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CANADIAN MILITARY LAW OVERSEAS.

We are indebted to Hon. Mr. Justice Dennistoun of the Court of Appeal, Manitoba, for an article on the above subject which will be read with much interest It is in fact a valuable historical record. Mr. Dennistoun has recently returned from service overseas where he was Deputy Judge Advocate General, in charge of the legal affairs of the Canadian Forces from February, 1917, to September, 1919. There is therefore no one who can give better information on this subject than himself.

During the last two years it was considered advisable to put forward in a very definite manner the independent status of our forces and officers, and to press for its recognition by the War Office and Army Council as having an important bearing upon the broader questions of the status of the Dominion in relation to the United Kingdom and the Empire.

Previous to this period little thought was given to such matters and they were allowed to drift; but, with the arrival in England of the Overseas Minister it became necessary to assert his powers as opposed to those of the British military authorities in many important matters. The Canadian Military Authorities were successful in the end in convincing the War Office and the Army Council that they had a very limited control over the Canadian Forces and in the event of Canadian soldiers taking part in future wars of the Empire there should be no uncertainty as to our position.

The learned Judge's article as sent to us for publication reads as follows:—

"When the first Canadian Contingent sailed from Canada in 1914, there was much uncertainty as to the status of the force and of the officers who accompanied it, and this uncertainty was

not entirely removed until almost the end of the war. Many doubts being now apparently laid to rest so far as the War Office and the Department of Militia and Defence are concerned, it may be interesting to refer to a few of them and to relate how they were dealt with.

The Manual of Military Law is a wonderful book. It contains many things; and of all modern law books is the most difficult of access, for it conceals and scatters its treasures throughout eight hundred pages of notes, statutes, rules and forms, supplemented by an index which is the despair of those who have not studied its subleties with extreme care.

At page 194 it lays down the following in respect to Colonial Forces, being careful in another place to state that the Dominions are included in the word Colony:—

"The colonial forces are of two classes, namely, the forces raised by the Government of a colony, and the forces raised in a colony by direct order of His Majesty to serve as auxiliary to, and in fact to form part for the time being of, the regular forces.

"The first class of colonial forces—those raised by the Government of a colony—are only subject to the Army Act when so provided by the law of the colony, and when serving with part of His Majesty's regular forces, and then only so far as the colonial law has not provided for their government and discipline, and subject to the exceptions specified in the general orders of the General Officer Commanding the forces with which they are serving. The Army Act, sec. 177, provides that the colonial law may extend to the forces, although beyond the limits of the colony in which they are raised."

In August, 1914, an order was issued from Militia Headquarters at Ottawa to the effect that the expeditionary force about to be mobilized would "be Imperial and form part of H. M. regular forces," and it was this order, for which there was no valid authority, that firmly fixed the idea in the mind of the War Office that the Canadians were Regular Forces and must be administered as such.

The mobilization which took place at Valcartier in August and September was authorized by orders-in-council which made it

clear that the force being assembled was not an Imperial or Regular Force, but that it consisted of specially formed units of the Canadian Militia.

The Government of Canada had no power to raise, equip and send overseas a military force except under the provisions of the Militia Act; and while His Majesty might possibly have levied troops in Canada to form part of his regular forces he did not see fit to do so.

Until the end of the war the Canadians were referred to in the London Gazette under the heading "Regular Forces," though it was well understood by that time that they were nothing of the kind.

The Army Act, sec. 190, defines "regular forces" and "His Majesty's regular forces." The expressions mean "officers and soldiers who by their commission, terms of enlistment, or otherwise, are liable to render continuously for a term military service to His Majesty in any part of the world."

The Canadians clearly did not come within the terms of this definition. The statutory authority by which they were governed was sec. 69 of the Militia Act under which "the Governor-in-Council may place the Militia or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears reasonable to do so by reason of emergency."

By sec. 2 (e) "Militia" was defined as meaning "all the military forces of Canada."

Sec. 71 provides for the immediate summoning of Parliament when the Militia has been placed on active service thereby enabling the Canadian people through their representatives to determine whether an emergency exists which renders it desirable to place the militia on active service beyond Canada, and to determine from time to time where Canadian troops may be employed "for the defence thereof."

By sec. 72 in time of war when the militia is called out for active service to serve conjointly with His Majesty's regular forces, His Majesty may place in command thereof a senior general officer of his regular army.

It was therefore essential, in order to maintain Canadian autonomy, when our troops went overseas, to take the position that they were Canadian Militia and not a part of the regular forces bound to serve in any part of the world, wherever sent by Imperial authority.

It was difficult to convince the War Office that the Militia order which has been referred to, and which was never revoked, was *ultra vires* of the Headquarters which published it in August, 1914, and it took several years to do it.

Sec. 74 of the Militia Act is in part as follows:

"The Army Act for the time being in force in the United Kingdom, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the regulations made thereunder shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia."

By reason of this provision of the Militia Act, aided by sec. 177 of the Army Act, which enabled Canadians to take their own law overseas, it was open to them to administer discipline and to control the machinery by which it was enforced, or to submit to the jurisdiction of the disciplinary powers exercised by the Army Council, as will be presently explained. Wisely the latter course was adopted, and the Canadians have never had cause to regret the confidence fully and implicitly placed in the Imperial authorities in regard to the enforcement of discipline.

The situation may be shortly explained as follows:

By sec. 102 of the Army Act provision is made for the issue of warrants by His Majesty to His General Officers giving authority to convene general courts martial, and district courts martial.

Such warrants being issued under the Army Act, the proceedings taken under them are subject to the regulations and rules of procedure therein provided, which make the Army Council and the Judge Advocate General (Imperial) the final authorities to pass upon the validity of such proceedings and to exercise the powers of suspension, remission, or commutation of sentences legally imposed, and to retain custody of all proceedings and documents after trial.

Instead of submitting themselves to this Imperial jurisdiction the Canadians might have obtained warrants addressed to their Generals overseas, emanating from the Governor-in-Council under sec. 98 of the Militia Act, to convene courts martial and in addition power to approve, confirm, mitigate, or remit, any sentence of any such court.

Had this been done no sentence of any general court martial could have been carried into effect until approved by the Governor-in-Council (Militia Act, sec. 104), and all courts martial proceedings would have been forwarded to the Judge Advocate General at Ottawa for final custody, instead of to the Judge Advocate General at the War Office. The Army Council would have had no jurisdiction over them.

Had the Canadians desired to set up their own jurisdiction and to control their own disciplinary administration, much confusion might have resulted, as Canadian military law was applicable to Canadian soldiers only, and it frequently happened that both Canadians and Imperials were tried together, and sometimes with soldiers of the other overseas Dominions.

Care was taken by the Imperial authorities that so far as the exigencies of the service permitted, Canadians were tried by their own officers, and Canadian officers of high rank were constituted by the Army Council "competent military authority" to suspend, remit and commute sentences imposed.

One of the first doubts which arose in the mind of the War Office was as to the status of the Canadian officer. Was he qualified to sit upon a Court Martial convened to try officers or soldiers who were not Canadians? Had he authority by reason of his rank and seniority over Imperial officers when serving with them in the field?

In the London Gazette of 1st May, 1915, appeared the following:

"With reference to A.O. 35 of 1915, officers of overseas contingents take rank as though they hold temporary commissions in the army with effect from the 5th August, 1914, or date of subsequent appointment, and take rank with officers of the Regular Army from such date."

When this appeared it was supposed that the Army Council had decided to recognize the validity of the commissions which had been granted in Canada, but long afterwards it transpired that for the purpose of allaying the doubt which troubled them, they had decided to issue an Imperial commission to every Canadian officer who arrived in England, and thousands of such commissions were sent by the War Office to the Canadian Record Office, but, with few exceptions, were never issued therefrom.

When the Canadian legal authorities in England had the organization, time, and opportunity, to clarify their own minds as to the situation they pointed out to the War Office that there appeared to be a misapprehension as to the status not only of the Canadian force but of the Canadian officer; that the force was "Canadian Militia" and not "regular," and that all Canadian officers already held His Majesty's commission under the provisions of sec. 38 of the Militia Act, which provides that:—

"Commissions of officers in the Militia shall be granted by His Majesty during pleasure, and all warrant and non-commissioned officers shall be appointed in such manner and shall hold such rank as are prescribed by the regulations."

By section 190 (4) of the Army Act—"The expression officer, means an officer commissioned or in pay as an officer in His Majesty's Forces, or any arm, branch, or part thereof," and it was not open to dispute that the Canadian Militia was part of those forces.

In the case of *The Attorney General for Canada* v. *Cain and Gilhula*, 22 T.L.R. 757, the Judicial Committee of the Privy Council, Lord Atkinson delivering the judgment, says: "In 1763 Canada and all its dependencies with the sovereignty, property and possession and all other rights which had been held or acquired by the Crown of France were ceded to Great Britain. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and save so far as it has since parted with these powers by legislation, Royal Proclamation or voluntary grant, is still possessed of them. . . . The Imperial Government might delegate those powers to the Governor or the Government of one of the colonies either by

Royal Proclamation which has the force of a statute, or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could have exercised them."

It was submitted that a commission signed by the Governor-General acting on behalf of His Majesty was as valid an exercise of the Royal prerogative as if the commission had been signed by His Majesty himself, and that the authority of the Crown was one and indivisible throughout the Empire, even though it operated through different channels branching from the original source.

Further, that Canadians would regret any action which would tend to lower the status of their officers or derogate from the functions of the Crown as exercised by His Majesty's representative in Canada.

