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A DIVORCE COURT IN CANADA.

An Address given before The Ontario Bar Association, by E. F. B. Johnston, K.C.

To deal properly with the question, whether we should have a Divorce Court in Canada or remain under present conditions, requires great consideration, and involves discussion of a very difficult subject. It is, perhaps, needless to state that what I shall say to you on the matter is entirely my own personal view, and does not in any sense pretend to be the opinion of the Bar Association of Ontario.

I have been requested to give an address on the subject from an independent standpoint, and having devoted much thought to the many difficulties in the way of a satisfactory solution of the question, I shall endeavour to place before you in a concise and logical form the reasons which have led me to the conclusions which I propose to present to you.

Involving, as it does, issues of various kinds—moral, religious, national and individual—the subject will be more intelligently dealt with by eliminating some phases which have their origin in the minds of certain classes, but which do not extend to the general public. The exigencies of modern social life and the conditions of a highly artificial and complex system of human relationship have practically changed in later days the relative positions of men and women. What may have once been cogent arguments in favour of a law preventing divorce under any or all circumstances, may not be at all applicable to our present conditions.

We find instances by way of illustration in other branches of the law. Combinations which at one time were altogether contrary to law are now, with certain limitations, quite lawful. Acts which

were at one time harmless, have been made crimes by statute. Many things which a century ago were looked upon as deeds of evil are now treated as ordinary acts in the lives of respectable citizens, and, conversely, the pleasures of the past are in some cases treated as sins in the present generation. It is impossible to fix a uniform, continuing standard for many of our motives and actions. It is equally difficult to determine the exact limits of moral conduct. Even in important questions relating to religion, very learned and pious divines have been known to differ. Let us, therefore, eliminate the religious aspect entirely, and this may be done on sufficient grounds, because granting of divorces is an established practice. Whatever our individual views may be, divorces under a recognized practice, and subject to well-defined principles, are granted, and are legal and effective. We must accept this state of affairs as beyond our control. The only enquiry open to us, therefore, is that relating to the methods of obtaining a divorce, and the grounds upon which it should be given. In order to understand the situation more clearly, I propose to deal briefly with one or two matters which lie at the threshold, and to examine the foundation on which the fabric of marriage rests.

It is generally considered that the marriage ceremony is a contract, but in addition to this, a large proportion of the body politic treat it as sacramental in its character, and hold that the marriage tie should not be interfered with under any circumstances. As I have stated, it is interfered with by virtue of legal authority, and a discussion on any other basis is to a great extent purely academic. We must take conditions as we find them. Indeed, the subject itself which I have been asked to discuss implies the continued existence of a right to obtain a divorce, and thereby to sever the marriage relationship.

Omitting, therefore, the proposition that marriage is more than a mere contract, and confining ourselves to the contention that it is partly in the nature of a contract, voluntarily entered into between a man and a woman and made legal by a compliance with existing law, the question forcibly presents itself to one's mind in this way: Why

should not such a contract be annulled just as any other legal and binding contract may be annulled by a court of law, if the circumstances and conditions be such as to warrant the court in so doing? I am not now dealing with the point as to what such conditions ought to be. I shall have something to say about that later on, but for present purposes I ask, if any other lawful contract can be voided by legal interposition, why not this one? I shall endeavour to give reasons why it should come within the scope of the law regarding contracts generally, but it appears to me that we have first to consider some other elements before answering the question I have just submitted for your consideration.

One element is that marriage is more than a contract. It is a status or condition of civilized social life carrying with it certain limitations and qualifications. When individuals marry, they enter on an entirely different phase of life, and are governed by a new relationship to human environment. The man is no longer a free agent. His actions are governed by new and different principles. He is not at liberty to roam at large. His duties are entirely changed, and his obligations assume a new character. Socially, he is bound to respect his wife and properly maintain her and his family, or he must lose caste with his fellow-citizens, and may become amenable to the law. His status in certain respects with regard to women other than his wife is absolutely reversed. Even his outgoings and incomings are circumscribed, and he finds that the perspective of his life is shifted by reason of the new condition in which he finds himself. So it is also with his wife. She no longer finds her friends as before, perhaps entirely outside the husband's circle. Her marriage has removed her to another plane, and her outlook is towards a new horizon. Many things she cannot any longer do, and many others she may now do, which were outside the sphere of spinsterhood. Both parties have drawn apart from former surroundings and have formed an entirely new relation. But for the moral law, aided by the law of the country in which they live, they might have acquired this status without the marriage law or ceremony at all.

Now, if this condition in which they find themselves becomes intolerable, why should they not be restored to their original position? Does the contract make it any the more imperative that they should be compelled to lead lives of misery, ending in death as the only relief? They may voluntarily separate, why not legally? They changed their status voluntarily, and without any obligation to the law in doing so. The law permits them practically to separate and live apart, as if they were unmarried, except that the restraint of the marriage tie remains, and marriage with another cannot be entered into. In other words, nearly all the practical results of single life, with its so-called freedom and relief from domestic trouble and responsibility, may be obtained by an agreement between the parties. Morally and socially they are divorced, and yet they must continue to be bound to each other by a bond which requires in Canada the united power of the Senate and Commons to sever. Regarding such a state of life, it may be fairly argued that having done all the damage possible to the marriage relationship, having destroyed the peace and union of a family, and having opened the door for scandal and endangered the reputation of both parties by making a separation valid and enforceable, the law might go a step further, and as a surgeon with his knife cuts away the diseased tissue to save the limb, so might the courts be empowered to operate on the moral and domestic relationship of husband and wife, and thereby save whatever of honour, virtue or respect might be found in the wreck of two lives.

But it will be said that the sanctity of the marriage tie must be protected. That this is right and necessary must be freely admitted. But what do you say about a case where the husband or wife, or both, have themselves degraded the marriage obligations, defiled the sanctity of the marriage relation, and rendered life unbearable and disreputable. Take the usual evidence in alimony actions, to say nothing of the graver facts in divorce cases. Open and notorious misconduct of the gravest character; cruelty, contempt and antagonism down to the minutest trifles of life; absolute want of sentiment; constant quarrelling with each

other without any regard or consideration; actuated by the coarsest and most vicious feelings, and every day of life treating one or the other of them as entitled to less kindness or sympathy than a person would shew towards his dog or horse; given this not uncommon state of affairs, and then consider that such relationship may and likely will continue through many years until a tribunal beyond the courts of law cuts the tie and gives relief to one of the parties, and perhaps to both. I do not exaggerate the circumstances to which I have referred. Judges and lawyers know the unfortunate condition in which married life sometimes finds itself. The average citizen knows but little of these matters. What comes to him is only the scandal. The suffering and inner life are not revealed until laid bare in the witness box. And knowing what we do, does it not appear to us as mere words when we hear people argue strenuously that he sanctity of the marriage tie must be maintained at all costs, notwithstanding the fact that the parties bound together by it have so degraded it as to make it the symbol of physical bondage instead of the badge of purity and the emblem of happiness?

