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CAN A MARRIED WOMAN BE PARTNER WITH HER HUSBAND?

It has recently been held by two Divisional Courts that under the Married Women's Property Act (R.S.O. c. 149) it is possible for a married woman to carry on business in partnership with her husband: *Reid* v. *Norwick*, 13 O.W.N. 462; *Faye* v. *Roumegous*, 14 O.W.N. 50, and see *Gibson* v. *Le Temps*, 8 O.L.R. 707. This conclusion is arrived at on the ground that a married woman is now able to enter into contracts as if she were a *feme sole*. The words of the Act, s. 4 (2), are as follows:—"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on *any contract*, and of suing and being sued in either contract or in court or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or against her; and any damages recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

It has been contended, however, and we think with some reason, that the powers conferred by the section just quoted must be read in connection with a subsequent section of the Act, viz., s. 7, which is as follows: "Every married woman, whether married before or after the passing of this Act, shall have and hold as her separate property, and may dispose of as such, the wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on and in which her husband has no proprietary interest, or gained or acquired by her in the exercise of any literary, artistic,

or scientific skill. Every woman married on or after the first day of July, 1884, shall also be entitled to have and hold and dispose of as her separate property all other real and personal property belonging to her at the time of marriage or acquired by or devolving upon her after marriage."

As to s. 4 (2) it may be noticed although apparently dealing with the power to enter into contracts generally seems by its very terms to exclude contracts by married women with their own husbands, because it proceeds to say (presumably with reference to the kind of contracts intended) that her husband need not be joined with her as plaintiff or defendant or be made party to any action or other legal proceeding brought by or against her; and it may be well asked how could any action or a contract made by a married woman with her husband be enforced by her without making her husband a party? Do not the concluding words of s. 4 (2) plainly limit the kind of contracts which are referred to in the prior part of the section to contracts with persons other than her husband? The section removes the common law restraint as to such contracts, but it is questionable whether, having regard to the concluding words, it enables any woman to enter into a contract with her husband. The ultimate test which the section proposes as the limit of her power to contract is that of a *feme sole*, but it is obvious that a *feme sole*, having no husband, has consequently no power to contract with a person standing to her in the relation of her husband; consequently on that ground also the section appears to fall short of giving a married woman any power to contract with her husband. But admitting that she has power to enter into a partnership contract, the 4th section does not empower her to hold the earnings resulting from such a contract; and resort must be had to s. 7 (1) above referred to, but that section expressly excludes her right to hold as separate property the earnings of any trade or business in which her husband has a proprietary interest; which would, we should think, exclude all profits derived from a business carried on by a married woman in partnership with her husband. We cannot but think, therefore, if the question were carried further it might very possibly receive a different answer.

THE CANADIAN BAR ASSOCIATION.

The annual meeting of this Association was held at Montreal on the 3rd, 4th and 5th days of last month and was largely attended by prominent members of the profession from all parts of the Dominion. It was noticed that there was a larger attendance than usual of Judges, both of the Superior and County Courts; and possbily this was partly due to the fact that the inadequacy of judicial stipends was to be one of the items for discussion. This meeting gives an accurate idea of the feeling of interest prevailing among the profession in Canada in respect of the Association and its work; and it was pleasing to note the sincerity and earnestness of those present to effectuate the objects of the Association.

The work that has already been done by the Association affords ample proof that it has justified its existence. It is not merely a gathering of lawyers interested only in professional matters and discussing subjects which have to do with legal education and their own interests and pursuits or matters of practice and procedure, but much more, as clearly appears from the programme of proceedings.

Those who have taken a leading part in connection with this Association have proved themselves to be statesmen and legislators as well as lawyers. The intelligent inspection of present difficulties, doubts and defects, and a farseeing view of how best to remedy, alter, supplement, or obviate that which is objectionable or defective have been the aims of the Association.

It is not necessary to enlarge upon the difficulties which confront the practical working of an Association which draws its membership from the widely scattered Provinces of this great Dominion, stretching as it does across a great continent, bounded by the Atlantic Ocean on the one side and the Pacific on the other, on the north by the Arctic regions and on the south by the great lakes and the rolling prairies. This difficulty is geographical and can only be met (though not entirely overcome) by that determined and indomitable spirit which characterises those who have their homes in this Canada of ours.

An important outcome of the Association is the inception of a Conference of Commissioners, representing the different Provinces,

for the purpose of considering and reporting upon certain branches of law with a view to them being made uniform in all. This action is in the direction of moulding into one harmonious whole the differing and incongruous legislation now existing in the various Provinces. It is evident that if Canada is ever to fulfil what we believe to be her destiny, something of this sort must be accomplished. This is the task which the Association and the Conference of Commissioners have undertaken; and it is one which is worthy of those members of the Association who feel the responsibility that lies upon the class to which they belong; namely, those who by their training and experience are the best fitted to deal with such an important and difficult task. Some of the Provinces have not as yet formally appointed Commissioners to represent them, though they were represented at the meeting in Montreal by prominent members of the Bar or by members of the Dominion Government. Sir James Aikins, of Winnipeg, acted as chairman, and Mr. John D. Falconbridge, of Toronto, as secretary. This is only a beginning, but it is a move in the right direction; and, if it receives the support and encouragement of the various Governments, should prove a most useful auxiliary to those who are charged with legislation which would be necessary to accomplish the end in view.

The first day (Monday, September 2) was devoted to (1) Meetings of the Council; (2) Conference of the Provincial Commissioners; (3) Meetings of the various committees.

At the morning session of the next day (Sept 3) there were words of welcome from the Batonier of the Montreal Bar. This was followed by the inaugural address of the President of the Association, Sir James Aikins, K.C., Lieutenant-Governor of Manitoba. This interesting and valuable paper is published in full at p. 344.

The afternoon was devoted to Mr. Jacobs' report on Bankruptcy. This is now in the form of a draft bill, in the hands of the Dominion Government for consideration at the next session of Parliament.

Reports were also presented on Company Law by Mr. Isaac Campbell, K.C., of Winnipeg, and on Legal Education by Dr. R. W. Lee, Dean of McGill University.

The report of the committee of the Association on Uniform Legislation was next presented. It will doubtless also be dealt with at the next conference of the Provincial Commissioners before being handed to the proper Department of the Dominion Government for consultation with the Provincial Governments and for further action.

The report of the committee on Legal Education gave rise to a lengthy discussion and was eventually referred back to the committee for further consideration. Mr. Justice Russell, of Halifax, and others took part in the discussion.

On the morning of the third day various Committees met. The subject of Foreign Judgments next came up for discussion on the draft bill presented by Mr. Clarke, K.C., entitled "An Act to facilitate the reciprocal enforcement of orders and awards in the United Kingdom and other parts of his Majesty Dominions." This was referred to the Committee of the Association on Uniformity of Laws and also to the Provincial Commissioners for suggestions and revision. During this discussion a brilliant and notable address was delivered by Mtre Frederic Allain, of the Paris Bar, the legal adviser to the French Commission in the United States, a lawyer of eminence and distinction.

The Progress Report of the Committee on Administration of Justice and Legal Procedure was presented by Mr. W.J. McWhinney, K.C., of Toronto, being a revision of the report laid before the Association in April, 1917. The discussion on this report was both lengthy and interesting, as it embraces a number of subjects all of great practical importance. Various changes were made and suggestions given, a[illegible] the report as amended was adopted. The recommendations in this report are all admirable and to the point. We say this feelingly, inasmuch as they embody views which have been expressed over and over again in this journal; for example, speaking of vacant court offices, we have always claimed that professional men should be appointed when such a vacancy occurs. At present both political parties fill positions requiring legal knowledge with broken down or troublesome partizans. In Toronto, for example, such positions have been

given to a baker, an auctioneer, a farmer, a doctor and others equally ignorant of their duties. This is unfair to the profession, and detrimental to the interests of the public.

The subjects dealt with were: (1) Court Officials; (2) Interprovincial Agency Allowances; (3) Judgments and their Enforcements; (4) Judicial Appointments; (5) Judges as Arbitrators, Commissioners, etc.; (6) Multiplication of Magistrates; (7) Marriage and Divorce and Divorce Courts; (8) Uniformity in Procedure; (9) Salaries of Judiciary; (10) Statutes; (11) Shortening of judgments by Judges, etc., for the purpose of lessening the volume of reports. We hope to give this valuable report to our readers in extenso.

The day's work was pleasantly concluded by an address given by Hon. Hampton L. Carson, of Philadelphia, entitled: "Our Common Inheritance." A most appropriate subject when we remember that our men are fighting side by side with those of common origin to the south of us. This address will appear hereafter.

