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SIR JOHN BOYD, K.C.M.G., CHANCELLOR OF ONTARIO.

By the death of the Honourable Sir John Alexander Boyd, K.C.M.G., Chancellor of Ontario and President of the High Court Division of the Supreme Court of Ontario, the Dominion has lost one of its most able jurists. Sir John had reached a ripe old age and during the thirty five years in which he sat upon the Bench of the Province of Ontario he earned for himself the lasting gratitude and respect of the community as an able and upright Judge, as well as the affection and esteem of every member of the Bar with whom he came in contact.

Sir John was the son of Mr. John Boyd, the principal of a school formerly carried on in Toronto and known as "The Bay Street Academy." He was born on Shakespeare's Day, 23rd April, 1837, and was educated in part at his father's school and subsequently at Upper Canada College and the Toronto University, where he took his degree of B.A., and was awarded the gold medal for modern languages; he subsequently proceeded to M.A. in 1861. and LL.D. in 1889. In 1863 he received the degree of D.C.L. from Trinity College.

Choosing the law as his life work he was admitted a solicitor August 26, 1863, and was called to the Bar November 16, 1863, with honours. He began the practice of his profession in partnership with the late D. B. Read, Q.C., the firm being Read & Boyd.

On October 31, 1870, he was appointed Master in Ordinary of the former Court of Chancery of Ontario which office he held until December, 1892, when he resumed practice as a member of the firm of Blake, Kerr & Boyd. On May 3, 1881, he was elevated to the Bench as Chancellor of Ontario in succession to the Hon. J. G. Spragge, who was promoted to the Chief Justiceship of the Court of Appeal. This position Sir John retained until his death.

His judicial career therefore began almost simultaneously with the changes in the organization of the Courts, and in the procedure called for by the Ontario Judicature Act of 1881, and it is due to his able and sympathetic administration of the new system then inaugurated, that it soon approved itself to the profession.

Sir John was of a singularly calm and equitable disposition and of an eminently judicial frame of mind, apt to see all sides of a case and without any prepossessions for or against any litigant who came before him. As a lawyer, few of his contemporaries could reasonably claim to be his equal either in the grasp of legal principles, or the wide and varied stores of knowledge which he possessed and was ever adding to. His official duties were discharged with firmness, but with unfailing courtesy to and consideration for the Bar, the members of which always regarded him with profound admiration and respect, and by whom his death will be sincerely regretted. And here we desire to pay our tribute of gratitude for his many contributions to the editorial column of this journal: articles of great value to practitioners and counsel and on a variety of subjects.

Sir John was perhaps ill advised when in 1903 he undertook the office of a Commissioner to inquire into the Gamey charges, for it was the only occasion during his long career that he was exposed to adverse criticism, a result almost inevitable when party politics are concerned. This incident was another illustration of the evil of appointing Judges on commissions and taking them away from their proper sphere of labour, especially in cases (as we have seen lately in Manitoba), where political animosities can creep in.

In 1900 he was offered and declined the Chancellorship of Toronto University, of which he was a most distinguished alumnus. In 1901 his late Majesty was graciously pleased to confer on him the honour of Knighthood, in connection with the Order of St. Michael and St. George; this distinguished record of Royal favour was unanimously approved by the profession.

He had thus for twenty years past filled one of the highest judicial offices in the Province with distinction and universal

acceptability. He has gone now to his reward leaving behind him the reputation of a learned and thoroughly upright magistrate, and the memory of a kindly Christian gentleman.

He leaves a widow (a daughter of the late David Buchan, a former Bursar of the Toronto University) and several children, Two of his sons are now serving in the army. His eldest son Alexander volunteered for the service of the Empire during the Boer war and died after the conclusion of war in South Africa.

We may observe that under the provisions of the Ontario Judicature Act with the demise of Sir John Boyd the office of Chancellor of Ontario comes to an end, and the present learned Chief Justice of the King's Bench now becomes automatically the President of the High Court Division.

Among the judicial tributes paid to the memory of the late Chancellor was the following by Mr. Justice Hodgins, at the opening of Court on the 23rd November, 1916, in the Chancery Court room. He spoke as follows:—

"It is fitting that, in this room where Sir John Boyd has so often presided, I should express on behalf of the Bench of this Province our profound grief at the sudden taking off of Sir John Alexander Boyd, for 35 years Chancellor of Ontario, and President of the High Court of Justice.

"His active work as a Master in Chancery preceded his appointment as a Judge. To his judicial duties he remained entirely faithful and it was while he was thus engaged during the week just ended that he was stricken down.

"The great career which has just closed has been of great value to Canada, and will, I believe, long remain as an example and incentive, not only to our profession, but to all Canadians who love their country and try to serve it. Of his commanding services to the jurisprudence of this country much might be said. Sir John Boyd is the last of a line of Chancellors, and he has worthily maintained the high standard which they inaugurated.

"In some departments of our complex profession he shone with peculiar lustre. No Judge has ever drawn so deeply from the well of English undefiled, or lent such an Attic flavour to the

judgments which he pronounced. His eminence as a master of exquisite English will long be remembered, not only here but wherever that language is spoken.

"Sir John Boyd added a simplicity of character and kindliness of disposition to an almost passionate love of law. His rare conception of what was equitable, and therefore equity, and his unequalled training in that branch of legal science, enabled him to give force and direction to the actual union of law and equity which, but for his influence, might have longer remained a union but in name.

"The presence of Sir John Boyd upon the Bench has for so long been a link with the great Judges of the past that his passing away will mark the closing of one period of our legal history. Toronto has a peculiar interest in his memory. He was born here, he was educated and practised here, and here he gathered his judicial laurels. He has during his long life identified himself with what was sound and wholesome in our national life and he leaves with us the remembrance of a great Canadian."

Sir Glenholme Falconbridge who now, by the decease of the late Chancellor Boyd, becomes President of the High Court Division, thus referred to the death of his life long friend and predecessor: "I cannot add anything to the beautiful eulogium pronounced by my learned brother Hodgins, and had I been in his place I think my emotion would have been too great if I had attempted to say anything in public. The relations between Sir John Boyd and myself were particularly intimate and affectionate, dating from the days of his early career at the Bar and my own studentship. The passing of the last of the Chancellors is an irreparable public calamity as well as a cruel personal loss."

JUDICIAL APPOINTMENTS IN ONTARIO.

The vacancies created by the death of Hon. Mr. Justice Garrow of the Appellate Division and of Chancellor Boyd have been filled by the appointment of Mr. Hugh Edward Rose, K.C., and Mr. William Nassau Ferguson, K.C. These appointments

have been favourably received by the profession, and these gentlemen will, we are sure, give a good account of themselves in their new and honourable positions. Both of them were born in the same year, 1869, and both were called to the Bar in the same year, 1894, and both have been members of large firms practising in the City of Toronto.

Mr. Rose was the son of the late Hon. J. E. Rose, LL.D., one of the Justices of the High Court of Judicature, Ontario, in which capacity he evinced judicial qualities of a high order. His death, at a comparatively early age, was a great loss to the Bench. His son, whose appointment has just been announced, will, we doubt not, take an equally high position. Mr. Rose is a student and a man of letters, and is recognized as a sound and well read lawyer. We venture to predict that he will prove a valuable acquisition to the Bench and be a dignified and courteous member of it. He sits as one of the Judges of the High Court Division.

Mr. Ferguson has not of late been so much in Court as Mr. Rose, as his pressing office business required closer attention; but he is also a sound lawyer, and having had an extensive business experience, and being possessed of a large fund of shrewd common sense (which counts for much), we may well believe that he also will make an excellent Judge. Personally popular and genial, he has long been a favourite with the profession, and he goes to his new position with their best wishes for a long life of usefulness. Mr. Ferguson has been appointed to the Appellate Division of the Supreme Court of Ontario.

Although we all might recognise the value of experience and mature judgment in the occupants of the Bench, there is much to be said in favour of the appointment of comparatively young men to judicial positions, provided always, of course, that they have been engaged in active practice and have evinced qualities which fit them for such important duties. To appoint men who for years have been active politicians, but whose usefulness in that field has ceased, and who have no judicial qualities or practical experience in the law, is injurious both to the public and

the profession, and yet such appointments have been made in the past.

It cannot be said that any objection of that kind could be made to the recent appointments. Both of these appointees are comparatively young; of considerable practical experience in the business of the Courts and may be expected to become more useful day by day, whereas those appointed late in life, mainly for political reasons, are apt to become less and less useful as the years go by.

We are sure the new judges will not fail to emulate those of their predecessors, whose patience and courtesy have grown with their years. Unfortunately there are some of whom this cannot be said.

REDEMPTION ACTIONS AND THE STATUTE OF LIMITATIONS.

In the recent case of *Smith* v. *Darling*, 36 O.L.R. 458, it has been decided that the disability clauses of the Statute of Limitations (R.S.O. c. 75) ss. 40-42 do not apply to actions to redeem. The Court, in effect, holds that infants may be barred of their right to redeem while still under age; and that they have no period allowed them after coming of age within which to assert their rights.

With all due respect to the Appellate Division which, we may observe, was unanimous, we cannot but think that the conclusion arrived at is reached by a very technical construction of the Statute of Limitations and though it may be supported by high authority, is nevertheless an unsatisfactory conclusion.

It is admitted by the Court that an action to redeem is "an action to recover land" and on that point there can be no reasonable doubt the moment the nature of the relief granted in a redemption action comes to be considered: By the judgment in such cases an account is ordered; if anything is found due to the defendant, then on payment thereof, or if nothing is found due, the defendant is ordered to deliver up possession of the mortgaged property. Then, s. 40 of the Limitations Act says:

"If at any time at which the right to bring an action" to recover any land . . . first accrues, as herein mentioned the person, entitled is under disability he is to have a further period after such disability ceases for bringing his action. But it is held that this provision is limited to actions provided for by sections 5 and 6, but not to actions to redeem under section 20, although the time for bringing an action to redeem which is admittedly an action to recover land is certainly herein mentioned."