A strong argument in favour of divorce is, in my judgment, the danger resulting from legal or other separations without dissolution. The parties to such arrangements are practically neither married nor single. The man who leaves his wife under any circumstances goes back to the world under a cloud, justly or unjustly, according to the facts. His future conduct in time becomes a matter of no great consequence. In many instances, he leaves his country, goes elsewhere, gets an irregular divorce and marries again. So with the wife, who, neglected and forsaken, meets with so little sympathy or assistance even from her own sex, that she too degenerates owing to the want of a sustaining moral force. She may fall into straitened circumstances, temptation may become too strong, and the result is what might naturally be expected. One family legitimate, but deserted and handicapped through no fault of theirs, and two human derelicts, living irregular lives, and perhaps responsible for children who have neither name nor heritage is the story told

in most cases of the husband and wife who ought to be absolutely and judicially separated, but who are compelled to drag along in chains which a professedly moral world says are not to be interfered with. The rich man knows nothing of the pangs of hunger and poverty. The good man knows little of the depth of degradation into which many of his fellow-men have fallen. The husband and father, whose life is one of peace and domestic happiness, cannot understand the terrible ordeal a frail, delicate and sensitive woman may have to undergo at the hands of a brutal husband, or what a husband suffers through the neglect and infidelities of a reckless wife. The evil results of such conditions are felt most keenly by those who have no means of indulging in pleasure of any kind. Engaged all day in labour or business drudgery, the return each evening to what is misnamed home is accompanied by or is met with a repetition of violence, abuse and suspicions which have destroyed the sympathy and kindness of the earlier years of married life, if such feelings ever existed. Escape by legal means from this daily and hourly life of misery is practically impossible to people without money. Drink is indulged in as an antidote to the domestic poison, but this only aggravates the disease and often ends in crime. The rough outline of such lives is all that the world knows or sees. The sins of the erring wife, or the brutality of the husband are never fully known to the public. A Divorce Court alone can shew something of the facts following an unfortunate marriage, but the whole truth of domestic unhappiness cannot in any case be fully expressed.

I say, therefore, that there are many cases in which relief of a permanent character should be given. If this proposition is granted, it then becomes only a matter of prudence and wisdom, as to how far and on what grounds, relief may be open to those whose claims come within the general class of cases deserving remedial action. It is however argued that it is better that such things should be than that the door should be opened to divorce proceedings, and it is also contended that by opening the door, the general tone of morality and the standard of married life

will be lowered. The result in the United States is pointed to as evidence of this, and it is said that in that country marriage has lost its significance, and the ideals of home life have been shattered.

In this connection, I would like to deal with the statements so frequently made regarding the divorce laws and methods of the United States. One of the most common arguments used by those opposed to a Canadian Divorce Court is the one I have just mentioned,—namely, that marriage is not only a failure in the United States, but is practically disregarded by a large proportion of the people, and that this condition has been brought about by loose divorce laws and procedure.

Is this allegation correct? If so, it is entitled to great weight. What do the facts and statistics shew? We can arrive at no reasonable conclusion as to the proportion of divorces to marriages. It is assumed by some writers to be as one to fifteen. As to this, it is clear on examining the facts that no such proportion exists, having regard to the method of calculation adopted by such writers. In the first place, there is no record of marriages kept in at least one-half of the States, and no means of finding out the correct figures. There are hundreds of thousands of immigrants to that country every year, mostly married, of whose marriages there is no record, except in Europe, or some other continent. Under what is known as Census Reports all judicial separations, conditional decrees, and all cases in which the marriage is declared a nullity from the beginning are included under the heading "Divorce." And I venture to say from facts which have come before me in the course of my practice, that the number of Canadians who acquire irregular and fraudulent divorce in the United States is ten times greater than the total number of divorces granted in Canada. We should consider the important fact that the comparison is not sound, because in many of the States, divorces may be granted on very trivial grounds, which are not contemplated or advocated in this country. Even with this fact to aid us, it is a singular circumstance that in some States where the causes are

both slight and numerous, the increase of divorces is not marked, and that in New York State, where adultery is the only cause, the increase is greater and steadily growing. The causes vary in the States from adultery to "causes deemed sufficient by the court" as in Washington State, and we find the same want of uniformity in practice as we do in Canada. That is accounted for, to some extent, by the fact that each State deals independently with the subject.

But I think there is a broader ground than mere statistics on which the question can be put. We have not as yet the dense commercial centres we find south of our boundary. There is not that restless and changing spirit which actuates so many American citizens. The substitution of business rush for home ideals, the desire to make money quickly, the mode of living in hotels and rooms, the growing tendency towards travel and variety, impatience of restraint, and perhaps more than we are aware of, the absolute, individual independence of the man and woman, and the freedom of both married and unmarried life, —all these must be important factors in considering the present state of divorce laws and their effect in the United States. Except in the case of very large cities, and looking at the country as a whole, there is no ground for saying that the general morality of the American citizen, farmer, artisan or business man is lower than it is in any other country. We have only to look at such places as Italy or Spain where no divorces are permitted, and where morality is at any rate no higher than it is in America, to realize that divorces are not the cause of the low moral tone of any country.

The want of uniformity in Canadian divorce law is one of the strangest features in an otherwise reasonable Constitution. In British Columbia there is a Divorce Court based somewhat on the principles of the English law, under the Act of 1857. Courts for granting absolute divorces were established in New Brunswick, Nova Scotia and Prince Edward Island before Confederation, and these were continued by sec. 129 of the B.N.A. Act, 1867. Ontario, Quebec and the remaining provinces of the Dom-

inion are without Courts of Divorce, and the application for relief must be made to Parliament, both bodies having to pronounce the dissolution of the marriage obligation, which is done by a hearing of witnesses before a Senate Committee and if a proper case is made out, this is followed by a private Act of the House of Commons. It is certainly one of the most remarkable anomalies in the history of Constitutions. The exclusive right to legislate on marriage and divorce is given by the British North America Act, 1867, to the Parliament of Canada, and yet notwithstanding the British North America Act, there is no uniformity of the law, and the right is, as I have stated, exercised under a saving clause by several of the Provinces to the exclusion of Dominion authority. Quebec, then Lower Canada, a Province opposed to divorce laws, was the cause of this anomalous condition of things, although, I have no doubt, Upper Canada was, as a whole, disinclined at that time to deal with the question of establishing Courts of Divorce in this country. Owing to the state of the law now in force here, a grave injustice is experienced. There is in respect of divorce, one law for the rich and another for the poor. This may be said to be inaccurate. It is so theoretically, but in practice, it is undoubtedly true. In ordinary litigation, care has been taken to bring the place of trial of both civil and criminal cases to the doors of the litigants. Judges travel from one end of each province to the other twice a year and more often in some localities, in order that the poor man may have justice on the same terms as his richer neighbour enjoys. A ten-dollar Division Court case takes a County Judge thirty miles from the county town, in order that a trumpery dispute may be settled according to law. Actions within the jurisdiction of the County Court, and larger issues requiring the aid of High Court Judges, are disposed of at the county towns in almost every county in the Dominion. Magistrates are provided in every school section to dispose of troubles of a petty character. And yet with all this expense and care in matters largely of a monetary and temporary nature, the unfortunate woman who is grossly wronged, and is being slowly yet surely

battered to death, or the equally unfortunate man who is bound to an adulterous wife has to travel perhaps thousands of miles to get relief, and can get it only by a slow, tedious, and expensive process.

This state of affairs is a blot on the administration of justice in a civilized country. If the party is poor, justice cannot be had. Only the rich can avail themselves of our present system of granting divorces. And let me remark in this connection that the remedy is practically denied by force of circumstances to those upon whom the burden lies most heavily, and in respect of whom the most dangerous and immoral results are most likely to follow. Money, under the circumstances which give rise to divorce, affords relief in the way of travel, change of residence and other means of escape, but poverty drives both the man and woman to desperate deeds, and to a still more desperate condition of immorality and degradation.

Having thus briefly touched on some of the conditions with which we have to deal in this discussion, I wish to call your attention for a few moments to the subject of divorce in its legal aspect, and the remedies which in my opinion ought to be provided to meet present conditions. It may be useful to see what has been done in the past history of England towards a solution of the problem which confronts, and has for centuries, confronted thinking men and women. I do not hope to say anything original in this connection, but if I can direct your minds to some new line of thought, or create a new phase of reflection and analysis, I shall be fully satisfied that my work has not been in vain.