On the fourth and last day of the meeting a paper was read by Mr. G. F. Henderson on Bulk Sales, and Mr. Baxter, K.C., read a draft bill amending, consolidating and making uniform the law of Conditional Sales. These will be found in the Association's Year Book. In the afternoon a paper was read by Hon. Isunegino Miayok, a distinguished member of the Japanese Bar, on the Growth of Representative Government in Japan, a subject most ably dealt with, and one of great interest at this time.

As it is quite impossible, with out limited space, to give in full the proceedings of this meeting or to publish all the reports and addresses, a selection is imperative; but we are glad to know that the Association's Year Book will contain everything in extenso. It will be looked for with great interest.

The thanks of the profession are due to the President of the Association, Sir James Aikins, K.C., for his valuable services in that capacity, and the time and thought he has given to the Association; also to its most efficient and courteous Secretary-treasurer, Mr. R. J. Maclennan, of Toronto, as well as to those who

have in various ways done yeoman service for the Association, and therein for the country at large.

The next meeting has been fixed for August, 1919, in the City of Winnipeg.

COUNCIL OF THE ASSOCIATION.

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Inaugural Address of the President.

Sir James Aikins, K.C., Knt., Lieutenant-Governor of Manitoba.

The ravening world war continues to collect and cast into its insatiable abyss the choicest human lives and the material wealth of the people accumulated by centuries of toil and thought, leaving its desolated trail bestrewed with broken happiness and hopes and hearts and crushing debt—ruin indescribable. "This

quarry cries on havoc . . . the sight is dismal." Why such a war? Why? Because the fundamental law and principle according to which humanity was created for individual and social life has been set at naught. The Central Powers—Hun and Turk and Austrian and Bulgar—still offend and their crimes go unwhipped of Justice, but that Justice presiding in the conscience of the people of upright nations has pronounced Judgment of Doom against them, and must inexorably enforce it.

Before continuing further observations on beneficent law that has been defied, I should refer to progress made by the Association since its last meeting in June, 1916. The Annual Meeting for 1917 was postponed because of war conditions and the pendency of the Dominion elections. The reports of the meetings of the Council held on the 27th April, 1917, and 13th April, 1918, will be presented to you. An interesting result of these two formal meetings and of meetings of the provincial executives has been the passing of Acts by British Columbia, Manitoba, Ontario, New Brunswick and Nova Scotia authorizing the appointment by the Governments of those Provinces of Commissioners on uniformity of provincial laws, and the appointment under those Acts of such Commissioners, who are holding their first meetings, etc., in connection with this Association. It is expected that the representatives of the Association in the Provinces will co-operate locally with the Commissioners in each Province, and that this Association and the whole Board of Commissioners will work heartily together to advance and effectuate a common purpose, that is the unification of those laws which, while they lie essentially within provincial jurisdiction, effect business dealings between people in different Provinces. That unification will greatly facilitate such dealings and be for the distinct benefit of the people of all the Provinces and so of the nation generally. As the laws thus to be unified relate to all classes of people and their vocations and transactions, the Association could not accept financial support from any of them though needed for expert and clerical services, lest it should be said the Association was working in the interest of some section or body or class. Therefore the source of income for carrying on the work, where not from the

members themselves, should be from the Governments, which represent all the people. The Association has been well approved by the profession generally. In this movement, as in all progressive innovations, the apathetic retard as well as the obstructionist. The benevolent critic, however severe, is not of that number, for he causes those who are advancing to ponder the path of their feet that their ways may be established. In the highway along which lawyers worthily press to their objective, there are always those who cause some delay by sauntering aimlessly along, or with deliberation stop to tie a shoe-string. Woe betides such, as it usually does in the intense race of life. A few members of our profession may desire to keep up the difference in the expression and in the details of provincial business laws and the consequent divergences of judicial decision although in substance they are the same. In other words, out of the confusion and loss to business men occasioned by such confusion, those few may think some little gain may be made. The mere mention of this is equivalent to public condemnation of that attitude. While the manufacturing, agricultural commercial and industrial organizations, and the public to whose attention the purposes and work of the Association has come, have generally commended, there are some fearful and unbelieving who have hesitated to applaud. For, from observation, perhaps their own experience, they know of organizations whose sins are to help themselves regardless of the interests of others or the principle of Fair Play. That disregard in the end breeds trouble everywhere. They know that Capital can combine against Labour and workingmen organise against property-owners, know middlemen, manufacturers and producers can in their respective occupations unitedly manipulate to their material advantage though not of others. They overlook the fact that the learned professions are fundamentally different from trade occupations, accordingly they fail to comprehend how lawyers can form an association for other than the purpose of the material advancement of the individual members. They understand the keenness of the lawyer's analytical mind, not always the sincerity of his heart or his public spirit. To these are unintelligible such phrases as "the honour," "the elevation," "the dignity of the profession" of which we are

proud because of its honour, and elevation and dignity. It is difficult for them to believe that the profession has no excluding conditions or practices not intended for the benefit of the people The fact, however, stands that the Bar has never combined for sinister purposes, any more than have the courts whose officers they are. This war has demonstrated that no body of men has more quickly responded to the call to service and sacrifice than the lawyers and law-students of Canada both at home and overseas. It is that same spirit that mainly moved our body to organize into an association, and at this particular time stimulates it. Let us not boast, for we have no cause nor has Canada for special glorification when we compare our accomplishment with what France and the lawyers of France have done in this war.

The people of France did not waste their time and strength in wordy denunciations of their enemies. They translated their feelings into daring deeds to defeat them. They did not seek the sympathy of the nations for the costliness of their sacrifice in helping to save the world from cruel-hearted despotism—patiently have they accepted sacrifice as their lot. They do not acclaim the glory of their heroes and heroines, for the people of France, man, woman and child, seem possessed by the heroic. Service and sacrifice, patient suffering and valour have become national characteristics, and the fruitage of them is the glory of France—a crown which will not fade away. Let us emulate them.

A few politicians have expressed the view that the unification of the law may be an invasion of provincial jurisdiction. On the contrary, it acknowledges local autonomy. Business law is conventional, and the convention agreed upon is supposed to contain the fairest and easiest rules for conduct in trade of all people, wherever living. Thus the law merchant originated. If one jurisdiction declines to accept the conventions agreed upon by others, necessarily it will in time be out of the smooth trade current and its people will be hampered. This was recognized in principle by conferring on the Dominion the regulation of Trade and Commerce, Banking, Bills of Exchange, Insolvency, etc., but outside of those things, and just as essential to trade, are the laws of Contract, Sales of Goods, Conditional Sales, Preferential

Assignments of Debtors, Insurance and Partnerships, general and limited, incorporation and capacities of business companies, grain, implement, milling and elevator companies forsooth, which lie within provincial authority. If the nations between which there is large trade were to agree upon some uniform domestic business laws to facilitate such dealings that would not affect their several state sovereignty or autonomy. The nations of the British Commonwealth, the United States and France which have fought side by side naturally will co-operate for mutual protection, and will probably have more constant trade relations. That flow of trade will seek the freest facilities, among other things easily understood, common and constant rules of business conduct, in other words, uniformity of law. Already tendencies in that direction are appearing. Pride of youthful nationality and a desire for distinctive individuality may have prevented Canada from acknowledging the efficient influence upon Canada of the progressive legislation of the United States. On the other hand, there are not a few instances of Canadian pioneering legislation being followed in some of the United States. We would be deficient, and deserving of all the results of stupidity, if when good suggestions are made or ideas presented we did not take them. They are communicated by American newspapers and magazines and books, which Canadians read more than those from any other country. There are 100,000,000 people in the United States expressing their thoughts in the English language; outside of it only some 60,000,000. The result naturally will be uniformity first of thought then of conduct and that will express itself in the laws of the two nations. How does that apply in the Province of Quebec where the language of the people generally is French? Certainly not to the same degree. Not wishing isolation or to be out of touch with environment or world progress their leaders and teachers and journalists read the daily or periodical literature of those who surround them, catch the best thought and impress it. Their business usages and undertakings, notwithstanding the disadvantage to both of the lingual barrier, are substantially the same as their neighbours, with a consequent approximation of the rules of conduct or laws relating thereto. On behalf of the

French-speaking people of Quebec it is claimed that their language is necessary, or is the natural, the best means of expressing and developing the aspirations and spirit characteristics of their race. If so, in that for them there are compensations. French is an unknown tongue to the mass of the people surrounding Quebec. Therefore, to them the spirit and viewpoint of the Quebec residents are not freely communicated. This fact has been exploited by designing persons and misunderstandings and antagonisms have arisen. If those antagonisms were between nations foreign to each other, small a occasion might be a *casus belli*. Is there not some underlying principle or law of conduct that may be appealed to to adjust fairly the difference between people and province and states which desire peace?