The judgment of the Court in this case shows the extraordinary conflict of opinion which has prevailed on the point. The decisions which the Appellate Division followed appear to have been for the most part based on the collocation of the sections of the Act as originally framed, which collocation we may observe is now altered in the present Revised Statutes, and therefore the reason for the decision which favours the view which the Court below deems to be taken away; and the change in the arrangement of the statute appears to us would have furnished a very reasonable ground for holding that as the Act is now framed the disabilities clauses do apply to actions to redeem. But the Court conceived itself barred by the prior decision of the Court of Appeal in *Faulds* v. *Harper*, 9 App. R. 537, which was opposed to the still earlier case of *Hall* v. *Caldwell* or *Caldwell* v. *Hall*, 7 U.C.L.J. 42; 8 U.C.L.J. 93. But we venture respectfully to doubt that the decision of the Court of Appeal in *Faulds* v. *Harper* was a decision which was binding on the Court or which it was under any obligation whatever to follow. That action was brought by the representatives of a deceased mortgagor to redeem or for an account in the following circumstances: The mortgagee had instituted a suit for and had obtained a decree for sale. The sale was had, and the mortgagee being the plaintiff and having the conduct of the sale, had secretly, through an agent, himself become the purchaser. The majority of the Court of Appeal treated the case as one against a mortgagee in possession and as such barred because as they held the disability clauses did not apply to actions of redemption. Spragge, C., and the Supreme Court of Canada, on the other hand, held that the mortgagee by secretly becoming the purchaser had placed

himself in the possession of the trustee and that the Statute of Limitations had no application to the case. In such circumstances it would seem to us that the expressions of opinion of the majority of the Ontario Court of Appeal as to whether or not the disability clauses of the Limitation Act applied to actions to redeem were clearly unnecessary for the decision of the real point at issue in the case, as ultimately adjudged by the Supreme Court of Canada, and therefore because mere *dicta* and in no sense binding as an authority which the Court was under any obligation to follow. One test, we think, to determine the true character of the nature of the decision is its appealability. Was it necessary for the Supreme Court of Canada for the ultimate decision of the case to decide whether the views expressed by the majority of the Court were right or wrong? As the result proved, clearly it was not. The case before the Court was "Is the defendant a trustee for the plaintiff?" and the majority of the Court of Appeal in effect say we think he is a mortgagee in possession and because we think he is in that position we think the Statute of Limitations has barred the claim of the plaintiffs: and in so doing they virtually decide on a false assumption of fact a question of law which did not properly arise in the case at all. How such a judgment can be anything now than a mere dictum we fail to see. On the other hand, there can be no doubt that the judgment of the Court of Error in appeal in *Hall* v. *Caldwell*, 8 U.C.L.J. 93, really was a decision on the very point.

In these circumstances it is to be regretted that it was not considered admissible to apply a little ordinary commonsense to the solution of the question. If that had been done it might very properly be asked "Is there any conceivable reason for supposing that the Legislature intended to apply one rule to infants claiming to recover land by a legal right, and some other rule to those claiming to recover land by virtue of an equitable right?" and the answer must inevitably be "No."

That being the case the Court might very reasonably be astute to find that the statute had in fact made no difference, rather than to find that it had. Moreover, in the construction of Statutes of Limitations which often in effect legalise the stealing

of one man's property by another, the inclination of the Court in any doubtful case should be rather in favour of the original owner than of the man who seeks the aid of the Statute to despoil him of his rights. It is hard enough that one who is *sui juris* should lose his rights by failure to assert them within a limited time, but it seems to be almost repugnant to natural justice to deprive of their rights persons who are not *sui juris* by reason of their failure to assert them while under disability. And yet it is true that under the Statute of Limitations as now framed it is possible that a person under disability when his right accrues may be barred while still an infant even in respect of legal rights inasmuch as twenty years is the utmost period of limitation now allowed as between subjects.

It must be remembered that persons under disability are debarred from bringing actions of their own volition, an infant must sue by his next friend, a lunatic by his committee; and as the law now stands it in effect says to the person not *sui juris*, "You can't sue to recover your right, and if you don't sue you shall be barred."

According to the decision now under consideration a person may be in his cradle when his right of redemption accrues, and by the time he is ten years old his right may be barred, unless he brings an action, which the law will not permit him to do, except through the intervention of a next friend, whom he may not be able to find. But there is another feature in the case under discussion which deserves notice. It appeared that one action of foreclosure was begun against the morgtagor, wherein judgment was obtained, but before the final order was pronounced the mortgagor died, and without issuing any order to continue the proceedings against the mortgagor's representatives a final order was applied for and granted; and relying on the supposed foreclosure thus obtained the mortgagee sold the property to some third party, who conveyed to some one else who was not made a party to the action.

A final order pronounced in such circumstances is nugatory. It is in effect a judgment against a non-existent person, and cannot by any possibility be binding on persons who are not

subject to the jurisdiction of the Court. A solicitor obtaining such an order knowing of the defect would be guilty of grave misconduct and would be committing a fraud on the Court as on all *ex parte* applications *uberrimae fides* is required on the part of the applicant. If he did it ignorantly the proceedings, though not reprehensible from a moral standpoint, would be none the less nugatory.

As regards purchasers from the mortgagor in such circumstances we do not think that the law "Transfer of Property Act" would protect them. S. 56 of that Act provides that "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or want of any concurrence, consent, notice or service."

But no Court has power to pronounce judgments against persons who are not parties to the proceedings in which a judgment is pronounced. All that this statutory provision does is to make the judgment of the Court binding on those whom on its face it purports to bind, as far as purchasers are concerned, even though as against such persons there may have been a want of jurisdiction, but there is nothing in that statute which makes a judgment against A., who appears to be a party to the proceedings, binding on his representatives in case A. be dead, where such representatives are not parties. It is enough to say the judgment does not purport to bind them.

Before the Judicature Act it was a well understood principle of equity procedure that in a redemption action all persons interested in resisting the right of redemption ought to be made parties to the suit, but this elementary principle seems to have been forgotten in the constitution of the action in question. Formerly the Court of Chancery would not pronounce judgment in suits where the proper parties were not before it. Nowadays such defects seem to be regarded as immaterial, whether in this respect we can be said to have improved on the former procedure may perhaps be open to question. At all events the modern method seems to leave the door open to further litigation and the possibility of conflicting decisions on the same question.

THE SUPREME COURT OF CANADA.

The views of an outsider, unless he is also an onlooker, are apt to be inaccurate; but they have an element of abstraction which may in this case prove an advantage. These views now expressed may have some value and may be suggestive.

The impression is abroad that the Supreme Court of Canada has not taken a position at all comparable to that occupied by the Supreme Court of the United States.

This last mentioned Court has a unique status in the Constitution of the United States. It is part of the machinery of government and forms the judicial counterpoise to the activities of the legislative and executive functions which evolve and enforce the Federal laws. But it has greater claims on our admiration, in that it has maintained a high reputation as an exponent of law and commonsense.

The Supreme Court of Canada is subject to what appears to be a serious disadvantage. It is overshadowed by a Court of equal authority and great prestige to which suitors may resort, either as an alternative or as a further Court of Appeal.

The Judicial Committee of the Privy Council in England has been the final tribunal in practically all the constitutional questions which have agitated Canada. Naturally this has robbed the Supreme Court of Canada of much reputation and has prevented it from becoming a great factor in moulding the political fortunes of Canada in a constitutional sense.

But in another way, differences of method seem to have worked in the same direction. The Judicial Committee's decisions are unanimous, so far as the world knows, while in Canada its highest Court displays in its judgments, both in statement and result, methods that tend to diffuseness. Many of the Judges write opinions of great value but each seems to speak from a different standpoint and to reach his conclusions with a dissimilarity of treatment. This, to an outsider, betrays want of collaboration, which in the highest Court is a distinct and unqualified defect.

How far this is due to racial divergence or to appointments due to territorial representation must be left for Canadians to

determine. The real secret of success in a Court drawn from a wide and diverse area is appointment by merit, not relative merely, but actual. In the United States, with a larger field and equally inharmonious systems in law and training, the Supreme Court has been singularly fortunate in its personnel.

To an American the unadorned dignity and simplicity of its highest Court is a subject of unalloyed congratulation. It fits in with the national idiosyncrasy which rejoices in conferring colloquial titles on the unworthy and denying distinctions to the highest of its servants.

But in a British Dominion one naturally expects that its most notable Court should receive the greatest of those honours which monarchical institutions provide. How is it that while the Chief Justices of Provincial Courts receive Knighthood from their Sovereign, the members of the Supreme Court of Canada, who rank higher, are treated as unworthy of that honour unless they have achieved it in political circles for pre-judicial services?

Is the explanation due to want of merit in the members of the Court? This can only be partially so when some of the names of its Judges are recalled. Or is it that the Canadian people have never taken it to their hearts and bestowed upon it their choicest gifts? And if so is it not something for the people to ponder over and question whether indifference may not be the result of lack of appreciation of the fundamental conception that a great Court is one composed of great lawyers? And may not that want of affection react on the Court itself and render it less responsive to its duties to the State and somewhat careless of its reputation?

Whatever the cause, the effect is there. And to one accustomed to appreciate the regard in which the highest Court in the United States is held both at home and abroad, it is puzzling that a people so clear headed and progressive as those of the Canadian Dominion, should not realize that its conditions require and demand as the keystone of its national arch a Court possessing its highest esteem and confidence, strengthened by its best and brightest legal intellects and honoured by its country.

AN OUTSIDER.

JUDGES AND EXTRA-JUDICIAL DUTIES.

Divergence in view among members of the judiciary as to the scope and limitations of the judicial office are always of interest, especially when the views that differ are the views of Judges who themselves belong to different generations and also find themselves in different environments. A greater difference of opinion could not well be found than in the views expressed by the late Lord Esher, as Master of the Rolls, on the 9th Nov. 1892, and those expressed by Lord Reading, the Lord Chief Justice of England, on the 9th Nov. 1916, in speeches at the Lord Mayor's inauguration dinner at the Guildhall on the question of Judges taking part in the work of commissions outside the sphere of strictly judicial duties. The late Lord Esher, in response to the toast of the judges and the Bar of England, said: "When the judges of England acted within the scope of their ordinary duties nobody ever attempted to suggest that they were not impartial. At the present time, however, they knew that one of the judges (the late Mr. Justice, afterwards Lord, Justice Mathew) had been asked to go beyond the scope of his ordinary duty (as chairman of the Irish Evicted Tenants Commission), and he for one was sorry and surprised that the judge in question had consented to do so. The result was inevitable. That judge had already been fiercely accused of partiality or of a want of desire to do justice. But he could safely say that throughout his close experience of twenty-four years there had not been a judge on the English Bench who had shown at any time or in any position any other feeling or desire than to be absolutely impartial and to do right." Lord Reading, four-and-twenty years afterwards to the very day, replying to the selfsame toast at the Guildhall, gloried in the assumption of extra-judicial work by judges which Lord Esher has so strongly deprecated. "During the last year of their work," said the Lord Chief Justice, "the judges have discharged a more important task in the affairs of the State than is usually allocated to them. They have been called upon to take part in the work of Royal Commissions, advisory committees of great responsibility, to sit upon local tribunals, to hold inquiries, and in other ways to serve the State. They are ready to do all

that, striving at the same time to their utmost that there shall be no disturbance in the ordinary daily routine of the judicial work intrusted to them. I desire to say that we consider it a privilege that we have been called upon to take a greater part in the national work. That in a time of stress the country should turn to the judges for the impartial analysis of evidence and welcome their assistance in important public affairs is one of the greatest tributes that has ever been paid to the Judicial Bench." Had Lord Esher spoken in 1916, no doubt he would have expressed himself in the same sense as Lord Reading, with whose remarks the whole profession will agree.—*Law Times.*

[So far as Canada is concerned we entirely agree with the views expressed by Lord Esher. Lord Reading's eloquence may sway some minds, but not ours. We venture to think the profession in this country would rather favour the sound and safe rule laid down by Lord Esher. What is good for England is not necessarily good for Canada.—*Ed.*]

FOREIGN INFLUENCES IN ENGLISH AND AMERICAN LAW.

