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DIVORCE IN CANADA.

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I. *Introductory.*

In considering the question of divorce it must always be remembered that marriage is the basis of the social life of the community. It has for long ages past had both a religious and civil aspect, and it has created a status involving both religious and civil obligations. The State, of course, is only competent to deal with marriage in its civil aspect, but in doing so it cannot properly ignore the moral and religious side of the question. It is its duty, in any laws it may enact respecting marriage, to have regard to what is best for the community from a moral standpoint. It may safely be said that any real and substantial improvement which has taken place in the social life of professedly Christian countries over that of pagan times has been principally due to the fact of the general acceptance of the view that marriage creates a sacred bond which ought not lightly to be cut asunder. This has had an important bearing on the home and family life of the people, and most beneficially so, wherever it has been most strictly observed.

The clamour which is nowadays raised for divorce for all sorts of trivial causes does not, we believe, come from those who have the welfare of the human race at heart, or who seek that which is for the best and highest interest of the nation from a moral standpoint, and which is best for its character and stability.

It comes rather from a minority which lightly regards the marriage tie, and which does not realize the evils sure to flow from its easy rupture. This clamour is no doubt fostered by the knowledge of the lax views as to marriage prevalent in the United States of America. The condition of things there however ought to be to us a warning, and not an example for imitation. Mr. Francis M. Moody, the Executive Secretary of the International Committee on marriage and divorce, which is attempting to get uniform laws of Marriage and Divorce throughout the United States, recently stated that the divorce situation in the United States is at present worse than it was in Japan in its worst days of heathenism. He said: "In 1916 Japan had one divorce to every seven marriages approximately. Seventeen of our States had ratios ranging from one divorce for every six marriages in Kansas, to one divorce for almost every marriage in Nevada." Such is the result of the divorce laws of that country, and we do not think that any judicious lover of his country would wish to see Canada enter on such a downhill road.

II. *The Religious Side of the Question.*

From what has been said we do not think that in considering what is the duty of the State in Canada in regard to the question of marriage and divorce that the religious aspect of the question can be properly ignored even in a legal discussion of the question. It was a familiar phrase in the mouths of some of the eminent English lawyers of a former age that "Christianity is a part of the law of the land," and this was a very prevalent opinion among lawyers even in recent times. A few years ago, however, the House of Lords gave a rather rude shock to the idea; and one learned Lord declared that the phrase was "a mere rhetorical expression;" and a dispassionate consideration of the question must lead to the conviction that the noble Lord was right. Christianity as generally understood is both a system of dogmatic belief and a system of life and morals founded on that belief. And as such it cannot truly be said to be part of the law of the land. In former days in England it is true the State did assume to enforce the Christian religion, or what was generally regarded as such,

by coercive legislation, and certain parts of the administration of justice were committed to what came to be called "the Courts Christian" in which ecclesiastical Judges presided; and these Courts successfully claimed jurisdiction in many matters which are now in England and Canada administered in temporal Courts. As long ago as before the Norman Conquest, marriages in England were by law required to be solemnized by "a mass priest." In the middle ages statutes were passed in England for the suppression of heresy, and by temporal law heretics were liable to be burnt. Indeed, it was not until the reign of Charles II., that the Writ "De hæretico comburendo" was abolished though it had then, for some time past, fallen into disuse. The English Parliament by statute in former days endeavoured to compel all people to attend, at public worship on the Lord's Day and gave the sanction of temporal law to a formula of public worship according to Christian rites, and forbad all other, but from that position it had to retreat. In those days our ancient lawyers might have been justified in saying that Christianity was a part of the law of the land. But we have changed all that.

In a land where toleration of all religious beliefs which are not manifestly offensive prevails, and where no complusion, except of a purely moral and persuasive character, to adopt any particular religion exists, it is obviously untrue to say that Christianity is part of the law of the land. For no one can by law be compelled to accept the Christian faith and no one can by law be compelled to lead a Christian life.

But though the law does not give any coercive sanction to Christianity as a system of religion it does nevertheless still give a positive and coercive effect to many parts of the moral law of the Christian religion. It cannot and does not attempt to compel men to believe in the Holy Trinity, or to love, or worship God, or to adopt the golden rule regarding their duty to their neighbours, and yet it can, and does, impose penalties for blasphemy, and it does restrict labour on the Lord's Day. It cannot compel children to love and honour their parents, but it can, and does, compel them to help them when in need. It can and does impose penalties for murder, stealing, and bearing false witness; but it does not adopt

or enforce, except to a limited extent, the moral law against adultery or coveting. Such moral laws as it selects for enforcement it first makes temporal laws, and the penalty imposed is not for breach of the Divine law, but of the human law which is made to enforce the Divine law. These considerations are important when we come to consider what should be the action of the State in regard to the questions of marriage and divorce. Marriage has always been considered by Christian people as involving religious considerations and for many years in England it was a matter within the jurisdiction of the Ecclesiastical Courts. Christian marriage is defined to be the union of one man with one woman for the term of their joint lives. By many Christians their union is regarded as absolutely indissoluble for any cause whatever, that is the accepted doctrine both of the Anglican and Roman Churches, by others a dissolution on the ground of adultery is regarded as admissible; and by others a dissolution for many other causes such as crime, desertion, cruelty, incompatibility of temper, etc., is regarded as warranted.

In regard to marriage, up to comparatively recent times the State in England gave effect to the doctrine of the Church concerning Christian marriage, and, even for purposes purely civil, it made no provision for dissolving lawful marriages. This was the law of England up to the year 1857.

III. *Cause for Parliamentary Divorces.*

One of the earliest steps in the Reformation in England was to abolish all ecclesiastically devised impediments to marriage and practically to give the sanction of temporal law to the prohibitions in the Book of Leviticus, as being the only prohibited degrees henceforth to be recognized in the British Dominions as lawful impediments to marriage. The consequence of this was the disappearance in England of the ecclesiastical machinery for what was nominally nullity of marriage but really divorce. From the time of the Reformation until the year 1857 no judicial tribunal, ecclesiastical or civil, existed in England whereby an absolute divorce could be granted, the Ecclesiastical Courts having no jurisdiction to pronounce divorce *â vicculo* but only from bed and board.

In these circumstances resort was had to Parliament in individual cases: but it is needless to say that Parliament was only competent to exercise a civil jurisdiction, and though it might assume to dissolve lawful marriages and authorize the parties to marry again in the lifetime of each other, it had and could have no jurisdiction in the spiritual sphere, and if the true Christian doctrine of marriage is, as many Christians believe, summed up in the words "Whom God hath joined together, let no man put asunder," then neither a Pope on the one hand, nor a Parliament on the other could have any possible right to dissolve a lawful Christian marriage for any cause whatever. If on the other hand the exception in the Gospel according to St. Matthew is really authentic, a dissolution of marriage on the grounds of adultery would be admissible, and not contrary to the Christian religion. When therefore Parliament by any individual law, or by any general law, authorizes the dissolution of lawful marriages for any cause other than adultery, it is virtually authorizing persons to commit with impunity a breach of the moral law of the Christian religion; and is relieving the spouses who marry again in the lifetime of each other from the penal consequences of bigamy.

