Canada Law Journal.

VOL. XLVII. TORONTO, AUGUST. Nos. 15 & 16.

THE MARRIAGE LAWS AND THE COUNCIL OF TRENT.

Recent events have drawn public attention to a matter of profound national importance, namely the law as to marriage and divorce, the moving cause being the enforcement by what is known as the "Ne Temere" decree of one of the decrees of the Council of Trent concerning clandestine marriages, and some cases which have arisen where the provisions of that decree have been invoked for the purpose of questioning the validity of marriages which, but for that pronouncement, could not have been questioned.

The Council of Trent dates back to 1564. That part of its proceedings which affect the present situation was the decree that, "those who attempt to contract marriage otherwise than in the presence of their parish priest or of the ordinary, and in the presence of two or three witnesses, become thereby incapable of marrying validly, since the Council declares that all such contracts are null and void."

The reason given for the above was that it was desirable to make provision against the rash celebration of secret marriages.

So far as Canada is concerned this was a dead letter until August 2, 1907, when the present Pope issued a decree on the subject which contained amongst others, the following provisions:—

"Only those marriages are valid which are contracted before the parish priest delegated by either of these, and at least two witnesses, in accordance with the rules laid down in the following articles."

"The above laws are binding on all persons baptised in the Catholic Church, and on those who have been converted to it

from heresy or schism (even when either the latter or the former have fallen away afterwards from the Church) in all cases of betrothal or marriage."

"The same laws are binding also, on such Catholics, if they contract betrothal or marriage with non-Catholics, baptised or unbaptised even after a dispensation has been ordained from the impediment mixtae religionis or disparitatis cultus; unless the Holy See have decreed otherwise for some particular place or region."

"Non-Catholics, whether baptised or unbaptised, who contract among themselves are nowhere bound to observe the Catholic form of betrothal or marriage."

These provisions (with others which are not important in this connection) were not to affect marriages performed before Easter Sunday, 1908.

The case which brought this decree and its results prominently before the public in Canada was the suit of *Hebert* v. *Clouatre*. The facts connected with this suit were shortly that a man by the name of Hebert, a Roman Catholic, was on July 14, 1908, married to a woman, also a Roman Catholic, by a Methodist minister in Montreal. This minister was authorized by the statute law of Quebec to perform marriage ceremonies. Mr. and Mrs. Hebert lived together as man and wife and had one child. It appears that the husband subsequently for some reason which does not appear applied to the ecclesiastical authorities of his church to have the union dissolved on the sole grounds that it was not solemnized by a priest. The civil suit which followed came before Mr. Justice Laurendeau of the Superior Court of the Province of Quebec. He decided that the ecclesiastical authorities having declared that the marriage tie so solemnized between the parties was null and void, the plaintiff was entitled to have the Superior Court give that declaration full force and effect from a civil point of view.

This judgment is not without precedent, but fortunately it is not without dissent on the Bench. In *Larameé* v. *Evans*, 24 L.C.J. 235, Papineau, J., on demurrer, held as follows:— "According to the jurisprudence of the country the sentence

of the Roman Catholic Bishop, regularly pronounced and de-deciding as to the validity or nullity of the spiritual and religious tie of marriage between Roman Catholics, can and ought to be recognized by the Superior Court."

In the same case in 25 L.C.J. 261, Jette, J., at the trial decided that before pronouncing on the validity of such a marriage, the Superior Court ought to refer the case to the ordinary of the diocese in order that he might pronounce previously the nullity of the marriage and its dissolution, if there be reason for it, saving the right of the Superior Court afterwards to adjudge as to the civil effects of the marriage tie.

To understand completely the meaning of these adjudications it is necessary to realize that, to the Roman Catholic, marriage is a sacrament and a spiritual bond. Its civil effects, that is those civil rights and obligations which result from the marriage (such as, in Quebec, the amount of the marriage portion, the right of succession, heritage and legitimacy) are regarded as wholly collateral affairs. They can be adjudged of by the Court because, and only to the extent to which they are separable from the substance of the contract, that is the sacrament.

It would seem naturally to follow from this conception of marriage, that where the Church, as in this country, is entirely free and separate from the State, the civil authority would have no right either to establish invalidating impediments to the sacrament of marriage, at least between Christians, nor to grant dispensations from impediments established by the Church, any more than it can effect the sacrament of the marriage itself. To put it more simply, the state cannot make laws concerning marriage itself, but only concerning the civil effects which flow from it. This was the view promulgated by Archbishop Bruchesi, head of the Roman Catholic church in the diocese of Montreal, in a pastoral quoted in the case of *Delpit* v. *Cote* (1901) 21 Q.O.R. 338.

The opposition to this view is ably maintained in *Connolly* v. *Woolrich*, 11 L.C.J. 197, by Mr. Justice Monk and in the case just cited of *Delpit* v. *Cote*, by Mr. Justice Archibald.

It is to be observed that in the *Hebert* case the court gave effect t an ecclesiastical decree dissolving the marriage tie, and in the *Laramée* case the Court referred the matter to the Bishop to pronounce the nullity of the marriage and reserved only the right to pronounce such decree as would give effect to that decision in regard to the civil rights affected by it.

This brings into strong relief the Roman Catholic aspect of marriage as solely a religious and not a civil tie. Archbishop Bruchesi puts it that the state can only legislate and adjudge "provided that its laws do not affect the marriage tie, neither that which necessarily concerns that tie."

But while this is unquestionably the doctrine of the Church of Rome, acted upon by its ecclesiastical authorities, the important question remains, has it become and is it the law of the Province of Quebec, and under what authority do the bishops of that denomination of Christians acquire jurisdiction to nullify marriages solemnized pursuant to Article 128 of the Quebec Code, which enacts that "marriage must be solemnized openly, by a competent officer recognized by law."

It would be to beg the question in issue to assume that the marriage tie is entirely a sacrament of religious institution and that only the effects of it are civil, e.g., the right to dower, to an estate by the courtesy and the legitimacy of the children. That view is certainly contrary to the belief prevailing in Ontario.

The case in hand is a decision that a marriage between two Roman Catholics is void because not celebrated by their own curé and in their church. If the status obtained by a marriage of Roman Catholics is an ecclesiastical one only and not a civil one then the ecclesiastical courts, if existent and legal, may well have jurisdiction, if conferred on them by their church, over its members and their rights. But, if marriage is a civil contract, though sanctioned by religious ceremonies, then no ecclesiastical court could dissolve it unless expressly empowered so to do by civil authority. Blackstone (Vol. 1, p. 433), states that "Our law considers marriage in no other light than as a civil contract." Lord Hardwicke's Act, 26 Geo. II. c. 33, which

was the law of England at the time of the cession of Canada, expressly enacts (sec. 18) that the Act did not extend "to any marriages solemnized beyond the seas."

While in England therefore, pursuant to that statute, marriage could only be solemnized by a clerk in holy orders, yet that part of the law did not extend to this country, and was not introduced here, but rather the common law which existed prior to that enactment. It is clear that marriage under the common law of England was a contract made per verba in presenti, that is in words of the present tense followed by co-habitation, and that before Lord Hardwicke's Act it was totally a civil contract: *Dalrymple* v. *Dalrymple*, 2 Hagg. 54; *Reg.* v. *Millis*, 10 Cl. & F. 534, *Beamish* v. *Beamish*, 8 Jur. 781, *Latour* v. *Teesdale*, 8 Taunton 830. And, as pointed out by Mr. Vice-Chancellor Proudfoot, the English Ecclesiastical Courts, having jurisdiction derived from the civil power and not from the church, could decree dissolution of the marriage, even though it were a civil contract, where legal disability existed.

Archbishop Bruchesi while insisting strongly upon the sacramental character of marriage, apparently limits this characteristic to marriages between those of his own communion. To quote from his own pastoral again: "In order that a marriage may be valid between two Catholics in the limits where the Council of Trent has been published, the presence of the proper priest and two witnesses are necessary; consequently the marriage of two Catholics before a civil officer or a Protestant minister is null. By virtue of the constitution of the pontiffs there are countries, and the Province of Quebec is of the number, where in spite of the promulgation of the Council of Trent, we are to consider as valid marriages celebrated clandestinely between two parties, one being a Catholic and the other a baptised non-catholic. The marriage of a Catholic and a baptised Protestant, or vice versa, celebrated before a Protestant minister, although gravely illicit and calling down the censure of the church, is, however, a marriage contracted in a valid manner even in the eyes of the church herself. Once consummated this marriage

cannot be broken by any earthly power, death alone rendering liberty to the party surviving."