It should be found in the law of nature of which some definite and authoritative expression should not be wanting. I do not mean the law of nature in the sense in which it was understood by mediæval jurists, for they did not consider it simply a principle eternal, immutable and in agreement with the deepest needs of human nature, but a true positive law that any court was bound to recognise and enforce where it was applicable. As all people are presumed to know the state law which is to govern their conduct and according to which they are to be judged, it should be so positive, definitely expressed and easy of understanding that "the wayfaring man, though simple, shall not err therein." Certainly the unwritten law of nature is not that, and, therefore, is not of practical value insolving concrete cases where human life and liberty and property are involved.

Georgia del Vecchio says, in his book published a few years ago on "The Formal Basis of Law:"

"The only constant factor to be found in the historical life of law is that it is not an entity but a relation. Beyond the infinite diversity of positive law is a permanent essence based on the fundamental unity of human nature toward the realization of which all particular laws are and have been groping . . . The idea of natural law is in fact connected with that of a human world-wide law, which can be described in terms of historical evolution."

These and other passages in his book suggest that positive law is not an original entity but derivative and is related to other elements in social life; that its fundamental principle lies in the nature and essence of man; that the spirit in humanity which makes positive law gropes its way toward the fundamental, called, by Vecchio, "the essence of human nature." Undoubtedly positive or particular law, man-made or nation-made, has no life with which to evolve itself. It does change, it may improve, but only as the progressive spirit in humanity makes changes and improvements in living conditions, and necessitates suitable laws for them.

Let us assume what is generally accepted: That all life, including human life, is created according to a design, a principle or law for its existence and continuance and for the purpose of its being, both as individuals and as members of society, and that in respect of the latter its essence is fairness and justice, and I may safely add, kindness, that if such law regulating human life were fully disclosed to the people it would be regarded as positive law, and in so far as it related to the human in society would be enforced accordingly by constituted authority; that such law is always beneficent but contains in it as a necessary incident corrective provisions for its breach or non-observance which may be very painful to the wrong-doer, but yet are benevolent and for the protection of social and physical existence. To illustrate in physical life: If a child puts its hand upon a hot stove or its feet touch boiling water, instantly it suffers torment, benevolent torment, a sentinel to warn and thus prevent the loss of those members or its life.

Illustration in respect of moral life may be found in Shakespeare thus:—

"My conscience hanging about the neck of my heart
Says very wisely to me 'Budge not'
'Budge' says the Fiend,
'Budge not' says my conscience."—*Merchant of Venice.*

What follows if one budges,

"The dread of something after death
Puzzles the will.
Thus conscience does made cowards of us all!"—*Hamlet.*

Again,

"I'm no baby, I that with base prayers
I should repent the evil I have done
Ten thousand worse than any yet I did
Would I perform if I but had my will,
If one good deed in all my life I did
I do repent it from my very soul."—*Titus Andronicus.*

What follows

"When we in our iniquity grow hard
Oh misery on't. The wise gods seal our eyes,
In our own filth drop our clear conscience,
Make us adore our errors, laugh at us while we strut
To our confusion."—*Anthony and Cleopatra.*

Those two last quotations fitly describe the moral turpitude and degradation at the present time of the Huns, for breach of that fundamental law to which I have referred, and suggest the confusion to which they are most certainly strutting.

Science and philosophy have done much toward the discovery of portions of that law of our organization in the individual, but not so much in the relation of individuals to each other or as members of society. Assuming all that as substantially correct, is not the clearest and simplest exposition of the universal law intended to govern that relation disclosed by a true and wise authority recognized as such in all Christian lands, when He said: "The second great commandment is like unto the first (which relates to the duty of man to his Creator) 'Thou shalt love thy neighbour as thyself.' On these two commandments hang all the law." Toward the realization of this second world law, to use an expression of Vecchio, "all particular laws are and have been groping their way." Shakespeare did not interpret that law properly when he said: "Love thyself last." God Almighty has the capacity to love everybody—ours is sometimes strained to love our neighbour. Love and appreciation of one's self is made the standard of our regard for and conduct towards our neighbour—or the other fellow. It is the fundamental principle and philosophy of "fair play," "a square deal" and "what is right between man and man,"

or just treatment of others. The good I would like for myself, I should wish for my neighbour. Thus I would like my neighbour's help to protect my person, property and name from one who would injure or destroy them, and would expect in similar circumstances to help my neighbour. I would wish that person who did injure or destroy them corrected by the neighbour with such certainty of justice and swiftness of judgment that he would not repeat the offence, or be removed if he should shew himself unrepentent, persistent in evil, with an "in terrorem" effect on others—and I should be as sincere in my desire to help the community to punish a like offence against others. The higher persons or nations rise in uprightness or in a genuine regard for the neighbour, the greater will be their indignation against one who commits an offence against another, and, like the author of that great law, they will by no means spare the guilty. Love thyself to the exclusion of thy neighbour, or love thy neighbour to the exclusion of thyself is not the law. Both are in violation of it—and automatic correction to nations as well as to individuals follows that violation. Those of the first class are more common than the second, and to it belong the Hun and his vainglorious kultur, also the Bolsheviki and their ignorant wantonness. The hand of these is against every man and every man's hand against them, ruthless forces, the one directed by trained intelligence, the other dominated by ignorance, and both the more dangerous because heartless and conscienceless. Those of the second class are headed for the lunatic asylum and moral and material bankruptcy.

The active principle of that great law — consideration of the rights of all—gradually evolved the common law and equity and our business and criminal laws and such legislative acts as after being tested are likely to remain also international law. Moreover, being quick with truth it will give birth to other positive law suited to the changing conditions and post-war needs of our people and others of the Empire. It is true that our positive laws and those which may at least in our time be passed will be but crude expressions of that truth which cannot in its abstract form be administered by national courts, but they are constantly

at work to protect the honest doer and his property against those who will only be checked by external compulsion or the fear of it. Those who have in themselves that inward conviction of the two great commandments on which hang all the law, do not require positive enactments to prevent them from injuring others. Hence it is that so few of our citizens trouble themselves to know the provisions of our Criminal Code. Those who intend to do evil are much more likely to study them to see how far they may carry out their purposes without infringing the letter of the law, or how they may escape if they do.

The war has made manifest many conditions against the evils in which laws will have to be made and the good in which will have to be nurtured and brought to fulness, but in all the principle of fairness must be applied. For instance, new positive law will have to be enacted controlling conduct in the many phases of socialism accentuated and developed by the war. Socialism is a word that covers many right ideas and a multitude of errors, everything from Bolsheviki to I. W. W. and anarchism to the policy that aims at securing through the federal and provincial Governments a better distribution and in subordination to that a better production of wealth. In its best sense, socialism should be synonymous with democracy wherein every person serves and possesses according to the collective will of the people. Some of those new phases are shewn in more frequent strikes, not only by employees of private concerns but of the public, shewn in profiteering not only by these controlling capital but by labour, in the demand for the provincialising or nationalising of public utilities and national resources and for the conscription of wealth, for the adoption of different taxation so that its incidence may fall equal on the people for whose benefit and safety our ordinary and war debts were incurred, and for the national control of organizations the government of which is outside of Canada. As a result of the war and its disclosures, there must also be changes in our international law, clearly so in respect of the right of asylum. Lord Hawkesbury's answer in 1802 to Napoleon Bonaparte was: "Englishmen have been chivalrously sensitive on this point. Having undertaken to protect the stranger, they have resented any menace to him as an insult to themselves."

Campbell, C.J., said in 1858, "It has been the glory of this country to afford right of asylum to the persecuted foreigner . . They cannot be disturbed by the Government of this country as long as they obey our laws. They are under the same laws as native-born subjects"; and Erskine May, in his Constitutional History, remarks, "Nothing has served so much to raise in other States the estimation of British liberty as the protection which our laws afford to foreigners;" and the Institute of International Law in 1888 passed the resolution that in all countries the rule should be, "The foreigner, no matter what his nationality or religion, shall have the same civil rights as the citizen."