First, let me take up the record. It has always been admitted that the wrongs suffered by the innocent partner in matrimony are entitled to some remedy. The Ecclesiastical Courts had the earliest jurisdiction. In the very early days in England, these courts took upon themselves, or acquired the power to grant a divorce, *a mensa et thoro*. Although marriage was looked upon as indissoluble, there grew up various schemes for declaring the marriage a nullity *ab initio*, on the ground that an im-

pediment of relationship existed. This is described by a well-known writer as a "relationship which might consist in some remote or fanciful connection between the parties or their god-parents." Later on, and particularly after the Reformation, resort was had to Parliament for private Acts authorizing divorce and permitting re-marriage, owing to the fact that there were no courts having jurisdiction to decree a divorce *a vinculo*. This remedy was adopted by no less a person than Royalty, in the case of Henry VIII. The first Private Divorce Act related to the Marquess of Northampton, whose re-marriage after a decree of separation by the Ecclesiastical Court was declared to be valid by a Commission under the Archbishop of Canterbury. This was further confirmed by statute, and, indeed, it was accepted law that a statute was necessary. Acts of Parliament became more frequent in the 17th and 18th centuries until 1798, when Lord Chancellor Loughborough succeeded in getting certain remedial orders passed by the House of Lords. Applications for absolute divorce had, under this new practice, to be founded on Ecclesiastical decrees and verdicts at law in crim. con. actions, or good grounds shewn why such verdicts could not be obtained. The ground was adultery. A Royal Commission sat and reported. It was felt that a gross injustice was being done to the great body of the people who could not afford the cost of these expensive proceedings. As a result, the Act of 1857, known as the Matrimonial Causes Act was passed. During the discussion on the bill, the Attorney-General stated that the object was to create a new tribunal which may hereafter have to administer other laws made under happier auspices. The new court was composed of several judges, but subsequently power was given to a single judge. The sittings were to be held in London, Middlesex or elsewhere, but the latter provision was never carried into effect. The Act was amended at various times, and now the position of matters is that a husband may obtain a complete divorce on the ground that his wife has been guilty of adultery since marriage, but a woman can only get relief by shewing that the husband has been guilty of adultery coupled with such

cruelty as without adultery would have entitled her to a divorce *a mensa et thoro,* or adultery coupled with desertion, without reasonable excuse, for two years or upwards. There are four additional crimes named in the Act, each being of a grosser type of the same class, any one of which entitles the wife to an absolute divorce. But although the English Parliament has provided a certain degree of relief, it has been found that only people of means can avail themselves of the remedy, and the poor are still in the same hopeless condition as they were before the Act of 1857 was passed. As a result of public agitation, a Royal Commission was appointed in November, 1909, composed of very eminent men, who have made a thorough enquiry into the whole matter, and who have just lately presented their report, a copy of which I have read with the greatest care. The remedies and provisions suggested are of a very drastic and perhaps far-reaching character. I do not think all of them would be favourably received in this country, so I shall not deal with them in detail. Apart from various grounds on which a separation is recommended, the Commissioners find that in their opinion the law should be amended so as to permit of divorces being obtained on the following grounds: (1) Adultery; (2) Desertion for three years and upwards; (3) Cruelty; (4) Incurable insanity after five years' confinement; (5) Habitual drunkenness found incurable after three years from first order of separation; (6) Imprisonment under commuted death sentence. A number of grounds of a less serious character are named as being sufficient to support a judicial separation. A minority report was made, which I understand has received approval from a very high quarter in England. The minority report is that of the Archbishop of York, Sir William P. Anson, and Sir Lewis T. Dibdin, which differing on several grounds from the majority, agrees with some of the radical changes recommended by a large body of the Commissioners.

Looking at the character of these various grounds suggested for divorce, I am unable to see that any one is much less serious than the others. Adultery on the part of a married woman has

always been treated as a sin of the gravest character, but the conditions of social life have caused it to be considered less seriously on the part of the man. I am not concerned with the illogical result of such a situation. That it is so is sufficient for my contention. Continued desertion is as much a breach of the marriage obligation as adultery. Persistent cruelty may, and often is, the cause of greater suffering to the wife than anything else can be, and nothing can so degrade the relationship of man and wife as habitual drunkenness. Incurable insanity renders the afflicted incapable of performing the obligations of married life, and along with drunkenness generally visits the sins of the parents on the children of succeeding generations. Imprisonment for life under a commuted sentence is in fact a divorce to all intents and purposes from the marriage point of view. Wherein can we make a logical difference in the result? The man guilty of any of these crimes or subject to any of these conditions is not the man who entered into the state of matrimony. He is a different individual in relation to his wife, and no longer remains the same person as regards the original status which he and the woman created. A trustee is removed if he becomes insane, and the tie of guardianship is severed if the guardian is guilty of cruelty to his ward. A grossly immoral life is ground for annulling the tie which binds the clergyman to his church. Desertion compels the husband to pay alimony to an innocent wife, and sufficient cruelty warrants her in living wholly apart from the man to whom the law has bound her by every legal means in its power. Why should the law grant only a partial remedy in cases of this kind? Why not grant complete relief when grave wrongs are admitted to exist, and great danger likely to result from the continuance of a condition condemned by the law and only feebly remedied? Social and sentimental reasons do not affect the question. Divorce is not the cause of the looseness of married life. Rather it is the logical outcome of wicked and sinful men and women, whose immoral lives are the result of a licentious and unholy system of living and a condition springing from the corrupt and degenerate ten-

dencies of humanity. Society has much to answer for in this connection, especially when we find, as we do, that apparently a large and influential class, instead of dealing out justice to the sinner, winks at his lapses, and welcomes him as a family guest. The remedy does not lie in preventing divorce. The true remedy consists in an exaltation of life.

For my own part, I am induced for the reasons therein given to follow the report of the majority in its main features, and I cannot see that the enlargement of the causes for divorces along the lines indicated would produce the evils which some people think would result from the changes proposed, if carried into effect. The state of the divorce laws in the United States is not relevant. The conditions are entirely different, and the easy methods of getting a divorce in many of the States are not contemplated here. We look only for sound, conservative and substantial grounds on which a divorce may be granted, and not for the creation of a court too readily available to the man or woman who is tired of married life, or whose respective tempers may not harmonize, nor should we advocate remedies so difficult and costly as to make the court a millionaire's tribunal.

This brings me to the question of the constitution of the court itself. It is manifest that on the trial of issues of pure fact, judges who are experienced in weighing evidence are best qualified to deal with matrimonial causes. Many of the members of the Divorce Committee of the Canadian Senate are laymen. They are engaged in business or callings which are quite foreign to the conception and consideration of the probative force of evidence. A few hours of each session, and an experience only extending over the time they have been members of the Senate, represent the training available to them, and it cannot be expected that they could analyze, weigh and estimate the value of the statements made by witnesses as a judge can do in the light of varied and daily experience, and with that knowledge and penetration, which are the product of half a lifetime at the Bar, and later, on the Bench. It is true there are lawyers on the Committee, but there is not, and cannot be the same searching

enquiry, the same judicial quality which we expect, and get from the trained and experienced jurist.