A most interesting and complex question relates to the effect of the conquest, the articles of capitulation and the treaty of cession in 1763 upon the common law existing in Quebec, and whether the common law of England displaced it. But it is unnecessary to enter upon that field of enquiry because Mr. Justice Jetté admits that as a matter of law the old French law as to marriage would be superseded and made obsolete by the institutions of the conqueror. But he relies upon the fact that Roman Catholics were permitted by the Treaty of Paris the free exercise of their religion, and that, as the old institutions relating to matrimony formed part of the exercise of their religion, they were reserved to their jurisdiction. But that free exercise of religion, even if it included the formalities for the celebration of marriage in Roman Catholic churches, would not in any way prevent its adherents of that church, if they so desired, from taking advantage of the more liberal rules laid down by the State for their fellow subjects who were not Roman Catholics. And certainly it could not be contended that the laws of Lower Canada, which were continued, included those which would compel Roman Catholics to conform to that religion, when at that very time the exercise of that religion in England was strictly prohibited. Hence the expression in the treaty of 1763, "so far as the laws of England permitted."

In addition to this the power of dispensation in England was vested in the King and exercised by the Archbishop of Canterbury under a statute delegating it to him (25 Henry VIII. c. 21). To assume that in Quebec after the cession the power still remained in the French King or in the Pope or his bishops would be "contrary to the prerogative of the British Sovereign to issue such dispensations," to quote Lord Stowell in *Ruding* v. *Smith*, 2 Hagg. 378, a case in which it was argued that, as under the articles of capitulation of Cape Colony it was provided that "the inhabitants shall preserve the prerogatives they enjoy at present," dispensations from the publication of banns must be had from the States of Holland.

But when the Civil Code, adopted in Quebec in 1866, is examined it contains enough to indicate that, even if it were true up to that time the ancient law permitted the annulment of the sacrament of marriage by the Roman Catholic ecclesiastical authority, such a right has been done away with. In addition to this, it is quite clear that, even if the French law at the conquest and cession preserved its vitality, the enforcement of it by courts or authorities, whether civil or ecclesiastical, must reside in the courts and authorities which received their power from the King of England, whose supremacy was explicitly acknowledged by the treaty. The authority of the Pope disappeared and the power of courts established by the French King necessarily ceased at the cession in the conquered provinces.

In the *Guibord case, Brown* v. *Cure de Montreal*, L.R. 6 P.C. 157, Mr. Mathews, Q.C., counsel for the Roman Catholic Church, arguendo, said: "The old ecclesiastical law of France cannot apply to Canada after the conquest. The root of it was in the ecclesiastical jurisdiction and supremacy of the Church of Rome;" and Mr. Westlake, K.C., his associate, said: "The ecclesiastical law existing among members of the Roman Catholic body is no longer, since the cession, the law of the land in any respect whatever, it is the law existing among them solely by contract." And in the judgment (p. 211) it is stated that, "It is no doubt true . . . that there are now in Canada no regular ecclesiastical courts such as existed and were recognized by the state when the province formed part of the dominions of France." Hence no ecclesiastical authority could validly adjudicate upon the status of couples united under civil authority, nor indeed upon any other aspect of marriage tie than that of a sacramental one, if that can, in law, exist apart from the civil contract.

The Civil Code, the present law of Quebec, is copied largely from the Code Napoleon and is explicit as to the formalities to be observed in marriages and as to the rights of the parties to a marriage to seek its annulment. By Article 128 it is provided that "marriage must be solemnized by a competent officer

appointed by law" and by Article 129, "all priests, rectors, ministers, and other officers authorized by the law to keep registers of acts of civil status, are competent to solemnize marriage; but none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Other articles are as follows:

57. "Before solemnizing a marriage the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of banns required by law has been duly made; unless he has published them himself, in which case such certificate is not required."

58. "This certificate, which is signed by the person who published the banns, mentions, as do also the banns themselves, the names, surnames, occupations and domiciles of their fathers and mothers, or the name of the former husband or wife. And mention is made of this certificate in the act of marriage."

59. "The marriage ceremony may, however, be performed without this certificate (that is the certificate of publication of banns) if the parties have obtained and produce a dispensation or license from a competent authority, authorizing the omission of the publication of banns."

59A. "In so far as regards the solemnization of marriage by Protestant ministers of the gospel marriage licenses are issued by the Department of the Provincial Secretary under the hand and seal of the Lieutenant-Governor, who, for the purpose thereof, is the competent authority under the proceeding article."

63. "The marriage is to be solemnized at the place of the domicile of one or other of the parties; if solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

Section 1297 of the Revised Statutes of Quebec enacts that "in so far as regards the solemnization of marriage by Protestant ministers, no marriage license issued in any other manner or from any other authority shall be necessary."

Section 1208 enacts that "the licenses issued under this section are furnished by such persons as the Lieutenant-Governor-in-Council names for that purpose to all persons requiring the same who shall previously have given a bond together with two sureties, being householders, and in form appended to this section."

Article 156 of the Code declares that "every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves, and by all those who have an existing and actual interest, saving the right of the court to decide according to circumstances."

Article 161 of the Code provides "when the parties are in possession of the status, that is when they have lived together as man and wife publicly, and the certificate of their marriage is produced, they cannot demand the nullity of such act."

From these quotations the following conclusions may fairly be drawn: That a marriage is properly performed if solemnized publicly by a competent officer recognized by law; but no officer is compelled to solemnize a marriage if any impediment according to his religion exists; that banns may be dispensed with by license and that the license is to be issued by the civil government of Quebec. Nor is there any limitation that a Protestant minister can only marry non-Romanists.

It is quite true that a Roman Catholic priest may decline to marry either Roman Catholics or Protestants in his church unless the banns have been published, but there is no reason for the assumption that Roman Catholics or others may not be validly married elsewhere under a provincial license.

Any other construction of these articles would lead to the preposterous and unthinkable result that the provincial licence allowed the celebration of a ceremony resulting not in a marriage but in concubinage. Besides, the parties to a marriage are by articles 156 and 161 restricted to contesting (but always before the court) clandestine marriages, and cannot demand adjudication of nullity where they have lived publicly as man and wife.

To allow a church court to annul marriages is to allow it to repeal these enactments, one of which empowers the civil court so to do where the marriage has not been solemnized by a "competent officer," and the other which prohibits those who have openly lived together and have a certificate of marriage, from demanding its nullity that is in any court or from any authority. In fact if the contention could be maintained that the ecclesiastical courts could before 1866 annul a marriage, then it can hardly be doubted that the civil code then adopted has radically altered the situation by substituting its distinct provisions regarding the solemnization of marriage for the pretensions set up under the treaty of cession, and thus, by their own law, those pretensions necessarily fall to the ground.

The "Ne Temere" decree has extended this assumed ecclesiastical jurisdiction to mixed marriages. This is an extension of the Roman Catholic claim to jurisdiction as evidenced by Archbishop Bruchesi's pastoral, and for the first time affects denominations other than the Church of Rome. It is also a step in advance as to Roman Catholics citizens. For example, while by the doctrine of the Church of Rome marriage is indissoluble by any civil power, the innocent person under a divorce by Parliament in Canada may marry again; but, if such a one were a Roman Catholic and wanted to marry, and could not get a Roman Catholic priest to marry him, the statute law of Canada would be of no effect unless a marriage by a Protestant minister were valid.

The real question, and it is of great interest, is not whether any church can annul a marriage, but whether a particular one can. No other church claims for its ecclesiastical courts such power. The Church of Rome has no greater power than any other denomination, and its claim must rest wholly upon the contention that at the conquest and cession the right to the free exercise of the religion of French Canada resulted in the abdication by Great Britain of the sovereignty of her courts in regard to what is the foundation of the security of the State. A proposition which is on its face a manifest impossibility, and one which is not even open to argument.