These and other arguments were taken by the War Office and the Army Council in the utmost good part, and finally the ancillary or *ex abundanti cautela* commissions were recalled, and duly returned to the War Office and the incident was closed with the assurance that the status of the Canadian officer was beyond question equal to that of any other officer who held His Majesty's commission, that they were all officers of His Majesty's Forces and whether "Regular" or "Canadian Militia" made no difference so far as status was concerned.

The matter came up in another form over the appointment of Warrant Officers, but this time it was with regard to the jurisdiction of the Army Council as opposed to that of the Minister of Militia or his co-adjutor, the Overseas Minister of the Military Forces of Canada.

By the Militia Act, sec. 74, the King's Regulations and Orders for the Canadian Militia take precedence when inconsistent with King's Regulations and Orders (Imperial). In practice Canadians followed K.R. & O. Imperial for the sake of uniformity but there were a few occasions upon which it was considered advisable to

insist upon the Canadian Regulations as against the Imperial—and the appointment of Warrant Officers was one of them.

By K. R. & O. (Imp.) these officers are appointed by the Army Council and nearly two thousand warrants were issued creating Warrant Officers Class I and Class II in the Canadian Forces. At the time the matter came to notice nearly eighteen hundred warrants had accumulated at the Canadian Record Office.

A very good-humoured and instructive discussion then took place, with the result that the Army Council acknowledged that by Canadian statute above quoted the Canadian Regulations governed when inconsistent with Imperial Regulations, and as the Canadian regulation provided for the appointment of Warrant Officers by the "Minister," the Army Council had no jurisdiction in the matter.

The warrants were accordingly withdrawn and the much wider point was at last fully grasped by all concerned, that in matters of appointment, promotion, pay, equipment, training, and organization the Canadian force was subject only to the laws, orders-in-council, and regulations which it brought with it under sec. 177 of the Army Act and that the only real jurisdiction which could be exercised by the Army Council was in respect to discipline (by consent) and during operations in the field under the provisions of sec. 72 of the Militia Act.

An interesting point arose which shewed how effectually Canadian control could be exercised over Canadian troops overseas when Canadian law was at variance with British law.

In 1917 a number of Canadian soldiers refused to submit to re-inoculation against typhoid fever. One of them was court-martialed for "refusing to obey a lawful command" and his conviction was quashed by direction of the Judge Advocate General—Mr. Felix Cassel, K.C., a very able lawyer, who gave the Canadian legal staff every consideration and assistance at all times.

On enquiry as to the reason for this decision he stated that the British authorities have always refused to compel a soldier to submit to a surgical operation (Manual, p. 397), and that inoculation, involving a puncture of the skin by a needle, was regarded as such an operation.

It was pointed out in reply that no soldier could be sent to France without a certificate that he had been inoculated against typhoid and that such a decision would enable a considerable number of men to escape service at the front. He was obdurate. It was the law, and he had no power to change it. But we had power to change it, and in a very brief space of time obtained an order-in-council from Ottawa, passed under the provisions of the War Measures Act, aided by sec. 177 of the Army Act, making it a military offence for a Canadian soldier to refuse to submit to inoculation. The Judge Advocate General at once admitted the validity of the enactment, and undertook to quash no more convictions on the ground previously taken, but he was never called to rule upon the point a second time, for on publication of the new law in orders, the recalcitrant soldiers submitted without exception, and disciplinary action was no longer necessary.

The publication in the London Gazette from time to time of promotions and appointments under the heading "Canada—Regular Forces" was misleading, and not generally understood. Most Canadian officers thought they were being gazetted into the Regular Army and were puzzled to understand what was really happening.

The Army Council authorized promotions and appointments in the Regular Army and published them in the London Gazette, but the Army Council had no power to make promotions or give appointments in the Canadian forces. Such were authorised solely by the Overseas Minister of the Canadian Forces, who was permitted to use the London Gazette as the publishing agent of the Government of Canada. All entries in the London Gazette which affected Canadians were reproduced in the Canada Gazette and the officer who received his first commission or subsequent promotion overseas took it in the Canadian Militia and not otherwise. The establishment to which he was posted and the pay which he received were provided by the Canadian Government and the selection of the necessary personnel could be controlled by the Canadian Minister alone.

The Australians did not use the London Gazette as their publishing agent. They were content to circulate information as to promotions and appointments through their own orders.

The extra-territoriality given to Canadian law by sec. 177 of the Army Act is interesting to lawyers. Its scope and effect have not yet been judicially considered, nor do they appear to have been dealt with by text-book writers dealing with the Canadian Constitution."

DEVOLUTION OF ESTATES ACT.

By F. P. Betts, K.C.

The amendment to the Devolution of Estates Act made at the last session of the Legislature (9 George V., Chapter 28, Section 2), seems to be open to serious objection. The amendment reads as follows:

"(7) Notwithstanding anything contained in subsection 1 hereof, real property, devolving by reason of any will which has not been proved or registered or by reason of any intestacy in respect of which letters of administration have not been granted shall not vest at the expiration of three years after the death of the deceased in the persons beneficially entitled thereto under such will or intestacy or their assigns as in that subsection provided unless and until a statement similar to that required by section 11 of the Succession Duty Act has been filed either with the Treasurer of Ontario or with the Registrar of the Surrogate Court of the County or District where the deceased had his fixed place of abode or where such real property or part thereof is situate, and, unless with the consent in writing of the Treasurer of Ontario or some one authorized by him to consent, no deed, conveyance, assignment or other document or instrument purporting to convey, transfer or assign such real property shall be registered with the Registrar of Deeds or Officer of Land Titles of the County or district where such real property or part thereof is situate, unless accompanied by a certificate of the Registrar of the Surrogate Court of the County or District where the deceased had his fixed place of abode, or where such real property or part thereof is situate, shewing that a statement similar to that required by section 11 of the Succession Duty Act has been filed with him,

and such certificate shall be deposited with the Registrar of Deeds or Officer of Land Titles."

It will be observed that the provision is that the statement in question may be filed either with the Treasurer of Ontario or with the Registrar of the Surrogate Court of the County or District where the deceased had his fixed place of abode, or where the real property in question is situate. That is quite intelligible and one would suppose that the latter part of the enactment would be to the effect that no deed, etc., should be registered unless accompanied by a certificate of the Registrar of the Surrogate Court *or of the Treasurer of Ontario* shewing that the statement in question had been filed with the Official who gave the certificate, but there is an omission in the statute to make that provision.

The provision relating to the certificate in question is that it shall be the certificate of the Registrar of the Surrogate Court, and, moreover, that it shall certify that the statement in question has been filed *with him*. Surely this is an oversight on the part of the framer of the Act. Surely, if the Legislature meant to provide that the statement in question might be filed either with the Provincial Treasurer, or with the Registrar of the Surrogate Court, they must have meant to go on and provide that such filing *with either of those Officials* should be sufficient, and that the deed might be registered on the certificate of the Official with whom the filing had been made. It will be observed that at present it is not merely that the Act provides that the Registrar of the Surrogate Court is the only one who can issue the certificate that the statement has been duly filed, but it goes further than that, and provides that his certificate so issued must certify that the statement has been filed *with him*. It will be seen therefore that the filing of the statement with the Provincial Treasurer, although that is one of the courses directed and authorized by the Act, would be simply nugatory, as, in such case, there would be no means of obtaining the certificate referred to in the Act. On the production of it alone the deed could be registered. Affecting as they do so important a matter as the transfer of real estate, we think these defects should be rectified at the earliest possible moment.

EMPIRE AND ITS MEANING.

There are many thoughts in many minds on this subject in these days. Lovers of their country, not "Little Englanders" or Canadians of narrow vision, too small to grasp big things, are beginning to look abroad, as the smoke of battle clears away, and they see something of the greatness, the power and the dignity with which an overruling Providence has clothed the nation known to the world as the British Empire; a nation clothed for a purpose and to achieve a destiny which as long as our high mission is kept as our lode star should be greater and higher as the years roll by.

Some such thoughts as these cannot fail to come to the thoughtful ones who read aright the history of Great Britain and her dependencies and realise her present commanding position. Expecially do these thoughts come to us just now as we read the very remarkable speech of His Royal Highness, The Prince of Wales in the closing days of 1919, at the Mansion House when he spoke in such accurate and felicitous terms—speaking as a statesman, for such he shews himself to be, as well as the worthy heir to the Thorne of his forebears—of the impressions formed in his mind as to the Empire and its loyalty during his recent visit to the Dominion of Canada.