I have, therefore, come to the conclusion that we should have a purely judicial tribunal for divorce cases, composed of at least three judges, in order to lessen the danger of unconscious reasoning of a dogmatic tendency. They should be of the province in which the parties to the marriage reside, and on any legal question there should be the right of appeal to the Supreme Court of Canada. Each province should be divided into districts, and the court should sit as often as expedient for the hearing of causes. They should also have power to deal with separation on well-defined grounds as set out in the report to which I have referred. If this method were adopted, the court would be available to the labourer as well as to the millionaire, and there would be practically a certainty of justice being done without any danger of the heavens falling. The procedure should be of the simplest and least expensive character, and power ought to be given to the court to assess in favour of an innocent wife, reasonable damages against her husband. The rules of evidence should be stringently applied, and the strictest proof of the merits should be demanded when the case is being tried, whilst the cost and means of getting to trial should be moderate and within the reach of worthy suppliants seeking only justice.

What other suggestion may be made? There is one of importance, and I think of great value, although I hesitate to advance it at present, because it might tend to weaken my main contentions in the minds of some of those who, on the whole, may agree with me. It is this,—In every case where the husband is found guilty of the offences, or any of them, which warrant an absolute decree against him, and a dissolution of the marriage, a punishment ought to be imposed. Let us compare other conditions of the law with the misdeeds which ought to warrant a divorce. A violation of a snow by-law carries with it a fine. A trifling matter from a moral standpoint may be ground for imprisonment. The stealing of a loaf of bread for a starving family sends a man to gaol. Yielding to temptation and taking

some trifling article from a bargain counter is penalized by perhaps a month in a cell. But the gravest of crimes against Divine laws, and a vicious defiance of the well-recognized principles of morality, are allowed to go unpunished and treated as a matter only of scandal and idle gossip. There should be some deterrent, some dread of the future consequences ever present to the mind of a man who has taken a young girl from her home under a promise to protect and provide for her as a wife, and who, in violation of this, has used her as an unresisting object on which he could vent his anger and exercise his cruelty. If proved, why should not the tribunal have the right to punish? A witness who clearly commits perjury in the box is dealt with at once, and a judge orders that he be forthwith arrested and prosecuted for the crime. Half a dozen serious crimes may be proved on divorce proceedings, but the man goes free, and a judgment is given, a Committees' report is made, or a private Act passed, granting him that result which, but for his own misconduct, he would perhaps have cheerfully applied for on his own account.

I do not think there is anything more I could say to advantage. I believe as much as any one does in the sanctity which ought to exist in connection with the marriage relation, and the care we ought to exercise in dealing with the question I have discussed, but in a matter of this kind, if that sanctity has been desecrated by either husband or wife, or by both, it no longer exists, and the marriage relationship is a hollow mockery and a thing defiled. And when it is found by proper judicial enquiry that one of two lives is blasted and that death itself would be a relief, it surely cannot be argued that a tribunal which pronounces bare justice, is acting contrary to the laws of God or the higher principles of modern civilization.

THE GREAT PROBLEM.

An event of such importance as that disclosed in the debate on the Naval Bill on the fifth of last month can hardly be passed over in silence even by a journal which keeps aloof from all questions of a political nature. That the time has come when this country should take some share in the general defence of the Empire is admitted by all; the only matter of controversy being the form in which such action should be taken. With this we are not concerned. It is to the great constitutional principle, now for the first time assuming practical shape, that the acceptance of responsibility for Imperial Defence must carry with it the right to share in the direction of Imperial Foreign Policy, that we would call attention.

The course of events has brought to the minds of the peoples of the self-governing colonies, as well as of the parent State, that the difficult problem of combining the principle of autonomy on the one side with the duty owing to the Empire on the other, must be solved, or the Empire can no longer exist. The mistress in her own house must shew herself ready to play the part of a daughter in her mother's. Happily the principle is accepted on all sides. The leaders of both political parties in the Imperial Parliament admit that if the Dominions take part in the work they must be allowed to have some say as to the planning of it. The leaders of both parties in this country claim that if they undertake to share Imperial responsibility they have a right to take part in Imperial Councils. With all parties thus agreed in laying the foundation stones there may be difficulties, but there should be no impossibility in rearing upon them the Imperial edifice which all hope to see complete, and fully realizing the ideas which it embodies.

There need be no apprehension as to the result. The British people, while tenacious of their rights, are the last to engage in aggressive warfare. For centuries they have not done so, and with the enormous interests at stake they are not likely to do so now. Sacrifices may be required but they should be cheerfully

accepted. Nothing was ever gained without sacrifice. Lastly, may we not believe that Providence has ordained the British Empire for some nobler task than the acquisition of territory, and the accumulation of wealth, and that this binding together of its component parts is a further step in some grand design in which all will be called to play a part worthy of the British name and nation.

The Naval Bill which has brought these matters under our consideration is as follows:—

2. From and out of the Consolidated Revenue Fund of Canada there may be paid and applied a sum not exceeding thirty-five million dollars for the purpose of immediately increasing the effective naval forces of the Empire.

3. The said sum shall be used and applied under the direction of the Governor in Council in the construction and equipment of battleships or armoured cruisers of the most modern and powerful type.

4. The said ships, when constructed and equipped, shall be placed by the Governor in Council at the disposal of His Majesty for the common defence of the Empire.

5. The said sum shall be paid, used and applied and the said ships shall be constructed and placed at the disposal of His Majesty subject to such terms, conditions and arrangements as may be agreed upon between the Governor in Council and His Majesty's Government.

Whether this is the best form for the aid to take is a question for the Dominion Parliament to decide. There is a difference of opinion as to this, but all agree that something adequate should be done in the premises.

W. E. O'Brien.

ALLOWANCES TO TRUSTEES AND EXECUTORS IN ONTARIO.

At one time the rule was that trustees, executors and others standing in similar position could not charge anything for their services. This was upon the principle of equity, that a trustee could not profit by his trust. Otherwise, it was said, the trust estate might be loaded and rendered of little value and the trustee put in a position where his interest and his duty would conflict.

This rule was first relaxed in favour of persons acting under a will or letters of administration by 22 Vict. c. 93, s. 47 (C.S.U.C. c. 16, s. 66), as follows: "The judge of any Surrogate Court may allow to the executor or trustee or administrator acting under will or letters of administration a fair and reasonable allowance for his care, pains and trouble and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of and settling the same, and generally in arranging and settling the affairs of the estate, and therefore, may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts."

Then followed 37 Vict. c. 9, which was in effect: "Any trustee under a deed, settlement or will, and executors and administrators, and any guardian appointed by any court, and a testamentary guardian, or any other trustee, howsoever the trust is created . . . shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate, as may be allowed by the Court of Chancery, or any judge or master thereof, to whom the matter may be referred." Thus, was virtually abrogating in Ontario the above equity rule.

The two enactments were consolidated in R.S.O. (1877), c. 107, as ss. 36 to 41 and continued, in pari materia, in R.S.O.

(1887), c. 110 as ss. 38 to 42, and in R.S.O. (1897), c. 129 (The Trustee Act) as ss. 40 to 44, of which 40 and 43 were as follows:—

"40. Any trustee under a deed, settlement or will, any executor or administrator, any guardian appointed by any court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate, as may be allowed by the High Court or judge, or by any master or referee thereof, to whom the matter may be referred.

"43. The judge of any Surrogate Court may allow to the executor or trustee or administrator acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee or administrator in passing his accounts."