The *Hebert* case, in which the child of the marriage is deprived of its legitimate status, and the still more recent *Howden* case involving the annulment of a marriage celebrated thirty years ago calls attention to the extraordinary range of this astonishing invasion of civil rights. Worst of all is the indifference displayed to the incalculable suffering inflicted upon wives and children for the sake of temporal authority, which can only be maintained at the cost of the civil liberties of our people.

The proclamation of the "Ne Temere" decree has provoked emphatic protest in Canada as well as in other countries. It is rejected in Germany and non-existent in Austria. In Italy the new civil code, which deprives priests of the power of celebrating marriage, indicates the extent of the revolt against the ecclesiastical pretensions so far as Canada is concerned. We trust we have heard the last of any attempts at ecclesiastical interference with the marriage laws of this Dominion. They simply cannot and will not be permitted.

DISCRETION IN PENALTIES.

"My object all sublime
I shall achieve in time—
To make the Punishment fit the Crime.
The Punishment fit the Crime."
The Mikado.

This quotation from one of the most justly famous of comic operas may, at first sight, appear to be scarcely a fitting prelude to the discussion of so serious a subject as that intended—namely, the exercise by judges and magistrates of their discretion in the imposition of penalties for breaches of the law. Nevertheless this clever rhyme, composed, I believe, by one who was formerly a practising barrister, aptly expresses that which should be the principal aim and object of all makers and interpreters of the law.

Of the making of statutes and ordinances there is no apparent end; such at least is the impression conveyed by the perusal, year by year, of our statute books. Much time and labour is

expended—though perhaps not always successfully—in the attempt to define clearly the scope of these measures and leave no loophole for misinterpretation. It would appear, however, as if the kindred and no less important question as to the best method of securing their observance had never received the same close attention. That problem has been held to be mainly the concern of the judges, who are, accordingly, in most cases given a very wide discretion.

Given a statute designed to remedy an evil, there must obviously be some definite means of securing its observance. Otherwise, such statute shares the weakness of so-called international law, being devoid of a legal sanction. The methods most generally accepted are fines and imprisonment, and these modes of punishment, by their extent or duration, are intended approximately to measure the gravity of offences against the laws which they safeguard. Some statutes provide a maximum penalty, others a minimum, while in others again we find both a maximum and minimum. In spite of these limitations, the latitude allowed to the discretion of the judge or magistrate is, in most cases, very wide—too wide indeed to serve him as an accurate guide when assessing a penalty. His discretionary powers being so great, and there being no general consensus of expert opinion to help him, the judge's personal feelings and bias must inevitably determine the nature and extent of his sentences to a greater degree than is desirable. In cases where the judge has a thorough experience of the class of work with which he has to deal, coupled with a broad humanity in his general outlook, the results of this uncontrolled discretion may be excellent; but even assuming that all judges possess these characteristics, uniformity and consistency in the administration of the law will not be the necessary consequence.

"Quot homines, tot sententiæ" is an obvious platitude, and it is equally obvious that the opinions of learned judges vary in no small degree as to the best methods of dealing with certain crimes and criminals.

If this be the case where legal luminaries of the first magni-

tude are concerned, is it not even more likely to be true of colonial judges, who are called upon to fill important positions—sometimes with comparatively little previous training—and, in still greater degree, of the average justice of the peace, who has not (or at any rate need not have had) any such training at all.

It is with the discretion vested in these two classes that the writer proposes to deal, such personal experience as he can claim having been acquired as a judge in one of our colonies, and as a justice of the peace in Ireland. His object, in so doing is to emphasize the importance of a right exercise of judicial discretion, and to suggest a method of checking its abuse.

To attempt, within the limits of this article, to deal exhaustively with a subject involving such intricate psychology as the punishment of crime would be absurd. It will be sufficient to point out some of the difficulties which beset the path of a conscientious, but inexperienced magistrate, and shew how they might be mitigated, if not entirely removed.

The thought must constantly occur to a judge when determining the penalty for an offence—be it a felony or merely some trifling misdemeanour—that a certain specific sum of money, capable of being measured to within a few pence, or a certain term of imprisonment, capable of no less accurate definition, would, if he could but gauge it, exactly meet the requirements of the case before him. To exceed or fall short of this measure must involve an act of injustice, either to the individual whom he condemns, or to the community at large—perhaps even to both.

It will no doubt be contended that, from a practical point of view, such exactitude is impossible—that individual cases require individual treatment, and so forth. This may readily be admitted, and the writer does not propose that the discretion of those holding judicial authority, however humble, should be limited by hard and fast rules incapable of relaxation. In the inferior courts, however, some form of restraint might with advantage be imposed upon the arbitrary exercise of judicial or magisterial discretion, without endangering its principle, or in

any way impairing the efficiency of such tribunals. We would suggest as a remedy the adoption of standard penalties for each of the offences usually dealt with at Petty or Quarter Sessions, Police Courts, and other courts of similar jurisdiction. Such standard penalties would serve as guides to the Bench in deciding Crown cases, and should, in normal circumstances, form the basis of their judgments. In proportion as the circumstances varied from the normal and tended either to aggravate or partially to excuse the offence, so would the punishment inflicted be greater or less than the theoretical standard.

The objection may be raised that no crime is normal, and therefore that no standard penalty, implying a general average of guilt, is possible. This is doubtless true so far as the graver crimes, such as manslaughter, burglary, arson, and many others, are concerned; but the writer maintains that this argument does not apply to such minor offences as form the routine work of Petty Sessions or Police Courts. We hope, in due course, to be able to convince our readers of the real need for greater uniformity in the practice of courts of a similar jurisdiction. It ought not to be possible that an offender brought before one court should receive a trifling penalty, whereas, his conviction for the same offence, by another court of co-ordinate authority, would result in comparatively severe punishment. Inconsistencies of this kind should be impossible, but they are, nevertheless, of everyday occurrence. The impression produced upon the minds of those who study the Police Reports must be one of uncertainty. Yet, surely, certainty is an essential attribute of true justice.

The gaol-bird, when convicted, still stands a "sporting chance" of a light sentence; and, as a race, we are supposed to be lovers of sport of all kinds. It is more than questionable, however, whether these "sporting chances" are conducive to the moral improvement of such persons. Under present conditions it is not uncommon to hear it asserted that one magistrate is unduly severe in his attitude to certain offences, while another is charged with excessive leniency. In order absolutely to pre-

clude the possibility of such statements, it would be necessary to abolish the judicial discretion vested in magistrates, and thereby turn them into so many automatons—an object by no means to be desired. On the other hand, the steady and restraining influence of a well-defined and consistent practice with regard to punishment could, surely, be productive only of good.

Many of our readers are, no doubt, familiar with the so-called "legal pillory" in that interesting and entertaining journal, *Truth*. To those possessed of even an elementary legal training, the bald statement of the offence, coupled wit' the penalty inflicted, without any of the aggravating or alleviating circumstances, which may have been obvious enough to those who were present at the trial, must tend to destroy the value of such records as proofs of magisterial incompetence, or at least render them unconvincing. At the same time there are, now and then, instances of judicial vagaries which appear to justify even this method of criticism. It would be idle to assert that the general public is entirely satisfied with the manner in which the law is administered in some of the inferior courts. But what can be of greater importance than that there should be, so far as is humanly possible, entire public satisfaction in this matter!

The old idea of vengeance as the primary, if not the only, object of punishment is fast becoming obsolete. We desire, for the most part, not to kill but to cure—to prove to one who steals that honesty really is the best policy—to another who has committed an assault that to keep the King's peace pays better than to break it. In order to effect this, all suspicion either of vindictiveness or partiality should not only be absent in fact, but should as far as possible be proved to be absent by the nature of the sentence. A judge should not only act justly, and without personal bias of any kind, but he should convey the impression that he is so doing to the accused and to all those who are present in court. Otherwise, half the moral effect of his judgment is lost. How can he best convey such impression? The answer is by consistency—not only with his own previous

decisions, but also with those given by other judges in similar circumstances.