That part of his address which we reproduce deals with the subject under two appropriate heads (1) A partnership of five nations and (2) the patriotism of the Dominions, whereby they proved their right to be members of such a partnership. He said:—

"I should not think much of myself if my wonderful journey and experience had only been so much pleasure and nothing more than a joy-ride. It was all a great pleasure and I enjoyed every moment of it, but it was more than that! It was an inspiring education which will influence the whole of my life. And I should like to try and tell you what I feel I have learned. In the first place, I have come back with a much clearer idea of what is meant by the British Empire, or, as it is often more appropriately called, the British Commonwealth. The old idea of Empire handed down from Greece and Rome was that of a mother country surrounded by daughter States which owed allegiance to her. Now,

we Britishers have left that obsolete idea behind a long time ago. Our Empire implies a partnership of free nations, nations living under the same system of law, pursuing the same democratic aims, and actuated by the same human ideals. The British Empire is thus something far grander than an Empire in the old sense of the term, and its younger nations—Canada, Australia, New Zealand, South Africa, and India—are now universally recognized as nations by the fact that they are signatories to the Peace Treaties which they fought so magnificantly to secure. Now among these new nations of the British Empire, recognized by signatory at Versailles, is India. India occupies a special position. Like the Dominions she played a gallant part in the war, and we owe much to her soldiers and Government and men for all they endured in the common cause. I am looking forward to the day when I shall be able to pay a visit to that wonderful country. Now the position of the self-governing Dominions is different. They are made up of peoples long trained in the management of their affairs. They are inhabited by highly-advanced and progressive democracies who have made new civilizations out of wildernesses, and they look back on their achievements with intense and legitimate pride. Think of what they have achieved in four generations. Think of their noble devotion and sacrifice in the Great War. There is no limit to the bounds to which their progress and development may some day attain. It is no exaggeration to say that the united action of the British Empire in the war was one of the factors least expected by the enemy, and the most effective in securing liberty. But the people in the old country must realize that the patriotism of the Dominions is national patriotism and not mere loyalty to Great Britain. It is loyalty to their British institutions, it is loyalty to the world-wide British system of life and government; and it is, above all, loyalty to the British Empire, of which Great Britain, like the Dominions, is only one part. I have felt the inspiration of this great idea throughout my journey, but I have also learned that the loyalty of the Dominions is, in a very special sense, loyalty to the Crown—and the Crown represents the unity of the Empire. The King, as constitutional Soverign of the Empire, occupies

exactly the same place in Canada and in the whole British Empire as he does in Great Britain, and his House, although originally founded in Great Britain, belongs equally to all the other nations of the Commonwealth."

The Prince in his concluding remarks spoke of the duty of the British nation in the present days of unrest and perplexity. His words are so wise and so appropriate that we must find space for them:

"A year has passed since the Armistice, and in many parts of the world millions of people are still torn by conflict, haggard with want, and almost broken by despair. I am certain that there never was a time when the world looked so anxiously to Great Britain for an example of confidence and steadiness. I am certain too, that the restoration of peace and happiness in the whole world depends more largely upon that example than upon anything else. We did our duty quietly and thoroughly as a nation in the war. What is our duty now? It is to shew the world that we can work at our social, economic, and industrial problems with a general fairness and sympathy, striving whole-heartedly towards one goal. That goal is happier conditions of life, and to ensure that every man and woman in the country may enjoy the just proceeds of their labour, and that every child born into the country may have a fair sporting chance. Our present problems will never be solved by hatred or by violence. They can only be solved by common sense, and above all by good will. The world is feeling rather lost at the present time, and it is up to us, the British nation, and to all the nations of the Empire, to shew the way. I feel sure that we will shew that way, and that we can."

THE LATE SIR GLENHOLME FALCONBRIDGE.

By the rather sudden death of Sir Glenholme Falconbridge, Chief Justice of the King's Bench and President of the High Court Division of the Supreme Court of Ontario, the Province and the Profession have lost a distinguished member of the Provincial judiciary, whose loss will be widely regretted by a large circle of private friends—for he endeared himself to all—as well

as by those who knew him as a Judge who upheld the best tradition of the British Bench. When first appointed it was thought to be one of ordinary merit (there were giants on the Bench in those days). The judicial appointments made by Sir John A. Macdonald were uniformly good But as time passed his reputation grew and a most satisfactory Judge he proved to be; he evinced some of the qualities of one who in some respects was the very best of our Judges, Sir William Buell Richards, the first Chief Justice of the Supreme Court of Canada; a keen judge of human nature, of large experience and a close observer of men and things, and like him unequalled, certainly never excelled—in the elucidation of facts. In fact a sound lawyer, a common sense, all round Judge, possessed of good temper, patience and forbearance and therefore respected and beloved by the Bar, and known by them to be their friend.

For all this he will be regretfully remembered, and also because he was a whole hearted Britisher and not afraid to avow it. Of Irish extraction, he belonged to those of them whose devoted attachment to the Empire and all it stands for, form a striking contrast to those who in their disloyalty and persistent stupidity fail to appreciate, or rather perhaps who, led by England's enemies, refuse to appreciate the glory which is shed upon them as a component part of the British Empire. If the time ever comes to them to throw off any baneful foreign influence they will learn who are the best friends of that "distressful country," as the old song has it.

It was this sentiment of loyalty to the Empire which induced the late Chief Justice to resign his position as a member of the Senate of Toronto University to mark his disapproval of the action of the Senate in approving of the granting of a degree *honoris causa* to the late Dr. Goldwin Smith whose political sentiments in regard to the dismemberment of the Empire he viewed with disgust.

Referring again to the judicial qualities of the late Chief Justice, he had always a proper sense of the dignity of, and the respect due to the office which he so long adorned, and though he was always courteous to the Bar he brooked no disrespect. His

aim as a Judge appeared to be to make all his judicial deliverances as short and as pithy as possible. He deemed it no part of his duty to enter into long discussions as to the evidence but he usually confined himself as far as possible to the true points to be determined and with them he dealt concisely. Hence perhaps no Judge of his generation was more free from the charge of incumbering his judgments with useless or unnecessary matter.

The late Chief Justice may be said to have died in harness. He was at Osgoode Hall on Monday, February 2nd, and by the following Monday he was dead. Up to Saturday evening hopes were entertained of his recovery; but pneumonia, that dangerous enemy of elderly people, supervened and terminated his career in his seventy-fourth year, after having been 37 years on the Bench, for 20 of which he sat as Chief Justice.

HON. MR. JUSTICE ORDE.

APPOINTMENT TO SUPREME COURT OF ONTARIO.

The appointment of John Fosbery Orde, Esquire, K.C., to the Bench of the Supreme Court of Ontario, will give general satisfaction to the profession in Ontario. Mr. Orde like many other wise men comes from the East, having been born in Nova Scotia in 1870. He was called to the Bar of Ontario in 1891 and in 1908 was made one of His Majesty's Counsel. He has for some time past been one of the leading practitioners in the City of Ottawa, where, both socially and professionally, he enjoys the confidence, esteem and respect of the community. A courteous gentleman and a good lawyer, Mr. Orde possesses the foundation qualifications for a good judge. He is, in addition, in the prime of life, so that his judicial career bids fair to be marked by distinction. We respectfully tender to the learned Judge our heartiest congratulations and good wishes on his appointment.

MEANING AND SCOPE OF THE PHRASE "ARISING OUT OF THE EMPLOYMENT" IN COMPENSATION CASES.

Probably no set of words in the compensation acts, or in any other statute for that matter, is likely to give rise and has already given rise to more litigation than the phrase "arising out of the course of employment." The refinements possible in construing these words are almost infinite and the field of discussion is attracting the metaphysicians and other word twisters until the ordinarily clear thinker is almost prepared to admit the need of a strait jacket and a padded cell.

To begin with let us consider an early case often cited and likely to be regarded as a leading case; to-wit, the case of *Warner* v. *Couchman, L.R.* (1911), 1 K.B. 351, 1 Negligence and Compensation Cases Annotated 51.

The facts in this case were exceedingly simple. A driver of a bakery wagon, while delivering bakery goods to retail customers on a very cold day, suffered severe and permanent injury to his right arm by reason of having it frostbitten. It appeared that this particular arm suffered the injury by reason of the driver being compelled to pull off his glove at frequent intervals to make change for the customers.

The main question over which much gray matter was expended was whether this accident arose "out of and in the course of the employment." There was, of course, no doubt that the accident arose "in the course" of the employment, but after much labored reasoning, as it appears to us, the Court of Appeals finds that the particular accident did not arise "out of" the employment, simply because the injury suffered was one to which a large section of the population, whose occupation is out-of-doors, is ordinarily exposed.

If this reasoning is to be accepted by the Courts in this country, then, indeed, will the great and beneficent purposes of the Workmen's Compensation Acts be defeated. For the great underlying sociological idea in such legislation is to require the master directly and society indirectly to compensate such servants who, by reason of their employment, are subjected to unusual hazards and who while thus serving their masters and society suffer an injury which it is not fair nor just that they should bear alone.

Surely it is not a proper argument against a servant's claim for compensation that other servants in other employments are exposed to the same hazards, at least not if such hazard is increased by reason of the peculiar nature of the employments.

The dissenting opinion of Lord Justice Fletcher Moulton, in the Warner case, is so clear and convincing that we venture the following quotation, which is worthy of being carefully considered by the Courts when confronted with a question of this character. Justice Moulton said:

"The judgment of the learned Judge of the County Court shews that he thought himself permitted, and even bound to compare the man's employment with other employments in order to ascertain whether the accident arose out of the applicant's employment. To my mind this is *falsa demonstratio*. The law does not say 'arising out of his employment and out of that employment only.' Other employments have nothing whatever to do with the question. A shepherd who has to bring in his sheep in a snowstorm, and suffers frostbite and loses his life thereby, is the victim of an accident arising out of his employment none the less because a railway guard or a night watchman or a postillion might be equally exposed to the weather. The comparison of one employment with another is to my mind wholly illegitimate. But when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality as such and, whether so employed or not, were equally liable. If it is the latter, it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment."

Accidents occurring by reason of natural conditions, as rain, cold, heat, lightning, wind, water, fire, etc., are usually those that give the greatest difficulty. But the problem is not solved by referring to the universality of the general natural conditions that bring about the injury, but solely by the consideration whether the particular employment rendered the injury from natural causes greater than if one had not been engaged in such employment.

Thus, the most uncertain active force in nature is probably the lightning. Nobody within the area of the storm is exempt. Yet even in the face of a force so indiscriminate in its action the Courts of England have already announced distinctions which they seem to have ignored in the *Warner* case.