The original of the enactment which enables executors and others to pass their accounts in the Surrogate Court was 59 Vict. c. 20, s. 5, incorporated into the revision of 1897 as s. 72 of c. 59, thereof (The Surrogate Courts Act), which, as subsequently amended by 2 Edw. VII. c. 12, s. 11 and 5 Edw. VII. c. 14, s. 1, is now s. 71 of 10 Edw. VII. c. 31 (The Surrogate Courts Act), since amended by 1 Geo. V., c. 17, s. 71, and is, in part, as follows:—

"71—(1) Where an executor, administrator, trustee under a will of which he is an executor or a guardian, has filed in the proper Surrogate Court an account of his dealings with the estate and the judge has approved thereof in whole or in part, if he is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn,

shall be binding upon any person who was notified of the proceedings taken before the surrogate judge, or who was present or represented thereat, and upon everyone claiming under any such person. (2) A guardian appointed by the Surrogate Court may pass the accounts of his dealings with the estate before the judge of the court by which letters of guardianship were issued."

The jurisdiction of Surrogate Court judges to make allowances to trustees, executors, etc. for their services was greatly extended by s. 18 of 63 Viet. c. 17, subs. (1) thereof adding to the Trustee Act of 1897 a new section, 28*a*, which, as amended by 3 Edw. VII. c. 7, s. 26, read: "A trustee appointed by any deed, will or other instrument in writing, or by an order of any court desiring to pass the account of his dealings with the estate to which he is a trustee may file his accounts in the office of the Surrogate Court . . . and thereupon the proceedings and practice upon the passing of the said accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the Surrogate Court . . ., and subs. (2) thereof amending the above s. 40 of the Trustee Act (1897), by inserting after the word "judge" therein, the words "or Surrogate Court judge"—thus extending to Surrogate judges, in the cases of all the trustees named in subs. (1) who chose to file and pass their accounts in the Surrogate Court, the same jurisdiction to make such allowances as the High Court or any judge thereof possessed.

The whole statutory law on the subject is now comprised in s. 66 of the Trustee Act of 1911 (1 Geo. V. c. 26), as follows:

"66—(1) A trustee shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate, as may be allowed by a judge of the High Court, or by any master or referee, to whom the matter may be referred. (2) The amount of such compensation may be settled although the estate is not before the court in an action. (3) The judge of a Surrogate Court in passing the accounts of a trustee under a will or of a personal representative

or guardian, may from time to time allow to him a fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate. (4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be deemed fair and reasonable in respect of such services. (5) Nothing in this section shall apply where the allowance is fixed by the instrument creating the trust."

This last Act, as will be found, revokes the extended jurisdiction which had been conferred by 63 Vict. c. 17, s. 18, and 3 Edw. VII. c. 7, s. 26, upon Surrogate Court judges and restricts their jurisdiction again, as before these latter enactments, to the cases of "a trustee under a will, or of a personal representative or guardian" when passing his accounts under sec. 71 of "the Surrogate Courts Act."

The allowance to be made in all cases is, what is fair and reasonable for the trustee's care, pains and trouble, and his time expended in or about, the estate.

Quoting the words of Chancellor Boyd in *Re Fleming* (1886) 11 P.R. 426: "The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits, according to the sound discretion of the judge, who is to regard the care, pains, trouble, and time bestowed and expended by the claimant. Nor have the courts laid down any inflexible rule in this regard. While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute . . . Five per cent. may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility such a rate may be excessive."

The last case upon the subject is *Re Griffin* (1912), 3 O.W.N. 1049, where a Divisional Court, composed of Mulock, C.J.Ex.D.

and Clute and Sutherland, JJ. reversed the decision of Middleton, J., 3 O.W.N. 759, who had reduced to $815.73 the amount of $3,000 which the Surrogate judge of the county of Lambton had allowed as compensation to executors. In delivering the judgment of the court, the Chief Justice says, at p. 1050, "There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees. They are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case: *Robinson* v. *Pitt*, 2 W. & T.L.C. Eq. 214. Various authorities upon the subject are collected in Weir's Law of Probate, p. 389 et seq. An examination of the cases there cited shews the following allowances to executors according to circumstances. In some instances they have been given a commission on moneys passing through their hands, varying from one to five per cent.; in others a bulk sum; in others a commission and a bulk sum; in others an annual allowance in addition to or exclusive of commission."

Mr. Weir's book, commencing at p. 486, furnishes a compendium of cases down to time of its publication. Other cases and the later ones are:—

Williams v. *Foy* (1885), 9 O.R. 534. By his will the testator authorised his two executors "to retain for their own use and benefit the sum of $200 each in lieu of all charges for their services in performing the duties hereby imposed on them as the executors of this my will." Chancellor Boyd, distinguishing, if not over-ruling, *Denison* v. *Denison* (1870), 17 Grant 306, held that having accepted probate of the will, the executors could not afterwards be granted additional compensation to that so provided by the testator. The Chancellor points out in his judgment the different courses which may be taken where executors are dissatisfied with the provision in their favour made by the testator.

Re Farmers Loan and Savings Co. (1904), 3 O.W.R. 837 was an application to Falconbridge, C.J.K.B.D., by the liquidators of this company for remuneration in winding same up.

The Chief Justice stated, as clear, the rule that a trustee, or person in the position of a truste, was entitled by way of compperson in the position of a trustee, was entitled by way of remuneration for his services to a commission upon the corp as of the estate coming into his hands and finally distributed by him, but payable only when distribution actually takes place, from time to time, and he may be entitled, in addition, to a reasonable annual allowance for care and management of the estate, or, instead, he may be allowed a lump sum, to include and cover both commission and annual allowance, or either of them; also that the usual rate of commission, when allowed, is 5 per cent.

Re Toronto General Trusts & Cent. Ont. Ry. Co. (1905), 6 O.W.R. 350. The trustees having resigned, an order was made releasing them, dispensing with passing their accounts and referring it to Mr. Cartwright, official referee to determine "what compensation, if any, (they) are entitled to for their care and pains, trouble and time expended in and about the execution of the said trusts." Except as repository of a mortgage and trust title, the trustees had not been in possession of the trust estate, had not collected or disposed of any money, had not been requ. d to assume any supervision or control of the trust property and had not taken any steps to protect or preserve the trust property, save in prosecuting two actions and defending another brought against themselves, which litigation had been in charge of their own solicitors whose costs the railway company had paid or provided for. Mr. Cartwright allowed them as compensation the sum of $14,000. On appeal to Mr. Justice Teetzel, he reduced the amount to $1,500, and, in the course of his judgment, enunciated these as the circumstances which, in his opinion, ought to be taken into consideration in all cases in fixing the amount of compensation:—

(1) The magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; and (5) the success which has attended its administration.

Re Prittie Trusts (1908), 12 O.W.R. 264. In this case, Mr. Justice Britton adopted and approved of, as the rules which

should govern, the five cardinal considerations propounded by Mr. Justice Teetzel in last case. He added: "The compensation, where work has extended over years, should not be confined to an allowance by way of percentage, but it is proper to make an annual allowance. The amount depends upon the nature of the property, the degree of care, the extent of responsibility, etc."

Saskatchewan L. & W. Co. v. *Leadley* (1909), 14 O.W.R. 426, is a judgment of Mr. Hodgins, late Master in Ordinary, wherein he cites and acts upon what the late Mr. Justice Street said in *Re Williams* (1902), 4 O.L.R. 501: "I think we are warranted under the decision in *Re Berkley's Trusts* (1879), 8 P.R. 193, and the authorities there referred to, in holding that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make to them an annual allowance for their services in looking after the corpus of the fund, receiving repayments upon principal and re-investing it." And the learned master in ordinary added: "The general rate of compensation to executors and trustees in Ontario is five per cent. on the annual receipts, but may be less."