These express substantially the attitude and practice heretofore of the United Kingdom and Canada. Will Canada as sole master within its own boundaries after this allow that right to all people of all countries—even though healthy, capable of earning their own living and not convicted of crime, and though belonging to the Caucasian race? I think not. To guard somewhat against undesirable immigrants in England, the United Empire Act of 1905 was passed and the United States adopted a literacy test, but the experience of the last four years has proved the inadequacy of these. As I have pointed out, a nation should love itself first. Our essential duty and the obligation of our Governments is to create and maintain those conditions which will make for the highest moral, intellectual and physical development of Canadian citizens and cordial sympathy and co-operation between them and thus make the nation upright, strong and prosperous. Moreover, if Canada has this faith that it was born for a great world purpose, to help in maintaining peace and to aid other nations toward the attainment of the same freedom of self-government, and similar elevated ideals it possesses, then it should religously guard against the introduction of strangers from other countries who may hinder in the performance of that duty to itself and to its citizens, and in the attainment of that world purpose. Canada and the United States have erred in this respect, and this war has torn off the veil and more fully disclosed the ugly fact. Even before the war that error was made manifest in industrial dissensions, in the ignorant, too often corrupt, use of the

franchise and failure to understand the privileges and responsibilities of our free institutions and government, in the denationalizing and too frequently demoralizing force of undesirable foreigners. Detached by distance from their own people they generally are all for self and none for the adopted nation. If then, larger numbers are admitted to asylum in Canada from foreign lands, of different race, traditions, language and spirit than it can quickly and quietly absorb, Canada will be a sick nation with a long period of convalescing weakness. Its duty to itself is to keep healthy. That all peoples are not our brothers or even our neighbours, at all events for our own national purposes, is recognized by the desire of the Allies and of the races themselves to have boundaries of national governments determined by language, traditions and spirit. I think I can safely say that as all parts of Canada have been so long part of the benign British Empire, Canada's traditions and spirit are British and all true Canadian citizens have a common purpose with which no persons or powers external to ourselves should be permitted to interfere.

As already mentioned, there are two languages English and French. (No other should be recognized as Canadian.) Accordingly, a good class of immigrant from France would readily be absorbed in Quebec and from the United States in the English-speaking Provinces of Canada. It is a duty essential to the life and progress of Canada that all the people who make their home and living in it should love it, live for it and if need be die for it. To be efficient national government must have the whole soul of the people behind it, not apathy—service from them always, sacrifice where need be, and not selfishness—cheerful obedience to its laws, and confidence in the administration of them and loyalty to its institutions. A man who says that it matters little in what country he dwells, and is not prepared to fight for the one in which he resides is not entitled to the protection of the government he will not defend or to asylum among the people whose national existence he will not risk with them his life to save. People coming from a foreign government seeking such asylum should terminate their allegiance to that government, abandon the ideals and customs, institutions and tongue

of that foreign land, and adopt those of the country in which they come to dwell, speak its language, and read its literature. In Canada that must be English or French or both. Those coming should not think that by their arrival they are conferring on us a special favour and are therefore entitled to special privileges. We are willing to share with them our rights as citizens, if they are willing to accept with us all the obligations of citizenship, and to conform to national ways and give the earnest of it by actually doing so. If they are not thus willing, Canada is better off without them.

To what extent will the "Conflict of Laws" be still applied to people from enemy countries whose atrocities have shocked and hardened the hearts of all nations who have suffered from their fiendishness. Legislation which reflects public sentiment will express that indignation. It will also be shewn in international relations. Will not the test in the British Commonwealth and the United States be nationality and not domicile as in the past, thus following the Code Napoleon? To a limited extent United Kingdom legislation has already made it so (see Trading with Enemy Act, 1916). But what of international law (public)? I have heard lawyers say it is an ideal not a fact, an ideal that has been brushed aside and sneered at by the Central Powers because it did not suit their convenience and, to the extent to which reprisal was necessary to save themselves and smaller nations from extinction, sidestepped limitedly by the British Commonwealth and its Allies. The Hun has been insisting that as Germany is the dominant world power it can disregard international law, and enforce what rules of conduct it pleases on all other States and make those rules positive law. Some writers hold that international law may be an expression of natural law or an emanation of the fundamental second commandment, crude, but sufficient to warn an evilly disposed State; that as civilization advanced international law changed form from time to time to express the public opinion of well disposed peoples touching the rights and obligations of States to each other; that it grew naturally as the common law and equity in England to suit new conditions evolved out of saner ideas and juster dispositions. Austin maintained that a

law properly so called is a command and its sanction is the power to enforce obedience to it. Applying this test he concludes that international law is not positive law. Sir Henry Maine says: "Some of Austin's disciples infer from his language that men always obey rules from fear of punishment. As a matter of fact this is quite untrue, for the largest number of rules which men obey are obeyed unconsciously from a mere habit of mind. Men do sometimes obey rules from fear of the punishment which will be inflicted if they are violated, but compared with the mass of men in each community, this class is but small. Probably it is substantially confined to what are called the criminal classes, and for one man who refrains from stealing or murdering because he fears the penalty, there must be hundreds of thousands who refrain without a thought on the subject." Because of their habit of mind, of the justness of their principles and the sincerity of their heart all nations save the Central Powers have respected international law. The Hun and Bulgar, Austrian and Turk have not refrained from stealing or murdering because they feared the penalty, for, blinded by their conceit, they challenged the power of the nations to enforce it. They might have learned this of retribution long ago from Von Logau, one of their poets—

"Though the mills of God grind slowly,
Yet they grind exceeding small;
Though with patience He stands waiting,
With exactness grinds He all."

The English and French speaking peoples are an agency to grind and to teach Germany that if it does not leave its neighbours, such as Belgium and Serbia and Russia, and respect their rights there are others who do and will defend them against brutal outrage, and mightily correct the offender, teach it that international law is positive law "based on the fundamental unity of human nature" and that the nations which bring forth the fruit of righteousness and respect international law are a rock of defence and refuge and whosoever shall fall on that stone shall be broken and on whomsoever it shall fall it will grind him to powder. To-day the stone is falling on those Central nations which loved themselves excessively and their neighbours not at all.

NOTES FROM THE ENGLISH INNS OF COURT.

Lord Parker of Waddington.

In the death of Lord Parker of Waddington, not only the legal profession but the British Empire has sustained a very serious loss. Here was a lawyer "*sans peur et sans reproche*" one of the brightest ornaments of the House of Lords and the Judicial Committee of the Privy Council. An Eton scholar, and a Senior Classic at the University of Cambridge, he evinced remarkable mental powers at a very early age, and soon after his call to the Bar he acquired a large practice on the equity side. His services, however, were not long retained for the private litigant. When Sir Mathew Ingle Joyce was raised to the Bench, R. J. Parker took his place as Junior Counsel to the Treasury in chancery matters.

It has been for many years an established practice that the Attorney-General's devil shall be made a judge. Before very long Mr. Parker became a judge, and it was on the Bench that his great talents really had full scope. Some years ago a case arose in which the whole theory and practice of wireless telegraphy had to be enquired into. A complete installation was erected in Mr. Justice Parker's court, and for many weeks scientific questions of great difficulty were enquired into. Most of the leading experts of the day were cross-examined. As one of them—a friend of mine—left the court after judgment was delivered he said to me: "Of all the men in that court who do you think knows most about the Marconi invention?" I gave it up. He said, "Mr. Justice Parker!" Parker, however, was not long to sit as a puisne judge. He was translated to a higher sphere. At a very early period he was made a Law Lord. It is from the House of Lords and the Judicial Committee of the Privy Council that he will now be missed.

The End of the War.

The voice of the prophet who essays to give the date when the great war will come to an end has not been heard for some time. This is partly due to the fact that events have even falsified the

utterance of Lord Kitchener, who, soon after August 4, 1914, said that the war would last three years. This was at a time when others were talking cheerfully of 3 months. It is but fair to the memory of the great Field Marshal to say that shortly before his tragic death he is reported to have said: "The first seven years of the war will be the worst." But what is meant by "the end of the war?" This is a question of general importance so much so that the Attorney-General some time ago appointed a committee presided over by Mr. Justice Atkin to consider the matter in its legal bearings. This committee has now reported. In their opinion "the war cannot be said to be at end until peace is finally and irrevocably obtained, and that point of time cannot be earlier than the date when the treaty of peace is finally binding on the respective belligerent parties; and that is the date when the ratifications are exchanged." That there should be absolute certainty in this matter is of vital importance, because a very large number of statutes and statutory orders are expressed to be operative only until the end of the war. For example, all regulations made pursuant to the Defence of the Realm Act will automatically cease to operate when the war comes to an end, and the powers of a very large number of executive officers ceasing at that time, these persons may be exposed to liability on civil process. In these circumstances the committee not only recommend that the period of state of war be fixed with absolute certainty, but that Parliament should confer upon the Crown power to extend (by Order-in-Council) the powers of numerous Government Departments for such time as may be necessary to wind up their affairs.

Affidavits in Prize Cases.