A not uncommon conception as to the development of our law is that God and nature conspired to plant its seeds in a favoured island, to foster the growing plant until it achieved a certain maturity, and to cause it to be transplanted to our own land, where it continued to flourish. A very eminent English jurist, only a few years ago, delivered an address at the annual meeting of the American Bar Association, adopting as his thesis the proposition that the geographical situation of England predestined her legal development. He found the explanation of the phenomenon that England alone of the European states escaped the "reception" of the Roman Law in the fact that she was an island, and that "the influences which governed the development of law on the European mainland reached her in an attenuated form" (James Bryce, The Development of the Common Law, American Bar Association Reports, 1907, p. 458). Unfortunately for the learned gentleman's thesis, he overlooked the fact—though

himself a "Northcountryman"—that England is not an island (for, as our geographies teach us, it is bounded on the north by Scotland), and that her canny neighbour, though far more remote geographically from the continent, did "receive" the civil law (20 Juridical Review, p. 178).

In truth, English law is not wholly a plant of indigenous growth. Though in the main it is true that our law and that of England upon which it is based has a method and a spirit peculiar to itself and in many of its institutions and doctrines shows little of foreign influence, it is also true that at hardly any period of its history has it been wholly independent of such influence.

The history of English law really begins with a foreign and Romanized influence, the work of the Norman kings. The Saxon laws and customs, the importance of which it was formerly so much the fashion to exaggerate, had, modern scholars tell us, comparatively little influence on our institutions. Even the jury, which the older popular English historians were fond of tracing to a Saxon original, has been proved to be a Frankish invention, not unmodified by contact with Rome. Its source was in Norman despotism, not in Saxon liberty (1 Pollock & M. History of English Law, 2nd ed., p. 142). Our greatest legal historian declares that the most important date in English legal history is not 1066, the year of the Conquest, but 1166, the probable date of the introduction of the writ of novel disseisin. And that writ, as Professor Vinogradoff has said, is but "a secular variation of the canonistic action of spoliation (*actio spolii*), and this again has evidently sprung from the Roman interdict *unde vi*" (Vinogradoff, Roman Law in Mediæval Europe, p. 86). Sir Frederick Pollock, in his "Genius of the Common Law," points out that the men who make law are not "mere men in the crowd; they rather belong to the educated class who mediate between the leaders of thought and the general public opinion that sooner or later follows them" (Pollock, Common Law, p. 95). If we remember that practically all the educated class, that practically all the leaders of thought in the days when the foundations of the English law were laid, were ecclesiastics, trained to some extent at least

in the canon and the civil law, we can better appreciate the importance to early English law of those alien systems.

One of these trained ecclesiastics in the thirteenth century wrote a systematic work on the laws of England, a book that stood unrivaled for centuries as an institutional treatise. The researches of Professor Maitland have demonstrated that Bracton, as Kipling tells us Homer did, took "what he'd require" from Azo, an Italian commentator then in great vogue (Maitland, Bracton and Azo (Selden Society), Introduction). In this way large elements of impure Roman law were adopted wholesale into the body of our law. For what Bracton had done with respect to Azo, his successors, among them Coke and Hale and Blackstone, did with respect to him—they borrowed, to say the least, rather extensively (Scrutton, Roman Law and the Law of England, p. 150).

It is not to be supposed that foreign influences have always been as powerful as they were in the twelfth and thirteenth centuries—the former of which has been called the "most legal" of centuries. The succeeding years were perhaps the period of English legal history, during which the least contact with alien laws and systems took place, an era of almost strictly national development. The influence of foreign systems was largely national development. The influence of foreign systems was largely negative. Wycliffe, the reformers, the popular and nationalistic party, aligned themselves on the side of the common law, an alliance that was significant for the future development of the common law both in England and in America (2 Holdsworth, History of English Law, p. 339).

The sixteenth century was a time fraught with danger to the common law. It was an age replete with great changes in religious, political and social ideas, and, as in all such eras, the existing legal system was in some danger. The growing powers of the Privy Council, the Chancery, and the Star Chamber, all coloured with continental legal and political theories, threatened the native jurisprudence. Mr. Holdsworth has recently pointed out that Maitland, in his inimitable essay on English Law and the Renaissance, perhaps exaggerated the decrease in the number of

practitioners and the falling off in the business of the common-law courts. But, notwithstanding, he is forced to admit that it was the "critical period" for English law. "For the first and only time in its history," he says, "the common law was threatened, and its supremacy was not fully secured until the legislation of the Long Parliament. That it was able to assert its supremacy is due partly to the earlier reception of the thirteenth century, partly to its capacity to assimilate principles borrowed from its rivals—principles which, in many cases, can be connected directly or indirectly with the reception of this century" (Holdsworth, The Reception of Roman Law in the Sixteenth Century, 28 Law Quarterly Rev., p. 254). In other words, the inoculation of the thirteenth century saved English law from the fate of German and other national laws, that of being conquered by the revived law of Rome. There is a risk, however, lest we overestimate the influence of foreign legal and political ideas during this era. The greatest legal humanists at either end of the century, Sir Thomas More and Francis Bacon, were common lawyers; the legal profession during this century gained the monopoly of practice in the new Court of Chancery, as it already had done in the common-law courts (*id.* p. 142).

Coke, the chief representative of the common law at the beginning of the seventeenth century, was largely responsible for the traditional view that minimizes the debt of our law to alien influences. He says: "It is worthy of consideration how the laws of England are not derived from any foreign law, either canon or civil or other, but a special law appropriated to this kingdom" (3 Co. Inst., p. 100). And elsewhere he expresses a low opinion of the civil law, which he compares for uncertainty to "a sea of waves" (*Id.* p. 153). If we may believe Bacon, Coke's great rival, it was Coke himself who saved the common law from a like reproach, and restored the system of judicial precedents of which that system has been so proud. Bacon says that but for Coke's work of restatement, the law would have been "like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former times" (Bacon's Writings (Spedding's ed.), v. XIII., p.

65). To use Professor Pound's suggestive phrases, beginning with Coke an era of "law without justice" followed an era of "justice without law." Counsel and Judges cease to invoke the rule of conscience and reason; they cease to refer to an ideal system of natural law. The reign of the Year Books and of judicial precedents was re-established. And yet, as we have seen, Coke, the enemy of all things foreign, liberally borrows from Bracton matter which the latter had drawn indirectly from the Institutes of Justinian.

The eighteenth century was, next to the thirteenth, that in which foreign influences made themselves most strongly felt in the development of English law. The pages of Burrow's Reports, where may be found those great cases in which Lord Mansfield laid the foundations of the commercial law of England, are replete with references to French and Dutch jurists. Nowhere is there traceable a more conscious reliance upon foreign law than in the work of that great Judge (2 Campbell, Lives of the Chief Justices (Little Brown ed.), pp. 404 *et seq.*).

Very recently Professor Pound has pointed out how much our own law owes to the work of Story and Kent, particularly to that of the former (Pound, The Place of Judge Story in the Making of American Law, 48 Am. L. Rev., p. 676). Indeed, he shows that Story is largely responsible for the "reception" of the English common law, of English equity, and English commercial law in our own country. The common law was by no means recognized without question by the colonists as the basis of their jurisprudence. It may be that Sir Frederick Pollock is right when he says that "the Fathers of the Constitution, in the very act of repudiating allegiance to King and Parliament, enthroned our lady, the Common Law, on the western shores of the Atlantic" (The Genuis of the Common Law, p. 57). But, in spite of the "enthronement" of the common law in our Federal Constitution, it is by no means certain that the spirit evidenced by the Kentucky legislation of 1808 forbidding the citation of English cases might not have prevented the complete adoption of the common law (Gray, The Nature and Sources of the Law, appx. IX., p. 323). The fate of English law in America might have been different

but for the work of a few great jurists. The eighteenth century law and equity of Mansfield and Hardwicke were not on any strict theory part of the common law brought to the country by those who settled it. But a few of our early Judges and institutional writers, chief among them Story and Kent, perceived the value of the work done by the English Judges since the colonial settlements. They imported the eighteenth century English material, which might truly be called a foreign law, and thus placed the law of the United States in line with that of England. Finally, it should not be forgotten that in the important field of Conflict of Laws, "with some suggestions from the writings of the Dutch School and with the help of a meagre body of decided cases, Story wrote the law anew, and in a way which has fixed the ideas of American and English lawyers at least, and on the Continent gave a new impulse to legal scholarship" (1 Beale, A Treatise on the Conflict of Laws, pt. I., p. 51). The mention of conflict of laws suggests that the influence of other systems has been more active in certain branches of our law than in others. Equity, Admiralty, and those branches of law which were formerly administered by the ecclesiastical courts, at once occur as possible departments which have been largely affected. But conclusions must not be reached with too much positiveness. Such hopeful subjects for a foreign origin as the trust and the executor are by the best modern authority regarded as in the main native products (Goffin, The Testamentary Executor, p. 12; Maitland, Eq., p. 8). Indeed, it is difficult to point to this or that doctrine or legal institution, and say that it is or is not imported from the civil law. We do not establish a Roman origin for our law of bailments, for example, by showing that Lord Holt, in *Coggs* v. *Bernard* (2 Ld. Raym. 909) quoted the Latin texts with great fullness. The influence has worked in a more subtle fashion. Good examples of how it has operated are afforded by Mr. Goudy's interesting demonstration that the maxim, *Actio personalis moritur cum persona*, owes its origin to a misreading of Latin texts by Bracton (Goudy, Two Ancient Boocards, Oxford Essays in Legal History, 1913, p. 215), and by Mr. Maitland's suggestion that the illogical classification of a term for years under the category

of a chattel real is the result of a similar error (2 Pollock & M. History of English Law, p. 114. One who is curious to see instances of citation of Roman texts may find them collected by James Williams, Roman Law in English Decisions, 29 Law Magazine & Review, 139). Often the alien influence has operated in even a more indirect way, as the study of the history of our law of contracts would show.