At this stage the writer may be permitted to cite briefly his own experiences when called upon to act as Chief Justice in one of our small colonies. As a new-comer he was naturally desirous of following, so far as possible, the lines laid down by his predecessors in the same office. He soon discovered, however, that there was an almost complete absence of uniformity or consistency in their decisions. Each successive holder of the office had apparently been a law unto himself, and unto himself alone.

In cases where one occupant of the Bench had been in the habit of inflicting a fine equivalent to ten shillings or thereabouts, another had imposed one of five shillings or even less, while a third had given a term of imprisonment without the option of a fine. Yet all these sentences, be it observed, had been imposed in respect of first offences of a similar character.

Generally speaking, more especially as regards trivial breaches of the local ordinances, it appeared to the writer that the penalties imposed erred on the side of undue severity; but occasionally, as if by way of contrast, some of the more serious offences, such as perjury, met with what could only be considered as utterly inadequate retribution. There was in fact an apparent absence of balance and proportion, which rendered the discovery of an underlying principle (if any such principle existed) well nigh impossible. A new judge thus found himself faced with the task of attempting to reconcile the irreconcilable, or else of striking out an independent line, and thereby adding another discrepancy to the existing catalogue.

It is a commendable practice for those who are engaged in the administration of justice among native races, to attempt to estimate its effect upon them by viewing each decision from their standpoint. In the instances I have mentioned one could scarcely expect the moral results of the punishments inflicted to be either very salutary or very lasting, since the native would see in them only the personal equation of the judge, and dumbly submit to decrees as uncertain as those of Fate herself.

What then is the moral result of casual or ill-considered punishment? Far from effecting any improvement in the character of the victim, it can only succeed in ultimately inspiring him with a certain recklessness. He must come to regard his punishment almost as a matter of luck. If his sentence is light he is in luck's way—if severe, then his luck is "out." In either case there must appear to him but a casual connection between the degree of his offence and the extent of the penalty.

The habitual offender (criminal is too strong a term) is, in his way, something of a fatalist, and fatalism of this kind is not likely to produce good and law-abiding citizens. So long as the present unsystematic exercise of judicial discretion continues, we cannot be surprised if the wrong-doer is more often hardened than reformed.

Sentimental kindness in the administration of justice is apt to be misconstrued as a sign of weakness, and thus the best intentions in the world, when coupled with inexperience, are often foredoomed to failure. Some guiding principle is needed, and a definite policy with regard to punishment will surely best meet that need.

A consistent and graduated scale of penalties would bring home to the law-breaker, by the most cogent evidence possible, the view taken of his offence—not by individual judges only, but by society as a whole—as well as the corresponding severity with which its repetition would be visited.

An attempt will presently be made to point out how this graduated scale of penalties might be brought into general use, without interfering with a reasonable exercise of judicial discretion. For the moment, however, the writer will return to his personal experiences in order to illustrate this theory.

As a justice of the peace for the county in Ireland in which he resides, he is in the habit of attending Petty Sessions at three villages, all of them within a radius of about five miles from his home. Although there are no local conditions at any of these three places to explain the difference, the practice of the courts at each of them, in the treatment of certain minor

offences, varies to an appreciable extent. It is not suggested that these differences of treatment involve glaring or obvious injustice. It is indeed only fair to say that, considered individually, justice is, on the whole, administered with reason and impartiality; but, when considered in relation to one another, the practice of these courts is inconsistent, and therefore, to that extent, contrary to a true ideal of equity.

It is clearly inequitable, for example, that a person convicted at A of some trivial breach of the law (it matters not what) should be fined sixpence, if at B one shilling, and if at C eighteenpence. His offence against the community is the same, whether he commits it within the radius of A district, or at B, which is less than ten miles distant from A, while there is nothing to warrant greater severity at C than at A. Nor is there any intention on the part of the magistrates to exercise greater severity at one place than at another. The lack of uniformity is simply due to the absence of a common point of view or guiding principle.

Again, at one of these courts, a person, if convicted, is fined an extra sixpence if he has not appeared to answer the summons, although attendance at court may perhaps involve the loss of half a day's work. At another court his non-appearance involves no extra penalty. The latter course is perhaps the more reasonable, but the adoption by all the courts of the former would be preferable to the existing incongruity.

Some of our readers may think that the sums of money involved in the instances quoted are so small as hardly to deserve serious consideration; but apart from the question of principle, it is clear that in a locality where a labourer's daily wage is only eighteenpence, a difference even of sixpence more or less is no trifle.

As further proof of the need for some alteration in our judicial methods—so far at least as the magisterial bench is concerned—we may cite the not uncommon practice of "splitting the difference," where magistrates cannot otherwise agree as to the length of a sentence of imprisonment, or the amount

of a fine. It would be difficult to support this mode of arriving at a decision on any logical grounds—and yet under present conditions there may be no alternative. The excuse for such haphazard proceedings would disappear if there were some recognized standard upon which to fall back when opinions as to the weight or nature of a sentence were divergent.

Let us now turn to the consideration of a remedy for the inconsistencies which have been pointed out—inconsistencies which are probably no greater in the instances above quoted than in courts of similar jurisdiction throughout the British Empire. Briefly, this remedy lies in the appointment of a commission composed of persons possessed of the highest legal authority, whether as judges or jurists, for the purpose of assessing the average penalty for each legal offence, upon a first, second, or further conviction. These scales of punishment, strictly, of course, within the limits of the particular statute dealt with, would merely represent the normal penalties which it would be reasonable to inflict in cases presenting no unusual features. The recommendations of such a commission would have moral weight only, and would imply no form of compulsion whatever upon the judges and magistrates for whose benefit they were designed.

It will doubtless be objected that recommendations of this nature, without the aegis of sovereign power and authority, would be flouted, and promptly rejected—that magistrates like to go their own way, and would resent an implied interference with their discretionary powers. The writer, on the contrary, believes that every judge and magistrate who honestly desires to do his duty—and surely this must mean the great majority—would welcome any advice which would enable him to do so in a more efficient manner.

The recommendations of the Commission would, of necessity, be based upon general principles only, and might require substantial modifications according to the locality in which they were adopted. A penalty which would be reasonable and proper in the west end of London might well be excessive and unreason-

able in the west of Ireland, and entirely unsuitable to the social conditions of a negro population in West Africa. To meet such local requirements, sub-committees might be formed in each country and colony—possibly in each county, province, or other administrative area—which, while adopting the fundamental principles laid down by the Commission, would vary or modify the normal penalties to suit local conditions. By this method, while the same theory and standard of justice would obtain currency throughout the empire, any tendency to an uncompromising rigidity of detail would be avoided, whilst a greater measure of coherence and consistency would be secured. By no means the least benefit to be derived from a systematic treatment of legal penalties on the lines described, would be the gradual but sure development in the public mind of a sense of proportion with regard to the relative gravity of various offences. This sentiment would, in course of time, render impossible the glaring discrepancies in the administration of justice, which we have at present good reason to deplore.

Want of space forbids any attempt at more than an outline of this scheme for the solution of a most difficult problem. Its elaboration would involve a survey of the whole field of criminal law. One or two points, however, occur to the writer as having a special importance, if success is to be assured.

In the first place, it is clear that the amount of a fine should, ceteris pribus, be in proportion to the social, or rather financial, position of the wrong-doer. Strict accuracy would, of course, in many cases be out of the question, but nevertheless an attempt should be made to assess a money penalty in the manner described.

Again, penalties should be increased proportionally upon a second, third, or further conviction, for a similar offence. Thus, if a fine for drunkenness upon a first conviction were assessed at a sum amounting to half a day's wages, such fine might be doubled upon a repetition of the same offence within twelve months of the previous conviction, and re-doubled for a third conviction within the same period.

It would also be desirable to prescribe the point at which repeated convictions for such minor offences as are usually punished by fines should carry instead a term of imprisonment, the extent of which should also be the subject of definition. This point might be fixed at a period when the person convicted could no longer be regarded as a casual, but rather as an habitual, offender.

There are doubtless certain disadvantages in a system which would permit of a more or less accurate forecast of the penalty for any given offence. The assurance of a comparatively light punishment for certain misdemeanours might perhaps prove a temptation to commit them. On the other hand, the progressive severity with which their repetition would be visited, should serve as a more effectual deterrent than the existing uncertainty, and more than counteract the effects of the original leniency.

