUDGE OF THE COUNTY OF SIMCOE.

The county of Simcoe has, by the death of Judge Ardagh, lost one of its most prominent and respected citizens.

Mr. Ardagh was the son of the Rev. S. B. Ardagh of the city of Waterford, Ireland, and was born there September 18, 1835. His father emigrated to Canada in 1842 to take the incumbency of the parish and settlement of Shanty Bay, Lake Simcoe. About this time the church, in which his father officiated, was built, mainly through the efforts of the late Col. E. G. O'Brien and Captain Walker, whose daughter Judge Ardagh subsequently married.

He was educated at the Barrie Grammar School, and later took honours and his degree of M.A. at the University of Trinity College. He was called to the Bar in 1861. For a time he practised in Morrisburg, subsequently removing to Barrie, where he formed a partnership with his cousin, the late W. D. Ardagh, who was afterwards County Judge at Winnipeg. In 1869 he was appointed Deputy-Judge under Judge Gowan, who up to that

time had carried on, without aid, the arduous work of his large judicial territory, which included the districts as far north as the French River.

In October, 1872, he was appointed Junior Judge, and upon Judge Gowan's resignation in September, 1883, Judge Ardagh was promoted to the position of Senior Judge, and the late William F. A. Boys was appointed Junior Judge.

In October, 1912, Judge Ardagh retired from the Bench, having served his country well and faithfully for over forty years. During his long and active career he was closely identified with the affairs of the County, and no man commanded more genuine respect and admiration than did the late Judge Ardagh. His administrations of justice was satisfactory alike to both practitioners and litigants. He was a sound lawyer and a most conscientious, righteous Judge, and devoted to the duties of his office.

For many years Judge Ardagh was Chairman of the High School Board and Collegiate Institute, and always greatly interested in educational matters. In the early histroy of that district he contributed valuable papers to the local Historical Society. He was past President of the Simcoe County Law Association, and at the time of his death was Patron of the Society.

Judge Ardagh was a man of large heart and of a kindly nature. He contributed freely to philanthropic objects, and was deeply interested in all agencies for the spread of Bible truths, helping largely both foreign and home mission work. He leaves one daughter and two sons, B. Holford Ardagh, barrister, of Toronto, and H. V. Ardagh of Barrie. The funeral was a large and representative one.

Bench and Bar.

ONTARIO BAR ASSOCIATION.

The eighth annual meeting of the Ontario Bar Association was held on the 6th and 7th days of January last. This gathering was one of the most successful and interesting in the history of the Association. Mr. Frank M. Field, K.C., of Cobourg, the retiring president, presided. Sir George Gibbons, K.C., Honorary President, was also in attendance.

The President's address has already appeared in full in these columns, and has doubtless been read with much interest, reviewing, as it does, in a masterly manner, the work of the Association in the past, the present condition of legal matters as they affect the profession, and referring to the subjects which would come before the Association for discussion.

Sir George Gibbons expressed his appreciation of the honour bestowed upon him in succession to the late Mr. James Bicknell, K.C., and welcomed to the meeting various distinguished delegates from the United States: Honourable Frederick A. Henning of Washington, D.C., representing the American Bar Association; Hon. Mr. Justice Herbert P. Bissell of Buffalo, representing the New York State Bar Association; Frank T. Lodge of Detroit, representing the Michigan Bar; Mr. Eugene Lafleur and Mr. E. F. Surveyer, K.C., of Montreal, representing the Bar of Quebec; and Mr. Wm. Short, K.C., of Edmonton, representing the Alberta Bar. The various Judges of the Supreme Court Bench of Ontario, Hon. Mr. Justice Lennox, Hon. Mr. Justice Sutherland, the Hon. Mr. Justice Middleton, and the Hon. Mr. Justice Hodgins, were present on different occasions during the meetings.

At the close of the morning session various members of the Association and others in attendance were entertained at luncheon by the Treasurer and Benchers of the Law Society of Upper Canada.

The afternoon session opened with an excellent address by the Hon. Mr. Justice Lennox on "Bench and Bar," which contained many instructive criticisms and humorous sallies. One of the best papers of the gathering was given by Mr. Eugene Lafleur, K.C., on "International Law and the Present War." This able speaker was frequently applauded by a most attentive and interested audience. Reports of the standing committees were laid on the table, and included the subjects of Law Reform, Legal Ethics, and Legislation.