IV. *Introduction of Divorce Law in England and Canada.*

In 1857 a notable change was made in the matrimonial law of England when a statute was passed committing to a temporal Court the jurisdiction to grant divorces not only for adultery but also for cruelty, desertion, and other specified causes; and the matrimonial jurisdiction of the Ecclesiastical Courts was taken away. A like jurisdiction to that conferred by the English statute has been vested in the civil Courts of British Columbia and the other Western Provinces of the Dominion. And by the pre-Confederation legislation the power to grant divorces was vested in the temporal Courts of the Maritime Provinces.

In Ontario the law as to marriage and divorce is still the law as it existed in England prior to 1857 save that there is no Court having jurisdiction to grant divorces of any kind either *a mensa et thoro* or *à vinculo*, nor even sentences of nullity of marriage. That there ought to be some Court in Ontario having matrimonial

jurisdiction few would care to deny, but that such Court should be invested with the jurisdiction to grant divorces *â vinculo* may be doubted.

V. *Exclusive Jurisdiction of Dominion and Provincial Parliaments.*

By the Confederation Act the legislative authority in marriage and divorce is vested in the Dominion Parliament, but the exclusive legislative authority in regard to the solemnization of marriage is vested in the Provincial Legislatures. The wisdom of this division of legislative authority in such cognate subjects seems well open to question; but so it is, and we have to make the best of it. The way it is worked out in the Province of Quebec does not seem conducive to the sanctity of marriage, but rather the reverse.

At the recent meeting of the Bar Association of Ontario, it was proposed and we believe without any opposition that the Dominion Parliament should pass a divorce law applicable to the whole Dominion, and that the administration of such law should be committed to provincial Courts.

While it must be frankly admitted that there is a great deal to be said in favour of having a uniform law of marriage and divorce throughout the Dominion, it must we think be also admitted that such legislation may have more or less the effect of creating a form of marriage which is not Christian marriage: if by Christian marriage we are to take the definition laid down in *Re Bethell*, *Bethell* v. *Hildyard*, 58 L.T. 64; and *Hyde* v. *Hyde*, L.R. 1 P.D. 130, *viz.*, "the union of one man with one woman for life to the exclusion of all others," even if we qualify this definition by the admissibility of its dissolution on the ground of adultery, because the kind of marriage to which it is proposed to give legal effect is one that is to be dissoluble not only for adultery, but divers other causes, and it is also to be one contracted in the lifetime of a former spouse.

It must be admitted that Parliament in legislating on such a subject is in the difficulty of not having any uniform and consistent Christian opinion to rely on; from a religious point of view, it is the subject of great diversity of views among professedly Christian people, but the duty of Parliament to the community

at large is to consider what is for the best moral interests of the people for whom it legislates; and when from that point of view it comes to consider what is the best kind of marriage to stamp with the sanction of its temporal authority, the question naturally arises, can it frame for itself any better or truer ideal of the marriage relation than that sanctioned by the strictest rule of the Christian religion?

VI. *Present condition, and what is best for the State.*

We have before us the result in England, and in the United States, and in France, of the temporal authorization of the granting of divorce for other causes than adultery. Can it honestly be said that such laws have tended to improve the morals of the people? In the United States it has come to pass that it is computed in that country, one in every thirteen marriages is dissolved by divorce, and in some States, as we have already said, the average of divorces is very much higher. Can this state of things, from any point of view, be said to be desirable? In England the long list of divorce cases before the Divorce Court tells an almost equally ominous tale. One can easily imagine that this multitude of wrecked homes is really a dire injury to the State whose undeniable duty it is to guard, as far as it can, the sanctity of the home and the family. For this reason and quite apart from any religious considerations, it must determine what is for the best interest of the home and family. For those who believe in the sacramental character and indissolubility of marriage, no law of divorce is needed, and even if enacted, for then it would be a dead letter; but for those who do not entertain those opinions, and who think marriage should be made dissoluble, what should be done?

Christian marriage, as we think most people in Canada would be inclined to admit, is even from a purely temporal point of view, the best for the welfare of mankind. Knowing that the marriage tie is indissoluble, it is less likely to be rashly entered upon, self-restraint on the part of husband and wife are more likely to be learnt, the separation of children from one or other of their parents is less likely to take place. The respect of children, for their parents, and the love of parents for their children are less likely to

be jeopardized. But if the law gives to marriage a dissoluble character then the restraints which a Christian marriage imposes are to some extent removed, and the wider the grounds for divorce are made, the easier it becomes for one or both of the parties desirous of terminating the marriage tie to perform the acts which the law regards as justifying its dissolution.

The best interests of the State demand that the marriage tie shall not be broken. To facilitate families being broken up and children brought up without that parental control and discipline which are so necessary for their well being, and for their development into good and law-abiding citizens, is a menace to the stability of the State. The early years are the most impressionable, and one can hardly believe that the children of divorcees can ever have a fair chance of making reputable citizens; for they will almost necessarily have failed to learn by example the duty and self-restraint which Christian marriage is designed to foster; or the respect and affection which children owe to their parents.

By some persons it is not considered to be a reasonable or just state of the law which permits divorces to be obtained in the civil Courts of some Provinces of Canada, but denies that relief to the inhabitants of the leading Provinces of Quebec and Ontario? Though perhaps this is hardly true of Quebec where the civil Courts have a convenient method of dissolving marriages for no other cause than that they were not solemnized by some particular priest! One of two things they think should be done, either all divorces should be prohibited in Canada, or a uniform law of divorce for the whole Dominion should be enacted restricting the grounds of divorce in all Provinces within the same limits, and enabling such relief to be granted by local Courts in each Province. From a popular point of view this may seem to be the right method to take, and it has, at all events, the support of the Bar Association of Ontario.

It must be admitted that the exercise by the Dominion Parliament of its legislative power to annul lawful marriages, is really an intrusion of Parliament into the judicial domain; an intrusion for which it has no proper machinery, and it is to be feared, it is a jurisdiction which is often exercised in a way that,

to say the least, is not judicial. It is moreover an abnormally costly mode of administering justice, which ought not to be resorted to, except in cases of absolute necessity, and from a legal point of view it would be far better for Parliament, if it intends to sanction the principle of dissoluble marriages as opposed to Christian marriage, that it should commit to constituted Courts the power to dissolve them, and make throughout Canada the causes for dissolution uniform.

That some matrimonial jurisdiction should be conferred on the Courts of Ontario and Quebec seems obviously necessary. They should certainly be empowered within proper limits to grant sentences of nullity: but with all due deference to the opinion of others to the contrary we venture to doubt whether the conferring any jurisdiction to grant divorces *à vinculo* is necessary or expedient.

How far it is expedient that Quebec Courts should exercise what is a really divorce jurisdiction under the specious pretence of sentences of nullity, seems deserving of consideration. Only recently a marriage by an Anglican priest was declared by a civil Court to be null because one of the parties happened to be a Roman Catholic, notwithstanding s. 129 of the Code, expressly declares "All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

Such apparent judicial aberrations however may possibly be corrected by appeal, but in such cases appeals are not likely, because, as a rule, both parties are desirous of the dissolution of their marriage. In the meantime such divorces appear to be illegal, and a prostitution of justice.

WHENCE CAME THE COMMON LAW INTO CANADA?

