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THE LAW OF DIVORCE IN CANADA.

It is desirable that this most important branch of law should be thoroughly understood by the profession in view of the probability of its being the subject of legislation at an early date. With this in view we publish in this issue the report of the case of *Walker* v. *Walker* (see *post* p. 385), and an annotation thereon taken from the Dominion Law Reports; we reproduce also an article from the *Law Times* (Eng.), which calls attention to the obvious need of their being uniformity, if possible or as far as possible, in the law both as to marriage and divorce in the various Provinces of the Dominion.

Our readers will understand from this material that Ontario and Quebec are the only two Provinces in Canada without provision for judicial divorce, thus differing from the other Provinces.

The Courts in Ontario have consistently held that they have no jurisdiction to entertain divorce pleas, although in the early case of *Beatty* v. *Butler* (see Gemmill, at p. 40) the jurisdiction was exercised in a case when the marriage was void *ab initio*. In *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, Boyd, C., likewise held that the High Court of Justice in Ontario had jurisdiction to declare the nullity of a marriage which was void *ab initio* because it had been procured by fraud or duress. This would appear to be consistent with the judgment of Hyndman, J., of the Supreme Court of Alberta, in *Cox* v. *Cox* (1918), 40 D.L.R. 195.

Where however it was endeavoured to get the Ontario Courts to adjudicate *in rem* to dissolve the existing marital union, the Ontario Judges have held that no jurisdiction exists in their Courts. The following cases may be referred to in this connection:—

T. v. *B.* (1907), 15 O.L.R. 224; *Menzies* v. *Farnon* (1909), 18 O.L.R. 174; *May* v. *May* (1910), 22 O.L.R. 559; *A.* v. *B.* (1911),

23 O.L.R. 261; *Leakim* v. *Leakim* (1912), 3 O.W.N. 994; *Malot* v. *Malot* (1913), 4 O.W.N. 1577; *Prowd* v. *Spence* (1913), 10 D.L.R. 215; *Langworthy* v. *McVicar* (1914), 5 O.W.N. 767; *Hallman* v. *Hallman* (1914), 5 O.W.N. 976; *Reid* v. *Aull* (1914), 32 O.L.R. 68.

In Upper Canada (now Ontario) the laws of England of October 15, 1792, were introduced. This would not include the English Act of 1857, which enacted new substantive law and transferred cases of divorce and matrimonial causes to the newly-created Divorce Court. Hence when Upper Canada entered confederation it did not bring with it any substantive law as to divorce. Since Confederation the Dominion Parliament has as before mentioned enacted no general law as to divorce and hence it would appear that in Ontario to-day there is no substantive law in force.

If some substantive law is hereafter enacted by the Dominion Parliament for the Province of Ontario and no provision is made for the administration of same then it would seem to follow from the *Walker* and *Board* cases that the Supreme Court of that Province must adjudicate as to pleas filed under such law.

The old fashioned forum for the trial of divorce cases in this country, a Committee of the Senate of the Dominion, is entirely inadequate, unsuitable, and inconvenient, and is so expensive as to remind one of the well known sarcastic remarks of Mr. Justice Maule, when passing sentence on a man convicted of bigamy, in which he calls attention in a humorous and sarcastic manner to the hardship to which a poor man or woman is subject in seeking relief from the matrimonial tie. This unfortunate prisoner had taken to himself a wife to replace one who had deserted him, without previously obtaining a divorce, which the Judge said might have cost him the impossible sum of a thousand pounds or so. The Judge concluded his remarks as follows: "You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as a British Judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor."

If this jurisdiction goes from the Senate to the Courts, in Ontario and Quebec, the staffs that will have charge of these

cases will have to be materially increased as well as the number of Judges. It is a deplorable business, this clamor of the young people of this age to be freed from bonds which they hastily took upon themselves, and do not hesitate to break. Probably, however, if the Senate gets rid of these cases, applications may become fewer when they come to the Courts. There have been applications granted by the Senate which would never have been entertained by the Courts, such as cases in which the uncorroborated testimony of one witness had been held sufficient to make an order, ignoring the opportunity that such a departure from the ordinary rules of evidence affords for fraud and collusion.