Thus, in *Kelly* v. *Kerry County Council*, 42 Ir. L.T. 23, the Irish Court of Appeals held that a man, working on the roads, who was struck by lightning was not injured by reason of an accident arising "out of" his employment. On the other hand, the English Court of Appeals, in *Andrew* v. *Failsworth Industrial Society*, 2 K.B. 32 (1904), held that a bricklayer, working on a high scaffold, is subjected to greater danger from lightning, by reason of his position, than one on the road and was, therefore, entitled to compensation for injury resulting from being struck by lightning.

The law in these cases, as all other cases, follows in the wake of science and where science discovers that dangers from the operation of natural forces are increased by certain occupations, or by reason of a person being in certain positions, the law will, and should, give effect to such distinctions. Thus, woodmen, workers on electrical lines, or steeplejacks, may very well be regarded as being exposed to greater dangers from lightning, by reason of their employment, than other persons, even if such increased hazard is impossible to estimate.

If such distinctions can be drawn as to a natural force so indiscriminate in its action as lightning, they are surely warranted in cases where the accident is occasioned by natural forces, whose operation is better understood and danger from which is more easily avoided.

Thus, heat and cold are common and complementary forces of nature, whose laws are well understood. Thus, a man who is compelled by his employment to paint the side of a ship on a hot day in the tropics is not to be denied compensation simply because other men in other occupations were similarly exposed. It was so held in *Morgan* v. *The "Zenaida,"* 25 Law T. Rep. 446 (1909). So, also, it would seem to follow if one is compelled by his occupation to work out-of-doors when the weather is severely cold is not to be denied compensation simply because certain others may be exposed to the same hazard.

The sole question in all these cases would seem to be, does the servant's employment expose him to a greater hazard by reason of the operation of natural forces than the community in general. If so, the accident clearly arises "out of" the employment.

—*Central Law Journal.*

LAWYER'S LYRICS.

A METRICAL VERSION, BY F. M. FIELD, K.C.,

of the Case of

TURNER v. COATES.

(1917), 1 K.B. 670; 86 L.J.K.B. 321; 33 T.L.R. 79; 115 L.T. 766.

I.

To Newham Town from Tenbury, one evening dark and cold,
Led by a lad of tender years, a Mare sedate and old,
Accompanied by a frisky colt, proceeded on her way,
With Farmer Coates a following, in his old one hoss shay.

II.

That very night unknown to Coates, went forth upon a hike,
A fair young nurse, on duty bent, upon her trusty bike,
From Newham Town to Tenbury, her cycle lamp alight,
Mindful to keep the proper side, she rode out in the night.

III.

Thus "set", the scene of this my theme, but shortly after six;
Alas, that one short hour should see that Maid in such a fix,
The like of which she ne'er had dreamt, could happen to a nurse,
And yet, though it was bad enough, it still might have been worse.

IV.

The colt unbridled and unbroke, the glaring headlight saw,
And fearing some uncanny foe, ran wildly to her "maw";
While, heedless of the hiking maid, no warning gave the wight,
And hit by the stampeded foal, she suffered quite a fright.

V.

To Leominster County Court, Miss Turner promptly came,
And told to sympathetic ears, (to the defendant's shame)
Of Farmer Coates' uncultured colt, and what he did to her,
And how it hurt the bicycle, which was beyond demur.

VI.

The learned Judge with patience heard the plaintiff's woeful claim,
And though good Farmer Coates demurred, he held he was to blame,
For was it not a fact well known to farmers and to Courts,
A startled colt when running loose, kicks, capers and cavorts?

VII.

He found, moreover, negligence, in that the colt was there,
Untethered by a halter-strap, unbridled, free as air;
And also that no warning sound, no timely needful shout,
Was given by defendant Coates, or his unheeding clout.

VIII.

To the King's Bench the angry Coates, with his appeal came quick,
Retaining able Lawyer Brooke to try and "turn the trick";
He argued that the Court below, went woefully astray,
And used up fifty-seven lines to try and win the day.

IX.

The plaintiff, not to be outdone, applied to Brandon bold,
To tell to Lush and Bailhache, what she the Court had told,
So up spoke Harold Brandon then, in twelve good lines and true;
While Hawke, K.C., a friend of Court, referred to *Pinn* v. *Rew*.

X.

Though Brooke replied, Reports tell not, what further words he used;
But Justice Lush, without delay, declared the Nurse abused,
And wronged in law to such extent, that she her claim should hold;
And thus it was that Lawyer Brooke was beat by Brandon bold.

PRECEDENCE OF JUDGES OF THE SUPREME COURT OF ONTARIO.

By the death of Chief Justice Falconbridge the title of "Chief Justice of the King's Bench" becomes extinct. His death, and the resignation of Mr. Justice Britton, has also the effect of making a change in the order of precedence of the Judges. Sir William Mulock the Chief Justice of the Exchequer becomes automatically the President of the High Court Division and ranks next to the Chief Justice of Ontario, and the order of precedence among the Judges now on the Bench, therefore, now stands as follows:—

The Chief Justice of Ontario and President of the Appellate Division, The Chief Justice of the Exchequer and President of the High Court Division, Mr. Justice Maclaren, The Chief Justice of the Common Pleas, Mr. Justice Magee, Mr. Justice Hodgins, Mr. Justice Clute, Mr. Justice Riddell, Mr. Justice Latchford, Mr. Justice Sutherland, Mr. Justice Middleton, Mr. Justice Kelly, Mr. Justice Lennox, Mr. Justice Masten, Mr. Justice Ferguson, Mr. Justice Rose, Mr. Justice Logie, Mr. Justice Orde.

We may also note that the present holders of the titles of "Chief Justice of the Exchequer" and "Chief Justice of the Common Pleas" are the last holders of those titles, and no successors to them are under the Judicature Act, as it now stands, intended to be appointed, but on the death of the survivor of them a "Chief Justice of the High Court Division" is to be appointed.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PRINCIPAL AND SURETY—SURETY'S RIGHT OF ACTION AGAINST PRINCIPAL—NOTICE BY SURETY TO TERMINATE GUARANTY —UNASCERTAINED LIABILITY.

Morrison-Barking Chemicals Co. (1919) 2 Ch. 325. In this case the plaintiff had given to a bank a guaranty to pay on demand, or on the sooner determination of the guaranty, all moneys due to the bank by the defendants to the extent of £5,000 only for principal, the guaranty to be terminable by the bank on its closing the account ascertaining the amount due and demanding payment by the plaintiff; or by the plaintiff giving the bank three months' notice to determine the guaranty. Neither of these steps having been taken and the amount of the plaintiff's liability not having been ascertained, the plaintiff brought the action to compel the defendants to pay the £5,000 as indemnity against the payment of the same. It was admitted that the defendants' indebtedness to the bank amounted to a sum not exceeding £5,000, but their indebtedness varied from day to day. Sargant, J., was of the opinion that until the guaranty had been terminated, and the amount of the liability ascertained, the plaintiff was not entitled to judgment against his principal, having regard to the terms of the guaranty. He therefore dismissed the action.

PRACTICE—ACTION BY THE CROWN—INTERLOCUTORY INJUNCTION —DISPENSING WITH UNDERTAKING AS TO DAMAGES.

Secretary of State for War v. *Cope* (1919), 2 Ch. 339. Lawrence, J., decided that the settled rule of practice that in motions by the Attorney-General for an interlocutory injunction an undertaking as to damages is dispensed with, applies equally to a motion if made on behalf of the Secretary of State for War in respect of property vested in him or under his control on behalf of the Crown.

SHIP—CHARTERPARTY—CHARTERING BROKER'S COMMISSION—PERCENTAGE ON ESTIMATED GROSS AMOUNT OF HIRE—NO FREIGHT ACTUALLY EARNED—CUSTOM.

Les Affréteurs Reunis Société Anonyme v. *Walford* (1919) A.C. 80. This was an appeal to the House of Lords (Lord Birkenhead, L.C., and Lords Finlay, Atkinson and Wrenbury) from the decision of the Court of Appeal (1918) 2 K.B. 498 (noted *ante*, vol. 55, page 29). The point at issue was a simple one. By a charterparty it was provided "a commission of three per cent. on

the estimated gross hire is due to Leopold Walford on signing the charterparty (ship lost or not lost)." The action was brought against the ship owners on behalf of Walford who was their broker in negotiating the charterparty for the recovery of the commission. The defendants set up as a defence the existence of a custom whereby no commission is payable unless freight is actually earned. The Court of Appeal held that such custom could not override the express terms of a contract, and gave judgment in favour of the plaintiff, and this judgment their Lordships affirmed.

BEQUEST OF MASSES FOR SOUL OF TESTATOR—SUPERSTITIOUS USES —STATUTE OF CHANTRIES (1 Edw. VI. c. 14)—ROMAN CATHOLIC RELIEF ACT, 1829 (10 GEO. IV. c. 7), ss. 28, 29.