The general impression is that the Common Law was introduced into Canada in 1763 by the Treaty of Paris, when Canada (as then known) and Nova Scotia and Cape Breton were ceded to England by France. To understand what we are about to relate it is necessary to recall some history. Nova Scotia and Cape

Breton had an even more chequered career than the Canada of those days. For several centuries they were the subject of a game of battledore and shuttlecock between Great Britain and France.

Nova Scotia was discovered by Cabot in 1497. The first attempt to settle Cape Breton was by Baron de Lery in 1518. Nova Scotia was partially colonized by Marquis de La Roche in 1598. The English drove out the French in 1613 and in 1621 it was granted to Sir William Alexander. It was restored to France by the Treaty of St. Germain-en-laye in 1632, but 22 years later Cromwell retook possession, and his action was confirmed by the Treaty of Westminster in 1655. Although given back to France by the Treaty of Breda in 1667 it was actually in possession of England until 1670. In 1690 it was again seized by the English under Phips, but retransferred to France by the Treaty of Ryswick in 1697. It was again captured by the English in 1710; and the Treaty of Utrecht confirmed this in 1713, with the proviso that France should retain Cape Breton. Pepperel, however, captured the latter in 1744; but it was restored to France by the Treaty of Aix-La-Chapelle in 1748. The game came to an end when the Treaty of Paris in 1763 assured both Nova Scotia and Cape Breton to Great Britain. Nova Scotia has therefore been in England's possession since 1713 and as far as possible administered by their laws. This brings us to the subject referred to in the title of this article.

J. Murray Clark, K.C., LL.D., of Toronto, in a lecture recently delivered at Harvard University, stated that, a few months ago, Mr. Justice Chisholm, of Nova Scotia, discovered, in some hitherto neglected records, the Minute of the Order which provided for the first establishment, in a part of what is now Canada, namely Nova Scotia, of a Court of Judicature to administer English law. The Minute directed that the "Lawes of Virginia" should be followed as the rule or pattern. That was in 1721, when Virginia was still British, and when its boundaries were much more extensive than at present. The "Lawes of Virginia" were therefore introduced into that part of what is now Canada, which lay to the sout of French Canada, and which, when the Dominion was formed by the federation of 1867, became part of the Dominion of Canada.

We extract the following paragraphs from Dr. Clark's lecture, which deals with various subjects which the lecturer brought to the attention of his hearers in connection with the Common Law, the happy heritage of the Anglo-Saxon race and its transplanting to Virginia and thence to Canada. He says:—

"It is an interesting question why the 'Lawes of Virginia' were chosen rather than those of any part of New England, and rather than those of Old England. Harvard University was founded in 1635, although its charter was not issued until some years later. Eastern Canada, even in those early times, had constant communication with Boston, which was in 1721 a flourishing town. We may therefore ask why the laws of the Commonwealth of Massachusettes were not chosen? We may also pertinently ask by what merciful Providence Canada has so far escaped the Blue Laws of Connecticut?

"A writer of that time said that 'Pennsylvania did not need either the tongue of the lawyer or the pen of the physician, both being equally destructive of men's estates and lives.' This makes it plain why the laws of Pennsylvania were not chosen.

"One of the reasons why the 'Lawes of Virginia' were chosen is undoubtedly the fact, stated by Mr. Bruce, one of its historians, that 'Virginia was the foremost and most powerful of all the English dependencies of that day, and the one which adopted the English principles and ideals most thoroughly.'

"Sir Humphrey Gilbert was granted by Letters Patent, certain rights to lands which he would colonize. He is the founder of our oldest Colony, Newfoundland, but perished on the way back, cheering his comrades by reminding them that they were as near heaven on sea as on land. His half-brother, Sir Walter Raleigh, carried on his great work, and in 1584 obtained a grant of the lands which he should discover and colonize.

"In the reign of James, three successive charters were issued, which it is not necessary to discuss in detail. It may, however, be pointed out that many officers of the fleet which defeated the Armada became interested in Virginia. Some of those interested in the development of Virginia were great men, and they laid deep and true the foundations of our Empire, which,

as eloquently described by Webster, has 'become a great power to which Rome in the height of her glory was not to be compared—a power which has dotted the whole surface of the globe with its possessions and military posts, whose morning drumbeat, following the sun and keeping company with the hours, circles the earth daily with one continuous and unbroken strain of martial airs.' This is called the most eloquent description of the British Empire, but personally I prefer the description of the English statesman who said that the British Empire was 'the greatest secular agency for good that the world has ever known.'

"The Raleigh Patent, it is said, was drafted by the great Coke, and it provided that those inhabiting the territories which Raleigh should acquire 'shall and may have all the privileges of denizens and persons native of England and within our allegiance in such like ample measure and in such manner and form as if they were borne and personally resident within our Realme of England.' This memorable document also gave full power and authority to govern and rule 'according to such statutes, lawes and ordinances as shall be by him, the said Walter Raleigh, his heirs and assigns, and any or all of them, devised or established for the better government of the said people as aforesaid. So always as the said statutes, lawes and ordinances be as neere as conveniently may be agreeable to the form of the lawes, statutes, government and policie of England.'

"Raleigh anticipated the self-government which now prevails in all parts of the British Empire capable of exercising self-government. That certainly includes Canada, where for many years we have had complete self-government in domestic affairs. It is true that before the war, questions of foreign policy were decided by the British (Imperial) Government, as trustee for the whole British Empire. The Ministers of the Imperial Government are responsible to the British Parliament, that is, to the electors of England, Wales, Scotland and Ireland. It was felt that some adequate remedy must be found for this condition of affairs, which would give Canadians as full and complete rights with regard to foreign policy, to the question of peace and war, as Englishmen, Welshmen, Scotchmen and Irishmen.

"The Common Law of England, founded on and indeed embodying the principles of justice and liberty, and brought from the old world to the new, now prevails not only in the English-speaking part of the British Empire but also throughout the United States, except in Louisiana. It is not necessary for my purposes here to trace further the history of the Virginia Charter from which I have quoted, or to state in detail the steps to what was effectively described by Sir Frederick Pollock, one of the great jurists of our time, as the expansion of the Common Law.

"While I prefer the Common Law, I am not criticizing the Civil Law, or the Roman Law on which it was founded. The Code of Justinian and the Napoleonic Code are among the noblest and most beneficent achievements of the human intellect. The principles of the Roman Law now govern a large part of the civilized world, not by reason of imperial power but by the imperial power of reason, if we may so paraphrase the famous saying of Portalis:

"'*Non ratione imperii, sed imperio rationis.*'

"The Common Law, as I have said, is founded on the principle of liberty. Now private property is an essential attribute of liberty, as of personality. If you eliminate profit, according to one of the current fallacies which has already done much mischief, you necessarily eliminate private property, and you destroy the very basis and foundation of our civilization, indeed its very structure. Further, if you abolish private property, you necessarily abrogate the prohibition, 'Thou shalt not steal.' And if you bear in mind that the moral law is one and indivisible, you will perceive that if you eliminate profits and private property, you abrogate and eliminate the whole moral law and destroy the very foundations of society.