The article referred to reads as follows:—

'There is at present a complete lack of, and an urgent need for uniformity in marriage and divorce law throughout the Empire. This receives apt illustration from the circumstance that the Matrimonial Causes Act, 1857, is not in force in Ireland, many Provinces of Canada, many West Indian islands and other Crown colonies, etc. The Dominion (in its geographical sense) of Canada is particularly an object lesson in this respect, and two appeals to the Privy Council have recently been concluded in which it has at length been finally settled that the provincial Courts in Manitoba and Alberta have the same powers of granting divorce as were conferred on the "Court for Divorce and Matrimonial Causes" in England by the Matrimonial Causes Act, 1857: (see *Walker* v. *Walker* and *Board* v. *Board* (1919), W.N. 204).

The position in Canada is extraordinary. By sec. 91 of the British North America Act, 1867, divorce is one of the matters on which the Dominion Legislature has exclusive jurisdiction, and the Provincial Legislatures have no power to pass statutes dealing with divorce. Up to the present time, however, no general Dominion legislation on this subject has taken place, though indirectly divorce jurisdiction has been conferred on some of the provincial Courts. Among the Provinces there are three phases of the question as to the jurisdiction of provincial Courts to entertain and make decrees in divorce proceedings. The cases of Ontario, British Columbia, and Manitoba respectively may be

taken as typical, though each one of the Provinces presents points of peculiarity.

In Ontario, the local jurisprudence is based on the law of England as it stood in 1792, and no statute, provincial, Dominion, or Imperial, appears to have been enacted giving any jurisdiction to Ontario Courts to entertain divorce proceedings. In Ontario accordingly divorce by judical decree cannot be had.

British Columbia did not become a Province in the Dominion of Canada until 1871. Prior to this, provision had been made by two successive local enactments for English law as it stood on the 19th Nov., 1858, being in force in British Columbia. The latter of these (the English Law Ordinance, 1867), ran: "From and after the passing of this ordinance the civil and criminal laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia." After federation this enactment was re-enacted in each successive revision of the local statutes, and now appears in the Revised Statutes of 1911 as s. 2 of c. 75. Whether in virtue of this enactment the Matrimonial Causes Act, 1857, was in force in British Columbia was a question that came before the Privy Council in 1908 (*Watts* v. *Watts* (1908), A.C. 573), and it was held that the English Act of 1857 did apply to British Columbia, and that the local Courts had jurisdiction to pronounce decrees of divorce.

Manitoba was made a Province of the Dominion on the 15th July, 1870. In 1888 a Dominion statute was passed (51 Vict., c. 3), which by s. 1 enacted that "the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on the 15th day of July, 1870, were from the said day and are in force in the Province, in so far as applicable to the Province," and subject to any subsequent legislation. This enactment now appears in the Revised Statutes of Canada, 1906, as s. 2 of c. 99. The Privy Council have held in the recent case of *Walker* v. *Walker* (*sup.*), that this enactment has had the same effect in making the English Act of 1857 applicable to Manitoba and giving the Manitoba Courts divorce jurisdiction

as the British Columbia enactment of 1867 had with respect to British Columbia. It was laid down that the English Matrimonial Causes Act, 1857, did much more than set up a new Court, and actually introduced new substantive law, giving the new Court a new jurisdiction arising out of the principle then first introduced into the law of England—the right to divorce *a vinculo matrimonii* for certain matrimonial offences. This right, it was held, thus became part of the substantive law of Manitoba.

A similar decision was given in *Board* v. *Board* (*sup.*), with respect to the right of the Alberta Courts to entertain proceedings for divorce. The Provinces of Alberta and Saskatchewan were in 1905 formed out of the North-West Territories and took with them the law in force in the North-West Territories. A Dominion statute relating to the territories (49 Vict., c. 25), enacted by sec. 3, that English law as on the 15th July, 1870, should be in force, in the same manner as already stated with regard to Manitoba. This enactment is now s. 12 of Rev. Stat. Can., 1906, c. 62. The Alberta courts have now therefore been finally held to have the divorce jurisdiction conferred on the English Court in 1857. The same reasoning will apply to the Province of Saskatchewan, so that four of the Canadian provincial Courts must now be taken as fully qualified to grant decrees in divorce, notwithstanding that the Provincial Legislatures cannot pass any statutes relating to divorce, and no direct legislation on the subject has been set on foot by the Dominion Parliament. This is hardly a result that could have been contemplated by the framers of the British North America Act, 1867.