"Truth will out, even in an affidavit" is an utterance commonly attributed to an old judge. That affidavits *per se* are an unreliable form of testimony can be gathered from our rules of procedure. The King's Bench Division is never called upon to decide any real issue of fact upon affidavit evidence. Indeed, there are only about three forms of affidavit which crop up in an ordinary common law action. A defendant who desires to resist summary judgment must file an affidavit setting forth facts which shew that he has

a reasonable defence to the action. Upon an order for discovery, the litigant may be ordered to declare on oath what relevant documents he has in his power or possession, or he may have to file an affidavit in answer to interrogatories. It will be seen that in all these cases the matters sworn to are by no means decisive of the issue in the action; and even in the chancery courts, where affidavits are much more in vogue, the opposing party, if he doubts the affidavit evidence, may have the witness cross-examined upon his sworn statement. In the nature of things it is necessary that much of the evidence in prize cases must be taken by affidavit. But even in the Prize Court, the affidavit is read in an atmosphere of suspicion. In *The Proton* ((1918) A.C. 578) Lord Sumner with characteristic humour says this: (at p. 583):—"All these facts are deposed to in affidavits. It is true that they contain many other statements which are not evidence and are not trustworthy. They revel in rumors, they abound in hearsay, they contain many exaggerations and some extravagances, *and after all they are affidavits.*" But it is right to say that there the judge of the Prize Court had accepted the affidavits; that the Privy Council held he was right in so doing; and that, in the result, a valuable vessel was condemned in prize.

Metes and Bounds.

If my land Blackacre is separated from Whiteacre by a hedge, where is the exact boundary between the two closes? It is strange that in a country like England where the hedge has been used as a fence for hundreds of years there should be any question about such a point as this: but the question has arisen in a very acute form in a recent case. I refer to *Collis* v. *Amphlett* (1918) 2 Ch. 476. There the defendant owned certain closes bordering on a common. That common was enclosed in the year 1879, its boundaries being marked on a map. That map must be taken (having regard to certain Acts of Parliament) to mark for all time the metes and bounds of that common; but it was on too small a scale to shew the exact nature of the fences around the common, although it did indicate that those fences belonged to the defendant. Evidence was, however, called to prove that, when the common was laid out,

the measurements were taken to the centre of a living hedge around the common. "Our common," say the conservators, "extends to the middle of the hedge." The defendant, however, taking a different view, placed certain iron fences on the common side of the hedge at an average distance of 4 feet, alleging that he was entitled to a ditch width. In an action brought against him for trespass it was held by a court of first instance that the action failed because the award map was conclusive; and no custom or usage giving the defendant a ditch width being proved, that the plaintiffs were entitled to judgment. The Court of Appeal, however, has reversed this decision.

In taking this course, the Court of Appeal did what appears to be reasonable enough. They assumed that it is a reasonable custom for a man to claim a ditch width outside his hedge, although all trace of the original ditch may through lapse of time have disappeared. The law is thus stated in Halsbury's Laws of England, vol. 3, paragraph 247:

"No man making a ditch may cut into his neighbour's soil, but usually he makes it at the very extremity of his own land, forming a bank on his own side with the soil which he excavates from the ditch, on the top of which bank a hedge is usually planted. Therefore, where two fields are separated by a hedge or bank and an artificial ditch, the hedge or bank and ditch *primâ facie* belong to the owner of the field in which the ditch is not. This being the origin of the presumption, it is very doubtful whether it is applicable when it is not known that the ditch is artificial.

Acts of ownership such as trimming and pollarding a fence and cleaning a ditch even though continued for many (*e.g.*, fifty) years by an adjoining owner, do not rebut the presumption that the ditch and fence belong to the adjoining owner on whose side the ditch is not at any rate if the acts were done without knowledge on the part of the latter."

From *Vowles* v. *Millar* (a case cited in support of the above statement of the law), it appears that in some districts the owners of a bank and ditch are entitled to four feet of width for the base of the bank and four feet of width for the ditch, but, apart from any local custom, there is no rule to this effect. In *Collis* v. *Ampleti* the Court in effect found that the local custom was

established. It is interesting to notice that a strip of land is sometimes attached by local custom to a manor park, a forest, or an estate. Thus Richmond Park has a free boundary of sixteen and a half feet outside its boundary wall.

1, BRICK COURT, TEMPLE. W. VALENTINE BALL.

FLAWS IN OUR MUNICIPAL SYSTEM.

Public attention has recently been called to the gross mismanagement of money matters of some of the larger cities of the Dominion. This is largely the fault of a municipal system which, though reasonably effective in rural districts, has proved a failure in urban centres. The Commissioner of Finance of the City of Toronto, who is probably the best authority we have on the subject, recently criticised in severe terms the treatment of financial matters in various departments of the city of Toronto. He condemned especially the present mode of dealing with public utilities which he insisted should bear their proper share of the city's burden. The failure in this regard has he says caused disaster and injustice.

One phase of this subject is thus referred to in a leading financial periodical:—"Add to those instances the fact that the Hydro-Electric System, with an investment of $70,000,000 per year, pays no taxes, where private enterprise would be called upon to hand over more than $1,500,000 per year, and that, through street service and other charges, the ratepayers pay indirectly for their cheap house lighting, etc." It is not difficult to see how unjustly and disastrously, in a variety of ways, the system above referred to works out.

What is said to be the best governed city on this continent has discarded boards of aldermen and baneful policital influence by having its affairs (most satisfactorily and economically) managed by a commission of three first class and highly-paid commissioners. The position of these Commissioners is looked upon as one of high honour, whereas, under our municipal system, high-class men, declining to step into the mire of ward politics, stand aloof, and the public suffer accordingly. It is high time that some change should be made in the direction above indicated.

REVIEW OF CURRENT ENGLISH CASES

BEQUEST—UNCERTAINTY—"PUBLIC, BENEVOLENT OR CHARITABLE PURPOSES' AS TRUSTEES MIGHT THINK PROPER—LIMITATION TO PARTICULAR LOCALITY.

Houston v. *Burns* (1918) A.C. 337. This was an appeal from the Scotch Court of Session. The question involved was as to the validity of a bequest made by a testatrix "for such public, benevolent, or charitable purposes" in connection with a certain named parish, as her trustees might think proper. The House of Lords (Lord Finlay, L.C., and Lords Haldane, Dunedin, Atkinson, and Shaw) agreed with the court below that the bequest was invalid on the ground of uncertainty—because the bequest must be construed disjunctively, and a bequest for public purposes was too vague, and the fact that there was a limitation imposed as to the locality did not validate the bequest notwithstanding a dictum of Lord Romilly in *Dolan* v. *Macdermot*, L.R. 5 Eq. 60, to the contrary.

INSURANCE (MARINE)—VESSEL TORPEDOED—SUBSEQUENT LOSS THROUGH SINKING AT DOCK TO WHICH IT HAD BEEN TOWED—PROXIMATE CAUSE OF LOSS.

Leyland Shipping Co. v. *Norwich Union F. I. Co.* (1918) A.C. 350. This was an appeal from the decision of the Court of Appeal (1917) 1 K.B. 873 (noted *ante*, vol. 53, p. 329). The action was on a policy of marine insurance which exempted the insurers from loss occasioned by hostilities. The vessel insured was torpedoed, but was subsequently towed into port in a disabled condition and ultimately sunk at the dock to which she was moored and became a total loss. The Court of Appeal held that the proximate cause of loss was the torpedoing of the vessel and therefore the insurers are not liable, and this decision is affirmed by the House of Lords (Lord Finlay, L.C., and Lords Haldane, Dunedin, Atkinson and Shaw).

MORTGAGE—ACCOUNT—BANKER AND CUSTOMER—STATED ACCOUNT—APPROPRIATION OF PAYMENTS—RECEIVER—LIEN FOR SALVAGE PAYMENTS.

Yourell v. *Hibernian Bank* (1918) A.C. 372. This was an appeal from the Irish Court of Appeal. The action was brought

by a mortgagee to enforce its security. The mortgage was to secure a current bank account. The mortgage having fallen into default the bank appointed a receiver. Both before and after the appointment, the bank kept the account as a bank account, and from time to time rendered to the principal debtor statements of the account and obtained from him acknowledgments of their correctness. The bank also advanced moneys to the mortgagor, which were charged to the account, which were utilized by the mortgagor in preserving the mortgagee's security. The bank claimed the right to repudiate the account as it had been kept in the books and in which payments had been applied in reduction of principal instead of first in reduction of interest, and they also claimed a salvage lien in respect of the advances above referred to. The House of Lords (Lord Finlay, L.C., and Lords Atkinson, Parker and Wrenbury) held that the bank was bound by the accounts rendered, and was not entitled to have them taken on the usual basis of a mortgage account because it would be more advantageous to the bank: also that it was not entitled to any salvage lien, as the payments had not been made by the bank direct, but were treated as advances to the mortgagor and charged in his account. And that the mode of application of moneys received by a receiver prescribed by the Conveyancing and Law of Property Act was susceptible of alteration by consent of parties, and what had taken place amounted to such a consent.