"I have also said that the Common Law embodies the principles of justice. Some draw a sharp distinction between law and justice. The story is told that an eastern corporation in the United States retained an idealist lawyer to defend an action against it. The lawyer, being young and inexperienced, believed the directors who informed him that the action was an unscrupulous attempt to defraud the corporation. He won,

but, instead of reporting in the usual way, telegraphed, 'Truth and justice have prevailed.' When the report was received, the directors were in meeting assembled and the astonished lawyer was perplexed by receiving a prompt reply: 'Appeal immediately.'

"There is indeed a very proper distinction between abstract justice and law. Lying is a very reprehensible and mischievous practice. Yet there are sound reasons, quite apart from the inadequacy of the jail accommodation, why the law should not attempt to imprison all liars. There is not time to expound these reasons, but one can say that it is a monstrous absurdity for any one to attempt to legislate without a firm grasp of the principles of legislation.

"The Germans, after a long study of what Professor Holland of Oxford aptly designated 'Jurisprudence in the air,' devised a Code of their own which came into effect in 1900, when they thought the 20th century would belong to Germany, but in the rest of Western Europe and in all the civilized parts of America the Common Law or the Civil Law still governs.

"Bismarck observed that one of the most important facts of our time was that the people of the United States speak the English language. That indeed is a vitally important fact because liberty inheres in the English language. For in the statesmanlike words of the great English poet, Wordsworth:

'We must be free or die, who speak the tongue
That Shakespeare spake.

"It is to my mind even more important that the United States and the British Empire are so largely governed by the Common Law for the vital fact that we have common ideals of justice is the true basis of the unity of the English-speaking peoples upon which, in reality, depends the advancement of civilization, in truth its very security. The great Charter of Liberty was achieved before the division of the English-speaking peoples and some of its main provisions have been perpetuated in the Constitution of the United States.

"Magna Charta, the Bill of Rights, and, indeed, the whole Common Law, belong to all branches of our race as also do such

famous names as Shakespeare, Drake, Hawkins, Gilbert, Raleigh, Bacon, Sidney and Coke, and even the great men of a later date, such as Milton and Harrington.

"The living principles of justice and liberty embodied in Magna Charta are the precious heritage of the English-speaking peoples, for which we in Canada fought in the Great War, and which we must hand on, unimpaired and undefiled, to our children and children's children. When speaking of the United States, Macaulay expressed a very decided opinion that the principles of democracy, if put in practice, would inevitably lead to destruction. Those principles have been applied in England and Canada even more fully than in the United States. There is truth as well as wit in the remark of the Prince of Wales in Washington that he found the United States almost as democratic as England. What Macaulay says is quite as applicable to Canada and England as to the United States, and should be studied with great care."

[The lecturer then read the letter of Macaulay to his American friend, dated May 23, 1859. We have however only space for some extracts as follows:]

"'You are surprised to learn that I have not a high opinion of Mr. Jefferson, and I am surprised at your surprise. I am certain that I never wrote a line, and that I never, in Parliament, in conversation, or even on the hustings—a place where it is the fashion to court the populace—uttered a word indicating an opinion that the supreme authority in a State ought to be entrusted to the majority of citizens told by the head; in other words, to the poorest and most ignorant part of society. I have long been convinced that institutions purely democratic must, sooner or later, destroy liberty or civilization, or both. In Europe, where the population is dense, the effect of such institutions would be almost instantaneous. What happened lately in France is an example. In 1848 a pure democracy was established there. During a short time there was reason to expect a general spoliation, a national bankruptcy, a new partition of the soil, a maximum of prices, a ruinous load of taxation laid on the rich for the purpose of supporting the poor in

idleness. Such a system would, in twenty years, have made France as poor and barbarous as the France of the Carlovingians. Happily the danger was averted; and now there is a despotism, a silent tribune, an enslaved press. Liberty is gone, but civilization has been saved. I have not the smallest doubt that, if we had a purely democratic government here, the effect would be the same. Either the poor would plunder the rich, and civilization would perish, or order and prosperity would be saved by a strong military government and liberty would perish. You may think that your country enjoys an exemption from these evils. I will frankly own to you that I am of a very different opinion. Your fate I believe to be certain though it is deferred by a physical cause.

"'There will be, I fear, spoliation. The spoliation will increase the distress. The distress will produce fresh spoliation. There is nothing to stop you. Your Constitution is all sail and no anchor. As I said before, when a society has entered on this downward progress, either civilization or liberty must perish. Either some Caesar or Napoleon will seize the reigns of government with a strong hand, or your Republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth, with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without and that your Huns and Vandals will have been engendered within your own country by your own institutions.'"

[The lecturer then proceeded to controvert some of Macaulay's conclusions and continues as follows:]

"While we enjoy the inestimable blessings of liberty, safeguarded by the 'peaceful reign of organized justice,' as Balfour happily phrased 'The Reign of Law,' it is necessary to guard these blessings, and of late years there have been certain tendencies which at one time threatened to destroy individual liberty, undoubtedly the fundamental basis of free institutions. Men of science tell us that no two human beings ever have been or ever will be exactly alike and it would therefore be the most fatal thing that could happen to the human race to enforce a dull and deadly uniformity.

"Fortunately, the Common Law is a living thing and capable of growth, capable of being adapted to all the needs and circumstances of liberty-loving and justice-loving peoples.

"Many thoughtful persons view with alarm the growing custom of vesting in irresponsible bodies, legislative as well as administrative powers and making their arbitrary decisions above the law—not subject to appeal, as the phrase is. After a long fight it was established that even the King was not above the law, and our forefathers abolished one Star Chamber. This generation of English-speaking peoples is multiplying Star Chambers. When they become too oppressive and tyrannical, as most certainly they will, they can in turn be abolished. While the mischief done will be annoying, and to many distressing, I do not believe that in any case it will be fatal. The living principles of liberty and justice embodied in the Common Law have enabled our race to survive many dangers in the past and I, at any rate, have no doubt they still have sufficient vitality to ensure that we shall overcome the grave perils that menace our future."

RESTRAINTS ON ALIENATION.

After our article on this subject (p. 244 *ante*) was in print, a decision was given by Orde, J. (*In re Ferguson & Rowley*, 90 O. W. N. 16), to the effect that a restraint of alienation, except by will, is invalid, and that *Re Winstanley* (1884), 6 Ont. 315, has been in effect overruled by the Supreme Court in *Blackburn* v. *McCallum*, 33 S. C. R. 63. By a printer's error the case referred to in our former article is called "*Re Gooderham*" whereas it should have been "*Re Goodhue*."

We may remark that Mr. Justice Orde treats a restraint against alienation, except by will, as being a general restraint against alienation; whereas all prior authorities agree that such a restraint is only a partial restraint; and *Blackburn* v. *McCallum* seems only to decide that a general restraint cannot be made valid by a mere limitation as to time. The decision of Orde, J., in these circumstances, can hardly be said to be satisfactory.

CHANGE OF NAME.

It is quite time that there should be some legislation on this subject, uniform, if possible, in all the Provinces of the Dominion. References have already been made in our columns to the present objectionable practice; and some of the legal journals in the United States have also referred to the matter, taking much the same ground as ourselves.

Names have for obvious reasons been changed in the various Provinces since the beginning of the war. There were changes in previous years, in Canada, England and United States, but apparently not enough to call special attention to the matter. Some of these changes may not have been especially objectionable, but it may fairly be asserted that in the great majority of cases in recent years these changes have been made for reasons which are of a deceptive character and therefore not desirable in the public interest.