The Privy Council decisions, though finally declaring that the Matrimonial Causes Act, 1857, applies *mutatis mutandis* in British Columbia, Manitoba, and Alberta—and inferentially Saskatchewan must be included—do not place these Provinces on precisely the same footing as England with respect to divorce law. The amending Act of 1884 (47 & 48 Vict., c. 68), for instance, will not be in force in Canada. By s. 5 of this amending Act failure to comply with a decree for restitution of conjugal rights is made equivalent to desertion, and a right to judicial separation or dissolution of marriage may accrue to the injured spouse.

This will not be possible in Canada, and the application of English law to cases in the Canadian Courts will require care and discrimination."

CONSTITUTIONAL SAFEGUARDS—HOW FAR CAN DELEGATES DELEGATE,

The British constitution, with its array of a few foundation principles, and the absence of any process by which these principles can be varied, has always been thought to be free from the danger of undergoing alterations. Written constitutions can undergo alterations, because they always contain some provisions for the introduction of amendments.

To most persons the idea that the British constitution has changed will come as a surprise. It has been our boast in the past, is our boast still, and will so remain, many think, until there comes a revolution more disastrous than any we have yet experienced.

Is the British constitution undergoing alterations, or are those traditions handed down to us through ages, some of which have been crystallized into statutes, and upon which the fabric of the Imperial dominion has been constituted, undergoing a process of alteration? It seems to be so, and the same remark applies to the Canadian constitution, which is partly written and partly unwritten.

The sovereignty of Parliament as it was formerly understood meant in Great Britain, The King, the Lords Temporal and Spiritual, and Commons. In Canada, the King, the Senate and Commons. In both, all acting together constitute Parliament, and this Parliament has "the right to make or unmake any law whatever." In England an important and radical change has been introduced. Down to 1911 no Act of Parliament could be passed without the consent of both Houses. The House of Lords had the right and power to check any bill sent up to it by the House of Commons. The Lords may still discuss a money bill for a calendar month, but they cannot prevent its becoming an Act of Parliament at the end of that month. It is only in this case that the Parliament

Act abolishes the veto of the Lords, but in every case it changes it from a final to a suspensive vote. If a bill has been passed by the Commons without any material change, and rejected by the Lords in each of three successive sessions, and that at least two years shall have elapsed between the date of the second reading in the first session, and the date on which it passes the Commons in the third session, it may be presented to the King for his assent, as though the Lords had not rejected it.

The change is not a matter of form but of substance, and is more radical and serious than formal. The result of the Parliament Act, which may have been foreseen at the time it was passed and perhaps was one of its objects, is that the Lords have been deprived of a power which might be and sometimes was used with very real benefit to the nation—the power of compelling a dissolution. Before the passing of the Parliament Act the Lords very rarely rejected or altered a money bill. Their absolute veto has for years been nothing more than a suspensive veto.

If the Lords forced a dissolution and a general election took place, and if the results proved that the electorate endorsed the Commons, the Lords by a well-established custom offered no further resistance to the Government proposals. The Parliament Act provides no similar security. The more distrustful the country becomes of its representatives, the more unwilling those representatives will be to appeal to it. A Government whose popularity is on the wane will be opposed to a dissolution. With the Parliament Act in force, the power of the Upper Chamber to enforce a dissolution is destroyed, and the consequence is that at every general election the constitutencies are divested of political power for a term of five years.

Recents Acts of Parliament in Canada and the different Provinces have given judicial and quasi-judicial authority to certain Government officials. In different ways in Canada this is done by the Railway Act of Canada, with reference to the powers conferred upon the Board of Railway Commissioners, the Public Utility Acts of the Provinces, and the various Land Ti... Acts or Acts respecting real property.

The decision of certain questions has been expressly removed from the domain of the Courts of Law and given to authorities

appointed to carry out the purposes of certain Acts. Whether these changes are convenient from the point of view of the man of business is problematical. A business man possibly could not efficiently carry out the business if tied down by the rules, some of which are artificial, but for which there is strong reason, which check and rightly check the action of a Judge. But that is not an argument that these rules should be abolished and others substituted for them which do not afford the check, which centuries of experience have disclosed are necessary. It is in these rules that the private citizen finds his most effective protection against arbitrary government. To remove the occasional fetters which the Courts have imposed upon the acts of official persons, we have deprived ourselves of our very best safeguard against official tyranny.