In the evening the annual banquet was held, Mr. Field presiding. Amongst those present were several of the Supreme Court Judges of Ontario, and some members of the Ontario Government and other distinguished guests. A most pleasant evening was spent, and was enlivened by a number of clever and entertaining speeches from several of the guests. We regret that want of space prevents further reference to them.

The proceedings on the second day commenced with a paper on Bankruptcy Law by Professor D. W. Amram of the University of Pennsylvania, which produced some discussion, and an interesting reminiscence of the student-at-law of the early sixties was given by Mr. J. E. Farewell, K.C., of Whitby.

A resolution was passed appointing a committee to draw up an address expressive of the valuable services of the Corresponding Secretary, Mr. R. J. Maclennan, and a resolution of the Executive Council in regard to an official organ was rescinded and it was decided not to recognize any journal as such.

As has been noted elsewhere, the Association undertook to endeavor to raise a fund of $1,000 from the Bar of Ontario to provide a machine gun for the use of the Osgoode Hall Rifle Association, and the Council was also authorized to raise an equal sum for the relief of the Belgians.

The reports of the standing committees were referred to the Executive Council with the recommendation as to the possibility of calling another meeting of the Association to deal with them.

The meeting closed with the election of the following officers and representatives:—

OFFICERS.

Honorary President: Sir George Gibbons, K.C., London.
President: W. J. McWhinney, K.C., Toronto.
Vice-Presidents: Geo. C. Campbell, Toronto; A. E. H. Creswicke, K.C., Barrie; J. E. Farewell, K.C., Whitby.
Recording Secretary: C. F. Ritchie, Toronto.
Corresponding Secretary: R. J. Maclennan, Toronto.
Treasurer: C. A. Moss, Toronto.
Historian and Archivist: Col. W. N. Ponton, K.C., Belleville.

REPRESENTATIVES.

Past Presidents: A. H. Clarke, K.C., Calgary; Hon. Mr. Justice Hodgins, Toronto; S. F. Lazier, K.C., Hamilton; Charles Elliott, Toronto; W. C. Mikel, K.C., Belleville; M. H. Ludwig, K.C., Toronto; F. M. Field, K.C., Cobourg.

Toronto Members: Frank Denton, K.C.; E. J. Hearn, K.C.; N. B. Gash, K.C.; J. H. Spence; James Bain, K.C.; H. H. Dewart, K.C.; J. A. McAndrew.

Other Members: H. A. Burbidge, Hamilton; R. T. Harding, Stratford; J. J. Drew, K.C., Guelph. Twelve additional representatives to be elected at the first meeting of the Council.

JUDICIAL APPOINTMENTS.

CANADA.

Hon. Sir Francois Xavier Lemieux, one of the Puisne Judges of the Superior Court for the Province of Quebec, to be Chief Justice of such Court vice Sir Charles Peers Davidson, resigned. (February 2, 1915.)

Farquhar Stuart Maclennan, of the City of Montreal, K.C., to be a Puisne Judge of the Superior Court in and for the Province of Quebec. (February 3, 1915.)

John Kelley Dowsley, of the Town of Prescott, in the Province of Ontario, K.C., to be the Judge of the County Court of the United Counties of Leeds and Grenville. (January 29, 1915.)

ENGLAND.

Sir John Eldon Bankes, one of the Justices of the King's Bench Division, has been appointed one of the Lords' Justices of Appeal, taking the place of the late Lord Justice Kennedy. Sir Frederick Low, K.C., has been appointed one of the Justices of the High Court of Justice, replacing Sir John Eldon Bankes in the King's Bench Division.

War Notes.

THE UNITED STATES.

A correspondent in the United States, in speaking of a possible raid upon Canada from German reservists, says: "The situation which we have to deal with is not the usual situation of war. The Germans, owing to their repeated failures in the war, are stung to a mad fury, and care nothing what they do so long as it gratifies their insane passion for vengeance. We are dealing with madmen, and not with ordinary enemies." He also says: "The feeling in the United States is all that could be wished. The leading newspapers from the Atlantic to the Pacific are unanimous in their denunciations of the German Propaganda, and popular feeling is so strong against Germans and German sympathizers that it affects even their trade. The defeat of the Ship Purchase Bill reflects this strong public sentiment, and the Administration clearly understands that, should it favour the Germans, it will run counter to the current of popular feeling."