The late war has made it more clear that the instincts, habits and national characteristics of some other races are such that too many, though by no means all, of the new comers need watching and in the public interest it is well that they should be labelled as belonging to their own race or class. This label is naturally to be found in the name they bear and which came to them by inheritance from their forefathers.

Why should someone without leave take the name of someone else? Why should some objectionable character, ashamed of his own name or who has made it shameful, or who belongs to a race whose instincts, habits, and characteristics are objectionable to Anglo-Saxons, steal the name of some respectable citizen of this country, and pretend to be of the same stock as the one whose name is taken, a name it may be, which *noblesse oblige* helps him to keep stainless? This is going on at present; should it be allowed to continue? There are laws against stealing and frauds of other sorts, but none against this.

Rather let the man who is ashamed of his name or thinks it "better business" to have some other name try by honest dealings and rectitude to establish a character for himself in the name he was born under.

Much more might be said as to the objections of the present pernicious practice, but it is unnecessary to further enlarge thereon.

There is a real grievance, and there should be some remedy, even though this, from the nature of things, would be only partial. Something has been done in other countries, and in some of our Provinces, but not sufficient. We trust one of them may take a lead in some appropriate legislation which would as far as possible prevent the present objectionable practice. To change a name, it should be necessary to obtain the leave of some officer of the Government appointed for that purpose, and the application should be advertised in the daily papers, so that any citizen might have opportunity to file a caveat or protest against his surname being so appropriated; this caveat or protest to be filed in the proper office, which should be searched before leave might be given by the responsible authorities.

We learn from a cotemporary that this subject has been brought to the attention of the New York Geneological and Biographical Society whose committee reports as follows:

"The ease with which this change can be accomplished enables a large number of modern immigrants to change their unmistakably foreign patronymics for those more euphonious and familiar to the American ear. This change might not be objectionable if in exchange for their old surname they were compelled to assume a new one distinctly suggestive of their blood and ancestry. Such, however, is not by any means their custom. After a short sojourn in this land they experience the disadvantage of their own surnames, occasioned by the difficulty of spelling of, unpronounceability of and often business prejudice against their surnames, and at once proceed to change the same, and in so doing adopt surnames characteristically suggestive of blood and nationality entirely different from their own. Their choice generally results in the selection of Anglo-Saxon patronymics. This is a custom prevalent among the lower classes of Hebrew immigrants, and has resulted in many of the best known and respected Anglo-Saxon patronymics being now used by Hebrews (or others) whose inherited surnames they have for reasons of their own found to

be of disadvantage to them in this land. If the laws of a State are to continue to permit this free change of name, the new name permitted to be chosen should be (unless some reason better than those noted above is set forth in the application) one distinctly suggestive of the blood and original nationality of the applicant. Under the operation of State laws, a great many in the past four years have availed themselves of this ease of change to disguise their German blood and nationality by the adoption of surnames less suggestive of their origin. While we can fully sympathize with their desire in the matter, we maintain that a surname or patronymic is an unavoidable blood inheritance, and unless, in the eyes of the law, some very strong reason is given for its change, it should remain a permanent possession of the inheritor."

The following observations are from our esteemed contemporary *Law Notes*, of Northport, New York:

At common law a man could change his name at will, and in but few American states has any statutory restriction been imposed on the right. A writer in the CANADA LAW JOURNAL (January, 1920), writing from a Province wherein the common law obtains, makes a forcible argument for restriction. He fails, however, to distinguish clearly between two entirely distinct things, the taking of one or more assumed names as an aid to the concealment of identity and a permanent change of name by a person maintaining a fixed residence. The former is, as he says, the common practice of criminals, and is habitually resorted to by the promoters of sporadic business ventures which are criminal or on the verge of criminality. This practice is of course wholly vicious, is adopted in aid of an illegal enterprise and is frequently an important element in its success. But it is not altogether clear how it can be prevented. Change of name without prescribed formalities may be made a criminal offence, but nine times out of ten the project in aid of which the change of made is itself criminal, and the adding of one more penalty will avail nothing; certainly it will not deter the burglar or "con man" with a long record of felonies behind him from taking a new alias at the scene of each new crime. Nothing short of the establishment of a complete

system of personal identification records and passports such as obtains in some parts of Europe would check this class of name changing. While such a system might be in many ways advantageous, as for example in putting some check on the criminal tramp, nothing is more certain than that it cannot be adopted or enforced at the present time.

SUNDAY OBSERVANCE.

The Chief Justice of the Superior Court of Quebec, Sir Francis Lemieux, in a recent case (*Belgo Canadian Pulp & Paper Co. v. Court of Sessions, etc., of Three Rivers*, 56 Que. S.C., at page 173), in which a company had its workmen employed on the Lord's Day, took the opportunity of reading a lesson to employers upon Sunday observance. He said, in part:—"Society generally is interested in the proper observance of Sunday. Workmen require, in order to fulfil their duties and perform their work, to follow the exercise of their religion, to receive instruction respecting moral and social Christianity. Workmen whose conscience is not strengthened by a religious ideal, bring less courage, honesty and loyalty to the accomplishment of their task. The undertaking will not be helped by workmen who violate the Divine precepts. A workman who is made irreligious or indifferent by being kept away from church and prevented from observing Sunday becomes an easy prey to agitators. Employers should understand that Sunday work is not profitable. The workman is an economic factor who produces only if he is conscientious. When corporations break laws which affect society generally, it is not surprising that agitations frequently arise against capital, and that subversive doctrines infest certain territories less religious than the Province of Quebec."

It is common knowledge that strikes are almost unknown in the Province of Quebec, and the religious aspect of the case, so clearly set out by the learned Chief Justice, has undoubtedly contributed very largely to the absence of that form of idleness which brings loss to employer and employee alike, and often without material benefit to either side.

IPSISSIMA VERBA.

An incident which occurred at a sitting of a Judical Committee of the Privy Council when Sir Robert Finlay was still the leader in that august Court draws attention to the necessity of having on hand the exact words used by Judges when it is desired to cite an authority on an argument. In a Canadian case in which Sir Robert was acting for one of the parties he referred their Lordships of the Judicial Committee to Lord Halsbury's Encyclopaedia of the Laws of England. These references drew from Lord Haldane, who then presided, these observations:

"So far as I am concerned—I have already expressed the opinion, and I express it once again—this work is edited by a very eminent lawyer, and several eminent lawyers have written it, but I protest against it being cited as an authority, and I may say that it is not to be cited here again."

WHAT IS A "HIGHWAY?"—A DISCUSSION OF ENGLISH DECISIONS.

In a case lately before the Divisional Court (Mr. Justice Darling) the authorities cited disclosed an interesting series of attempts by our Judges to frame a sufficiently wide definition of the term "highway." Such a task might be deemed comparatively simple, but our readers will form their own conclusions, after a perusal of what is underwritten, as to the success or otherwise of the attempted definitions.