CONVEYANCE—DEED SIGNED BY AGENT IN HIS OWN NAME—AGENT AND PRINCIPAL OF SAME NAME—LEGAL ESTATE—COVENANT —ELECTION TO POSTPONE PRIOR EQUITY.

Fung Ping Shan v. *Tong Shun* (1918) A.C. 403. This was an appeal from the Supreme Court of Hong Kong The facts were somewhat peculiar. Tong Shun the respondent was a Chinese resident in Chicago. He had a nephew resident in Hong Kong, and his name when rendered into English was also Tong Shun, although when written in Chinese characters their names differed. The nephew in 1909 took a deed to Tong Shun of Victoria in the colony of Hong Kong of land in Hong Kong and the nephew signed the deed in Chinese characters in the respondent's name. The consideration for the deed was paid by the nephew with money supplied by the respondent. Afterwards, in fraud of the respondent, the nephew created an equitable mortgage on the property in favour of the appellants. In 1914 the respondent took from his nephew a conveyance of the legal estate subject to the appellants' mortgage, the nephew covenanting to pay the amount

of the mortgage. Afterwards the respondent brought the present action, claiming a declaration that he was entitled to the land free from the mortgage. The Judicial Committee of the Privy Council (Lords Shaw, Parker, and Sumner) held that under the deed of 1909 the legal estate passed to the nephew but subject to a trust for the respondent and that by accepting the deed of 1914 subject to the mortgage the respondent had elected not to keep alive as against the appellants his prior equitable estate, and that the appellants were entitled to the benefit of the transaction though they were not parties. The judgment of the court below was therefore reversed.

PRIZE COURT—NEUTRAL SHIP—CONTRABAND CARGO—NEUTRAL PORT OF DELIVERY—ENEMY DESTINATION—KNOWLEDGE OF SHIPOWNER.

The Hillerod (1918) A.C. 412. This was an appeal from a Prize Court condemning a vessel as prize in the following circumstances. The vessel in question was a Danish vessel bound from Philadelphia to Trondjern and Gothenburg with a cargo of lubricating oil which was contraband and which was on 16 November, 1915, seized at sea. The cargo was claimed by Westerberg a Swede by birth but naturalized in the United States and being the U.S. consular agent at Malmö in Sweden. His name appeared on the bill of lading as consignee and he purported by the charterparty to be the charterer of the vessel. Brix Hansen & Co., of Copenhagen, claimed to be owners of the ship. Evans, P.P.D., found as a fact that the cargo did not belong to Westerberg but that it had been acquired and shipped by Germans and was destined for Germany, and he condemned the ship because the contraband goods exceeded half the entire cargo, and the shipowners were consequently to be presumed to be parties to its ulterior destination, and also because Westerberg and the shipowners were associated with Westerberg in an attempt convey contraband to the enemy, and that they were endeavouring to mislead the court. It appeared that Westerberg's salary was only £200 per annum, and that he had engaged in no previous mercantile transactions, and no explanation was offered as to why the shipowners came to charter a vessel for £16,500 to such a man; that Westerberg had no knowledge of the purchase and had made no arrangement to receive the cargo, and that he was in fact a mere stool pigeon for the shipowners. The judgment of Evans, P.P.D., was confirmed by the Judicial Committee of the Privy Council (Lords Parker, Sumner, and Wrenbury).

PRIZE COURT—COMMERCIAL DOMICILE—NEUTRAL PARTNER OF ENEMY FIRM—GOODS SHIPPED BEFORE WAR—PRESERVATION OF RIGHTS OF NEUTRAL PARTNER.

The Anglo-Mexican (1918) A.C. 422. This was also an appeal in a prize case from the decision of Evans, P.P.D. A firm having branches in Germany, England and America had a partner German born, but naturalized in the United States and resident there. The American branch of the firm had, before the war, shipped goods from the United States to the German branch, and while on their way war broke out, and the ship and cargo were seized as prize. The partner in the United States claimed a one-fifth share of the cargo, but up to the time of the hearing had taken no step to dissociate himself from the firm, and that being the case, the Judicial Committee of the Privy Council (Lords Parker, Sumner and Wrenbury, and Sir A. Channell) held that his share was confiscable and should have been condemned and the decision of Evans, P.P.D., to the contrary, was therefore reversed.

PRIZE COURT—COMMERCIAL DOMICILE—BRANCH OF NEUTRAL COMPANY IN ENEMY COUNTRY—GOODS SHIPPED FROM ENEMY COUNTRY BEFORE WAR—PURCHASE FOR BRANCH IN ALLIED COUNTRY.

The Lutzow (1918) A.C. 435. This was an appeal from a Prize Court in Egypt. The facts were that an American company having branches in Germany and Japan had prior to the war, at the instance of its Japanese branch, sent an order for the purchase of aniline dyes to its German branch. The goods had been purchased and shipped prior to war and were seized en route after war broke out. The Judicial Committee of the Privy Council (Lords Parker, Sumner and Wrenbury, and Sirs S. Evans and A. Channell) held that in these circumstances the goods were not confiscable as prize.

PRIZE COURT—NEUTRAL VESSEL—CONTRABAND CARGO—COAL INTENDED FOR ENEMY CRUISERS—ABANDONMENT OF VOYAGE—SALE OF CARGO IN NEUTRAL COUNTRY—CAPTURE OF VESSEL ON RETURN VOYAGE—DECLARATION O LONDON, ARTS 38, 46—ORDERS-IN-COUNCIL, AUGUST 20 AND OCTOBER 29, 1914.

The Alurira (1918) A.C. 444. This was an appeal from the decision of Evans, P.P.D. (1916), P. 131 (noted *ante*, vol. 52, p. 354). The facts were that the vessel in question was Dutch and had been chartered to carry a cargo of coal ostensibly to Buenos

Aires, but really to supply German cruisers. On arrival at Teneriffe, the voyage had been abandoned and the cargo was there sold. On the home voyage the vessel was seized as prize. Evans, P.P.D., held that she was not in the circumstances liable to condemnation, but as an attempt had been made to deceive, by use of false papers, he ordered the owners to pay the costs. The Judicial Committee of the Privy Council (Lords Parker, Sumner and Wrenbury, and Sir A. Channell) affirmed his judgment.

COMPANY—TRANSFER OF SHARES—PAID-UP SHARES—REFUSAL OF DIRECTORS TO REGISTER TRANSFER—BY-LAW—ULTRA VIRES—COMPANIES ACT (R.S.C. c. 79), ss. 132, 138, 143, 145.

Canada National Fire Insurance Co. v. *Hutchings* (1918) A.C. 451. The simple question at issue in this case was whether a limited company can, under the Companies Act (R.S.C. c. 79), s. 132, pass a by-law giving its directors an arbitrary discretion to refuse to register a transfer of shares The Manitoba Court of Appeal had ruled that it cannot, and with this conclusion the Judicial Committee of the Privy Council (Lords Parker and Sumner, and Sir W. Phillimore) agree; their Lordships holding that a by-law purporting to give the directors unrestricted power in this respect must be construed as merely authorizing them to disapprove of transfers in case of shares which are partly paid, or upon which calls are due, or upon grounds of title and conveyance which it is their duty to attend to.

PRIZE COURT—CARGO—CONDITIONAL CONTRABAND—BILL OF LADING—NAMED CONSIGNEE—ORDER-IN-COUNCIL, OCTOBER 29, 1914—DECLARATION OF LONDON, 1909, ART. 35.

The Louisiana (1918) A.C. 461. This was an appeal from the unreported decision of Evans, P.P.D. The facts were that neutrals shipped conditional contraband, consisting of fodder, from the United States in a neutral ship under bills of lading which purported to make the goods deliverable to named neutral traders at a neutral port. The learned President found as a fact that the shippers had acted in the transaction by the direction of an agent of the German Government, and that the persons named as consignees had no interest in or control over the goods. An Order-in-Council of 29th October, 1914, had adopted with a modification the declaration of London, art. 35. The modification is as follows: "Notwithstanding the provisions of art. 35 of the said Declaration conditional contraband shall be liable to capture on board vessel bound for a neutral port if the goods are

consigned 'to order,' or if they shew a consignee of the goods in territory belonging to, or in occupation of, the enemy." The Judicial Committee of the Privy Council held that the persons named in the bill of lading were not the consignees of the goods within the meaning of the Order-in-Council, but that the goods were *in fact* destined for the German Government and had therefore been properly condemned.

PRIZE COURT—CARGO—UNLOADING BEFORE PRIZE PROCEEDINGS —FIRE IN WAREHOUSE—LOSS OF CARGO—CLAIM BY OWNERS AGAINST CAPTOR AND PRIZE OFFICER.