Bourne v. *Keane* (1919) A.C. 815. Ever since the Chantries Act (1 Edw. VI. c. 14) whereby property vested in chantries for the saying of masses for the dead were confiscated to the Crown, it had been held in England that a bequest for masses was illegal as being a gift to superstitious uses by reason of a supposed implied prohibition thereof by the Chantries Act. This course of decision, which has been taken to be the law for about 300 years, has now been declared to be erroneous by the House of Lords (Lord Birkenhead, L.C., and Lords Buckmaster, Atkinson, Parmoor and Wrenbury), Lord Wrenbury dissenting. Lord Wrenbury was of the opinion that the law was settled, and could only be properly altered now by Act of Parliament. The majority of their Lordships however thought that the Chantries Act only applied to past gifts and did not impliedly prohibit future gifts for the like purpose, and therefore that the original decision to the contrary was erroneous. —We may observe that for some time past in Ontario such bequests have been held to be valid, so long as they do not infringe on the rule against perpetuities, the last Ontario case on the subject being: *Re Zeagman*, 37 O.L.R. 536. According to the report, the bequest in this case was of so much money for masses, no specific amount being mentioned. What is the duty of an executor in regard to such a bequest? How is he to determine how many masses should be said for the amount of the legacy? In the event of a dispute on what basis could a Court of law decide such a question? From one point of view a single mass is of absolutely inestimable value—from another point of view it may as a matter of practical experience be obtainable for a comparatively small *honorarium*. Ordinarily if a bequest is made upon a condition, it is the duty of an executor when paying the legacy to see that the condition is fulfilled, a bequest for masses is in effect a bequest upon condition. It is not intended that the legatee shall put the money in his

pocket and do nothing: but how is an executor to see that the condition on which the bequest is given is fulfilled? The supposed efficacy of the mass we believe depends on the intention with which it is said. How can an executor determine whether there has been the required intention? The decision of their Lordships seems to have opened a wide field for discussion. Possibly in view of the difficulties we have suggested the decision overturned may have been substantially right, even though the reasons therefor were erroneous, inasmuch as such bequests appear to be beyond the power of any temporal Court properly to administer.

CONSTITUTIONAL LAW—PROVINCIAL LEGISLATURE—DELEGATION OF POWERS OF PROVINCIAL LEGISLATURE—OFFICE OF LIEUTANANT-GOVERNOR—INITIATIVE AND REFERENDUM ACT (6 GEO. V. CH. 59, MAN.)—B.N.A. ACT, 1867 (30-31 VICT. CH. 3) SEC. 92(1).

In re Initiative and Referendum Act (1919) A.C. 935. By an Act of the Provincial Legislature of Manitoba (6 Geo. V. c. 59), that Legislature attempted to delegate to the electoral constituencies the power of initiating and passing laws without the consent of the Lieutenant-Governor. The Judicial Committee of the Privy Council (Lords Haldane, Buckmaster, Dunedin, Shaw and Scott-Dickson) held that such an Act was *ultra vires* of the Provincial Legislature, affirming the judgment of the Manitoba Court of Appeal. By the Act in question it was provided that if a proposed law was approved by the majority of the votes polled it was to become law as though such law were an Act of the Provincial Assembly: and also providing that such Act or law or any part of it disapproved by the majority of the electors should be deemed repealed. It is as well that this novel experiment for introducing laws without due debate and consideration has failed. Their Lordships were of the opinion that such an enactment seriously affected the rights of the Lieutenant-Governor as His Majesty's representative, as an integral part of the Legislature. We have referred to this case on another page.

CANADA—MANITOBA—DIVORCE—JURISDICTION.

Walker v. *Walker* (1919), A.C. 947. The judicial committee of the Privy Council has by a series of decisions settled the controverted point that in British Columbia, Alberta, Saskatchewan and Manitoba the Superior Courts have jurisdiction to grant divorce. *Watts* v. *Watts* (1908), A.C. 573, settled the question as regards British Columbia and in the present case the matrimonial

jurisdiction of the King's Bench in Manitoba is affirmed on like grounds; their Lordships (Lords Haldane, Buckmaster, Dunedin, Shaw, and Scott-Dickson), holding that 51 Vict., c. 33 (D), s. 1, had the effect of introducing the laws of England as the same existed on July 15, 1870, so far as applicable, into Manitoba, which included the then existing law of divorce under the English Matrimonial Causes Act of 1857; and that the Provincial Act defining the jurisdiction of the Manitoba Court of King's Bench as that possessed on July 15, 1870, by the English Superior Courts of Law and Equity having cognizance of property and civil rights and of crimes and offences was sufficient to enable the Manitoba Court to exercise jurisdiction in divorce.—We may observe that the point does not appear to have been taken, that as divorce is within the exclusive jurisdiction of the Dominion Parliament, the conferring of jurisdiction on Courts to administer that law must also of necessity rest exclusively with the Dominion Government, and that for a Provincial Legislature to confer divorce jurisdiction on a Provincial Court is in effect a breach of the B.N.A. Act and a legislating on the subject of divorce. With the greatest respect for the Judicial Committee we venture to think it has in this case failed to consider an important point of our constitutional law. For while it is true that the constitution of Provincial Courts rest with the Provinces, yet we submit the right to constitute a Court does not involve the right to confer on the Court so constituted a jurisdiction in matters over which a Province has no jurisdiction. We think the course of Dominion legislation in the past has always been correctly based on the assumption, that whenever it was thought necessary to give Provincial Courts jurisdiction to deal with matters within the exclusive control of the Dominion, that jurisdiction must be conferred by the Dominion Parliament. The Criminal Code, the Dominion Winding-up Act, the Controverted Dominion Elections Act and the recent Bankruptcy Act are all familiar illustrations of this course of legislation.

The Crown as represented by the Dominion of Canada does not appear to have been represented in this case. It is therefore probably, not bound by this decision. In the meantime the Provincial Courts may act upon it and it may hereafter be held that they had no right to do so, this case to the contrary notwithstanding. In order to avoid such a contingency ought not the Dominion Parliament to pass an Act conferring jurisdiction on the Provincial Courts?

ALBERTA—DIVORCE—JURISDICTION.

Board v. *Board* (1919) A.C. 956. In this case the Judicial Committee of the Privy Council (Lords Haldane, Buckmaster, Dunedin, Shaw and Scott-Dickson), by a similar process of reasoning to that adopted by them in the preceding case, have determined that the Supreme Court of Alberta has also jurisdiction in divorce: and it follows that this would be also the law in Saskatchewan. Thus, as we have said, in all of the Western Provinces the Superior Courts are held to have jurisdiction in divorce, and the English divorce law as it existed in 1870 is in force—subsequent English amendments however are not in force in those Provinces until made so by the Dominion Parliament. This series of decisions ought to relieve the Dominion Parliament of a good deal of divorce business. In this case Lord Haldane observes, in reference to the question of the jurisdiction of the Provincial Courts, "If the right exists the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Court of Justice." In the Province of Ontario, long years before the establishment of a Court of Equity, equitable rights arose, but there was no Court to enforce them, and yet the Common Law Courts of the Province never assumed that they had jurisdiction to enforce them. What was called a Dormant Equities Act was passed to prevent such rights from being barred and to limit a time after the establishment of a Court of Equity within which they could be enforced see 7 W. IV, c. 2, s. 11 (U.C.), and 18 Vict., c. 124 (C). Lord Haldane's observation might be applicable in a country where there is only one King's Court, but in a country where there are a multiplicity of King's Courts it becomes a question which of them is endowed with this presumptive jurisdiction, in matters over which the Dominion has exclusive jurisdiction; it would seem that it might more reasonably be supposed to be one of the King's Courts under Dominion jurisdiction, *e.g.*, the Exchequer Court, than a Provincial Court.

PRIZE COURT—CARGO—CONDEMNATION—APPEAL—APPELLANTS NOT OWNERS OF SUBJECT OF APPEAL—ABSENCE OF LOCUS STANDI.

The *Kronprinzessin Cecilie* (1919) A.C. 964. This was an appeal from the condemnation of a cargo by the Prize Court. The appellants were neutrals who had shipped the cargo consisting principally of consignments of oil, f.o.b., at New York in July, 1914. The ship belonged to the Hamburg-America S.S. Co., a company

incorporated under German law. The consignees were an Austrian company and a German company. The vessel was taken into a British port and both it and the cargo was condemned as prize—the judgment as to the vessel was varied on appeal to the Judicial Committee and a judgment of detention substituted. The appellants now appealed as to the cargo and claimed a similar variation of the judgment as to it—but the Judicial Committee of the Privy Council (Lords Parmoor, Wrenbury and Sterndale and Sir Arthur Channell), held that the appellants were not, and did not claim to be, the owners of the goods, and therefore had no *locus standi*, and therefore no variation of the judgment could be made at their instance, notwithstanding that it appeared that they had agreed to indemnify the consignees in case of their failing to receive the goods.

PRIZE COURT—TRADING WITH THE ENEMY—GOODS SENT TO AGENT IN CHINA FOR SALE—AGENT AN ENEMY SUBJECT—TRADING WITH THE ENEMY PROCLAMATION NO. 2, 1914, CL. 5(7)—TRADING WITH THE ENEMY (CHINA, ETC.) PROCLAMATION 1915.

Salti v. *The Procurator General* (1919) A.C. 968. The appellants were Ottoman subjects carrying on business in England. In November, 1915, they posted to their agent (an Austrian subject) at Shanghai, packets of diamonds for sale on their behalf. They were seized and condemned on the ground that the transaction amounted to a trading with the enemy. The Judicial Committee of the Privy Council (Lords Parmoor, Wrenbury and Sterndale and Sir A. Channell) affirmed the judgment of the Prize Court, holding that the agent was for the purpose of the proclamation of 1915 an "enemy" and the transaction was a supplying him with goods contrary to clause 5(7) of the proclamation of 1914.

PRIZE COURT—RETALIATION—ORDER IN COUNCIL OF OCTOBER 16, 1917, INCONVENIENCE TO NEUTRALS—NEUTRAL SHIP CARRYING GOODS OF ENEMY ORIGIN.