It is apparent that the weight and importance of foreign influences cannot be summed up by a collection of citations of the works of Roman and foreign jurists. The fact, for example, that the reporter of the *Cases tempore Finch*, in the seventeenth century, notes the differences between the rule laid down by the Judge and the civil law rule merely means that the reporter had some sort of interest in Roman law (Wallace, The Reporters, p. 489). Indeed, it was quite the fashion, especially among the eighteenth century Judges, to garnish their opinions with scraps of learning. Sometimes the quotations were misunderstood; witness Sir Richard Pepper Arden's reference to the Digest and his mistranslation of *doli exceptio* as "exception of fraud practised" (*Kennell* v. *Abbott*, 4 Ves. Sr. 802, 4 Revised Rep. 351, 25 Eng. Rul. Cas. 480). But, whether the passages quoted were understood or not, the evidence of frequent citation bears but little upon the question as to the extent of foreign influence.

It may be of interest, however, to call attention to a few modern cases in which the influence of jurists, who base their conclusions in large part upon comparative jurisprudence, may be distinctly traced. In *Hindson* v. *Ashby* ([1896] 2 Ch. 1, 65 L.J. Ch. N.S. 515, 74 L.T.N.S. 327, 45 Week. Rep. 252, 60 J.P. 484) and in *Foster* v. *Wright* (L.R. 4 C.P. Div. 438, 49 L.J.C.P.N.S. 97, 44 J.P. 7), involving questions of alluvion, counsel and the Court not only cited Bracton and the Institutes, but counsel in the former case also cited Maitland's Bracton and Azo. In *Bridges* v. *Hawkesworth* (15 Jur. 1079, 21 L.J.Q.B.N.S. 75), a leading case on the subject of finding, Savigny on Possession was referred to both in the argument and by the Court, and on the same subject Chief Justice Russell, in *South Staffordshire Water Co.* v. *Sharman* ([1896] 2 Q.B. 44, 65 L.J.Q.B.N.S. 460, 74 L.T.N.S.

761, 44 Week. Rep. 653), founds his opinion solely upon the authority of a strictly theoretical work, Pollock and Wright's Essay on Possession in the Common Law, itself largely the product of the studies of continental jurists. The leading modern English case on the question of the necessity of delivery in gifts of chattels is *Cochran* v. *Moore* (L.R. 25 Q.B. Div. 57, 59 L.J.Q.B.N.S. 377, 63 L.T.N.S. 153, 38 Week. Rep. 588, 54 J.P. 804, 12 Eng. Rul. Cas. 410). In his opinion Lord Justice Fry not only refers to the Institutes, but also adopts the conclusions of Mr. Maitland in his brilliant papers on the Seisin of Chattels, the Beatitude of Seisin, and the Mystery of Seisin (1 Maitland, Collected Papers, pp. 329 *et seq.*). These papers are themselves largely under obligation to the labours of German and French legal scholars. Mr. Justice Holmes' great work on the Common Law, a philosophical and comparative study of some of the central ideas in our legal system, has been frequently cited and relied upon—notably by Collins, M.R., in the case of *The Winkfield* (L.R. [1902] P. 42, 3 B.R.C. 368, 71 L.J. Prob. N.S. 21, 50 Week. Rep. 246, 85 L.T.N.S. 688, 18 Times L.R. 178, 9 Asp. Mar. L. Cas. 259), dealing with the rights of a bailee, and by Lord Macnaghten, in the case of *Perry* v. *Clissold* ([1907] A.C. 73, 76 L.J.P.C.N.S. 19, 95 L.T.N.S. 890, 23 Times L.R. 232), on the subject of adverse possession. The latter Judge—an accomplished student of comparative law—also cites the articles of Maitland before referred to and the essay of the late Professor Ames on the Disseisin of Chattels.

But here again mere frequency of citation means little. The work of students who delve into the foundations of legal ideas and institutions, aided by the light of comparative law, ultimately has an influence more elusive, but more profound, than any which comes from shaping a particular doctrine. Legal and political theories are insensibly shaped by the efforts of such men. Students like Holmes and Pound and Wigmore are even now digging the channels through which our law must in the future flow.

Von Ihering has said: "Every age is a riddle, which not itself, but the future only, can solve" (1 Geist des römischen Rechts, p. 35). And so of our own century. Whether we are availing

ourselves more or less than did our forefathers of foreign materials only the future can say. But one can imagine that he observes certain influences at work which are forcing the leaders of legal thought to know more and more of other legal systems than our own. The existence of such Courts as the Judicial Committee of the Privy Council and our own Supreme Court, bound to take judicial notice of the laws of countries ruled by the most diverse systems of law, is one influence which calls for and produces lawyers and Judges learned in more than one system of law. Again, the increasing importance of questions of foreign law arising from the extension of commerce and travel is forcing upon our bar and bench some study of other sorts of law than our own. But, above all, there is a constantly increasing demand that our legal training be guided so that "when the lawyer comes to the bar," as Mr. Root said, in his recent address at the American Bar Association, "he will have learned to think not merely in terms of law, but in terms of jurisprudence" (American Bar Asso. Journal, October, 1916, p. 747). And that means that he shall have made to some extent a comparative study of legal systems. Elaborate programs in the study of legal science, including Roman, French, and German legal systems, are now presented in several of our university law schools to meet the need which even so practical a lawyer as Mr. Root recognizes as an actual one. The fact that a good beginning has been made presages well for fruitful results in our country from the scientific study of comparative law.—*Case and Comment.*

In a judgment reported 36 O.L.R. 405 the expression "Lords Justices;" is used. Query, is it right? If the plural "Lords" is used should not "Justice" follow? Or if "Justices" should be used, should not the word "Lord" precede? Is not the word "Lord" in this connection really an adjective defining the nature of the "Justices" referred to? If so, the expression "Lord Justices" would be correct. Or if the word "Justice" be used as the adjective indicating the kind of Lords referred to, then "Lords Justice" would be correct, but "Lords Justices" seems to be of doubtful propriety. It seems like saying "blackshorses."

The abbreviation is always "L.JJ." not "LL.,JJ."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

NEGLIGENCE—BUILDING CONTRACT—CLAUSE THAT CONTRACTOR SHALL ALLOW REASONABLE USE OF SCAFFOLDING BY OTHER TRADESMEN—DUTY OF CONTRACTOR TOWARDS WORKMEN EMPLOYED BY OTHER TRADESMEN—INVITATION.

Elliott v. *Roberts* (1916) 2 K.B. 518. The defendants in this case had entered into a contract with the London County Council to enlarge and remodel a school building. The contract included providing hot water and heating apparatus, but it reserved liberty to the County Council to nominate special tradesmen to do this work, in which case a fixed sum was to be deducted from the contract price and to be paid directly by the Council to the tradesmen executing the work: persons so employed were, by the contract, declared to be sub-contractors employed by the defendants. The contract also provided that the defendants would afford facilities to any other tradesmen employed by the Council, including the reasonable use of scaffolding erected by the defendants for their own purposes. The Council in exercise of its right nominated a firm of hot water engineers to provide and instal the hot water and heating apparatus. The plaintiff, one of the servants of this firm, in course of his work, had occasion to use a gangway provided by the defendants over an opening in an upper floor in the building, and owing to the planks being loose, they slipped, and he fell through the aperture and was injured. The action was tried by Lush, J., and a jury, and a verdict of £2,000 was given for the plaintiff, that learned judge however dismissed the action on the ground that the position of the defendants to the plaintiff was that of licensors, and as such they owed no duty to him, it being admitted that there was no concealed trap. The Court of Appeal (Eady, Pickford, and Bankes, L.JJ.) however came to the conclusion that the defendants were not licensors but inviters, and as such owed him a duty to take reasonable care that the gangway was in proper order; but as, from the way the case was presented to the jury, they might possibly have come to the conclusion that the negligence of the defendants consisted in not fastening the planks, or not providing a handrail, both of which defects were known to the plaintiffs, the verdict could not stand, and a new trial was therefore ordered. The plaintiff's ground for recovery, as put by Bankes, L.J., being "that his injury was the result of his being exposed to a concealed danger which the defendants knew or ought to have known, and of which he himself had no knowledge or notice."

PRINCIPAL AND AGENT—DAMAGE OCCASIONED BY UNTRUE STATEMENT MADE BY AGENT TO PRINCIPAL—MEASURE OF DAMAGES.

Johnston v. *Braham* (1916) 2 K.B. 529. This was an action by a principal against her agents to recover damages occasioned by the plaintiff being induced to enter into a contract owing to the false representations of the agents. The defendants acted as the plaintiff's agent in the leasing of a theatre for a week, under the contract which was made with the Suitu Company Ltd., she was to be entitled to 60 per cent. of the gross takings for the week commencing November 29, 1915, she undertaking to pay the salaries of certain artists amounting to £60 for the week. The plaintiff was induced to enter into the contract on the defendants' representations that the gross takings at the theatre were £250 a week. It did not appear that this representation had been made fraudulently, but it was made without reasonable and sufficient inquiry. The plaintiff found that the total takings for the week were only £68 11s. 7d., and she incurred £35 13s. 0d. expenses for her company; she claimed to recover that sum, together with £38 for the estimated profit she would have made, had the representations been true. The County Court Judge who tried the action gave her judgment for the £35 13s. 0d. plus £20 for loss of time, in all £55 13s. 0d. On appeal by the defendants it was held by the Divisional Court (Rowlatt & Sankey, JJ.) that though the £20 would not be recoverable as for loss of estimated profits, it would be properly recoverable as a compensation for loss of time, and the appeal was dismissed.

SHIP — CHARTERPARTY — VOYAGE INVOLVING "SEIZURE OR CAPTURE"—RISK OF BEING ATTACKED BY SUBMARINE.

Re Tonnevold & Finn Friis (1916) 2 K.B. 551. This was a case stated by an arbitrator on the construction of a charterparty which provided that "no voyage be undertaken and no documents, goods, or persons shipped that would involve risk of seizure, repatriation, or penalty by rulers or governments." The charterparty was made in 1912 and, of course, not in contemplation of the present war, and the question arose whether the risk which the vessel might incur of being sunk by a German submarine, was within the terms of the above mentioned provision. It was argued that to be sunk was neither "seizure nor capture;" but the arbitrator was of the opinion that the risk of being sunk by a submarine was within the meaning of the words used, and Scrutton, J., agreed with him. As the learned judge puts it, it would be putting too fine and technical a meaning on the words,

to hold that if a commander of a submarine went on board the vessel and ordered the crew to leave and there sank her, that would be "capture;" but that if he did not go, or send any one on board, but merely ordered the crew to leave and then sank her, it would not be "capture."