It cannot be too strongly insisted upon, that the standard penalty for any given offence should be regarded as an average penalty only. The judge or magistrate should feel himself entirely at liberty to vary it, should the circumstances, in his opinion, justify him in so doing. Probably, in many cases, the actual penalties inflicted would either exceed or fall short of the standard, although it is unlikely that they would do so to any great extent, if the work of the Commission had been carried out in an efficient manner. Whether the variations on either side of the line were great or small, the net result would be an average, and this would come to mean, as time went on, an ever-increasing degree of uniformity and consistency in the administration of the law.

Whenever the special circumstances of a case appeared to the judge or magistrates sufficiently important to justify a wide variation, or even an entire departure from the standard penalty, a note to that effect, inserted in the records of the court, would serve as a useful guide to the Bench in the event of a subsequent conviction.

Few schemes for the solution of any problem are perfect in their inception. None, it may safely be said, present greater

difficulties than those which attempt any reform of long-established usage or custom. The writer of these tentative suggestions claims no immunity from criticism on their behalf. He will be content if he succeeds in drawing attention to a subject which, although of the highest public interest, appears to have been hitherto unaccountably neglected. Some of the more obvious criticisms he has endeavoured to forestall and answer. Many others will doubtless occur to the minds of those who may read this article.

Granted that there are many reasonable objections to the scheme—at any rate in the form proposed—it has, at least, the merit of providing a specific remedy for a real and acknowledged evil.

Human justice is and, by its very nature, always must be, imperfect; but this fact should not deter us from striving after perfection. Amongst the highest attributes of an ideal justice may be placed those of perfect equality and consistency. Uniformity of practice in our courts is an essential factor in the attainment of these attributes. Until this is secured, that often-quoted phrase, "the lawless science of our laws," will bear a wider interpretation than the poet probably intended.—*Law Quarterly Review.*

PRESENT AND PROPOSED AERIAL LEGISLATION.

The regulation of aviation affords a particularly fertile field for the exercise of the wonderful powers of that type of statesman who unfortunately finds his way into nearly every legislature, and feels that he is specially commissioned to act as a universal regulator, and, having fairly exhausted the field afforded by things upon the earth, from the height of sky scrapers to the length of a hat pin, will be doubtless pleased with the prospect of a new world to conquer, and will turn with avidity to the heavens above.

An excellent illustration of this kind of regulation is a bill which was introduced into the legislature of a middle western

state last winter, which proposed to prohibit ascensions to a greater height than 1,000 feet, and provided for a bond of $10,000 guaranteeing obedience to the law, with a prison sentence of five years as a penalty for its violation. Just what the idea was that inspired this proposal is difficult to determine. Whether the legislator sought to protect the aviator on the theory that he would be more thoroughly dead after falling 5,000 feet than after a little drop of 1,000 feet, or whether his concern was for that part of the public which occupies the lower floors of apartment or office buildings, whose danger would doubtless be increased in proportion to the altitude from which a disabled engine might fall with ever-increasing power of smashing through the protecting upper floors, will doubtless remain a profound mystery. If provisions of this kind should be taken seriously enough to insure their passage, interesting questions might arise as to how they would be enforced. To equip every constable with delicate scientific instruments for determining altitude would doubtless be expensive, and would presume too much as to the mechanical and scientific ability of those worthy and useful public servants, while to require every aviator to carry a sealed barograph, and submit to periodical inspection for the purpose of determining if he had violated the law, might be open to the objection that it would compel him to furnish incriminating evidence against himself, to say nothing of the difficulty of determining the situs of the crime. However, this difficulty would not be likely to arise, for, even if such a bill were passed, it would doubtless go the way of all such legislation, and never be heard of again.

But while there will probably appear a considerable amount of useless, if not foolish, legislation, the rapid advance made in aviation, and the increasing number of those engaged in operating ships of the air have engaged the serious attention of legislators and statesmen. Last year there was held at Paris an international conference on aerial rights, at which the principal European powers were represented. An elaborate code for the regulation of aerial navigation was adopted, and embraced such

questions as the nationality of airships, customs, regulations, jurisdiction of offences, flight over military and naval establishments and operations in time of peace, and the carrying of photographic and wireless telegraphic apparatus. While perhaps such elaborate regulations are necessary for the conditions in Europe, where there are numerous independent nations covering relatively small territory with their enormous military equipment and mutual jealousies, they hardly seem necessary in this country, and at any rate are largely matters for international agreement.

Legislation upon the subject of aerial navigation, whether already in effect or merely proposed or likely to be adopted in the future, naturally falls under three general heads, according to the object to be obtained: First, protection of the public; second, protection of the lives and property of individuals; third, protection of aviators. These will be treated in the order named.

1. Protection of the public. The first step for the protection of the public in general would seem to be the adoption of laws requiring the registration and means of identifying aerial machines in order to make effective any other regulative laws which might be passed concerning them. The Connecticut statute for which is claimed the distinction of being the first passed in this country upon the subject of aviation provides for the registration of all airships, for which a fee of $5 is charged, and requires that each ship shall bear markers with the registration number 3 feet high. Closely associated with provisions for the registration and identification of aerial machines are provisions for the examination and licensing of aviators. The Connecticut statute requires aviators to be at least twenty-one years of age and to pass an examination and take out a license, for which a fee of $2 is charged. These provisions seem to be reasonable and necessary, and similar ones might well be adopted by other states as a beginning for aerial regulation. Considerable discussion has arisen as to what qualification should be required to entitle an aviator to a license. Some proposed statutes provide for the issuing of licenses to those who hold a license from a

recognized aeronautical society, but these have been criticized because such societies, it is charged, are frequently engaged principally in the exploitation of their members, and it is feared their decisions might not be a good criterion for determining who are competent to handle aerial machines from the standpoint of the safety of the public. Whether or not this criticism is justified, it would seem that it would be better to require air pilots to qualify under public authority, to avoid insufficient tests or favoritism, and to insure uniformity of requirement. The test proposed by the draft convention include a continuous flight of at least 3 miles, and height test at a minimum of 150 feet, and tests for alighting without mishap within 150 feet of a given point. Whatever regulations are adopted in this country, an effort should be made to make the laws of the various states as uniform as possible, and provision should be made for mutual regulation of licenses issued by the various states.

2. Rules for the protection of persons and property of individuals. The discussion of this phase of the problem of aerial navigation is confined principally to regulation of the flights, as to place, the principal restrictions proposed being the prohibition of flights over centers of dense population and large aggregations of people, and over places where large quantities of explosives or highly inflammable materials are manufactured or stored. It seems to the writer that provisions of this kind are somewhat premature. If the aeroplane never gets beyond the circus stage where it is at present, the numbers in use will doubtless remain so small that danger to the public from flights over those places will be negligible. On the other hand, if they are developed from the standpoint of stability and safety for those operating or taking passage upon them, so that they become a mode of travel for a considerable number of people, the danger to the public and property upon the ground from flights overhead will be correspondingly decreased, while restrictions of the kind mentioned might seriously impede the development and impair the usefulness of aerocraft by preventing access to large centers of population. If the number of machines be-

comes so large, and their use such that they are a real danger to the inhabitants of our cities, it will then be time to prohibit their use over such places, and to make provision for aerial stations outside the center of population, but within easy access thereto by other means of transportation.

Another question to be determined by legislation is the degree of liability to be imposed upon the owners and users of aeroplanes when damage is inflicted upon persons or property. The Connecticut statute provides that "every aeronaut shall be responsible for all damages suffered in this state by any person or persons from injuries caused by any voyage in an airship directed by such aeronaut; and if he be the agent or employer of another, in making such voyage, his principal or employer shall be likewise responsible for the same."