Re Patrick Hughes (1909), 14 O.W.R. 630 is a judgment of Denton, Co.J., under the extended jurisdiction which had been conferred upon Surrogate Court judges by 63 Vict. c. 17, s. 18, and 3 Edw. VII. c. 7, s. 26, but which, as already stated, has been revoked by the Trustee Act of 1911. He referred to the judgment of Mr. Justice Street in *Re McIntyre* v. *London and Western Trusts Co.* (1904), 7 O.L.R. 548, where the latter, after stating generally the law that trustees are not entitled to an allowance for merely taking over an estate, but only for taking over and distributing, proceeds: "I think they should be allowed 2½% upon such portions of the corpus of the estate as they have taken over and distributed, and that as the remainder of the corpus which they have taken over is distributed, they should be allowed a like allowance of 2½% upon the portions

distributed from time to time . . . I think this allowance should not be treated as earned, until the sums received are also distributed."

After stating the facts of the case, that the widow was entitled during her lifetime to $1,000 annually from the income of the estate and that consequently there could be no distribution of the corpus till her death, the learned County judge said: "When that event happens, the present trustee, if then trustee of the estate, will, or ought to be, allowed on passing of its accounts a commission on the amount so realised. The reason for withholding the commission in such a case is that the duties of the trustee are not as yet wholly performed. They are only half performed. The commission is earned as soon as the other half (the more important half to the beneficiaries) is distributed among the persons entitled."

Re Griffin (1912), 3 O.W.N. 1049 has been already noted ubi supra.

Subject to the above five cardinal considerations formulated by Mr. Justice Teetzell and approved and adopted by Mr. Justice Britton, the following propositions seem to be established by the cases:—

1. The remuneration or compensation usually allowed to trustees, executors, etc., for their services is a percentage commission, varying from one to five per cent. upon the amount of the estate passing through their hands.

2. But as remuneration is not to be considered as earned until the assets of an estate have been both got in and distributed, commission should be allowed, or at any rate paid, only upon the amount from time to time actually disbursed or distributed, or presently to be distributed.

3. Prima facie the rate of such commission should be 5%, "but where the estate is large and the services rendered are of short duration and involving no very serious responsibility such a rate may be excessive." The rate should then be either one, less than 5%, or be upon a sliding scale similar to that in the cases of commission in lieu of taxed costs in administration

and in partition matters under Con. Rule 1146, or of sheriff's poundage under tariff C. to Con. Rule 1189.

4. But, instead of commission, a lump sum may be allowed as the remuneration. A lump sum may also be allowed in addition to commission for services which appear to be outside those covered by the commission. And, where the services extend over a period of years, an annual sum for the general care and management of the estate should be allowed, in addition to the commission.

5. For the investment and re-investment of the funds of an estate, the proper mode of remuneration is not by commission, but by the allowance of a stated sum or sums, annually or otherwise, confining the allowance of commission to the receipts and expenditure of income.

6. Where an agent has been employed and paid for such work as is usually entrusted to an agent, such as collecting rents, etc., some compensation should still be allowed the trustee or executor in respect thereof because of the care and responsibility incident thereto.

7. If a legacy is given by the testator to his executor as compensation for his services, the executor cannot after acceptance of probate, claim more; but if the legacy is reasonable in amount, and to the extent that it is reasonable in amount, as compensation, it will not abate with other legacies, upon a deficiency of assets, and will take precedence of creditors' claims.

8. In the case of a specific legacy to an executor, the assumption is that it was given in respect of his services, but the same inference is not to be drawn from the gift of a share in the residue, in which case additional compensation may be allowed if the amount of the share prove to be inadequate.

9. Commission is not allowed upon sums which have not in fact been realised by the executor or trustee, but which are charged against him in consequence of neglect or misconduct.

10. Allowances to trustees and executors, like other expenses of administration, come out of the aggregate of the estate, but after the share of a beneficiary, payable at some future time,

has been segregated from the rest of the estate, the expenses and compensation in respect thereof must be borne by such share.

11. Mere mistake of judgment, lack of skill in keeping the accounts, or even the fact that the trustee or executor is found indebted to the estate, will not alone disentitle him to compensation. Only where there has been actual dishonesty, or other serious misconduct, on his part, will he be entirely deprived of some remuneration.

12. Where there are several trustees or executors entitled to share in the total remuneration allowed, it is to be apportioned between them according to the relative values of their respective services.

GRAY v. WILLCOCKS.

An Old Cause Célèbre.

Ontario solicitors who issue writs of fi. fa. as of course do not in general know of the troubles of their predecessors in issuing process during the first years of the existence of Upper Canada. When the Court of King's Bench was first instituted by the Provincial Statute of 1794, 34 Geo. III. c. 2, no subject had any transferable property in land within its jurisdiction, but that was soon a thing of the past, and the Court ordered a writ of fi. fa. against goods and lands as, of course, in any judgment, under the provisions of the Act of 5 Geo. II. which made lands in the Plantations or Colonies subject to simple contract debts, and provided (sec. 4) that in satisfaction of all debts established by judgment of the courts such execution as would go against goods and chattels should operate also against lands and tenements. This was, of course, a marked departure from the English writ of Elegit.

Then came the Provincial Act of (1803), 43 Geo. III. (U.C.) c. 1 (assented to by the King on January 4, 1803, after being reserved) which provided that a writ of fi. fa. should issue in the first instance only against goods a fi. fa. (lands) should not issue till after the return of the fi. fa. (goods) and the sheriff

was not to sell until after 12 months from the time he received his fi. fa. (lands). After this Act the clerk issued a fi. fa. (goods), as of course, without consulting the court, but deemed it requisite to receive further order before he issued the execution against lands.

John Gray had obtained judgment against William Willcocks. In Michaelmas Term, 46 Geo. III., Nov. 6, 1805, Mr. Scott (afterwards Attorney-General and Chief Justice) obtained from the court (Powell and Thorpe, JJ.) a rule calling upon the defendant to shew cause why a fi. fa. (lands) should not issue, on the judgment in debt, the fi. fa. (goods) being returned, and it was directed that the Rule should be personally served on the defendant. After an enlargement, the matter was argued, and on Jan. 13th, 1806, the court divided, Powell, J., being in favour of the issue of the fi. fa. (lands), but Thorpe, J., holding that such a writ could not validly be awarded. This was the third time the point had been argued. The first time, Allcock, J., had held that the writ should not, Powell, J., that it should issue. The second time, Allcock, C.J., and Cochrane, J., considered that it should not, Powell, J., that it should issue.

This time the matter went to the Court of Appeal. This court sustained Thorpe, J.; and the plaintiff appealed to the Privy Council. The Board on February 15, 1809, reversed the Court of Appeal. On July 13, 1809, the Court of Appeal remitted the record to the Court of King's Bench, in order that a writ of execution "should issue against the lands and tenements of the defendant for satisfaction of the plaintiff's debt and judgment," and on July 14, 1809, Mr. Justice Powell had the satisfaction of sitting in court (composed of Scott, C.J., and himself) when a fi. fa. (lands) was directed to issue in accordance with his opinion.

And so *Gray* v. *Willcocks* is a leading case, of which not one Ontario lawyer in a hundred has ever heard.

There never has since been any question as to the liability of lands to execution; the only question has been, "what is

land?"* The Legislature has extended the meaning at various times by Statute.

Mr. Justice (afterwards Chief Justice) Powell's reasons for judgment are to be found in a very rare pamphlet (not dated) printed by R. Stanton who became King's Printer at York, U.C. about 1824.†

WILLIAM RENWICK RIDDELL.

MERCY AND JUSTICE.

The senior of the three junior county judges of the county of York has been posing recently as a sort of judicial Santa Claus. He seems to be so saturated with the milk of human kindness as to forget that he is a judge sworn to administer the laws of the land.