SALE OF GOODS—STOPPAGE IN TRANSITU—VENDOR'S LIABILITY TO CARRIER FOR FREIGHT.

Book Steamship Co. v. *Cargo Fleet Iron Co.* (1916) 2 K.B. 570. In this case the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.) have determined that where a vendor of goods exercises his right of stoppage in transitu he is liable to the carrier for the freight due in respect of such goods. The decision is important as the Court lays down the law regarding the rights of the parties where goods are stopped in transitu as follows:

(1) Where goods are stopped by vendor in transitu before they reach their ultimate destination, the carrier is bound to act upon the notice by delivering the goods to, or according to the directions of, the vendor, and, if he fails to do so, is liable in damages to the vendor for conversion.

(2) The vendor on his part (although he may not be a party to the contract of affreightment) is bound to take the goods, or give directions for their delivery on arrival, and to discharge the carriers' lien for freight, and, in default, is liable in damages to the carrier for the amount of the freight.

(3) If the conduct of the vendor prevents the carrier from carrying the goods to their specified ultimate destination, he is liable for the freight not only to the place where the goods are in fact carried, but also to the ultimate destination.

(4) The effect of stoppage in transitu is not to rescind the contract between the carrier and the purchaser, or to vest the property in the goods in the unpaid vendor.

But according to Scrutton, J., a vendor stopping in transitu cannot, against the will of the carrier, compel delivery of the goods before they arrive at the specified destination.

The judgment of Bailhache, J., was reversed and judgment given in favor of the carriers against the vendors for the full amount of the freight.

PRACTICE — TRIAL BY JURY—SEPARATION OF JURY AFTER SUMMING UP, AND BEFORE VERDICT—VALIDITY OF VERDICT.

Fanshaw v. *Knowles* (1916) 2 K.B. 538. This was an action tried with a jury. After the summing up, the jury retired to

consider their verdict, and, after the judge had left the Court, they stated to the associate that they had agreed on their verdict on two points, but could not agree on the third, and they then separated for the night. In the morning on coming before the judge they gave a verdict on all three points. To this verdict they attempted to attach a condition, but on being informed by the judge that they could not do so, they withdrew the condition. Judgment was given at the trial on the findings of the jury in favor of the plaintiff for £1,052. The defendant appealed, contending that the verdict was invalid by reason of the separation of the jury before it had been given. But the Court of Appeal (Lord Reading, C.J., and Scrutton, J.A.) determined that although a jury which separates before they have given a verdict are guilty of misconduct, which in criminal cases is sufficient to render their verdict null and void, as was recently decided in *Rex* v. *Ketteridge* (1915) 1 K.B. 467 (noted ante vol. 54, p. 246); the same strict rule did not apply in civil cases, and there appearing to be evidence to warrant the verdict in question, it was allowed to stand: the fact that the jury had sought to make their answer to a question subject to a condition was held to be no ground of objection, they having subsequently submitted to answer without any condition.

SHIPPING—SHIPPERS' OBLIGATION TO SHIPOWNER—DELAY IN DISCHARGE OF CARGO — DEMURRAGE — LIABILITY OF CHARTERER.

Mitchell Co. v. *Steel* (1916) 2 K.B. 610. This was a case stated by arbitrators. The matter in dispute was as to the liability of the charterer of a vessel to the shipowner for demurrage in the following circumstances: Steel & Co. the charterers of a ship belonging to Mitchell Co. shipped thereon a cargo of rice for carriage to Piræus. It was known to Steel Co. that, without the permission of the British Government, there might be delay in discharging the cargo, although they thought they would be able to obtain the necessary permission. The shipowner did not know, and could not reasonably have known, that such permission was necessary, and Steel Co. did not inform them. The charterers were in fact unable to obtain the permission and delay arose and Atkin, J., who heard the motion on the case stated, held that the charterers were under an obligation to communicate to the shipowners the facts affecting the risk of a

possible delay, and not having done so, were liable for the demurrage claimed.

DEFAMATION — LIBEL — PUBLICATION — LETTER ADDRESSED TO ONE PERSON OPENED BY ANOTHER.

Powell v. *Gelston* (1916) 2 K.B. 615. This was an action for libel, and the sole question involved was whether or not there had been a publication of the libel. The plaintiff advertised his house for sale and the advertisement was answered by H. W. Pollard who contemplated purchasing the house, and who requested his son to write to the defendant to make certain inquiries about the plaintiff. The son F. W. Pollard accordingly wrote to the defendant asking for the information, and promising not to let the plaintiff know that the defendant had written. The defendant sent a reply containing the alleged libel addressed to F. W. Pollard at his own residence, but the father H. W. Pollard who happened to be staying with his son received the letter in his son's absence and opened and read the contents, and it was not seen or read by F. W. Pollard. Bray, J., who tried the action, held that the unauthorized opening of the letter by the father did not amount to a publication for which the defendant was liable.

PRIZE COURT—SEIZURE OF CARGO—RELEASE OF PROCEEDS—CLAIM FOR FREIGHT—JURISDICTION.

The Corsican Prince (1916) P. 195. In this case the Corsican Prince was a British ship with a cargo of barley consigned to Hamburg from Odessa. On its arrival at Falmouth the cargo was seized and sold by order of the Prize Court and the proceeds paid into Court. On an application for condemnation an order was made for payment out of the proceeds to a Russian Bank and others of the net proceeds of their portions of the cargo, subject to the payment of the charges of the shipowners for freight. An application was then made to transfer the proceedings to the Commercial Court to adjust the right of the cargo owners and shipowners in respect of the balance of the proceeds. Evans, P.P.D., however held that the Prize Court having once acquired jurisdiction was competent, and had exclusive jurisdiction to deal with incidental questions affecting the subject matter of the seizure, notwithstanding there may have been a voluntary release before the incidental question arose.

PRIZE COURT—OUTBREAK OF WAR—BRITISH SHIP WITH CARGO FOR ENEMY COUNTRY—VOYAGE DIVERTED—SEIZURE OF CARGO—CLAIM FOR FREIGHT.

The Iolo (1916) P. 206. This case involves a similar question to that in the preceding case. Shortly before the outbreak of war the Iolo a British ship left a Russian port in the Black Sea with a cargo of grain for Hamburg, and, at the suggestion of the British Admiralty, her owners diverted the vessel to a British port, where the cargo was seized, and subsequently sold, and the proceeds paid into Court. A Russian bank as owners claimed part of the cargo, and the amount was ordered to be paid to the bank, subject to the claim of the shipowners for freight and charges, and it was held by Evans, P.P.D., that although at common law no freight was due, as the contract of affreightment had not been carried out, and has become illegal by reason of the war, nevertheless, the Prize Court acting on equitable principles would allow a fair and reasonable sum for freight or charges, the amount to be ascertained by a reference on the principle laid down by the Court in *The Juno*, 1916, P. 169.

WILL—CONSTRUCTION—"ALL LEGACIES AND BEQUESTS TO BE PAID FREE OF ALL DEATH DUTIES"—GIFT OF ANNUITY OUT OF RESIDUE.

In re Kennedy Corbould v. *Kennedy*, (1916) 2 Ch. 379. By the will in question in this case the testator gave certain specific and pecuniary legacies, and life annuities, and declared that all legacies, annuities and bequests bequeathed by his will should be given and paid free of all death duties; and he gave his residuary estate in trust for sale and conversion, and directed his trustees to pay his funeral and testamentary expenses, death duties, debts, legacies and annuities, out of the proceeds, and invest the residue thereof, and hold the same upon trust to pay the annual sum of £500 each to A and B during the life of C and D, and, subject thereto, upon trust for C and D successively for life with remainder to A and B obsolutely in equal shares. The question was whether the life interests and the specific annuities given out of the residuary estate were freed from death duties, and Astbury, J., held that they were not.

WILL — CONSTRUCTION — LEGACY TO SERVANTS — FARM LABOURERS.

In re Forrest, Bubb v. *Newcomb* (1916) 2 Ch. 386. By the will in question in this case the testator bequeathed "to each of my

servants who shall have been in my service for three years prior to my decease and shall be still in my service one year's wages." The testator has an estate of 700 acres. There was a house on the land, and he employed several domestic servants. He farmed the land himself and had six labourers employed at ordinary labourers' wages. Sargant, J., held that these labourers were not servants within the meaning of the will, and that the word, in a legacy to servants, means domestic servants, who though not necessarily employed in the testator's house, yet minister in some way to his comfort.

SETTLED ESTATE—WILL—DIRECTION TO ALLOW CHILDREN TO OCCUPY HOUSE WHILE UNMARRIED—TENANCY TO LIFE—PERSONS HAVING POWERS OF TENANT FOR LIFE.

In re Boyer (1916) 2 Ch. 404. This was a summary application to determine whether certain persons had the powers of a tenant for life so as to entitle them to sell the property in question under the Settled Land Act, 1882 (45-46 Vict. c. 38), (see R.S.O. c. 74 s. 33 (1) (*g*)). A testator who was owner of a long lease in certain property known as the Grange, by will bequeathed the property to trustees in trust for his wife for life, and after her death upon trust to permit such of his unmarried children as wished to reside in the house to occupy the same, with gifts over in case the children should all marry, or not wish to reside in the house. The unmarried children desired to reside in the house, and desired as persons having the powers of tenants for life to sell the property and have the income of the proceeds so long as they remained unmarried. Sargant, J., to whom the application was made, held that although the applicants were not tenants for life, they had the powers of tenants for life and were entitled to sell as proposed. See R.S.O. c. 74, s. 33 (1) (*g*).

Correspondence

MATRIMONIAL JURISDICTION.

The Editor, CANADA LAW JOURNAL, TORONTO:

DEAR SIR,—Under the above title you argue for your previous declaration of opinion that no Court in Ontario has jurisdiction to declare the nullity of a void marriage.

In support you say:—

(*a*) A de facto marriage can only be annulled by judicial sentence of a Court with matrimonial jurisdiction.

(*b*) Many marriages liable to sentence of nullity become unimpeachable by efflux of time.

(*c*) You cite *Hodgins* v. *McNeil*, 9 Grant 305, and *Reid* v. *Aull*, 32 O.L.R. 68, as supporting your contention.

(*d*) Finally, you say that declaratory judgments must be confined to matters within the jurisdiction of the Court which makes them.