There doubtless will be some dispute as to the meaning of this provision when cases arise under it, but on its face it seems to eliminate the questions of negligence and contributory negligence, and to impose absolute liability for damages inflicted by an airship. If it does not have this effect, it is mere surplusage, and leaves the liability in such cases to be determined on common-law principles. But whether or not the effect of this statute is to make the owners and operators of airships absolutely liable for all damages inflicted by them, it would seem that the enactment of provisions having this effect would be wise as well as opportune at the present time. The reason for imposing a high degree of care on any class of persons is the dangerous nature of the operations engaged in and the inability of those affected to effectually protect themselves against injury. The operation of airships is unquestionably dangerous to those beneath them, and they are peculiarly helpless to protect themselves from the danger which would menace them when in the privacy of their own premises as well as when in public places. It seems justifiable to say that, in the present imperfect stage of development of the aeroplane, those over whom one is operated are in greater danger than are passengers by railway or steamboat, and that, therefore absolute liability is not too severe a rule to be imposed for their protec-

tion. Then, too, such a provision would doubtless act as a more effective protection of the public against reckless and negligent aviators, and against the operation of airships over places where the danger of injury to persons and property was great, than would a large mass of complicated and cumbersome as well as probably unenforceable regulative and restrictive measures.

In addition to the liability for actual damages, it has been suggested that a fixed, reasonable amount be allowed to the owner of property upon which an involuntary landing is made without any actual damage. Whether such a provision will become desirable at any time is questionable; for the present it might well be omitted.

3. Protection of aviators. One class of proposals for laws designed particularly for the protection of those using airships, includes rules of the road, distances to be maintained in passing, signals, etc. Such matters must necessarily be worked out by the airmen themselves from experience, and may safely and more properly be left for aeronautical societies to formulate.

Other proposals seek to limit the speed and the maximum and minimum height of flight. Of these the only one which seems practical or at all desirable is the regulation of a minimum height for flight over buildings or people, and it is doubtful if even this is necessary or feasible in view of the difficulty of enforcement and the fact that the aviator himself has more at stake than any other person in maintaining a safe altitude.

It has also been proposed to prohibit racing and exhibition meets. While most of the fatalities so far in aviation have occurred at these exhibitions, no reason is apparent why they should be placed under the ban any more than the equally fatal automobile or motorcycle races. The exhibition and racing meets afford opportunities for the public to become familiar with the sight and movement of aeroplanes, and furnishes a means of financial return for those who, in the air or workshop, are seeking to develop this new means of transportation, and to whose efforts will be due the determination of the possibilities of this new invention as a servant of mankind.

It has been proposed for the protection of aviators that the upper stories of high buildings be illuminated at night, and that the owners of overhead wires be required to indicate their positions by lights at night and flags by day. Such legislation, if it ever should be advisable, would be premature at this time. Practically no flights are made by night at present, and if they become common in the future, aviators may be relied on to protect themselves from such dangers, and it is at least questionable if they would not be safer relying on themselves for protection than they would be if they were led to rely on the enforcement of such a law, which would be only partial and intermittent at best.

One proposal which is closely associated with the provisions for registration of machines, but which is primarily for the protection of the aviator, though it is also important for the protection of others, is the inspection of machines before their registration and use is permitted. One of the causes of the numerous fatalities in aviation is the weak construction of machines, and this danger is increasing with the large numbers of inexperienced amateurs who are constructing their own machines. The danger to those using such machines and to others is great enough to justify a provision for the rigid inspection by experts of all aircraft before they are registered and their use permitted.

By way of conclusion and summary, it seems to the writer that there is more danger of too much legislation upon the subject of aviation, than there is that we will not have enough; that the dangers to the public and individuals are as yet largely imaginary, and may never become real, and that in general it will be best to await the development of aerial navigation and apply legislative remedies only as needed. For the present, in this country at least, sufficient restrictions may be embodied in statutes providing for the inspection, registration and identification of machines; for the examination and licensing of aviators; and for the absolute liability of owners and operators of aerial craft for all injury to the person and property of those over whom they fly.—*Case and Comment.*

REVIEW OF CURRENT ENGLISH CASES.

TRUSTEE—INVESTMENT—INSUFFICIENT SECURITY — MORTGAGE—TRADE BUILDINGS—ADVANCE OF MORE THAN ONE HALF VALUE—VALUATION—BREACH OF TRUST—TRUSTEE ACT, 1893 (56-57 VICT. C. 53) SS. 8, 9—JUDICIAL TRUSTEES ACT, 1896 (59-60 VICT. C. 35), S. 3—(1 GEO. V. C. 26, SS. 30, 36, ONT.).

Palmer v. *Emerson* (1911) 1 Ch. 758. This was an action against trustees for an alleged breach of trust in having invested the trust fund on an insufficient security and without procuring an independent valuation of the property. The security in question consisted in part of premises in which for forty years, the business of a butcher had been successfully carried on. At the time of the loan, a bank had in 1899 advanced £6,000 by way of overdraft to the mortgagor on the security of a deposit of the title deeds, and it was arranged that the bank should accept £3,500 from the trustees, who were to be first mortgagees therefor, and the bank was to take a second mortgage for the balance of its debt. The property had been valued in 1896 by a competent valuator at £6,550, of which the butcher business premises represented £3,800. Subsequent to the loan the butcher business was discontinued, and the value depreciated so as to be an insufficient security. On the evidence, Eve J. found that at the time of the loan the value of the property was £5,500, and he came to the conclusion that there is no rule which prevents trustees from lending more than one half, where part of the security consists of premises used for trade purposes; and that having regard to the advances made by the bank, and their willingness to take a second mortgage, the trustees had not acted unreasonably, and that though the loan was somewhat in excess of the amount which ought properly to have been lent, it was nevertheless a case in which he ought to exercise the discretion given him by statute to relieve the trustees from personal liability.

CANADIAN PACIFIC RAILWAY—CONSTRUCTION CONTRACT OF C.P.R. CL. 16—(44 VICT. C. 1 (D.))—EXEMPTION OF LANDS FROM TAXATION UNTIL SOLD OR OCCUPIED.

The King v. *Canadian Pacific Railway* (1911) A.C. 328. By the construction contract under which the Canadian Pacific Railway was built, ratified by 44 Vict. c. 1 (D.), it is provided by

clause 16 that the lands of the company are to be exempt from taxation until they are sold or occupied for twenty years after the grant thereof from the Crown. Certain lands of the company in Alberta had been contracted to be sold and part of the purchase money paid, but the contracts were subsequently annulled for default of the purchaser. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson), affirming the Supreme Court of Alberta, held that this was not a sale within the meaning of the Act, so as to render the lands liable to taxation. Another contention on the part of the Province of Alberta was that the twenty years' exemption commenced from the time when the survey of the lands was approved by the Surveyor-General and the lands were thus identified as part of the land subsidy of the company notwithstanding that the patent therefor did not actually issue until nine years afterwards, but their Lordships also agreed with the provincial court, that the twenty years ran from the date of the patent.

PATENT FOR INVENTION—SALE OF PATENTED ARTICLE TO JOBBERS AND DEALERS—CONDITIONS IMPOSED ON DEALERS—INFRINGEMENT OF PATENT—INJUNCTION—(R.S.C. c. 69, s. 21)—COSTS.

National Phonograph Co. v. *Menck* (1911) A.C. 336. This was an appeal from the High Court of Australia. The action was brought by a patentee to restrain an infringement of his patent of invention in the following circumstances. The invention was an improvement in phonographs and sound records. The plaintiffs in course of their business sold the patented articles to jobbers who in turn sold them to dealers, the dealers' contracts, however, were made with the plaintiff. The main object of these contracts was to prevent cutting of prices and the introduction of rival goods by way of exchange. The defendant held various dealers' contracts and was entered on the plaintiff's list, and under these contracts he was liable to be withdrawn from the list on violating any of the conditions of sale which might from time to time be imposed; and if so withdrawn he undertook "not to handle, sell or deal in or use either directly or indirectly" the patented articles unless authorized in writing to do so by the plaintiffs. The defendant's name was withdrawn from the list, but he still continued to sell the patented articles. The plaintiffs claimed an injunction to restrain him

from so doing. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson) agreed with the Australian court that no breach of contract had been established against the defendant. But on the important question whether a patentee can effectually impose conditions on which his patented article may be sold by others, their Lordships differed from the Australian court, and while conceding that special conditions of sale cannot be attached to a patented article so as to bind third parties into whose hands it may come without notice; they nevertheless concluded that such conditions may be made so as to bind all those who have actual notice of them. And applying that principle to the case in hand, their Lordships found that the defendant had actual notice of the restrictive conditions imposed by the plaintiffs, and therefore the plaintiffs were entitled to an injunction to restrain him from selling the patented articles contrary to those conditions. It appears that special leave to appeal was granted, and their Lordships, though to some extent allowing the appeal, nevertheless refused to reverse the award of costs to the defendant in the court below, and moreover ordered the appellants to pay the defendants' costs of the appeal as between solicitor and client.