Lord Hale in *Austin's (Katherine) Case*, 1672, 1 Vent. 189, said: "If a way lead to a market or were a way for all travelers and did communicate with a great road, etc., it is a highway." In 1 Hawkins, C. P., ch. 76, sec. 1, it is defined as a way "which is common to all the King's people whether it lead to a market town or only from town to town." Lord Coleridge in 1876: "The common definition of a highway that is given in all the textbooks of authority is that it is a way leading from one market town or inhabited place to another inhabited place, which is common to all the Queen's subjects," *Bailey* v. *Jamieson, 1876*, 1 C. P. D. 329, "A passage which is open to all the King's subjects," says Smith's Leading Cases, 11th ed., vol. 2, page 164. And in "Pratt on Highways," 16th ed., at page 1, it is laid down that

a highway comprises all portions of land over which every subject of the Crown may lawfully pass. This summary by the leading text-books on the subject of highways is no doubt wide, but in this, as in all the definitions, there exists one common factor, namely, that the way or place, whatever it may be, is open to all the King's subjects, and not merely to a limited or privileged few.

It is an essential element of a highway that it should be open to all members of the public. It, therefore, excludes a way over which a right of passage is given by license or in exercise of a right of ownership or occupation of adjoining land whereby an easement over such way is granted or possessed. Roads commonly called "occupation" roads, laid out for the accommodation of the occupiers of adjoining properties, do not come within the definitions. Nor, again, do village greens, parks, or fields, over which the inhabitants of a particular district have by custom or otherwise obtained a right of recreation.

Though a way to be a highway must be open to all and sundry it need not be a thoroughfare. "If it were otherwise, in such a great town as this (London) it would be a trap to make people trespassers." So said Lord Kenyon, C. J., in *Rugby Charity Trustees* v. *Merryweather*, 1790, East 375 n. The subject, however, has not rested there, and subsequently to this pronouncement there was considerable discussion on the matter and views were expressed contradictory to the above. Since the case of *Bateman* v. *Bluck*, 1852, 18 Q. B. 870, however, the question has been at rest. In that case the plaintiff brought an action for trespass for entering the planitiff's close and pulling down a wall therein. The plea was stated that the close was a public pavement within the Metropolitan Paving Act; 57 Geo. III., cxxix, that the plaintiff unlawfully and contrary to the Act erected therein the said wall, and because the wall encumbered the pavement and plaintiff refused on defendant's request to remove the same, defendant entered and pulled it down. It was held, on motion for judgment, non *obstante veredicto*, that the plea was bad for shewing that it was absolutely necessary for defendant, in order to exercise the alleged right of passage, to remove the wall. And it was further held that a public highway may in law exist over a place which is not a thoroughfare. Lord Campbell, C. J., thus delivered judgment:

"On the issue raised by the fourth plea, I think the defendant is entitled to a verdict. That plea alleges that there was a public highway through the *locus in quo*, and that it was impossible for the defendant to pass along the highway without removing the wall. The jury found that this was such public highway; and we are bound to assume that finding to be good, unless, as is contended, there cannot in law be a highway through a place which is no thoroughfare. It seems to me that such a doctrine is incorrect. There may or may not be a highway under these circumstances. Take the case of a large square with only one entrance, the owner of which has for many years permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. In the Trustees of the *Rugby Charity* v. *Merryweather*, Lord Kenyon laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such highway or not. In *Woodyer* v. *Haddon* (1813), 5 Taun 126, the Court did not decide that there could not be a highway under such circumstances, but only that in that particular case there was none; and I do not find anything decided there which is necessarily inconsistent with what was laid down by Lord Kenyon."

There are three kinds of ways which can be highways and which have been classified by Lord Coke, Co. Lib. 56a. "There be three kynds of wayes whereof you shall reade in our ancient bookes—first a footway which is called *iter quod est jus eundi vel ambulandi hominis;* and this is the first way. The second is a footway and horseway, which is called *actus ab agendo;* and this vulgarly is called pack and prime way, because it is both a footway, which was the first or prime way and a pack or drift way also. The third is *via aditus*, which contains the other two and also a cartway, etc., for this is *jus eundi, vehendi, et vehiculum et jementum ducendi;* and this is twofold, viz., *Regia via*, the King's highway for all men, *et communis strate*, belonging to a city or town or between neighbour and neighbours."

To designate a footpath as a highway certainly would appear rather grandiloquent, but on principle, guided by the consider-

ations and definitions quoted above, there is no reason why it should not be so called. The question, however, has been debated more than once. In 1836, in the case of *Davies* v. *Stephens*, 7 C. & P. 570, it was decided that if in an action for trespass the defendant pleads a footway his plea is supported by proof of a carriageway, as a carriageway always includes a footway. A gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with a reservation of the right of keeping a gate across it to prevent cattle straying. The case before Mr. Justice Darling, referred to at the commencement of this article, *Dennis & Son, Ltd.* v. *Good*, was an appeal from a decision of the Justices, who had convicted Dennis and Sons under section 72 of the Highway Act, 1835, of unlawfully destroying the surface of certain highways, the highways being public footpaths in two fields belonging to Dennis and Sons, and they had been destroyed by being ploughed up. Dennis and Sons sought to justify their action on two grounds: (1) that the footpath was not a highway; and (2) that they had acted under a notice from the war agricultural executive committee of Holland County Council, which required them to plough and convert into arable the grass land in question so as to provide a good crop for the harvest of 1918. The conviction was upheld. But Mr. J. Darling had some doubt whether a footpath could be a highway. In his judgment he says: "An ordinary person would not call a footpath a highway, and I was at first inclined to think that the appellants had committed no offence, but the decision in *Mercer* v. *Woodgate*, 1869, L. R. 5 Q. B. 26, went upon the assumption that a footpath was a highway, and therefore the Justices were right in holding that the appellant had infringed the statute."—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

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STATUTORY POWER TO PROHIBIT IMPORT OF "ARMS, AMMUNITION, GUNPOWDER, OR ANY OTHER GOODS"—CONSTRUCTION—EJUSDEM GENERIS—PROHIBITION OF PYROGALLIC ACID—ULTRA VIRES.

Attorney-General v. *Brown* (1920) 1 K.B. 773. By a statute the Crown was empowered to prohibit the importation of "arms,

ammunition, gunpowder, or any other goods" by Proclamation or Order-in-Council. A Proclamation was issued prohibiting the importation of pyrogallic acid. This was a proceeding for violation of the Proclamation, and it was held by Sankey, J., that the Proclamation was *ultra vires* and not warranted by the statute because pyrogallic acid was not *ejusdem generis* as the articles previously specified.

LANDLORD AND TENANT—YEARLY TENANCY—NOTICE TO QUIT—TO BE GIVEN "AT ANY TIME"—NOTICE EXPIRING BEFORE END OF FIRST YEAR—INVALIDITY.

Mayo v. *Joyce* (1920) 1 K.B. 824. In this case case the validity of a notice to quit was in question in the following circumstances: The agreement of tenancy provided that "the tenancy shall commence on September 1, 1918, to continue from year to year until determined by three calendar months' notice to quit, which may be given on either side at any time." On April 29, 1919, the plaintiff gave to the defendant a notice to quit which expired on August 2, 1919. The County Court Judge who tried the action held that the notice was bad and gave judgment for the defendant, and a Divisional Court (Bailhache and Sankey, JJ.), affirmed his decision on the ground that the agreement created a yearly tenancy, which could not be terminated before the expiration of the first year. They, however, admitted that the question of the construction of the agreement was one of considerable difficulty.