In a case that came before him last month a woman was indicted for stealing a number of articles from a departmental store. So far as the newspaper report of the case goes, there seems to be no doubt as to her guilt and no excuse of poverty; but it did appear that she was good looking, well attired, and the wife of a Sunday school teacher. The learned judge seemed to think that under such circumstances she ought to go on suspended sentence. That he had some slight sense of his duty is apparent from his observation, that he "expected that the sentence would bring a shower of comment" on him. Those who have followed the judgments and sentences of this learned judge in criminal matters do not always take him seriously, but, as he apparently expects comment from somebody, we are

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*Perhaps this is not quite accurate. The question arose as to whether lands in the hands of the heir were liable to execution for the debt of the ancestor, on a sci. fa.—and it was held in the negative. *Paterson* v. *McKay* (1823), Taylor's Rep. 43 (Praes. Powell, C.J., Boulton and Campbell, JJ.).

†In a letter dated at York, February 5th, 1826, from Miss Anne Jane Powell to Mary Powell, her cousin, she says, "Mr. Fothergill has been dismissed the printing business and young Mr. Robert Stanton appointed in his stead."

pleased to accommodate him by asking if there has been any repeal of the Criminal Code as regards theft, and why a well dressed and good looking woman, who must have known that she was breaking the eighth commandment (it does not appear whether she attended her husband's Sunday School class) should be let off when men or women less favoured and with less advantageous surroundings are sent to jail for similar offences? In the above case he perhaps looked upon the woman as a kleptomaniac and not altogether responsible; but, whilst the public might be pleased that she was not severely dealt with, such pleasure as well as a desire to find an excuse for this dispenser of justice (with blinded eyes it may be, but without a sword or pair of scales) is marred by the alleged fact that out of about fifteen cases of shoplifting brought before him during a couple of weeks of last month, there was not one punishment. Other records equally startling might, it is commonly said, be cited.

Another judgment of this learned judge, which, if the evidence given in the newspaper reports be correct, cannot be overlooked. We refer to the prosecution of a cabman in the city of Toronto for over-charging and defrauding a foreigner to the extent of a considerable sum. It appears that this cabman having received two dollars from the foreigner to take him a distance of a mile or so from the railway station, when they arrived at their destination he demanded a further sum of a like amount. As the traveller had only a single one dollar bill and five gold pieces, equal to about twenty dollars, the cabman cheerfully pocketed the lot, the unfortunate and ignorant foreigner being told that the gold pieces were only worth about twenty cents each. In the face of this, his Honor is said to have remarked, "the circumstances are very suspicious, but I will give you the benefit of any doubt," and acquitted the prisoner.

Another case is that of a servant girl who had stolen from her employer, and who it is reported had been dismissed for theft from every situation she had been in for a number of years. She received the paternal advice to be good in future, and was again let loose on society.

It is not seemly that a paragraph such as the following, introduced with large capital letters, should appear in a respectable daily newspaper:—

"Asked to be tried by Judge Morgan. Popularity of His Honour practically renders jury unnecessary. Since Judge Morgan has presided in the Criminal Sessions at the City Hall trial by jury has almost been eliminated. Out of a total of 96 cases in which the grand jury returned true bills, since the sitting of the court, only three prisoners have gone to a jury."

Why do alleged criminals ask to be tried by Judge Morgan—and how is his popularity to be accounted for?

If the facts as stated in the public press be correct it is clear that such travesties of justice as these should not be permitted to continue, and to that end it would seem desirable that the responsible authorities should enquire into the correctness of these reports and if found to be substantially true, to apply some appropriate remedy. If not true they should be contradicted. Public safety requires that the administration of justice should be sure, certain and swift; it certainly should not be brought into contempt and ridicule.

RIGHTS OF LIQUIDATORS IN PROPERTY OF INSOLVENT COMPANIES.

It would seem that there is in the minds of some members of the profession, an erroneous impression as to the nature of the title of a liquidator, under the Winding-up Acts, to the property of the company in respect of which he is appointed liquidator. It is assumed by some, that the effect of the order, appointing a liquidator under the statute, is to vest the estate of the insolvent company in the liquidator, and that, in case of a sale of the property, he is the person to convey. If, however, we look at the Dominion Winding-up Act (R.S.C. c. 144), and we believe most provincial Winding-up Acts are similarly framed, we do not find anything in the Act vesting or authorizing the court to vest the estate of the insolvent company, in the

liquidator. By section 33 he is empowered to take all the property of the company into his possession and by section 34 divers powers in reference thereto are conferred upon him, including a power of sale.

But, assuming a sale is made by a liquidator, the proper party to convey is not the liquidator, but the company, although of course the liquidator is a proper and necessary party to the deed. That seems to be the recognized rule in England: see Bythewood's Precedents, vol. 12, Nos. 207, 208, 209. We mention this circumstance because recently a case went up to the Supreme Court from Ontario, in which a sale by a liquidator was in question, in which all parties appeared to have treated the matter as if the estate of the insolvent company was vested in the liquidator; and as if he were the vendor and responsible as such for defects in title. But, when the property of an insolvent company is sold under the authority of the court by a liquidator, there seems to be no more reason for holding that he is personally liable as the vendor, than there is for holding that a master of a court carrying out a sale under a judgment of the court is so liable.

The liquidator is an officer of the court appointed to realize the assets and for that purpose to act as the agent of the company in selling its property, but in such circumstances it is the company, and not the liquidator, who is the real vendor, and the conveyance must, in order to vest the legal estate in the property sold, be made by the company. The liquidator does not assume a personal responsibility for the title, and if a good title cannot be made, it is the assets of the company which must be resorted to, and not the liquidator, unless, perhaps, where he has held himself out to the public as the vendor.

Similar erroneous views we have reason to know prevail in regard to the position of a committee of the estate of a lunatic who is also assumed to have the lunatic's estate vested in him, whereas his true position is merely that of a guardian; and in the event of a sale being ordered, the conveyance should be made by the lunatic, the committee being also a party and

usually being empowered to execute it on the lunatic's behalf:— Mistakes of this kind as to the person conveying may not seem very important. The trouble about them is, that it may become material at some future time to decide in whom the legal title is vested, and the question may arise when, it may be very difficult and perhaps impossible to rectify the mistake; this, from a lawyer's point of view, may be regarded as one of the advantages of our system of conveyancing, though it can hardly be thought so from the client's standpoint.

AUTOMOBILES — RESPONSIBILITIES ATTACHING TO.

A recent case decided a few months ago in the Province of New Brunswick, *Campbell* v. *Pugsley*, which appears on pp. 177, 178, of vol. 7, of Dominion Law Reports, gives a useful summary of the responsibility attaching to the use of these dangerous machines. We copy the headnote of the case. The authorities for the various propositions will be found in the report:—

While the automobile is not dangerous per se, its freedom of motion, speed, control, power, and capacity for moving without noise give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways.

The driver of an automobile is to be considered in law as being in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation.

Where an automobile on the highway is meeting a horse and buggy and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence sug-

gests and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with the horse; and the greater the danger capacity of the car the greater is the degree of care and caution incumbent on the motorist in its use and operation.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and under the provisions of the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. c. 19, s. 4, s-s. 4, the motorist, violating its provisions in not stopping his car, incurs a fixed penalty by way of fine for the violation, this penalty is additional to, not in lieu of, civil damages to the person injured by the motorist's negligence.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and fails to comply with the direct provisions against negligence enacted by the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. c. 19, his violation constitutes evidence of negligence.

The statutory requirements of the Motor Vehicles Act (N.B.), 1 Geo. V. c. 19, for the public regulation and control of the use on highways of automobiles, do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends.