The Leonora (1919) A.C. 974. As a retaliatory measure to meet the German U-boat menace an order in council of February 16, 1917, was passed in order to prevent commodities of any kind reaching the enemy. Whereby it was provided that vessels encountered at sea or on their way to or from ports of neutral countries affording access to enemy territory, would, until the contrary was established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and that such goods and the ship would be subject to condemnation, provided that if a vessel called at an appointed British port for examination it should

not be condemned. No ports were appointed under the order. The vessel in question was a Dutch steamer carrying a cargo of coals to Stockholm. The coals were the product of Belgian collieries being worked by the Germans. The vessel was seized as prize off the Dutch coast and the vessel and cargo was condemned. The Judicial Committee of the Privy Council (Lord Sumner, Parmoor, Wrenbury and Sterndale and Sir A. Channell) affirmed the judgment holding (1) that the order was not contrary to the law of nations; and upon the evidence was not invalid as subjecting neutrals to unreasonable inconvenience; (2) that the coal was of enemy origin; and (3) that the appointing of a port was not a necessary preliminary to the order taking effect.

PRIZE COURT—ENEMY OWNERSHIP—COMPANY INCORPORATED IN NEUTRAL COUNTRY—COMPANY UNDER ENEMY CONTROL—FLAG.

The Hamborn (1919) A.C. 993. The question in this case was whether a ship owned by a company incorporated in a neutral country but which was under the control of Germans resident in Germany was liable to capture. By art. 57 of the Declaration of London, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly: By an order in council of Oct. 24, 1914, art. 57 was adopted, but by a subsequent order in council of Oct. 20, 1915, it was provided that from that date art. 57 should cease to be adopted, and that thenceforth Prize Courts should apply the rules formerly observed by them. The ship in question was captured Oct. 27, 1915, she was owned by a company incorporated in a neutral country whose flag the ship flew as she was entitled to do—but it appeared that the company was entirely under the control of Germans resident in Germany. In these circumstances the Judicial Committee of the Privy Council (Lords Sumner, Parmoor, Wrenbury and Sterndale and Sir A. Channell) held that the vessel had been rightly condemned.

CANADA—VESTING OF TERRITORY—"PUBLIC HARBOUR"—BRITISH NORTH AMERICA ACT, 1867 (30-31 VICT. C. 3) S. 108—NAVIGATION.

Attorney-General (Can.) v. *Ritchie Contracting Co.* (1919) A.C. 999. In this case the construction of the B.N.A. Act, 1867, sec. 108, was involved. By that section "the public works and property of each province enumerated in the third schedule of this Act shall be the property of Canada." The schedule includes "public harbours." On the part of the Dominion it was argued that English Bay near Vancouver, by its physical characteristics,

constituted it a safe anchorage and harbour, and therefore was a "public harbour" within the meaning of the section. It was also contended that by virtue of its control of navigation, the Dominion had the right to prevent dredging in that bay. The Judicial Committee of the Privy Council (Lords Haldane, Buckmaster, and Dunedin) without attempting to lay down any exhaustive definition of the words "public harbours" held that it did not include the bay in question. In their Lordships' opinion in order to come within the words of the Act, the harbour must have been at the date referred to in the Act, a going concern, not merely a place that was suitable for a harbour, but a place to which the public had access as a harbour. On the facts they found that the bay in question did not come within that category. And they also held that there was no sufficient evidence that the dredging complained of, did, or would, in fact, interfere with navigation.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SHIP REPAIRERS—USE OF FIRE—INFLAMMABLE CARGO—OPEN HATCHES.

Ellerman Lines v. *Grayson* (1919) 2 K.B. 514. This was an action by the owners of a ship to recover damages caused to the ship and cargo by reason of the negligence of the defendants in the course of making repairs to the ship. The defendants were engaged in riveting cleats to the weather deck of the vessel and in order to do so the rivets were heated in a furnace on the weather deck and lowered in a bucket through an open hatch to the 'tween decks where a riveter drove them into holes bored in the weather deck to receive them. The vessel was discharging cargo from a hold below the 'tween decks and a 'tween deck hatch was open immediately below the open hatch on the weather deck so that a cargo of jute in the lower hold was exposed. A boy carrying a red hot rivet in a pair of tongs to the bucket close by the weather deck hatch slipped on the deck, the rivet shot over the coverings and through both of the open hatches and fell on the jute and set if on fire causing damage to both ship and cargo. Roche, J., who tried the action, held that the damage had been caused by the joint negligence of both parties and dismissed the action. The Court of Appeal (Bankes, Duke and Atkin, L.JJ.) reversed his decision but were not agreed on all points involved. All agreed that the defendants were guilty of negligence in carrying on the repairs with the cargo exposed. Atkin, L.J., thought there was no contributory negligence on the part of the plaintiffs. Bankes, L.J., thought that there was. But Duke and Atkin, L.JJ., came to the conclusion that even if the plaintiffs were guilty of negligence in not closing the hatch, they were nevertheless entitled to recover because the negligence of the repairers was the direct cause of the damage.

Reports and Notes of Cases.

Province of Ontario

SUPREME COURT—APPELLATE DIVISION.

Full Court.] [49 D.L.R. 476.

HUDSON & HARDY v. TOWNSHIP OF BIDDULPH.

Statutes—Claim against township for injury to sheep—Dog Tax and sheep Protection Act, R.S.O. 1914, c. 246—Act repealed by 8 Geo. V. c. 46—Cause of action arising before repeal—Effect of repeal—Damage assessed by corporation—Application for mandatory order to award—Appeal.

The repeal of a statute does not affect the rights of complainants which arose before such repeal, but the prerogative writ of mandamus cannot be awarded in an action to enforce the rights in question. On a proper application the complainants are entitled to a mandamus to the members of the Township Council ordering them to make the necessary inquiry and award under the statute (R.S.O. 1914, c. 246, s. 18.)

[*Rich* v. *Manchon Board of Health* (1912), 2 D.L.R. 866; *Eastview Public School Board* v. *Township of Glaucester* (1917), 40 D.L.R. 707, referred to.]

T. G. Meredith, K.C. and *W. R. Meredith*, for appellants.

J. McEvoy for respondents.

ANNOTATION FROM 49 D.L.R.

Mandamus.

By A. D. ARMOUR, of the Ontario Bar.

Before the present Rules of Practice and Procedure came into force, a writ of mandamus might be obtained in either of three ways:—(1) The High Prerogative Writ, granted only upon motion made in Court; (2) By Statutory Writ, granted summarily on motion under R.S.O. 1877, c. 52, s. 17, and later under former Rules 1091-1093, and (3) Under R.S.O. 1877, c. 52, s. 4, and later under former Rules 1081 and 1082, in any action. The first mentioned form of writ was described by Lord Mansfield in *Rex* v. *Barker* (1762), 1 Wm. Bl. 352, 96 E.R. 196, as "a prerogative writ, flowing from the King himself, sitting in this Court (King's Bench) superintending the police and preserving the peace of this country; and will be granted wherever a man is entitled to an office or a function and there is no other adequate legal remedy for it." The writ issued out of the King's Bench Division as a matter of the Sovereign's grace and discretion when the applicant had a right to

have anything done, and had no other specific means of compelling its performance. The general objects of the writ are given in Encyclopaedia of the Laws of England, 2nd ed., vol. viii, p. 531, as follows:—"To enforce the performance of duties of a public nature. The more important cases to which mandamus is applicable are those in which it is necessary to compel the proper exercise of jurisdiction of the inferior Courts and tribunals, to enforce the performance of duties by public bodies and public officers, and to compel the election, admission, or restoration to offices and franchises of a public nature." But the writ was never issued where there was another appropriate legal remedy, as by action, *Reg.* v. *The Commissioners of Inland Revenue, In re Nathan* (1884), 12 Q.B.D. 461, at p. 471; *Re Whitaker* v. *Mason* (1889), 18 O.R. 63, or by Petition of Right, *In re Nathan* (*supra*), or where a specific remedy was provided by statute for the person aggrieved, *Re Marter & Gravenhurst* (1889), 18 O.R. 243, at p. 255. But where the alternative remedy was inadequate, a prerogative writ was sometimes granted, *Rex* v. *Stepney*, [1902] 1 K.B. 317; *Munro* v. *Smith* (1906), 8 O.W.R. 452. This extraordinary remedy was available only to compel the performance of some imperative public duty. It could not be obtained to enforce a private right or specific performance of a contract, *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Ry.* (1897), 25 A.R. (Ont.) 462, 28 O.R. 399, "granting that a public right may arise out of a private contract and be enforceable by means of the prerogative writ of mandamus, the public duty is owed to the public and not necessarily to the party to the contract. The latter must for the purpose of obtaining the writ be able to shew that he is directly interested in the fulfilment of the public duty not as a party to the contract but as one of the public." *Per* Moss, J.A., at p. 469 (25 A.R.). This writ was never obtainable in an action, but only upon motion; *Smith* v. *The Chorley District Council*, [1897] 1 Q.B. 532; *Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329. But, in this latter case, Boyd, C., permitted the plaintiffs to have the affidavits re-sworn and further intituled as they would be in an application (not in an action) for the prerogative writ, and in *Eastview Public School Board* v. *Township of Gloucester* (1917), 40 D.L.R. 707, 41 O.L.R. 327, though the Court doubted the right of the plaintiffs to a mandamus in an action, they made a declaratory judgment that the plaintiffs were entitled to the writ, and intimated that one of the members of the Court would sit in Chambers and order the issue of the writ, unless the defendants would consent to the issue of the writ in the action. To entitle the applicant to a prerogative writ, the duty whose performance he seeks to enforce must be imperative and not only discretionary, *Re McLeod* v. *Amiro* (1912), 8 D.L.R. 726, 10 O.W.R. 649, 27 O.L.R. 232. This form of mandamus was not as a rule made peremptory in the first instance, but was made a rule *nisi*, and on the return of the motion the respondent was given an opportunity of shewing cause why the writ should not issue. The application was made in Court, and could only be heard in term; consequently delay often occurred in obtaining the writ. R.S.O. 1877, c. 52, s. 17, was accordingly passed, providing for a summary application before a Judge in Chambers at any time, upon notice to the opposite party, and for a peremptory order in the first instance. The provisions of this enactment were carried into rr. 1091 to 1093 of the Rules of Practice of 1897. These rules are now repealed and a prerogative mandamus