SWARM OF LOCUSTS—DRIVING DESTRUCTIVE INSECTS FROM PREMISES—DAMAGE TO ADJOINING OWNERS.

Greyvensteyn v. *Hattingh* (1911) A.C. 355 was an action for damages founded on the fact that the defendants had driven a swarm of locusts from their land, with the result that the locusts had settled in the plaintiff's land and destroyed his crops. The Judicial Committee of the Privy Council (Lords Macnaghten and Robson, and Sir A. Wilson) agreed with the Supreme Court of the Cape of Good Hope, that the defendants had a right to drive the insects from their property, and that their settling on and injuring the plaintiff's crops gave him no cause of action against the defendants, there being on their part, no intention of injuring the plaintiff.

RAILWAY—NEGLIGENCE—DAMAGE CAUSED BY COLLISION—PLAINTIFF A TRESPASSER—NO BREACH OF DUTY TO DEFENDANT.

Grand Trunk Ry. v. *Barnett* (1911) A.C. 361. This was an appeal from the Court of Appeal for Ontario. The action was brought to recover damages against the Grand Trunk Railway for injury to the plaintiff caused by a collision owing to the

alleged negligence of the defendants' servants. It appeared that the plaintiff was a trespasser on a train of the Pere Marquette Railway, and while on the platform of a car in that train it backed into a car of the Grand Trunk Railway Co. which had been left without light on a siding foul of the main line on which the Pere Marquette train was backing. The accident occurred on the defendants' premises. The Judicial Committee of the Privy Council (Lords Macnaghten and Robson, and Sir A. Wilson) disagreed with the majority of the court below and held that the plaintiff was a trespasser not only on the Pere Marquette train, but also on the defendants' premises and that no breach by the defendants of any duty to him was shewn and therefore they were not liable as claimed.

NOTE.—On p. 460, ante, second line, for "appropriate" read "approbate."

Correspondence

PROFESSIONAL ETHICS.

Editor, CANADA LAW JOURNAL:

DEAR SIR,—I would like to elicit the views of your Journal, or of some of its able contributors, upon a matter of professional ethics. Suppose a person consults a solicitor in respect of an alleged wrong, and the solicitor writes to the person complained of asking redress, and obtains an offer of compensation, which is communicated to the client, but, being deemed by him insufficient, is refused, although its acceptance is advised by the solicitor.

The complainant then consults another solicitor, who writes to the alleged wrong-doer asking a settlement, threatening action, and, failing settlement, asking the name of his solicitor authorized to accept service of process on his behalf. The first mentioned solicitor writes in reply that he is authorized to accept such service. The question is, can a solicitor, having been consulted by and having advised and acted for one party as mentioned, afterwards properly accept a retainer from and act for the other party? In other words, to put it generally, is there any circumstance or combination of circumstances, that can justify a lawyer, who has acted for a client in a litigation or threatened litigation, in subsequently acting for the other side?

Yours truly,

A. B.

[Conduct, such as is spoken of in the above letter is most reprehensible. The solicitor first consulted had no business whatever to act for the other party. Speaking generally, there are no circumstances or combination of circumstances that could justify a lawyer who has acted for one client in litigation or threatened litigation in subsequently acting for the other side. If such conduct were brought to the attention of the Law Society a solicitor acting in the manner complained of would doubtless be properly disciplined.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] [May 8.

THE KING *v.* JONES.

Expropriation of land—Compensation—Transcontinental railway commission—Jurisdiction—Railway Act—Exchequer Court Act., sec. 2 (*d*)—3 *Edw. VII. c.* 71.

The Transcontinental Railway Act, 3 Edw. VII. c. 71 does not expressly empower the commissioners to deal with compensation for land taken for the railway, and sec. 15 giving them "the rights, powers, remedies and immunities conferred upon a company under the Railway Act" does not confer such power.

The Transcontinental Railway is a public work within the meaning of s. 2, sub-s. (*d*) of the Exchequer Court Act and proceedings respecting compensation for land taken for the railway may be taken by or against the Crown in the Exchequer Court.

Judgment of the Exchequer Court (13 Ex. C.R. 171) reversed and appeal allowed without costs.

E. L. Newcombe, K.C., for appellant.

Ont.] SMITH *v.* GOWGANDA MINES. [June 1.

Joint stock company—Allotment of shares—Surrender by Allotee—Unpaid calls—Transfer—Waiver.

S. subscribed for shares in a mining company, was notified of allotment of the same and paid the amount due on a first call as agreed. Later he notified the company that he withdrew his subscription, and, refusing to pay further calls, was sued therefor. It turned out that when S. subscribed for the stock all the shares had been allotted by the company and that given to him had been obtained by surrender from one of the original allotees.

Held, 1. Under the Ontario Companies Act when stock has been allotted by a company the only case in which the directors can regain control of it is that of forfeiture for non-payment of calls. As in this case there was no forfeiture, the company

did not legally own the stock allotted to S. and could not compel him to pay for it.

2. The provision in said Act that stock on which calls are unpaid cannot be transferred is imperative and cannot be waived by the company.

Appeal allowed with costs.

Hellmuth, K.C., and *Gallagher*, for appellant. *Smythe*, K.C., for respondents.

N.B.] CROCKETT *v.* TOWN OF CAMPBELLTOWN. [June 1.

Municipal corporation—Water service—Statutory authority—Construction of Statute—Water for domestic, fire and other purposes—Motive power—Discretion of council.

The charter of a town (50 Vict. c. 58, s. 6 (N.B.)) provides that "the town council of the town of Campbellton are hereby authorised and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes."

Quaere, per DAVIES J., and ANGLIN, J.:—Could the town be compelled to furnish water power for a motor in an industrial establishment?

Held, per IDINGTON, J., FITZPATRICK, C.J., and DUFF, J., contra that the charter does not empower it to do so.

The town council by by-law, fixed the rates to be paid for water including "printing presses one service, 1¼ pipe or less, per year $30." C., proprietor of a newspaper and printing establishment, connected his premises with the water mains by a two-inch pipe and received water for a year for his motor paying said rate therefor. He then continued the use of the water for some months when the council passed a resolution that newspaper proprietors should be notified that the supply would be cut off at a certain date, which was done. C. brought an action for damages to his business.

Held, per IDINGTON, J.:—The council had no authority to make the contract with C.; there was no authority in the absence of a special contract with the town, to place a two-inch service pipe for receipt of water, and if the municipality had power to enter into this agreement it was under no duty to exercise it.

Per FITZPATRICK, C.J., and DAVIES, DUFF and ANGLIN, JJ.:—If any contract existed it was one under which C. was entitled to a supply of water for his motor so long as the town council should, in its discretion, deem it advisable to continue it.

Per DAVIES, J., and ANGLIN, J.:—There was no evidence to warrant the jury's finding that the council was guilty of negligence, and exercised its discretion malâ fide.

Per FITZPATRICK, C.J. and DUFF, J.:—The circumstances disclosed were such as to warrant a finding of unfair discrimination against C.

Judgment appealed against (39 N.B. Rep. 573) affirmed, and appeal dismissed with costs.

O. S. Crockett, for appellant. *Teed*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Garrow, Maclaren, Magee, JJ.A., and Sutherland, J.] [July 13.

MANUFACTURERS' LUMBER CO. *v.* PIGEON.

Receiver—Equitable execution—Fund not presently payable—Contract.

Appeal by the plaintiffs from the order of a Divisional Court, 22 O.L.R. 378, reversing the order of MIDDLETON, J., 22 O.L.R. 36, by which a receiver was appointed, by way of equitable execution of the plaintiffs' judgment, to reach a fund in the hands of the Corporation of the City of Stratford.