To these points I would like to reply:—

(*a*) A void marriage cannot be "annulled" by any Court anywhere; it never existed (Eversley p. 60). The decree even of a matrimonial Court says: "*is* null and void," not "shall be." "A void marriage has no effect at law; a decree of nullity is not necessary." 16 Halsbury 499. The children of a void marriage are bastards, and no time legitimizes them. For instance, if H. marries a woman, and she marry again, H. living, the last marriage is void, without divorce: *Bath* v. *Montague*, 1 Salkeld 120. See also *Riddlesden* v. *Wogan*, Cro. Eliz. 858.

(*b*) *Hodgins* v. *McNeil* and *Reid* v. *Aull* refer to voidable—not to void—marriages. The judgment of Middleton, J., in the latter case is undoubtedly expressed broadly enough—in reference to declaratory judgments—to cover void marriages, but such a marriage was not at issue. But in *Peppiatt* v. *Peppiatt*, 30 D.L.R., the Appellate Division said that the Supreme Court had jurisdiction, under the Judicature Act, thus impliedly over-ruling *Reid* v. *Aull*.

(*c*) This, I admit; but point out that you argue in a circle. The question is, what jurisdiction does the Supreme Court of Ontario possess? Undoubtedly in a suit for dower, for instance, it has jurisdiction to say that the parties are not married, and the real question is, if it can so declare in a suit where consequential relief is sought may it not legally do so under sec. 16 *b*. of the Judicature Act, 1914, where a merely declaratory judgment is asked? With regard to void marriages, I maintain that it can.

Yours truly, ALFRED B. MORINE.

[It seems useless to pursue this matter further. If the Appellate Division, or our correspondent, could point to any statute

giving the Supreme Court of Ontario matrimonial jurisdiction, that would end the dispute, but they do not. Our correspondent thinks it is to be found in the power to grant declaratory judgments, we have already given reasons why we think that is not so; to repeat them is unnecessary.—*Ed.*]

Obituary.

HON. JAMES KIRKPATRICK KERR, K.C., SENATOR.

After a long illness, Mr. Kerr died at his residence, "Rathnelly," in Toronto, in his seventy-fifth year.

Mr. Kerr at one time occupied a prominent position at the Bar, though in later years he was perhaps better known in the political arena, having been called to the Senate in March, 1902, and in January, 1909, selected as Speaker of the Upper House, remaining in office until 1911.

Mr. Kerr was born August 1st, 1841, in the township of Puslinch, in the county of Wellington. He received his early education at the well-known school of Dr. Tassie, in Galt, from whence he removed to Toronto to study law. After being called to the Bar in 1862, he entered into partnership with Mr. Blake, the name of the firm being Blake, Kerr & Boyd. He received silk in 1874, and was elected Bencher of the Law Society in 1879. He was from his early days an industrious student of the law, and soon secured a large practice. He was an able advocate and successful in the many business affairs that fall to the lot of lawyers to attend to. In later years he was a member of the firm of Kerr, Macdonald, Davidson & Paterson.

Mr. Kerr was a man of vigorous frame and untiring energy; work was his delight. Amongst his other activities, he was a prominent Mason, occupying the highest position in that Order. He also devoted much time to matters connected with the Church of England, being a most useful member of the congregation of St. James Cathedral, Toronto, and interested in numerous business ventures. Genial and warm-hearted, he was a general favourite.

His first wife was a daughter of the Hon. W. H. Blake, Chancellor of Upper Canada, whom he married in 1864. Some years after her death, he married Miss Pinhorne, niece of Rt. Hon. Stanley Hill, of London, England, who survives him. His son, Capt. Stanley Kerr, is on the Canadian Headquarters Staff in England. He also left four daughters.

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Ont.] [June 23.

TORONTO RAILWAY CO. v. CITY OF TORONTO.

Street Railway—Agreement with City Corporation—Exclusive right to operate upon streets—Exception as to a street then worked by another railway—Expiry of other railway's franchise—Right to operate upon portion of street released—Order of Ontario Railway and Municipal Board—55 Vict. c. 99 (O.).

On appeal from the Appellate Division of the Supreme Court of Ontario.

Under an agreement dated the 1st Sept., 1891, the appellants purported to grant to the predecessors of the respondents in title for a term of twenty years, and for a further period of ten years if enabling legislation were obtained, "the exclusive right . . . to operate surface street railways in the City of Toronto excepting . . . on that portion, if any, of Y.-street . . . over which the M. Street Railway claims the exclusive right to operate surface street railways . . . and also the exclusive right for the same term over the said portion of Y.-street . . . so far as the said corporation can legally grant the same."

This agreement, on the face of it, being in excess of the powers of the corporation, the necessary statute for its confirmation was obtained. The right of the M. Street Railway ceased in 1915, and the respondents claimed that by virtue of the agreement they were then entitled, for the residue of the term created by the agreement, to use this portion of Y.-street for the purposes of their railway for the residue of the term.

Held, that the grant of powers over the excepted portion of Y.-street was not invalid by reason of being a grant in reversion, and therefore the order of the Ontario and Municipal Board, declaring the exclusive right of the respondents to operate upon the portion of Y.-street in question should be affirmed.

Clauson, K.C., and *Geary*, K.C., for the appellants; *Sir John Simon*, K.C., and *McCarthy*, K.C., for the respondents.

Sask.] [July 25.

SMITH (APP.) v. RURAL MUNICIPALITY OF VERMILLION HILLS (RESPS.); ATTORNEY-GENERAL FOR THE PROVINCE OF SASKATCHEWAN AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

Canada — Taxation — Crown land—Freedom from taxation—Competency of Provincial Legislature to tax tenant's interest—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 125.

On appeal from the Supreme Court of Canada.

By sec. 125 of the British North America Act, 1867, no lands or property belonging to Canada or any province shall be liable to taxation.

Held, that a Provincial Legislature had power to impose a tax on a private person in respect of an interest acquired by him in Crown land, provided that the operation of the statute imposing the tax did not tax the land itself as owned by the Crown.

Decision of the Supreme Court of Canada affirmed.

Hellmuth, K.C., for the appellant; *T. Mathew*, for the intervenant the Attorney-General for the Dominion; *Sir Robert Finlay*, K.C., and *T. A. Colcough*, K.C., for the respondents and intervenant the Attorney-General for Saskatchewan.

Dominion of Canada.

SUPREME COURT OF CANADA.

Que.] VERONNEAU v. THE KING. [Oct 10.

Criminal law—Constitution of grand jury—Bias — Presentment of true bill — Presence of accuser on grand jury — Prejudice—Criminal Code, s. 899—Evidence.

The appellant was indicted for perjury and the person who laid the information had been summoned to act as a grand juror for the assizes at which the trial took place. The accuser was present with the grand jury in Court when the presentment of a true bill on the indictment was made. While the bill was under consideration by the grand jury the accuser had stated to a grand juryman that the circumstances of the case were to be deplored but it had come to the pass that either he or the accused would have to leave the town, and this statement was repeated to other grand jurors by the juror to whom it was made. In the reserved case it was stated by the trial Judge that the accuser had

in no manner taken any part in regard to the deliberations of the grand jury on the indictment.

Held, affirming the judgment appealed from (Q.R. 25, K.B. 275), Anglin and Brodeur, JJ., dissenting, that neither the fact of the presence of the accuser as a member of the grand jury nor the statement made by him had, in the circumstances, affected the investigation by the grand jury or constituted interference with the privacy of its proceedings; consequently, the accused had suffered no prejudice in regard to the constitution of the grand jury which had passed upon the indictment which would be cause for quashing the indictment under the provisions of section 899 of the Criminal Code.

Per Anglin and Brodeur, JJ., dissenting. In default of evidence that the accuser was not present with the grand jury during their inquiry in respect of the indictment against the appellant and that he had not voted as a grand juror on their finding of the true bill, as well as the fact of the statement made in regard to the case by the accuser and repeated to other grand jurors, the appellant was deprived of his right to have his case passed upon by a duly qualified and unbiased grand jury and thereby suffered prejudice within section 899 of the Criminal Code which would be sufficient for quashing the indictment. *Reg.* v. *The Herfordshire Justices* (6 Q.B. 753); *The Queen* v. *Upton St. Leonards* (10 Q.B. 827) and *The Queen* v. *Gorbet, et al.* (1 P.E.I. Rep. 622) referred to.

Per Anglin, J. On a motion to quash an indictment found by a grand jury it is improper to admit evidence of what took place in the grand jury room during the inquiry in regard to the indictment. *Reg.* v. *Hertfordshire Justices* (6 Q.B. 753); *Rex* v. *Lancashire Justices* (75 L.J. K.B. 198); *Reg.* v. *Meyer* (1 Q.B. 173) and *Reg.* v. *London County Council* ((1892) 1 Q.B. 190) referred to.

Appeal dismissed.

Verrett, K.C., and *Cabana*, for the appellant; *Nicol*, K.C., and *Shurtliff*, K.C., for the respondent.

Man.] CANADIAN NORTHERN RY. CO v. PSZENICNZY. [Oct. 14.

Railways — Negligence — Construction of statute — Railway Act, R.S.C. 1906, c. 37, s. 306 — Constitutional Law — Employers' Liability Act, R.S.M. 1913, c. 61 — Jurisdiction of Dominion Parliament — Provincial Legislation — Paramount Authority — "Operation of Railway" — Limitation of actions — Conflict of laws.

An employee of the railway company sustained injuries while engaged in unloading rails from a car alleged to have been un-

suitably equipped for such purposes. The unloading of the rails was for the convenience of the company in using them to replace other rails already in use on the constructed tracks. An action was brought to recover damages, under the Manitoba Employers' Liability Act, R.S.M. 1913, c. 61, within two years from the time of the accident, the limitation provided by section 12 of that Act, but after the expiration of the limitation of one year provided in respect of such actions against railway companies by the first sub-section of section 306 of the Railway Act, R.S.C. 1906, ch. 37. The fourth sub-section of section 306 provides that such railway companies shall not be relieved from liability under laws in force in the province where responsibility arises.

Held, affirming the judgment appealed from (25 Man. R. 655), that, in the exercise of authority in respect of railways subject to its jurisdiction, the Parliament of Canada had power to enact the first sub-section of section 306 of the Railway Act, R.S.C. 1906, ch. 37, providing a limitation of one year for the recovery of damages for injury sustained by reason of the construction or operation of the railway. *Grand Trunk Ruy. Co.* v. *Attorney-General for Canada* ((1907) A.C. 65), applied.

Per Fitzpatrick, C.J., and Davies, Anglin and Brodeur, JJ. (Idington, J., *contra*). The fourth sub-section of section 306 of the Railway Act, R.S.C. 1906, ch. 37, does not impose such a qualification in regard to the limitation of actions provided by the first sub-section thereof as may permit the application, in such cases, of a different limitation provided under provincial legislation. *Greer* v. *Canadian Pacific Ruy. Co.* (51 Can. S.C.R. 338), followed.