The Sudmark (1918) A.C. 475. This was an action brought by the owners of a cargo against the captor and the port officer into whose custody the cargo had been delivered, to recover for the loss of the cargo by fire. The Naval Prize Act, 1864, s. 16, provides that ships taken as prize are when brought into port within the jurisdiction of a Prize Court, without bulk broken, to be delivered up to the marshal of the court, or if there be none then to the principal customs officer at the port. The vessel with the cargo in question was seized in the Red Sea and taken into the port of Alexandria where there was no marshal nor customs officer, and was delivered to a detaining officer appointed by the British Government to take custody of prizes. That officer, in consequence of a representation made by the master of the vessel that the cargo was likely to deteriorate before prize proceedings were commenced, authorized the cargo to be placed in a warehouse where subsequently a fire occurred and part of the cargo was burnt. The residue was subsequently released to the owners, who then claimed and recovered judgment for damages for the portion destroyed against the captor and the detaining officer, and from this judgment the appeal was had, and the Judicial Committee of the Privy Council (Lords Parker, Sumner, Parmoor and Wrenbury, and Sir S. Evans) held that neither was liable and the appeal was therefore allowed, because (1) the captor was justified in delivering the ship to the custody of the officer, who did not receive it as the captor's agent and, (2) in the circumstances the Prize Court, if applied to, would have authorized the cargo to be unloaded, and consequently the damage was not the result of not making an application, and moreover because the damages were too remote, there being no contract of bailment.

WATERCOURSE — STREAM EXCLUSIVELY FED BY RAINFALL — RIPARIAN RIGHTS — SENSIBLE DIMINUTION AND POLLUTION OF STREAM—ABSENCE OF DAMAGE—DECLARATION OF RIGHT —TIME TO ABATE NUISANCE—RESERVATION OF RIGHT TO APPLY FOR INJUNCTION.

Stollmeyer v. *Trindad Lake P. Co.* (1918) A.C. 485. This was an action to restrain pollution and diversion of a watercourse which was exclusively fed by rainfalls, and in the dry season was apt to go dry altogether. The plaintiff had riparian rights in the stream but his land through which the stream flowed was not suitable for agriculture, nor was it used for any purpose. The defendants owned the stream higher up its course and were engaged in boring for oil and in the course of their business polluted the stream with oil and salt and; in order to supply other properties not riparian, had diverted part of the water system and thereby sensibly diverted the flow of water past the plaintiffs' land. The court below in Trindad considered that the plaintiff had suffered no damage and dismissed his action: but the Judicial Committee of the Privy Council (Lords Parker, Sumner and Wrenbury) considered that the plaintiff's rights were being infringed and that he was entitled to a declaratory judgment in his favour, but in view of the circumstances the defendants should be given two years within which to abate the nuisance complained of with liberty to the plaintiff then to move for an injunction if necessary to enforce his rights. See *Watson* v. *Jackson*, 31 O.L.R. 481.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Full Court.] GAUTHIER v. THE KING. [40 D.L.R. 353.

Arbitration—Provincial statute—Reference to the Crown—Construction—Constitutional law.

A reference to the Crown in a provincial statute is to the Crown in right of the Province only, unless the statute makes it clear that the reference is to the Crown in some other sense. Sec. 5 of the Ontario Arbitration Act does not apply to a submission by the Crown in right of the Dominion.

McGregor Young, K.C., for plaintiff, appellant.

ANNOTATION FROM D.L.R.

Privileges of the "Crown."

In the principal case all the judges apparently concur in the proposition thus expressed by Anglin, J., at 40 D.L.R. 353 at 365, 56 Can. S.C.R. 176 at 194:—

"Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion."

The proposition, indeed, seems obviously true, and it is a good many years since the same view was expressed by the Minister of Justice, when, with reference to a British Columbia Act, he said that he apprehended that:—

"It is incompetent to a provincial legislature to so legislate as to impose a liability upon the Crown in right of Canada and that in so far as this Act is intended to have that effect, it is *ultra vires*": Prov. Legisl. 1901-3, pp. 83-4.

If the principal case were carried to the Privy Council we might expect a very interesting judgment upon "the Crown" and its relation to colonial legislatures—a matter which does not seem to have been discussed in detail by any of the standard writers on the constitutional law of the British Empire.

So far back as *Calvin's* case, decided in 1608, 7 Rep. 27 b., we have it decided that the Crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms. And so it was held in that case that notwithstanding the existence of two separate kingdoms (England and Scotland) at the date of the decision, yet every subject of James I., born after his accession to the throne of England in 1603, no matter in which country he was born, was a subject of both. This was because allegiance is due to the King as a person; and the Lord Chancellor of that day, with the unanimous concurrence of twelve other judges, held that a Scottish born

subject of the King was no alien in England. And so in *Gavin Gibson and Co.* v. *Gibson*, [1913] 3 K.B. 379, Atkin, J., pointed out that the effect of *Calvin's* case was to establish that throughout the Empire the King acts everywhere as the same individual, and that all subjects everywhere are his subjects, and not those of any particular State or colony; that a subject of the King in one part of the Empire is equally his subject elsewhere.

In the last case there was no question of legislation—of the power of this or that legislature to bind the Crown—as, *e.g.*, to bind the King to accept a certain man as a subject of his. Where there is no such question of legislative power involved, the unity of the Crown came neatly out, as Mr. Keith observes in his great work on Responsible Government in the Dominions, vol. 3, p. 1456, in *Williams* v. *Howarth*, [1905] A.C. 551. In that case the New South Wales Government were sued in a New South Wales court, on a contract to pay a soldier ten shillings a day for service in South Africa. The Imperial Government had paid him four shillings and sixpence a day, and the New South Wales Government claimed to set this amount off against the total claim. The Privy Council held that this could be done, and they stated that in such a case there could be no difference asserted between the Crown in its several positions as the Crown in the United Kingdom and the Crown in the State of New South Wales. As the Lord Chancellor said, p. 554:—

"The plaintiff was in the service of the Crown, and his payment was made to the Crown. Whether the money by which he was to be paid was to be found by the colony or the Mother Country was not a matter which could in any way affect his relation to his employer, the Crown."

When it is a case of legislation binding the Crown, other considerations arise. And so in the very recent case in England of *Rex* v. *Francis*, *Ex parte Markwald* (1918), 34 T.L.R. 273, a Divisional Court held that an alien who, born in Berlin, enters Australia and is duly granted there a certificate of naturalization under the powers conferred by the Commonwealth Constitution Act, 1900, is a subject of the King only in Australia, and remains an alien in other parts of the King's Empire, including the United Kingdom. The local legislature could not bind the King to accept a man as a subject of his, except within the territorial limits of its jurisdiction.

The fact is we are forced by constitutional circumstances—or at all events it is convenient under the circumstances of the Constitution of the British Empire as it exists to-day—to draw a distinction between "the King" and "the Crown." It is quite true, as Mr. Keith, quoting Lord Haldane, says, in his recent work on Imperial Unity and the Dominions, p. 385, that "the King is not a local but an Imperial institution, and is present in each of his dominions, and represented by his Ministers"; who in their turn, are, under responsible government, controlled by the local legislatures. It is also true as said by Pollock and Maitland in their History of English Law, 2nd ed., p. 515, that:—

"There is something anomalous in the ascription to a King of powers that he may not lawfully exercise in person—something which suggests that our "King" is rather a figment of law than a man."

Perhaps, instead of calling the King "a figment of law," it is preferable to say that "the Crown"—that "magic circlet," as the same learned writers

somewhere call it—is in our constitutional law used as a symbol. When we wish to speak of the King, not as a man, but as a symbol, we usually employ the term "the Crown."

We speak of a statute not binding "the Crown"—we do not say "the King"—except by express words or necessary intendment. "The Crown," in such use of the expression, is the symbol of executive power.

And so in Halsbury's Laws of England, vol. 6., p. 425, it is said:—

"Where representative or representative and responsible government has been conferred upon a colony . . . the prerogatives in relation to government become assimilated to those exercisable by the Crown with regard to the Imperial Government, though delegated to the governors of the various colonies."

And again, vol. 27, p. 166:—

"When we talk of the Crown being bound by the provisions of a statute, if directly or by necessary implication referred to, "the Crown" means not only the King personally, but, also, the officers of State when acting on behalf of the Crown in discharge of executive duties, whether in the United Kingdom or anywhere within British Dominions."