MACLAREN, J.A.:—. . . The defendant had entered into a contract with the City of Stratford to pave a certain street and maintain it for 10 years. On the completion of the paving, he was to be paid 90 per cent. of the contract price, and the remaining 10 per cent. was to be retained by the corporation until the expiration of the 10 years, with the right to pay out of the same for any repairs not made by the defendant, interest being allowed him meantime on the balance in the hands of the corporation. The contract provided that at the end of the 10 years a "final certificate for the balance due (if any) shall be issued and paid to the contractor."

The whole question is, whether the said 10 per cent. is such a sum as is subject to equitable execution, and whether a receiver should be appointed. No case precisely in point was cited to us, and I have not been able to find any. It cannot be said that the authorities in cases more or less analogous are consistent

with each other or that they can all be reconciled. Upon the whole, the weight of authority appears to be decidedly in favour of the view taken by the Divisional Court, that this is not a proper case for the appointment of a receiver. The contract for the paving and maintenance is a single contract, and the money is only divided or apportioned for the purpose of payment. It is significant, also that the final certificate is not to issue until the expiration of the 10 years, and then only for the amount (if any) then found to be due. It is not at all certain that any part of the 10 per cent, retained by the corporation will ever be due or payable to the defendant, in which case the action of the Court in appointing a receiver would be wholly barren and fruitless.

Of the cases that have been referred to, I think that of *In re Johnson*, [1898] 2 I.R. 551, bears the closest analogy in its facts to the present; and in that case an Irish Divisional Court held that it was not a proper case for the application of the principle of equitable execution.

Appeal dismissed.

R. T. Harding, for plaintiffs. *R. S. Robertson*, for defendant.

Full Court.] [June 17.

WARREN, GZOWSKI & Co. v. FORST & Co.

Evidence—Telephone conversation between parties—Testimony of persons hearing words of one party—Admissibility.

Appeal by the plaintiffs from the judgment of a Divisional Court, 22 O.L.R. 441, ordering a new trial on account of the rejection by the trial Judge of certain evidence tendered by the defendants.

The parties are brokers in Toronto and the dispute is over a stock transaction. Both plaintiffs and defendants admit that there were telephone conversations between them on the 28th and 29th of June.

The defendants proposed to have their stenographer, Annie Slough, who claimed to have been in the same room as her employer during the conversation of the 28th, testify as to what he said through the telephone on that occasion. The trial Judge refused to allow her to do so, on the ground that she could not swear that it was the plaintiff Gzowski that was at the other end of the line, or that he had heard what the defendant Forst had spoken into the telephone. The Divisional Court over-

ruled the trial Judge and ordered a new trial, from which the defendants appeal.

MACLAREN, J.A.:—No English or Canadian authority was cited to us on the point. A number of American cases were referred to, the weight of authority there being in favour of the reception of such evidence. Among the cases that may be mentioned are *Miles* v. *Andrews*, 103 Ill. 262; *McCarthy* v. *Peach*, 186 Mass. 67; *Dannemiller* v. *Leonard*, 8 Ohio Circ. 735; *People* v. *McKane*, 143 N.Y. 455; *Shawyer* v. *Chamberlain*, 113 Iowa 742.

On principle I do not see how such evidence can be excluded. It is simply an application of the old recognized rules of evidence to modern methods and conditions. After a witness has sworn that he recognized by his voice the person to whom he was speaking, and who was answering him from the other end of the line, it is quite competent to produce in corroboration one who heard what he spoke into the telephone, in so far as it is relevant to the matter in question. In case of an oral contract it is not necessary that each witness should have heard the whole contract. The witness may testify as to what he heard, and it is for the Judge or the jury, as the case may be, to determine what weight is to be attached to it. If, for instance, two persons of different languages, but each understanding the language of the other, were to make a contract, each using his own language, a bystander, knowing only one of these languages, might testify as to what was said in the tongue he understood. Or a witness might testify as to what was said by one person on an occasion, although he might not be able to identify, or even see or hear the other party to the conversation provided the latter were identified *aliunde* as the other party. The fragmentary nature of the testimony, the possibility of a dishonest party talking into a telephone in the hearing of his witnesses without having any connection with the person to whom he was purporting to talk, and giving answers to questions that were never asked, are all circumstances that should be taken into account in determining what weight is to be attached to the evidence, but are not valid grounds for refusing to hear it at all. Such testimony is not in any way objectionable as being hearsay.

Appeal dismissed.

F. Arnoldi, K.C., and *D. D. Grierson*, for the plaintiffs. *A. McLean Macdonell*, K.C., for the defendants.

HIGH COURT OF JUSTICE.

Divisional Court—Chan. Div.] [June 15.

THIBODEAU *v.* CHEFF.

Negligence—Parent and child—Fire caused by act of imbecile son—Parents' liability.

Appeal by defendant from judgment of BRITTON, J., in an action for damages for injuries caused by the act of the defendant's son, who set fire to plaintiff's property. The boy was half-witted and in the habit of doing foolishly mischievious acts. The father did not see the act which caused fire nor consent to it or share any benefit therefrom, but rather shared in the loss. The rule of the common law was stated to be that a parent is not, because of his family relationship, legally responsible to answer for damages of the torts of his infant child, unless, amongst other things, he acquiesced in the act; so that in this case the question to be determined was as to the father's acquiescence.

Held, that the father's assent may be expressed or implied, and, if he carelessly and negligently countenanced his child in having used dangerous material which might be expected to do harm he was liable without direct approval of the particular act of tort; but, as in this case the father knew that the child was in the habit of doing torteous acts and was irresponsible and had access to matches and was allowed to handle and play with them, and the father failed to take steps to avert the disaster by removing the matches or by restraining the child, he was liable.

M. Wilson, K.C., for defendant. *O. L. Lewis,* K.C., for plaintiff.

Divisional Court—K.B. Div.] [July 19.

BONDY *v.* SANDWICH, WINDSOR, AND AMHERSTBURG RY. CO.

Street railway—Operation of on township highway—Township by-law forbidding running of animals at large—Animal killed by car—Negligence.

Verdict of jury of County Court of Essex for $200 damages for the killing of a horse on the highway. Appeal by the defendants. The plaintiff alleged that his horse was lawfully upon the highway and that the defendants' servants were negligent

in the operation of an electric car running on a tract on the highway. The jury found, (1), that the plaintiff's horse was wrongfully on the defendants' right of way, but (2), that the defendants could, by the exercise of reasonable care, have avoided the accident. The only negligence proved or which could be considered was that the motorman should have seen the horse sooner.

Held, 1. There is no such thing as negligence in the abstract. Negligence is simply neglect of some care which one is bound by law to exercise towards somebody.

2. That as the defendants were rightly upon the locus in quo, they did not owe any duty to the plaintiff in respect of his straying horse, which was a trespasser, except to use of proper precautions after discovering a condition of things which would be likely to cause an accident.

3. The case might be different if it had been proved that the township was in the habit of permitting a violation of their by-law, so that the horse might be expected upon the highway, or if, for any other reason, horses running at large were to be expected to be on the road and therefore on the track.

See *Barnett* v. *Grand Trunk Ry. Co.*, ante, page 385.

C. A. Moss, K.C., for defendants. *J. H. Rodd,* for plaintiff.

LAW SOCIETIES.

The Law Society of Alberta.

The eighth convention was held at Lethbridge on July 4, 5. A very satisfactory report was presented by the treasurer. The secretary reported that during seven months since the last Convocation, 35 barristers and solicitors had been enrolled, bringing the total number up to 347. The solicitor of the society reported on some matters of discipline; this report shewing that this important part of the duties of a law society had apparently been well attended to. Grants were made to branch libraries at Wetaskiwin, Red Deer, Medicine Hat, Macleod and Lethbridge. It was decided to co-operate with the Law Society of Saskatchewan in endeavouring to have the Provincial Governments of Alberta and Saskatchewan jointly re-print the complete ordinances of the North-West Territories. Speaking generally, we may gather that the business appertaining to the welfare of the legal profession in the Province of Alberta is being carefully attended to. The President is Mr. James Muir, K.C., and the secretary, Mr. Chas. F. Adams.