is always obtained upon a summary application by originating notice (r. 622) returnable before a Judge in Chambers (rr. 207(11) and 208(9)). No writ of mandamus issues; all the necessary provisions are made in the judgment or order (r. 623). Another form of mandamus was obtainable under former r. 1081, in any action. The plaintiff might indorse upon the writ a notice that he intended to claim a mandamus, and might claim in the statement of claim, either together with any other demand which might be enforced in the action, or separately, a mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested. This remedy was not the prerogative writ, jurisdiction to grant which was inherent in the Sovereign, but was conferred upon the Courts by R.S.O. 1877, c. 52, s. 4. These provisions were not consolidated in the Statute Revision of 1877, but were embodied in r. 1112, and appeared in the Rules of 1897 in rr. 1081-1083. The Act of 1877 was followed by the Judicature Act, 44 Vict. (1881), c. 5, s. 17(8), providing that a mandamus might be granted by an interlocutory order of the Court in all cases in which it should appear to the Court to be just and convenient that such order should be made. The result of these enactments was that the powers of the Court were enlarged to grant a mandamus in an action in cases where the prerogative writ would not be granted. The remedy was not intended to be available for the enforcing of public duties only. Day, J., in *Baxter* v. *London County Council*, 63 L.T. 767, at p. 771, described the jurisdiction as follows: "The action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a *mandamus* was to supersede the prerogative writ of mandamus." The privilege of claiming such a mandamus is that right to claim a mandamus in an action where the litigant is personally interested in the fulfilment of a duty of a quasi public character, as for instance where a statute gives a right to a person to have an act or duty performed by another, and that other does not perform it, *Young* v. *Erie* (1896), 27 O.R. 520. The intention of the Legislature was to confer upon Courts of law the power of acting in *personam* possessed by the Court of Chancery, practically to give to them the equity powers of injunction and enforcing specific performance of a duty in the nature of an execution; *Smith* v. *The Chorley District Council*, [1897] 1 Q.B. 532 at p. 39. The jurisdiction probably extended as far as enforcing specific performance of a contract by a mandamus in an action; *Grand Junction Rly. Co.* v. *Peterborough* (1883), 8 Can. S.C.R. 76 at p. 123. The chief difference between this remedy and the prerogative writ was that the former might be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie. Whereas the prerogative writ is only granted in cases where the performance of the duty sought to be enforced could not be compelled by action; *Glossop* v. *Heston* (1879), 12 Ch.D. 102 at p. 122. The enactment of 44 Vict. is now found in the Judicature Act, R.S.O. c. 56, s. 17, but the former rr. 1081-1083 have been repealed. The question therefore arises whether a mandamus

may now be claimed in an action. No provision for claiming such relief in an action is contained in the rules. It would seem that the jurisdiction to entertain such an action being purely statutory, and not inherent, and the enabling statute and rules having been repealed, there is now no such jurisdiction. On the other hand, r. 552 provides that "if a mandamus granted in an action or otherwise," is not complied with, the Court may direct that the Act required to be done may be done so far as practicable by a person appointed by the Court. It is true that a mandamus may be granted by an interlocutory order under s. 17 of the Judicature Act, if the Court deems it just and convenient. But an interlocutory order is any order other than final judgment, whether before or after final judgment; *Smith* v. *Cowell* (1880), 6 Q.B.D. 75; and the enactment does not enable the Court to include a mandamus as relief in the final judgment. Apparently the litigant having established his right to this relief at the trial, must make a further and substantive application by motion. There is still another remedy which the Courts may apply in order to enforce the performance of an act, namely a mandatory order under the Court's equitable jurisdiction to grant an injunction. Originally all injunctions were negative in form, restraining the defendant from performing some act, and so preventing the recurrence of the injury. But when the granting of relief involved the compelling of the performance of some positive act, as, for instance, the removal of work already executed, and the person to whom the order was directed was illiterate, orders in affirmative form, or mandatory injunctions began to be issued; *Bidwell* v. *Holden* (1890), 63 L.T. 104, and now the direct mandatory form instead of the indirect form is commonly and properly used: *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438. The distinction between a mandamus and a mandatory order must be carefully drawn. A mandamus compels the doing of an act which ought to have been done; while a mandatory order compels the undoing of an act which should not have been done. Moreover, a prerogative mandamus is a legal remedy, while a mandatory order is an equitable remedy. The mandamus claimed in an action, if such an action is now maintainable, is hard to define. It was originally statutory and legal. If it now exists, it does so by virtue of s. 17 of the Judicature Act, and is therefore equitable. In *Rich* v. *Melancthon Board of Health* (1912), 2 D.L.R. 866 at p. 870, 26 O.L.R. 48, the judgment of the Court says in part: "The great weight of modern authority is in favour of the view . . . that the mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law." In other words, it is one or the other, and seems to be aptly defined in the language of Kipling as a kind of a giddy harumfrodite. Whenever the evidence justifies an order directing the performance of an act there seems to be ample jurisdiction in the Court, whatever the procedure may have been. In *Stothers* v. *Toronto General Trusts Co.* (1918), 47 D.L.R. 176, 15 O.W.N. 253, the case arose of parties acting under an order made in 1911, before the present rules came into force. The order had been made although no writ had issued and no notice of motion had been served. It was held that the order was valid, because service of a notice of motion was not essential to give jurisdiction to the Court to deal with an application as upon originating notice under the rules then in force. The thing to be done

was to bring the motion before a competent tribunal and the notice of motion was only the form by which that was to be accomplished. If the person who, under this rule (938), is the person to be served, is willing to waive that formality and to go before the Court in order that the motion may be made and dealt with, that course may be properly taken. If this case is still law under the present rules, it seems logical to conclude that if the parties are before the Court, no writ or notice of motion is necessary. If no preliminary process is necessary to give the Court jurisdiction, then the method by which the parties are brought before the Court seems immaterial to give the Court jurisdiction to grant the relief of mandamus, whatever the form of proceeding may be. This view is supported by the provisions of s. 16 (8) of the Judicature Act: "The High Court of Justice and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." Rule 10(1) however now provides that every proceeding in the Court other than an action or a proceeding that may be taken *ex parte*, shall, unless otherwise specially provided, be commenced by a notice of motion called an originating notice. It is possible, therefore, that *Slothers* v. *Toronto General Trusts Corporation, supra*, is no longer authoritative. Whatever may be the proper method of procedure, if the wrong procedure is adopted it is open to the Court to grant relief in a proper case as was done in *Toronto Public Library Board* v. *City of Toronto, supra*, or in *Eastview Public School Board* v. *Township of Gloucester, supra*.

Bench and Bar.

Appointments to Office.

John Fosbery Orde, of the City of Ottawa, in the Province of Ontario, K.C., to be a Judge of the Supreme Court of Ontario and a Member of the High Court Division of the said Court and ex officio a Member of the Appellate Division of the said Court, in the room and stead of the Hon. Mr. Justice Britton, retired.

Obituary.

Hon. Chief Justice Sir William Glenholme Falconbridge, Knt.

Sir Glenholme at the time of his death on the 8th instant was the last of the Judges of the old King's Bench, and President of the High Court Division of the Supreme Court of Judicature for Ontario. He died after a week's illness from pneumonia, deeply regretted.

The deceased who was born on May 12, 1848, being the eldest son of the late John Kennedy Falconbridge, J.P., who came to Canada in 1837 from the North of Ireland. His parents moved to Richmond Hill while he was still a boy. He was educated at Barrie Grammar School, and the Upper Canada Model Grammar School. He continued his education at the University of Toronto. His record there was exceptionally brilliant, capturing prizes and scholarships every year. This included the Gold Medal for Modern Languages in 1866 when he graduated M.A. in 1870. Mr. Falconbridge was a lecturer in University College in Toronto from 1867 to 1868. He was called to the Bar in 1871; elected a Bencher of the Law Society of Upper Canada in 1863; Q.C. in 1885. After leaving the University he took a temporary position as Professor of Modern Languages at Yarmouth, Nova Scotia and leaving there to become lecturer in Italian and Spanish at University College, Toronto.

Entering the active practice of his profession he joined the firm of Messrs. Harrison, Osler & Moss, in 1879. In 1887 he was elevated to the Bench as a Justice of the Supreme Court of Judicature for Ontario. This position he held until July 2nd, 1900, when he became the 15th and last Chief Justice of the Queen's Bench, and subsequently President of the High Court Division of the Supreme Court of Judicature for Ontario.

After being raised to the Bench, in 1887, His Lordship was appointed to many important Royal commissions, including that one which revised the Statutes of Ontario in 1896, and later the one which revised Imperial Statutes dealing with certain civil rights in Ontario. In 1901, he wrote the introduction to the Canadian edition de luxe of Burke's works; was a vice-president of the Imperial Maritime League, and an honorary colonel in the Canadian militia. He was formerly chairman of the Public Library Board of Toronto, and president of the Ontario Fish and Game Protective Association.