SOLICITOR—ACTION BY CLIENT AGAINST SOLICITOR FOR ACCOUNT—JURISDICTION OF COUNTY COURT.

Chambers v. *Tabrum* (1920) 1 K.B. 840. This was an action in a County Court by a client against his solicitor for an account. The plaintiff had retained the defendant to act for him in four matters. In only one of them were proceedings taken in a County Court, in none of the others was process issued. As the defendant delayed delivering a cash account and his bill of costs the plaintiff brought this action. The defendant contended that the County Court had no jurisdiction to entertain the action, and that the plaintiff's remedy was by summary proceedings under the Rules of Court. The County Court Judge held that the plaintiff was entitled to bring the action and that the County Court had jurisdiction and gave judgment in his favour: and his judgment was affirmed by a Divisional Court (Bailhache and Sankey, JJ.), but Bailhache, J., who delivered the judgment of the Court, said: "It is obvious that the only costs which can be taxed in the County Court are those incurred in that Court; and if the plaintiff sues

in the County Court for an account he must accept the bills of costs rendered by the defendant relating to matters not in the County Court as correct, for they cannot be taxed in that Court, and it may be that they are not taxable anywhere, . . . if he (plaintiff) chooses to incur this risk he may do so, and he is not limited to the procedure under the Solicitors Act."

INSURANCE — THEFT — HOUSEBREAKING — WARRANTY — PREMISES TO BE "ALWAYS OCCUPIED"—TEMPORARY ABSENCE —PREMISES LEFT UNATTENDED.

Simmonds v. *Cockell* (1920) 1 K.B. 843. This was an action on a policy of insurance against loss by burglary, housebreaking or theft. The policy contained the clause "warranted that the premises are always occupied." The plaintiff and his wife and no other person resided on the premises. On a day during the currency of the policy, the plaintiff and his wife were attending a social function and the premises were left unattended between 2.30 p.m. and 11.30 p.m. except for a short interval between 6 p.m. and 7 p.m. when the plaintiff was on the premises. On the return of the plaintiff and his wife at 11.30 p.m. it was found that the premises had been broken into and some of the contents to the value of £400 had been stolen. The defendant relied on the warranty as a defence, but Roche, J., who tried the action, held that there had been no breach, and that it was merely meant that the premises would be occupied as a residence and not as a lock-up shop, and that if this were not the true construction it was ambiguous in its terms and according to the well recognised rule must be construed against the insurer who has drawn the policy and inserted the clause for his own protection.

SHIPPING—CHARTERPARTY—ERROR OF JUDGMENT IN MANAGEMENT OR NAVIGATION OF VESSEL—ERROR IN CHOICE OF ROUTE.

S.S. Lord v. *Newsum* (1920) 1 K.B. 846. This was an appeal from the award of an arbitrator. The question being whether in the construction of a charterparty which exempted the charterers from loss or damage arising from an error in judgment of the pilot, master or crew "in the management or navigation of the steamer," an error of the master as to the route he should take was within the exemption. The arbitrator held that it was not and Bailhache, J., upheld the award.

CONTRACT OF SALE OF GOODS—BREACH—MEASURE OF DAMAGES — COMPANY — ARBITRATION — LIQUIDATOR — LIABILITY FOR COSTS.

Van den Hurk v. *Martens* (1920) 1 K.B. 850. This was a special case stated by an arbitrator, and one of the questions involved was to the proper measure of damages for breach of contract for the sale of goods in the following circumstances: The defendants sold to the plaintiffs sodium sulphide in drums. Drums were delivered to the plaintiff in Manchester, but the defendants knew they were for export. Owing to a difficulty in opening and reclosing the drums it is impracticable to open them until the contents are required for use. The drums received were resold by the plaintiffs and owing to the delays on French railways and other causes did not reach the ultimate consignees at Lyons and Genoa till some months later. On the drums being opened by these consignees they were found not to contain sodium sulphide, but caustic soda of inferior quality, and were then rejected. The question submitted was as to the proper measure of damages, and Bailhache, J., held that they should be assessed according to the prices ruling, not at the date of delivery at Manchester, but at the date when the drums were opened by the ultimate consignees at Lyons and Genoa. Another point submitted was whether the liquidator of the defendant company was individually liable to be ordered to pay the costs of the reference with a right to get reimbursement out of the company's assets, and as to this Bailhache, J., held that the liquidator was not personally liable and that the costs should be ordered to be paid by the company, but he also held that if in such circumstances the liquidator applies for the statement of a special case and at the hearing of it fails in his contention, he then makes himself party to the proceeding and may be ordered to pay the costs with a right to be recouped out of the company's assets, and he made that order as regarded the costs of the special case.

EMERGENCY LEGISLATION—ARTICLES REQUISITIONED BY ADMIRALTY—RIGHT OF OWNER TO COMPENSATION AND TO JUDICIAL DETERMINATION OF AMOUNT THEREOF—VALIDITY OF GOVERNMENT REGULATION—ULTRA VIRES.

Newcastle Breweries Limited v. *The King* (1920) 1 K.B. 854. This is an important decision from a constitutional point of view. The Defence of the Realm Act, 5 Geo. 5. c. 9, authorised certain Government Departments to take possession of war material and food, and provided that the price to be paid therefor should be fixed by the tribunal by which claims were, in the absence of any express provision to the contrary, to be determined: and certain regulations

were laid down for fixing prices. Goods of the plaintiffs' were requisitioned, and under the regulations the Admiralty offered one-third of their value in payment, which the plaintiffs refused and brought the present petition of right. Salter, J., who tried it, held that so far as the regulations purported to deprive persons whose goods were requisitioned of their fair market value and to a judicial decision as to the amount, they were *ultra vires*. The learned Judge says that it is an established rule that a statute will not be read as authorising the taking of a subject's goods without payment, unless an intention to do so be clearly expressed; and that this rule applies no less to partial than total confiscation, and must apply *a fortiori* to the construction of a statute delegating legislative powers.

SALE OF GOODS—IMPLIED TERM—SALE OF WHEAT IN UNITED STATES—SHIPMENT TO BELGIUM—PAYMENT AGAINST SHIPPING DOCUMENTS—INABILITY OF SELLERS TO SELL EXCHANGE OWING TO WAR.

Comptoir Commercial Anversois v. *Power* (1920) 1 K.B. 868. This was an appeal from a decision of Bailhache, J., on a case stated by arbitrators. The question in dispute arose out of a sale by defendants in the United States of wheat to be delivered to the plaintiffs in Belgium. According to the contract payment was to be made on tender of shipping documents. It contained a clause that in case of war, on failure of the buyers to tender a policy against war risks, the dealers might themselves effect such insurance. It also contained a clause, "In case of prohibition of export, *force majeure*, blockade or hostilities, preventing shipment, this contract or any unfilled part of it shall be at an end." War having broken out the sellers found that they could not effect an insurance against war risks on goods being sent to Belgium, and in consequence were unable to sell exchange in the United States; and they claimed the right to cancel the contract which they assumed to do. Bailhache, J., held that they had no such right, and that the shipment was not "prevented" by hostilities within the meaning of the contract, and that the question of whether a term should be implied in the contract providing for its dissolution on the ground of the frustration of the commercial adventure was a question of law for the Court, and that as the buyers were not concerned with the method of the sellers for financing their exports of wheat to Europe, and the contract contained a provision in case of war, no term could be implied that if the sellers could not sell exchange the contract should be at an end; and with this conclusion the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), agreed.