The unloading of rails for the convenience of a railway company in replacing those already in use on the constructed permanent way constitutes "operation of the railway" within the meaning of the first sub-section of section 306 of the Railway Act, R.S.C. 1906, ch. 37.

The judgment appealed from (25 Man. R. 655), was reversed, the Chief Justice and Idington, J., dissenting.

O. H. Clark, K.C., for the appellants; *M. J. Gorman*, K.C., for the respondents.

Province of Quebec.

COURT OF SESSIONS.

Langelier, J.S.P.] REX v. POULIN. [31 D.L.R. 14.

Desertion from military unit—Evidence.

Under the Order-in-Council of January 6, 1916, the proof of

engagement for overseas service by the soldier charged with being absent without leave is complete on production of the signed enlistment paper and proof that the accused had been passed as fit for military service and that the military unit had been regularly established; and *primâ facie* proof of absence without leave may be made by the production of a letter to that effect from the officer commanding the Military District; it is no answer for the accused to shew at the trial that the age he gave at enlistment as under 45 was incorrect and that he was over that age.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

A new order-in-council in substitution for that of January 6, 1916, was passed at Ottawa on August 5, 1916, in the following terms (P.C. 1873):—

"Whereas it has been found that the Regulations made and established by order-in-council 6th of January, 1916, P.C. 3057, with the view of punishing and preventing the offence of absence without leave from the Active Militia and the Overseas Expeditionary Force, need amendment, therefore, the Governor-General in-Council is pleased to order that the said order-in-council shall be and the same is hereby cancelled.

"The Governor-General in Council, with the same purpose in view, and under and in virtue of the power conferred by section 6 of the War Measures Act, is further pleased to order and it is hereby ordered as follows:—

(1) Every man of the active militia of Canada, and every soldier of the Canadian Overseas Expeditionary Forces who absents himself from the corps or unit to which he belongs, without the leave of the Commanding Officer of such corps or unit, is guilty of an offence and liable upon summary conviction under the provisions of part XV. of the Criminal Code to imprisonment, with or without hard labour, for a term not exceeding two years.

(2) Notwithstanding anything contained in the Criminal Code, or in any other Act or law, any justice of the peace, police or stipendiary magistrate shall have jurisdiction to hear, try and determine any charge of an offence of absence without leave, although the offence may have been committed or be charged to have been committed outside the territorial division in which such justice, police or stipendiary magistrate ordinarily has or exercises his jurisdiction.

(3) The production of a Service Roll or Attestation Paper purporting to be signed by the accused and purporting to be an engagement by him to serve in the corps or unit from which he is charged with being absent without leave shall be sufficient proof that the accused was duly enlisted in the said corps or unit, and a written statement purporting to be signed by the Officer Commanding or administering a Military District in Canada

and stating that the accused is absent from the corps or unit to which he belongs, shall be *primâ facie* proof that the accused is absent without leave from such corps or unit, and shall be sufficient to cast upon the accused the onus of proving that his absence from the corps or unit was duly authorized.

(4) Nothing in these regulations shall in anywise limit or affect the right of the military authorities to proceed in respect of any such offence according to the provisions of military law, but a person accused shall not be subject to be tried both by a military tribunal and by a civil Court for the same offence.

(5) The military pay and allowances of any person who has been convicted of absence without leave from his corps or from the unit to which he belongs may be stopped to make good any loss, damage or destruction by him done or permitted to any arms, ammunition, equipment, clothing, instruments or regimental necessaries, the value of which the Minister of Militia and Defence has directed him to pay."

Langelier, J.S.P.] [31 D.L.R. 229.

PATENAUDE *v.* THE PAQUET CO.

Master and servant—Whether master penally liable for servant's default—Revenue Laws.

A company operating a retail store in which perfumes are sold is not liable to fine under the Special War Revenue Act 1915, for the default of its salesman to affix a stamp to a package of perfume on making a sale of same, it if has given all proper directions and facilities for carrying out the provisions of the statute; the penal liability which the statute provides is upon the "person selling" and the statute has not in this case made the master criminally responsible for the act of his servant done without his connivance or knowledge.

Somerset v. *Hart*, 12 Q.B.D. 360, 53 L.J.M.C. 77, applied; and see Annotation on Master's Liability under penal laws for servant's acts, at end of this case.

Internal revenue — Sales to "consumers" — War Revenue Act 1915—Penalties.

A sale made at a retail store of an article subject to stamp duties under the Special War Revenue Act, Can., 1915, secs. 14-18, is not shewn to be a sale to a "consumer" as defined by sec. 14 so as to warrant a summary conviction for neglect to affix a tax stamp to the package, if the purchase was made by a revenue officer on behalf of the Department of Inland Revenue.

Henri Bernier, for complainant. *E. Betteau*, K.C., for defendant.

ANNOTATION ON ABOVE CASE FROM D.L.R.

It is well settled that a master or principal may, *under certain circumstances*, be held liable criminally for an act committed by the hand of his servant or agent acting either under his direct authority or with his knowledge or consent or without such authority or knowledge or even in disobedience of orders. *R.* v. *Holbrook* (1877), L.R. 3 Q.B.D. 60, 13 Cox C.C. 650; Labatt on Master and Servant, sec. 2565. As to criminal acts declared to be offences under the Criminal Code the master will be liable as a participant if he aids or abets the servant in the commission of the offence. Cr. Code 1906, sec. 69.

In most instances, where the master is held to be responsible criminally for the wrongful conduct of his servant, it is on the theory that the act complained of is positively forbidden and therefore guilty intention is not essential to the conviction. In some cases the statute expressly makes the master responsible for the act of his servant. *Reg.* v. *King*, 20 U.C.C.P. 246.

The owner of works carried on for his benefit by his agents may be indicted for a nuisance caused by the obstructing of the navigation of a river by his agents casting rubbish in it without his knowledge and contrary to his general orders. *Reg.* v. *Stephens* (1866), L.R. 1 Q.B. 702. The fact that the directors of a company are ignorant that a nuisance is being created by the conduct of its business will not absolve it from liability although they have given a manager authority to carry it on and although his method is a departure from the directors' original plan and results in the nuisance. *Rex* v. *Medley* (1834), 6 C. & P. 292.

A master is not criminally liable for "knowingly" allowing liquor to be sold to a girl under fourteen years of age where the sale was made knowingly by the master's bartender but against the orders of the master and without his knowledge, actual or constructive, or the wilful connivance of his foreman who was present. *Conlon* v. *Muldowney*, [1904] 2 Irish R. 498. So, the word "knowingly" in sec. 207 of the Criminal Code Can. 1906, dealing with the unlawful sale or possession for sale of immoral literature, makes it incumbent on the prosecution to give some evidence to prove knowledge of the contents of the book on the part of the accused. *R.* v. *Beaver*, 9 Can. Cr. Cas. 415, 9 O.L.R. 418 (and see amendments of sec. 207, passed in 1909 and 1913 respectively). See also *R.* v. *Macdonald*, 15 Can Cr. Cas. 482, 39 N.B.R. 388; *R.* v. *Graf*, 15 Can. Cr. Cas. 193, 19 O.L.R. 238; *R.* v. *Britnell*, 20 Can. Cr. Cas. 85, 4 D.L.R. 56.

A person charged with "suffering" a nuisance to arise under a Health Act must be shewn to have knowledge for which he is legally answerable of the nature of the act and of its consequences, before he can be found guilty of an offence; but the knowledge of a servant employed to do an act, and from whose act the nuisance necessarily and immediately arises, is, for the purposes of such case, the knowledge of the master who directs the act to be done. *Mowling* v. *Justices*, 17 Vict. L.R. 150.

In *Mullin* v. *Collins* (1874), L.R. 9 Q.B. 292, the defendant was prosecuted because his servant supplied a constable on duty with drink. It was held to be no defence on his part that his servant had done this without his

knowledge. The section of the statute under which the prosecution was brought provided as to one class of offence against a licensing law that it must have been "knowingly" committed and as to the others, including the offence of supplying liquor to a constabl on duty the word, "knowingly" did not appear in the enactment. This circumstance was viewed by the Court as indicating that the intention of the statute was to make the licensee liable for the act of his servant as regards the offence in question although the licensee himself had not knowingly committed it.

The decision in *Mullins* v. *Collins* (1874), L.R. 9 Q.B. 292, frequently quoted in support of the criminal liabliity of the master, does not extend the doctrine of liability of the master so as to include an act of the servant outside of the general scope of his authority. *Somerset* v. *Hart* (1884), 12 Q.B.D. 360, 53 L.J.M.C. 77; *Coppen* v. Moore, [1898] 2 Q.B. 306; *Watt* v. *Brown* (1896), 40 Sol. J. 575; *Hogg* v. *Davidson* (1901), 3 Sc. Sess. Cas. 5th series 49; *Police Commissioners* v. *Cartman* [1896] 1 Q.B. 655.

Sec. 17 of the Licensing Act, 1872, Eng., imposes a penalty upon a licensee who "suffers" any gaming to be carried on in his premises. To make a licensed person liable under this section, if neither personal knowledge on his part nor connivance is shown, it will be sufficient if the gaming had been allowed by the servant whom the master had left in charge of the premises, so that the servant's permission of the gaming had been an act done in the course of his employment even though contrary to his master's express orders. *Redgate* v. *Haynes*, 1 Q.B.D. 89; *Bond* v. *Evans*, 21 Q.B.D. 249. So, in *Somerset* v. *Hart*, 12 Q.B.D. 360, knowledge of a potman who was not put in charge of the licensed premises was held insufficient to make the master liable.

The doctrine of *Redgate* v. *Haynes*, 1 Q.B.D. 89, was applied in *Crabtree* v. *Hole*, 43 J.P. 799, to make the proprietor responsible for gambling which had taken place without his knowledge but which his servant, left in charge, should have discovered and prevented had he taken reasonable care.

The principle to be deduced seems to be that if the form of the enacting statute indicates that the master is to be held responsible without personal knowledge or connivance of the offence against a penal law, such as a licensing Act, the master will be liable if the offence be committee by a person he has left to act for him in the management of the business. *Smith* v. *Slade*, 64 J.P. 712; *Emary* v. *Nolloth*, [1903] 2 K.B. 264. *Conlon* v. *Muldowney*, [1904] 2 Irish R. 498; *McKenna* v. *Harding*, 69 J.P. 354; *Allchorn* v. *Hopkins*, 69 J.P. 355. But where there has been no delegation of the conduct or control of the business, he will not be liable in respect of an offence of that class committed without his knowledge or connivance. *Emary* v. *Nolloth*, [1903] 2 K.B. 264, 72 L.J.K.B. 620, 20 Cox C.C. 507.