Sir Glenholme is survived by his widow, Lady Falconbridge, who was a daughter of the late Hon. Mr. Justice Sullivan, and one

son, John DeLatre Falconbridge, well known in the profession, and four daughters, Mrs. A. W. Anglin, Mrs. Robert Cassels, Mrs. Thomas Moss, and Mrs. Douglas Young.

In our editorial columns we refer more fully to the distinguished judicial career and to the personal worth of the late Chief Justice, who may well be called, one of the great men of Canada.

Numerous testimonials appeared in the daily press at the time of his death. One however did not appear, and we prefer to quote it as perhaps the one most worthy of record; it is the memorial of the officers and members of the County of Hastings Law Association, expressing their deep sense of loss in the lamented death of the Chief Justice in the following words:—

> The Officers and Members of the County of Hastings Law Association desire to record their deep sense of loss in the lamented death of the Honourable Sir Glenholme Falconbridge, Chief Justice of the King's Bench.

"In him centred and lived again all the old traditions, literary, scholastic, social, professional and judicial, which have lent honour and dignity to the British Bench and Bar. He fulfilled the ideals of the grand old name of gentleman and he touched nothing that he did not adorn. As a friend, as a public-spirited citizen and philanthropist, he will be missed by a still wider circle, but by none will his death be more sincerely deplored than by the Members of the Bar of this District who will ever keep green the most delightful memories of his charming and cultured personality and intercourse so genially and generously shared. And we desire to extend to Lady Falconbridge and all the other members of the bereaved family our sincerest sympathy and condolence."

Mr. Z. A. Lash, K.C.

In the death of Mr. Z. A. Lash, K.C., LL.D., the Bar has lost a distinguished member, and the Province one of its best citizens. His career, a notable instance of varied activity, legal, commercial and philanthropic, closed at 74, an age at which many other leading professional men are still in harness Born in Newfoundland, he practised law first in Dundas, Ontario, having been called to the Ontario Bar in 1868. For six years he held the important Dominion appointment of Deputy Minister of Justice. Removing to Toronto, the firm of Blake, Lash and Cassels was soon afterwards formed. Mr. Lash was appointed Queen's Counsel in 1879 and has been a Bencher of the Law Society of Upper Canada continuously since 1898. He was made an LL.D. of Toronto University in 1909.

Mr. Lash was generally recognized as an authority on banking, company and commercial law, and his connection with many large commercial and financial interests is well known. Nothing, however, prevented him from devoting time and means to the support of philanthropic objects. His political aspect was broad, and his arguments on the side of what he deemed to be the right were convincing. Those who had the privilege of enjoying his friendship, and who knew him in his intimate home life, will most keenly feel the loss suffered by the community generally.

GOODWIN GIBSON, M.A.

Mr. Gibson was born in Scotland, November 3rd 1848. He came to Canada early in life and like many others who have come into prominence in the Bar of this Country, began as a school-teacher, first in Coburg, and subsequently at the Galt Collegiate Institute.

He completed his education at Toronto University. His college mates there and his worthy competitors for honours and prizes were George R. Grasett, second son of Rev. Dean Grasett, and James H. Coyne, of St. Thomas. Since the days when Thomas Moss carried all before him no more brilliant scholars than these ever graduated at Toronto University. This close competition lasted from about 1867 to 1870, when Grasett and Gibson were bracketed for the Gold Medal. Grasett subsequently went to Cambridge where he was prominent both as a scholar and as an athlete, being the best quarter of a mile man at Cambridge, and also an expert oarsman. On his return to Canada he was made Captian and Coach of the Argonaut Rowing Club. He commenced the study of the law, but the promise of a brilliant career was unhappily cut short by a long illness and death.

Gibson after his University honours took up law as his life work, entering the office of Christopher Robinson and Henry O'Brien as a student, and subsequently becoming a partner in the firm. He was as fine a lawyer as he had been a student, good all round, but taking a place in the front rank in the law of real property, in which he had no superiors.

Later in life, owing to failing health, he became one of the Examiners of the Law School and in 1906 was appointed one of the Law Reporters at Osgoode Hall, which position he held until the illness, which terminated in his death on February 5th, 1920.

In 1883 he married Miss Emily Adair who survives him. They had five sons and one daughter. Four of the sons were in the great war, one of them, Lt. Lawrence P. Gibson, being killed in action in France.

Lt. Col. John H. Moss, B.A., K.C.

A very definite gap has been made in the ranks of the Ontario Bar by the death on 10th inst. of John H. Moss, from pneumonia, after a few days illness. The deceased was born in 1869, the son of one of Canada's most brilliant lawyers and judges, Thomas Moss, who died as Chief Justice of Ontario.

The deceased was an old Upper Canada College boy, taking his degree of B.A. at Toronto University in 1889. In 1892 he was called to the Bar, and a K.C. in 1908. He soon became a leading spirit in the partnership and enjoyed in a marked degree the confidence of his many important clients, being a shrewd man of affairs as well as a sound and well read lawyer.

He took an active interest in Military matters before the war, and joining the Mississauga Horse finally became Lt. Col. of that force. During the war in 1917 and 1918 he was a member of the Military Council at Ottawa in connection with the enforcement of the Military Service Act. He was twice married; his first wife being Miss Sullivan, niece of Lady Falconbridge, and his second, the daughter of the late T. C. Patteson, who, with one son, survives him.

Mr. Moss was at the time of his death a member of the firm of Messrs. Aylesworth, Wright, Moss & Thompson. The development of this well known firm is of interest and it would not be inappropriate to refer to it here. Hon. James Patton, Q.C., coming from the Town of Barrie in 1860 took into partnership his student Featherston Osler, who subsequently went on the Bench, and recently retired from the Ontario Court of Appeal, one of the very best of our Judges. The firm of Patton & Osler was joined by Thomas Moss, father of the deceased, then giving promise of the distinguished, but all too short career, which awaited him. It eventually became necessary for him to choose between politics and the Bench. He choose the latter and was made one of the Judges of the Court of Appeal and in 1875 became Chief Justice of Ontario at the remarkably early age of 41. He was perhaps the most brilliant of all our Judges.

From time to time changes and additions took place. In 1871 Robert A. Harrison, already well known to the profession, as author of Harrison's Common Law Procedure Act, as compiler of the Municipal Manual, and one of the Editors of the Canada Law Journal, and a great jury lawyer became head of the firm; but in 1874 he was taken away to become Chief Justice of the Queen's Bench. In 1879 another future Chief Justice joined

the firm, the late Sir Glenholme Falconbridge, whose death this month we now lament—the last Chief Justice of the King's Bench. In the list of those who attained to eminence in this seed plot of Judges was Charles Moss, brother of Thomas, who was taken from the same firm to become Judge and afterwards Chief Justice of the Court of Appeal. His son Charles, also of the same firm, gave his life for his country in the great war. Another notable of this firm was N. W. Hoyles, LL.D., K.C., who subsequently became the head of the Ontario Law School.

Book Reviews.

A Concordance of the Railway Act, ch. 68 of the Statutes of Canada, 1919, etc. By A. H. O'Brien, M.A., late Law Clerk of the House of Commons; author of O'Brien's Conveyancer, etc. Toronto, Canada Law Book Company, Ltd., 1919.

This book contains a complete analytical index of the new Dominion Railway Act, with a table of reference from the section numbers in the old Act to those in the new. This is of the greatest value. Other contents are: the Rules and Regulations of the Board of Railway Commissioners for Canada, with forms under the rules; Regulations *re* Plans and Specifications: Indexes to all Rules; and lastly, the Railway Act itself. Those having to do with railways—either for or against—will find this book invaluable. The author's name is sufficient to insure its accuracy and completeness.

Flotsam and Jetsam.

The Prevaricators.

A New York lawyer, acting for the appellant, at the close of the case, anxious to win his appeal, cited to the Court a case of *Jones* v. *Sprinwer*, 34 Huns Reports, page 82, as being exactly in point with the case at Bar thereupon. Counsel on the opposite side despatched one of his assistants to the library, but it took some time to ascertain the fact no such case ever existed. Time pressed and the Court was waiting. Counsel for the respondent was, however, equal to the occasion and stated that he had had the case referred to by the opposing counsel looked up and he agreed

that it was exactly in point and could not be distinguished from the case at Bar, "but," he continued, "this case was appealed to the Supreme Court of the United States and was unanimously reversed"; whereupon the appeal was dismissed with costs.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and contents according to the circumstances and the time in which it is used."—Per Mr. Justice Holmes in *Towne* v. *Eisner*, 245 U.S. 425.

BANK—LIABILITY FOR DISHONOURING CHECK.

Proof of actual damages is held not necessary in the Arkansas case of *McFall* v. *First Nat. Bank*, 211 S.W. 919, annotated in 4 A.L.R. 946, to enable a merchant or trader to recover substantial damages from a banker who dishonours his checks when he has funds on deposit.

NEGLIGENCE—FOREIGN SUBSTANCE IN FOOD.

The mere presence of a small, flat-headed black tack in blueberry pie, served by the keeper of a restaurant to a patron, is held in *Ash* v. *Child's Dining Hall Co.*, 231 Mass. 86, 120 N.E. 396, not to establish negligence under the rule of *res ipsa loquitur* on the part of the keeper of the restaurant, although the pie was made on his premises, if there is no evidence as to how the tack got into the pie, and its size and shape are such that it might have been embedded in a berry, when it would escape the most careful scrutiny.

The presumption of negligence from finding a foreign substance in food is considered in the note appended to this case in 4 A.L.R. 1556.