Reports and Notes of Cases.

Province of Nova Scotia.

SUPREME COURT.

DRYSDALE, J.] BUCKLEY v. MOTT. [50 D.L.R. 408.

FOOD—MANUFACTURE OF CANDY—NEGLIGENCE—PURCHASE FROM MIDDLEMAN—INJURIES FROM EATING—DAMAGES—PRIVITY OF CONTRACT.

A manufacturer of chocolate bars for use as a food and supplied to the public through retail dealers, owes a duty to the public not to put on sale a chocolate bar filled with powdered glass or other injurious substance and is liable in damages to a purchaser who is made ill through eating the bar although there is no privity of contract between the manufacturer and the purchaser.

Brown, K.C., for plaintiff. *Henry*, K.C., for defendant.

ANNOTATION ON ABOVE FROM D.L.R.

The interest in this case lies in the fact that it is the first of its kind to be tried in a Canadian Court.

A careful search has disclosed very few cases either in the English or American Courts on the specific branch of this general question of the liability of a packer or manufacturer of food to the ultimate consumer, who purchased the same from a middleman.

Tomlinson v. *Armour & Co.* (1908), 75 N.J.L.R. 748. Held that irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer, and between retailer and consumer, the manufacturer of canned goods is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer to exercise care that the goods which he puts into cans and sells to retail dealers to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison.

In *Salmon* v. *Libby*, 219 Ill. 421, reversing 114 Ill. App. 258, a declaration was held to be good which set out a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another and which alleged that defendant negligently and improperly prepared and manufactured mince-meat so that the same became poisonous and destructive to human life when used as food, and that the plaintiffs testator while lawfully partaking of the same, was poisoned and died in consequence thereof; though it also shewed that the plaintiffs testator did not purchase the mince-meat directly from the defendant. The question of the liability of the packer to persons not in privity of contract with him was not discussed as the specific objection to the declaration was that it failed to state the particular negligence complained of. *Craft* v. *Parker W. & Co.*, 96 Mich. 245, is another case to the same effect. This was an action to recover damages for injuries caused by eating spoiled bacon sold by defendant to the plaintiff's brother. The Court held if the defendant was negligent in selling meats that were dangerous to those who ate them, he would be liable for the consequences of his act if he knew the meats to be dangerous or by proper care on his part could have

known their condition, but in this case also the Court did not discuss the question of the manufacturer's liability to third persons.

In *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, the Court refused recovery to a purchaser from a retailer of canned meats, against the packer on the ground that as the goods were purchased from a middleman, there was no privity of contract between the consumer and the packer and that therefore no warranty of wholesomeness passed to the property, from the packer to the consumer through the latter's vendor. The question of the packer's liability for negligence in the preparation of the goods was not discussed by the Court.

Uren v. *Holt*, [1903] 1 K.B. 610, was an action to recover damages for breach of an implied warranty upon the sale of beer. It was proved that the plaintiff had suffered damage from illness caused by arsenical poisoning by beer purchased and drunk by him at a beer house kept by defendant. The plaintiff's custom was to go to the house and ask for ale, with which he was served in the usual way, but he knew that the house was a tied house at which all the beer sold came from the brewery of the owners of the house, and he went to the house because he preferred their beer.

Held, that the beer was bought by description within the meaning of the Sales of Goods Act, and that under the Act an implied condition arose upon the sale, that the goods should be of merchantable quality, for the breach of which the plaintiff was entitled to recover.

On the general question of the liability of a manufacturer or tradesman to persons other than those directly contracting with him, the following cases may be noted. Qu. *Langridge* v. *Levy* (1837), 2 M. & W. 519, the father of the plaintiff bargained with the defendant to buy of him a gun, for the use of himself and sons, and the defendant by falsely and fraudulently warranting the said gun to be made by a certain maker and to be a good, safe and secure gun, sold the gun. The gun was not made by the maker as represented, and was unsafe and dangerous and in consequence of its weak and dangerous construction, exploded while in the hands of the plaintiff, injuring him. The Court held that admitting the proposition to be true that no person can sue on a contract but the person with whom the contract is made, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not a party to the original contract, provided at least that his use of the article was contemplated by the vendor and that the boy who used the defective gun for whose use the defendant knew it was intended, had a good cause of action.

The case of *George* v. *Skivington* (1869), L.R. 5 Ex. 1, was an action by a wife, her husband being joined for conformity, against a tradesman who in the course of his business professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used as a hair wash, without causing injury to the person using it, and to have been carefully compounded by him. The husband thereupon bought a bottle of the hair wash to be used by his wife, as the defendant well knew. The wash was unfit to be used for washing the hair and the wife who used it for that purpose was injured. Held that the wife had a good cause of action, and the defendant was liable.

Dominion Natural Gas Co. v. *Collins*, [1909] A.C. 640, was an action for damages in respect of an accident against the appellant gas company. It

appeared that the appellants were not occupiers of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises, instead of into the open air. Held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could shew that the true cause of the accident was the act of a subsequent conscious volition, *e.g.*, the tampering with the machine by third parties.

In *White* v. *Steadman*, [1913] 3 K.B. 340, e male plaintiff hired from the defendant, who was a livery stable keeper, a landau with a horse and driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse shewed considerable signs of restiveness when meeting motor cars, and when passing a traction engine shied and became unmanageable and the carriage was upset and both husband and wife were injured. In an action by the husband and wife to recover damages for the injuries the jury found that the defendant ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. The defendant upon these findings, while admitting liability to the husband, contended that he was not liable to the wife. The Court held that as the defendant ought to have known of the vicious propensity of the horse, he was in the same position as if he had known, and that therefore it was his duty to the wife, whom he must have contemplated would use the carriage, to warn her of the dangerous character of the horse, that this duty arose independently of contract, and that therefore the defendant was liable to the wife.

In *Bates* v. *Batey & Co.*, [1913] 3 K.B. 351, the defendants manufactured ginger beer which they placed in bottles bought from another firm They sold the bottled ginger beer to a shopkeeper from whom the plaintiff bought one bottle; owing to a defect in the bottle it burst when the plaintiff was opening it and injured him; the defendants did not know of the defect, but could have discovered it by the exercise of reasonable care. Held, that the defendants were not liable in as much as they did not know of the defect, although they could have discovered it by the exercise of reasonable care.

In this case Horridge, J., referring to the *White* v. *Steadman* case, says at 355: "I do not think that . . . that case can have intended to decide that, where a thing not dangerous in itself becomes dangerous through a defect occasioned by breach of contract in its manufacture or delivery, the person handing it over must be held liable to a third party because, although he did not know, he might by the exercise of reasonable care have known its condition."

A recent case in The Ontario Supreme Court (Appellate Division) is that of *Hill* v. *Rice Lewis & Son* (1913), 12 D.L.R. 588, which held that a retail vendor is not answerable for personal injury sustained by the purchaser of a sealed box of cartridges of a certain description and make, as the result of the box containing one cartridge of a different kind, and of the explosion of the cartridge after it had missed fire because of its being the wrong size, where the plaintiff relied solely on his own judgment and not that of the vendor in making the purchase.