In *Anglo-American Oil Co.* v. *Manning*, [1908] 1 K.B. 536, one Baldwin, a servant of the oil company, was sent out with a travelling tank of oil and with two good measures. He sold oil, however, with a fraudulent measure which had not been given him but which he used for his own profit and not for the benefit of his masters. The Court said that Baldwin's possession must be deemed to be his own possession and not the possession of his employers and set aside a conviction of the latter under the Weights and Measures Act, Imp., 1878. It was pointed out, however, that the Court was

not considering the case where an employee in a shop makes an instrument fraudulent and continues to use it and that the decision was not to govern in any cases of that kind.

Under statutes for the regulation of automobiles and other motor vehicles, a provision that the owner shall be held responsible for any infraction of the speed limit upon a public highway may be so wide as to authorize a summary conviction of the owner of the motor vehicle for a speed limit offence actually committed by the garage machinist who had taken the car out of the public garage where it had been left for repairs. *R.* v. *Labbe*, 7 Can. Cr. Cas. 417.

In construing a statute creating an offence against public order and punishable as a crime there is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient until met by clear and definite enactment overriding such presumption. (*Sherras* v. *DeRutzen*, [1895] 1 Q.B. 918, 921, and *Chisholm* v. *Doulton*, 22 Q.B.D. 736, applied.) *Rex* v. *McAllister*, 22 Can. Cr. Cas. 166, 14 D.L.R. 430; and see *Patenaude* v. *Thivierge*, 30 D L.R. 755, 26 Can. Cr. Cas. 138.

Upon a charge under the fishery regulations of having in possession sturgeon under the permitted size, the doctrine of *mens rea* was held to apply, it being said that a conviction should not be made against the master in respect of the unauthorized possession by the servant, if there is no knowledge of connivance on the master's part in regard thereto. *R.* v. *Vachon*, 3 Can. Cr. Cas. 558.

So, where a drug clerk, contrary to instructions from the proprietor and without his knowledge, sold crude opium for other than medicinal purposes, the proprietor was held not liable to be convicted of the offence under 7-8 Edw. VII. (Can.) ch. 50, sec. 1. *The King* v. *A. & N.*, 16 Can. Cr. Cas. 381.

Province of New Brunswick.

SUPREME COURT.

McKeown, J.] HAYDEN *v.* CAMERON. [31 D.L.R. 219.

Mortgage — Discharge by administrator—As re-conveyance—Estoppel.

Where a widow holds two mortgages on certain property, the first mortgage as administratrix of her deceased husband's estate, the second mortgage in her own name, and she executes and registers a discharge which recites the second mortgage, but is signed by her "as administratrix," she and her assigns are estopped, as against innocent parties without notice claiming title under a foreclosure of subsequent mortgages, from denying that her personal mortgage had been paid and discharged; the discharge operates by law as a re-conveyance.

J. C. Hartley, K.C., for plaintiff. *M. L. Hayward*, for defendant.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The principle that a conveyance of all a man's estate and interest for value will cover every interest vested in him is important and well established.

Elphinstone on the Interpretation of Deeds, Rule 60, expresses it thus: Where a party conveys all his estate, or right, or title, or interest in property to purchaser for value, every interest vested in him will pass by the conveyance, although not vested in him in the character in which he is made a party.

"This is clear, that when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance. It is true that in *Fausset* v. *Carpenter* (2 Dow. & Cl. 232, S.C. 5 Bl. N.R. 75), the House of Lords took a different view. At the time when that case was decided, it was thought impossible to maintain the decision, and it was a subject of consideration among the profession whether it would not be advisable to bring in a short Act of Parliament to reverse it. That case cannot operate to weaken the rule of law. Nothing could be more mischievous or contrary to law than to hold that when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance." *Per* Lord St. Leonards, C., in *Drew* v. *Earl of Norbury*, 3 J. & L. 267, 284, 9 Ir. Eq. Rep. 71, 524.

"*Primâ facie*, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except. General words apt for that purpose are invariably used. *Per* Lord Cranworth, C., in *Johnson* v. *Webster*, 4 DeG. M. & G. 474, 488.

"Where a grantor possesses distinct interests in the property described and there is nothing in the deed to indicate that this entire interest was not conveyed, but on the other hand an intention to convey whatever interest he had in the property may be gathered from the instrument, it should be construed in accordance with that intention:" 13 Cyc. 656.

In the case of *Hayden* v. *Cameron*, the above rule applies, for, while the discharge of mortgage under consideration was not in terms a conveyance but a mere certificate of payment, it is provided by statute (C.S.N.B. (1903), ch. 151, sec. 58) that such a certificate "shall discharge the mortgage and revest the legal estate in the mortgagor, his heirs or assigns," and the Privy Council in a late case has lucidly expressed the effect of such a discharge of mortgage under the Ontario statute in the following words:—

"A very simple procedure for the discharge of mortgages and the revesting in the mortgagor of his former estate in the property mortgaged is provided by secs. 62 and 67 of the Registry of Deeds Act (R.S.O. 1914, ch. 124). A form of document called a discharge has merely to be filled up and authenticated in the manner prescribed. On this being duly registered the mortgage debt is discharged, and the legal estate revested in the mortgagor." *Brickles* v. *Snell*, 30 D.L.R. 31 at 37. See also *Laudor* v. *Laudor*, 10 Can. S.C.R. 194.

War Notes.

THE SECRET OF VICTORY.

Sir William Robertson, Chief of Staff of the British Army, follows in the wait of Admiral Sir David Beatty, at the head of the British Navy, in these words:—"I fear that even yet too many of us are putting an undue amount of trust in 'chariots and horses.' I am old fashioned enough to think that this great war, like those of which we read in the Old Testament, is intended to teach us a necessary lesson, and if this be so it follows that we ought to examine ourselves and take the lesson to heart."

The well known words of Sir David Beatty are:—"When England can look out on the future with humbler eyes and a prayer on her lips, then we can begin to count the days toward the end."

It seems to have come to this, that the heads of the Army and Navy of Great Britain have to tell the religious leaders of the Empire how the latter could best assist them in winning the war.

Recent changes in the British Cabinet, and the suggestion for a small War Council of capable and aggressive men and the retirement of Mr. Asquith, reminds us of a book, "Ordeal by Battle," reveiwed in these columns (ante page 129). The forecasts of the writer of that book and his thoughts on inaction, of the British Cabinet, referring especially to Mr. Asquith, are now fully justified. Mr. Oliver and others said the motto of the late Prime Minister was: "Wait and see." Chapter and verse were given him for the fact that, years before the war began, Germany was preparing to attack England. Nothing was done. Had the Government acted on the facts before them, they would have saved thousands of lives—the cream of the young men of the Empire.

Limitation of consumption by voluntary means having clearly failed, the Government have at last announced that they intend to take some steps forward towards regulating the sale and price of food by means of regulations under the Defence of the Realm Acts. These steps might well have been taken six months ago, and there is considerable ground for the general feeling which has been expressed that the measures which are to be taken might well be more drastic. It is denied that food

profiteering has been general, but the fact remains that large fortunes have been and are being made out of food, and strict and immediate control over necessary commodities is essential if the public is not to suffer in the future more than it has in the past.—*Law Times.*

Lord Grey's reply to the United States note of protest against the statutory prohibitions of trading pursuant to the Trading with the Enemy Acts is a conclusive answer to the various points which have been raised in the American objections. A sovereign State may certainly prohibit its own citizens from trading with persons who assist or render service to its enemies, and such a step forms no proper ground for complaint as a violation of any principle of international law, even although it may cause inconvenience to neutrals. As Lord Grey truly points out, the legislation in question is purely municipal, and is merely the exercise of a sovereign right of an independent State over its own citizens, and nothing more.—*Law Times.*

Flotsam and Jetsam.

Abolishing the Bar.

At a recent meeting of some members of the profession, the following humorous verses were read by a gentleman present. They seem too good to be lost, and historically appropriate, and so we trust no apology is needed for preserving them in the pages of this journal.

Lay the jests about the Scott Act 'neath the chestnut tree at last,
For the miracle has happened and the olden days are past,
That which made Milwaukee famous does not foam in Napanee,
And the lid on old Toronto is as tight as it can be.
Oh! the old Militia Colonel, and his cronies well may sigh,
But the L.D.A. is merry now Ontario's going dry.

From Kenora to the lakeside in Ontario all is still,
For the only damp refreshment must be taken from the rill.
At Rideau Hall our Ruler gives his toddy glass a shove
And discusses Local Option with the Manitoba Gov.
It is useless at the fountain now to wink the other eye
For the cocktail glass is dusty and Ontario's going dry.

'Tis water, water everywhere and not a drop to drink,
No more is heard the music of the glass's mellow clink.
When the Captain and the Major, the Colonel and the "Jedge"
Meet to have a little nip to give their appetites an edge.
The Collins now is ginless, the high-ball lacks the rye,
And the punch-bowl holds carnations—Ontario's going dry.

All night-caps now are lacey, and worn on ladies' heads—
Those are vanished that were taken when no real sport went to bed.
The free and thirsty men-folk are gentle now, as lambs,
And they speak in husky whispers, that are flavoured well with damns.
And each can walk a chalk-line when the stars are in the sky,
For the fizz-glass now is fizz-less, and Ontario's going dry.

Draw the curtain, gentle reader, in their anguish let them be,
As our poor Toronto brethren try to "jingle up" on tea,
For the water-waggon rumbles through Ontario on its trip
And it helpeth not to drop off to pick up the driver's whip.
All the bars have turned to "Movies," and the corkscrew hangeth high
And things are blue in Club-land—Ontario's going dry.

There was a time when the bachelor was taxed in England, but, even if he attempted to escape by marriage, he could not avoid the tax gatherers. For William III. passed a comprehensive measure "for carrying on the war against France with vigour," whereby a tax was levied on marriages, births, burials, bachelors, and widowers. The payment was on a scale, an unmarried duke paying 12 pounds 10 sovereigns yearly, and bachelors at the bottom of the list only a shilling. It cost a duke 50 pounds to get buried and the same sum to be married. And there must have been dukes who balanced the cost of those luxuries.—*London Chronicle.*

In the last volume of the Dominion statutes there is an Index of Private Acts granted from the year 1867 to 1916, a period of 50 years, from which it appears that the total number of divorce Acts passed was 308, of which 162 were obtained by men, and 146 by women.

ANALYTICAL INDEX.