In an action by the plaintiff for personal injury for negligence against the driver of an automobile on meeting a horse and buggy on the highway, and the consequent frightening the horse, it is not contributory negligence by the plaintiff to whip up his horse and pass the motor car on the embankment side of the road, where the evidence shewed that the plaintiff was accustomed to driving horses and that the means he took, by using the whip, to urge his horse ahead and keep it on the road, were reasonable and proper under the circumstances, and that the law of the road in New Brunswick required the plaintiff to pass on the left-hand side where the embankment was.

Where the Motor Vehicle Act (N.B.), 1 Geo. V. c. 19, s. 3, s-s. 4, provides that in case a horse appears "badly frightened" in meeting a motor the motorist shall stop the car, it is a question for the jury to determine upon the evidence, in a negligence action against the motorist, just what may be the condition that should be termed "badly frightened."

Where a motor collides with a waggon and in a negligence action against the motorist, the jury assess damages against him taking into consideration upon the evidence (1) repairs to the waggon; (2) necessary painting and that it would still be a patched-up waggon; (3) a valuable horse made lame and still lame; a verdict of $100 will not be disturbed as excessive.

That automobiles are vehicles of great speed and power, whose appearance and puffing noise are frightful to most horses unaccustomed to them, and that from their freedom of motion laterally they are much more dangerous than street cars and railroad trains, are elements of danger calling for the utmost care and caution to protect the public in their operation.

In a recent number of the Ontario Weekly Notes, Mr. Justice Middleton calls attention to an incident shewing the very loose manner in which criminal justice is frequently administered in that province. In giving judgment in *Re Holman and Rea*, he gives an illustration of the evils sometimes resulting from County Crown Attorneys engaging in general practice, and states his opinion that it is unfortunate that they should be allowed so to do. This is a matter which has been referred to before, and might well engage the attention of those whose duty it would be to make a change in that direction should it be thought that a change is desirable.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Garrow, Maclaren, Meredith, and Magee, JJ.A., Lennox, J.] [Nov. 19.

REX *v.* MURRAY AND FAIRBAIRN.

Criminal law—Two defendants—Appeal under s. 1021 *of Crim. Code—Meaning of "verdict"—New trial.*

Motion for a new trial by defendants, on consent of the Junior Judge of Middlesex, who tried the case under 1021 of the code. Both defendants were convicted of burglary.

Held, 1. The cases of the two appellants should be considered separately on their respective merits, following *Rex* v. *Mambey,* 6 T.R., p. 368, notwithstanding *Reg.* v. *Fellowes,* 19 U.C.R., p. 54.

2. Quære, whether, under s. 1021 of the Criminal Code the use of the word "verdict" limits the operation of the section to cases tried by a jury. But although strictly and accurately the word "verdict" is only applicable to the finding of a jury, or of a judge sitting as a jury on the question of fact, the point not having been taken by the Crown, it was not passed upon, the prisoner being given the benefit of the doubt, and a new trial was granted to one of the appellants.

J. R. Cartwright, K.C., for the Crown. *P. H. Bartlett,* for defendants.

HIGH COURT OF JUSTICE.

Boyd, C.] [Nov. 8.

TOWN OF WATERLOO *v.* CITY OF BERLIN.

The Ontario Railway and Municipal Board—Jurisdiction.

A formal agreement between municipalities which is not of a voluntary character but which is executed in conformity with a

direction of the Ontario Railway and Municipal Board as to the operation of a municipal railway is within the exclusive jurisdiction of the Board as to adjustment of differences arising thereunder between the municipalities in the accounting for the profits of the operation of the road, and an action in the High Court will be dismissed.

A. B. McBride, for plaintiffs. *A. Miller*, K.C., for defendants.

Riddell, J.] [Oct. 24.

RE CANADIAN SHIPBUILDING CO.

Appeal—Granting leave to appeal—Matter of public importance—Liquidation of company.

Held, 1. Leave to appeal to the Court of Appeal on the ground that the question raised by the judgment of the trial court is of great public importance, will not be granted the liquidator of a company under ss. 101 (*c*) and 104 of the Winding-up Act, R.S.C. 1906, ch. 144, where the question involved is not of a common law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

2. Leave to appeal to the Court of Appeal will not be granted the liquidator of a company under ss. 101 (*c*) and 104 of the Winding-up Act, from the decision of the trial court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the judgment should be reversed, he could not prevail in the action unless he could successfully contend, as he must, in order to succeed, that the bills of sale under which the opposing party claimed, did not satisfy the requirements of such Act, and no case for leave to appeal on that branch of the case was made out.

J. A. Paterson, K.C., for the liquidator. *H. E. Rose*, K.C., for the company.

Province of Nova Scotia.

SUPREME COURT.

Sir Charles Townshend, C.J.] [Nov. 28.

IN RE DEBLAIR'S ESTATE.

Concurrent jurisdiction of Supreme and Probate Courts.

In the administration of estates the jurisdiction of the Supreme Court is concurrent with that of the Probate Court, and in matters of difficulty or importance it is desirable that questions should be dealt with in a summary way under the procedure in the Supreme Court, but where the application is needless or the amount small, costs will be refused.

Rogers, K.C., for executors. *Roscoe,* K.C., for creditors.

Full Court.] GORMLEY *v.* DEBLOIS. [Dec. 14.

Absent or absconding debtor—Prior and subsequent attachers —Right of latter to avail themselves of Statute of Limitations.

Under the provisions of O. 46, r. 6, which provides that a subsequent attacher may dispute the validity and effect of a previous writ of attachment on the ground that the sum claimed was not justly due, or was not payable when the action was commenced, the subsequent attacher may take the ground that the debt was barred by the Statute of Limitations as an answer to the claims of the previous attacher.

Where this is made to appear the Court will order the writ of attachment and also the judgment to be set aside.

D. Owen, for appellants. *Roscoe,* K.C., for respondent.

Full Court.] [Dec. 14.

MARITIME GYPSUM CO. *v.* REDDEN.

Contract—Action for money paid—Failure of consideration— Party's own default—Agreement not pleaded—Appeal.

A party is not entitled to recover back money paid for a consideration which has failed, where the failure has been caused by the party's own default.

An attempt to shew an agreement to return the money sought to be recovered cannot succeed where it is neither pleaded nor made a ground of appeal.

Roscoe, K.C., for plaintiff, appellant. *Sangster*, for defendant, respondent.

Bench and Bar.

Louis Edmond Panneton, of the City of Sherbrooke, Que. K.C., to be a puisne judge of the Superior Court of Quebec.

Some wag at Osgoode Hall has concocted the following epitaph anent recent changes in the courts of Ontario:—

SACRED TO THE MEMORY
OF
THE DIVISIONAL COURT
OF THE
HIGH COURT OF JUSTICE.
BORN 22ND DAY OF AUGUST, 1881.

DURING ITS CAREER
IT WENT THROUGH VARIOUS
TRANSFORMATIONS
AND
IN THE YEAR 1897
FINALLY
SETTLED DOWN TO ITS LATE FORM,
WHEN,
IN THE BLOOM OF YOUTH,
IT WAS PUT OUT OF EXISTENCE
BY
AN ACT OF THE PROVINCIAL LEGISLATURE.

ITS END CAME QUIETLY,
AND
WITHOUT A WORD OF FAREWELL,
IT PASSED OUT OF EXISTENCE
LIKE SMOKE,
ON
WEDNESDAY, THE 18TH DECEMBER, 1912,
IN THE THIRTY-SECOND YEAR OF ITS AGE.
R.I.P.