We are glad to note that the feeling of the people of the United States as a whole continues to be (and this feeling we venture to think will increase) very friendly to England and the Allies. It certainly ought to be, as we are fighting her battles without any assistance. It may be doubted, however, whether the present administration sufficiently represents this feeling. It may be that the President's message to the Emperor of Germany on the occasion of his birthday was a customary courtesy, but it did not sound well at this time to say: "In behalf of the Government and people of the United States, I have the pleasure to extend to your Majesty cordial felicitations on this anniversary of your birth, as well as my own good wishes for your welfare." A more intelligent sense of neutrality would seem to have required at this time the omission of this birthday message; but it must be remembered that Mr. Wilson has an eye to votes in the near future, and thinks this may secure him some.

Military Service.

In his speech in the House of Lords last week, Lord Haldane made quite clear the obligations of the citizen towards military service. By the common law it is the duty of every subject of the realm to assist the Sovereign in repelling the invasion of its shores and in defence of the realm. Again, compulsory service is in no way foreign to our Constitution, and this is conclusively proved by our past history. Few will deny the superiority of voluntary over compulsory service, but the Lord Chancellor left no doubt that the Government, should it become necessary, would fall back on compulsion, although with reluctance.—*Law Times.*

Neutrality.

The beautiful and brilliant daughter of Thomas Sheridan, one of the most gifted of British writers, says "Neutrality is hate." It certainly is not friendship as we have recently learned to know. Mrs. Norton's lines are as follows:—

"Neutrality is Hate: the aid withheld
Flings its large balance in the adverse scale,
And makes the enemy we might have quelled
Strong to attack and possibly prevail;
Yea, clothes him, scoffing, in a suit of mail!
Upright we stand, and trust in God—
And in ourselves."

Lawyers as Soldiers of the King.

The legal profession, through Mr. Gerard B. Strathy, Barrister, has been honoured by his munificent and patriotic gift to the Army Medical Corps (No. 2 Casualty Clearing Station) of a Wolseley Automobile Ambulance fully equipped to be delivered in London. And not only this, but Mr. Strathy goes to the front himself as Quartermaster of the Unit. The gift has been accepted by the authorities and Mr. Strathy thanked by Lt.-Col. Rennie and Major-General Hughes for so useful and practical a gift.

We of the profession may learn some lessons in these days, when we think we are doing so much, from Lord Cockburn's "Memorials of His Own Time." The spirit that embued the legal fraternity in the old land, a hundred and odd years ago, might well be emulated by some of us in this country. Speaking of the Napoleonic wars Lord Cockburn says:—

"After the war broke out again in 1803, Edinburgh, like every other place, became a camp, and continued so till the peace in

1814. We were all soldiers, one way or other. Professors wheeled in the College area; the side arms and the uniform peeped from behind the gown at the bar, and even on the bench; and the parade and the review formed the staple of men's talk and thoughts. Hope, who had kept his Lieutenant-Colonelcy when he was Lord Advocate, adhered to it, and did all its duties after he became Lord Justice Clerk. This was thought unconstitutional by some; but the spirit of the day applauded it. Brougham served the same gun in a company of artillery with Playfair. Others (naming them) were all in one company of riflemen. Francis Horner walked about the streets with a musket, being a private in the Gentlemen Regiment. Dr. Gregory was a soldier, and Thomas Brown the moralist, Jeffrey, and many another since famous in more intellectual warfare. I, a gallant captain, commanded ninety-two of my fellow creatures from 1804 to 1814—the whole course of that war. Eighty private soldiers, two officers, four sergeants, four corporals, and a trumpeter, all trembled (or at least were bound to tremble) when I spoke. Mine was the left flank company of the Western Battalion of Midlothian Volunteers. John A. Murray's company was the right flank one; and we always drilled together. When we first began, being resolved that we townsmen should outshine the rusties, we actually drilled our two companies almost every night during the four winter months of 1804 and 1805, by torch light, in the ground flat of the George Street Assembly Rooms, which was then all one earthen-floored apartment. This was over and above our day proceedings in Heriot's Green and Bruntsfield Links, or with the collected regiment. The parades, the reviews, the four or six yearly inspections at Dalmahoy, the billettings for a fortnight or three weeks when on permanent duty at Leith or Haddington, the mock battles, the marches, the messes—what scenes they were! And similar scenes were familiar in every town and in every shire in the kingdom. The terror of the ballot for the regular militia which made those it hit soldiers during the war, filled the ranks; while duty, necessity, and especially the contagion of the times, supplied officers. The result was that we became a military population. Any able-bodied man, of whatever rank, who was not a volunteer, or a local militiaman, had to explain or apologise for his singularity."

We commend this last sentence to the special attention of any student or any young barrister whom the cap would fit. We would again remind them that Canada is at war with Germany. A German invasion would not be an unmixed evil.