Now a gift of legislative power carries with it a corresponding executive power, even where such executive power is of a prerogative character, unless there be some restraining enactment. The authorities are collected in Canada's Federal System, pp. 24, 25; and see *Donanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566. There is no such restraining enactment in the case of our provincial legislatures, except that they may not affect the office of Lieutenant-Governor: B.N.A. Act, s. 92, sub-sec. 1. Consequently our provincial legislatures can in the matters and within the territorial limits to which their legislative power extends, affect the executive power. In other words they can bind "the Crown" so far as it symbolizes provincial executive power, but no further. They cannot bind "the Crown" so far as it symbolizes executive power over the Dominion as a whole; or so far as it symbolizes executive power over the United Kingdom; or so far as it symbolizes executive power over the Empire as a whole, where there has been a reserve of such executive power in granting self-government to the Dominions, or where statutes of the Imperial Parliament extending to the Empire generally permit or require the exercise of such Imperial power.

As the Judges of the Exchequer Chamber say in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, 20:—

"A confirmed Act of the local legislature lawfully constituted, whether in a settled or a conquered colony, has *as to matters within its competence and the limits of its jurisdiction*, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

The Executive, of course, comprises the King and his Ministers, the chief of which form the Cabinet: Anson's Law and Custom of the Constitution, 11th ed., vol. 1, p. 41.

The question of the right of a Dominion or provincial legislature to interfere with the King's prerogative as the fountain of justice, to allow an appeal from the local courts to the Judicial Committee of the Privy Council, is subject to some special considerations. Is this a local or an Imperial exercise of prerogative?

The Privy Council has not, apparently, yet passed upon the effect of s. 1025 of the Dominion Criminal Code, R.S.C. 1906, c. 146, which purports to forbid appeals to it. It was unnecessary for them to do so in *Toronto R. Co.* v. *The King*, 38 D.L.R. 537, [1917] A.C. 630. Keith, Imperial Unity and the Dominions, pp. 367-9, questions the power, but mainly, if not altogether, because of the provisions of Imp. 7-8 Vict. c. 69, by which, he thinks, the power to prevent the operation of the prerogative is taken away from nearly all Dominion legislatures. See also his Responsible Government in the Dominions, vol. 3, pp. 1357 *et seq.*

Space will not permit further discussion of the matter here. Reference may be made, however, in respect to it, to *Cuvillier* v. *Aylwin* (1832), 2 Knapp P.C. 72; *Re Wi Matua's Will*, [1908] A.C. 448; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; Clement's Law of the Constitution, 3rd ed., pp. 157-164.

In any event, it is an academic question in the main. John Bull's sons have grown into big boys now, and the parental authority cannot go beyond gentle suasion. If any self-governing Dominion expressed a real desire to do away with the appeal from its Courts to the Privy Council, there can be no doubt that the right so to do would not be disputed by the Imperial authorities.

Toronto. A. H. F. LEFROY.

War Notes.

LAWYERS AT THE FRONT.

KILLED IN ACTION.

Capt. Hugh L. Hoyles son of, Dr. N. W. Hoyles, K.C., Principal of the Law School of the Province of Ontario, was instantly killed in action on Aug. 12th, while leading his men in a successful attack.

He was a student in the office of Aylesworth, Wright, Moss & Thompson, and afterwards practised with them. Later he went to Montreal to take up the position of General Solicitor of the Bell Telephone Company, which position he occupied at time of his death. Capt. Hoyles went overseas with the 42nd Highland Battalion from Montreal. He was not called upon to enlist, but, with a sense of duty, like many other heroic spirits in this Canada of ours, he left home and wife and children to fight for the King and the right. Capt. Hoyles was a splendid specimen of a man, a soldier and a citizen; and those who knew him will heartily echo the words of his commanding officer: "He died, as he lived, going straight forward."

Germany's Peace Proposals.

Among the subjects to be considered after the Huns submit unconditionally to the Allies is the advisability of teaching the former to behave like human beings instead of like wild beasts, and how best to keep them in mind of their atrocities. A contemporary suggests that this might best be done by turning Berlin into a heap of ruins, similar to the ruined towns and villages of France and Belgium. Christianity and all that it teaches being unknown to Germany, the sight of their capital city reduced to chaos might in time cause them to put together in proper sequence; "Be done as you did," and "Do as you would be done by." The Allies would not, of course, in preparing this object lesson, follow the example of the Hun by murdering innocent women, children, nurses, and wounded men, but would give ample notice of the destruction of the city so that the inhabitants might save their lives by leaving before the mines exploded. If Cato had reason to advocate the destruction of Carthage, a thousand times more would it be reasonable and, in the long run, merciful to take some such action as has been suggested.

There is another matter which must engage the attention of the Allies. The devilish atrocities of German leaders and their soldiers, quite apart from their barbaric mode of warfare, cry to Heaven for punishment and should not be ignored when the time arrives. There have been crimes committed in cold blood, with the approval, and often at the instigation of German officers and officials, for which death is the sentence in all civilised countries. These cases should be tried and the criminals and every accessory should be hanged like other criminals.

The following is taken from the *New Republic*, one of the most conservative and perhaps the leading weekly in the United States:

"The greatest crime of this war is likely to be that Germany will not be sufficiently punished. Cannot the Allies hand out to the Germans what the Germans would hand out to us if they could win? Kill every German willing to fight for the war-lords, and when through let Germany and what is left rot! Impose a peace and make it in such a form that the German cannot ever lift his head or hand again. "Are the American boys going over to make the world a safe place to live in? Well, if so, make a clean job of it in the peace terms . . . Germany ought to be crushed out of existence as a nation."

The first answer of President Wilson to Germany's impudent request for an armistice was not entirely satisfactory; but his more extended reply of October 14th is more definite, and is said to accurately set forth the position of the Allies. After saying that all conditions of any armistice must be left to the military advisers of the Allied Governments, and providing for all proper safeguards, he proceeds to say that they will not consider any armistice "so long as the armed forces of Germany continue the illegal and inhumane practices which they still persist in. At the very time that the German Government approaches the Government of the United States with proposals of peace its submarines are engaged in sinking passenger ships at sea, and not the ships alone, but the very boats in which their passengers and crews seek to make their way to safety; and in their present enforced withdrawal from Flanders and France the German armies are pursuing a course of wanton destruction, which has always been regarded as in direct violation of the rules and practices of civilized warfare. Cities and villages, if not destroyed, are being stripped of all they contain, not only, but often, of their very inhabitants. The nations associated against Germany cannot be expected to agree to a cessation of arms while acts of inhumanity, spoliation and desolation are being continued, which they justly look upon with horror and with burning hearts."

The address of the President at Mount Vernon on July 4th is then referred to:—

"The destruction of every arbitrary power anywhere that can separately, secretly and of its single choice disturb the peace of the world; or, if it cannot be presently destroyed, at least its reduction to virtual impotency. The power which has hitherto controlled the German nation is of the sort here described. It is within the choice of the German nation to alter it."

The President's reply concludes as follows:—"The President's words just quoted naturally constitute a condition precedent to peace, if peace is to come by the action of the German people themselves. The President feels bound to say that the whole process of peace will in his judgment, depend upon the definiteness and the satisfactory character of the guarantees which can be given in this fundamental matter. It is indispensable that the Governments associated against Germany should know beyond a peradventure with whom they are dealing."

Bench and Bar.

OBITUARY.

Sir George Christie Gibbons, K.C.

This prominent citizen and well-known lawyer of London, Ont., died on August 8th at the Rosemount Hospital, Montreal, having been taken ill on his return from St. Andrews, N.B., where he was spending the summer.

Sir George was born at St. Catharines, July 2, 1848. He was called to the Bar when only 21 years of age, and entered the practice of his profession in partnership with the late Mr. Justice McMahon; and subsequently was the head of the firm of Gibbons, MacNab & Mulkern. In 1887 he was made Q.C.

He was elected a Bencher of the Upper Canada Law Society, and was a President of the Ontario Bar Association. Sir George was an active, enterprising business man and at the head of various financial institutions. He took a prominent part in connection with the International Joint Commission intrusted with the settlement of disputes between Canada and United States under the treaty dealing with boundary waters, and was Chairman of the Canada section of the International Commission. For his services in this important matter he was knighted in January, 1911.

JUDICIAL APPOINTMENTS.

Robert Maxwell Dennistoun, of the City of Winnipeg, K.C., to be a Judge of the Court of Appeal for the Province of Manitoba. (July 27.)

Joseph H. Parker, of the City of Regina, Saskatchewan, Master-in-Chambers, to be Judge of the District Court of the Judicial District of Yorkton, in said Province, vice Thomas Cranston Gordon, deceased. (Sept. 7.)

William Alexander Logie, of the City of Hamilton, Ontario, Barrister-at-law, (Major-General), to be a Judge of the Supreme Court of Ontario and a member of the High Court Division of the said Court and *ex officio* a member of the Appellate Division of the said Court, vice Hon. James Leitch, deceased. (Sept. 30.)