No doubt the delegation by the Legislature of its functions to quasi-judicial authority is the result of the serious mistrust felt by large classes of persons in the Government and partly because the Legislature itself is not opposed to relieving itself of controversial issues so long as it is not divested of political power and patronage.

Acts have been passed which have conferred extraordinary powers on authorities. For instance, the Public Utilities Act of Manitoba. Under that Act the Public Utility Commissioner for the time being is a law unto himself without any check. His mind may be judicial or otherwise. He is not obliged to follow precedent. He is not bound by the technical rules of legal evidence. His decision upon any question of fact or law within his jurisdiction is conclusive. He has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred upon him by the Act or by any other Act, and, save as provided in the Act, no order, decision or proceeding of the Commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court even when the question of its jurisdiction is raised. The only ground on which an appeal lies is from a final decision of the Commission upon any questions involving the jurisdiction of the Commission. Under the Act it would be very difficult to say when

the Commission has made a final decision, because the Commission, at any time, may order a re-hearing and extend, revoke or modify any order made by it. A Commissioner who did not desire his jurisdiction contested could unreasonably delay matters to the detriment of the parties interested. The experience of litigants has been that even Judges have endeavored to delay appeals in cases of their decisions. If there is an appeal from a Court of Law and Equity in ordinary cases, why should a Public Utility Commissioner be placed in a higher plane? It is not good for one man to have such far-reaching powers.

It was the glory and happiness of our excellent constitution that to prevent any injustice no man is to be bound by the first judgment, but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief.

Important and delicate questions involving property and rights of large value are to be submitted under the Act with no appeal. The important curb upon a Judge is to always have the right of appeal hanging over him, an efficacious remedy as it has been proved in many cases. Such an official may satisfy his own mind, but it is quite another thing to satisfy the law. He is subject to no effective discipline, his rulings may have continuity or not, his foot may be long or short.

The appointments of such authorities, as the appointments of many Judges, are political in a sense, and if made for proper qualifications would be satisfactory to that extent, but it is too much to expect that such appointments would always be so from the appointments in the past of other authorities, and even some of those to the Bench.

No doubt the principle, with proper safeguards, of delegating powers to such quasi-judicial authorities has been found convenient, particularly so on this continent where there has always been the conflict between the public utility and the municipal authorities, and the result may be, if the Act is administered and carried out in the spirit in which it was enacted, that evenhanded justice may be administered between conflicting interests. The municipal authorities however represent the masses; the public utility the investment classs. The municipality can generally

cry loudest, and it is just a question whether the result will not be that the quasi-judicial authorities' decision is imperceptibly deflected from impartiality. The human factor must be considered.

As rights of decision are conferred upon Commissioners in a large number of matters now, it is quite impossible to say where it will end. The people seem to be running mad on it. We may get so far soon that the country will be governed by commission and the people will find themselves divested of political power. This may be the result of the extraordinarily wide franchise that we boast about, a stake in the country is immaterial. The more ignorant and illiterate the voter, the more he distrusts those who he places in power, and desires some check upon his representative. He trusts himself to vote for someone he never should vote for.

The various Acts affecting real property and titles to land have provided in some jurisdictions that a mortgage can be foreclosed only by following the procedure provided for that purpose by the Act itself. The Australian Courts and the Privy Council have decided that the only way a mortgagee could extinguish the rights of a mortgagor was by foreclosure under the Act or by sale under the Act. Foreclosure by the Courts was satisfactory, but now, and I have never heard a reason given for the change, the jurisdiction of the Courts which has existed for ages is ousted. Here again the mind of one man is paramount. The Registrar's successor, or whatever the official's name may be, is in no way bound to follow the technical rules laid down by his predecessor, more often than not unwritten and handed down from memory, and these officials are almost as jealous of their rights as the Chancery and Common Law Judges used to be.

The practice has not been to find such authorities any more expeditious than the Courts, except possibly the Board of Railway Commissioners which exists under peculiar circumstances and is certainly an improvement upon the old Railway Committee of the Privy Council, especially the practice of hearing cases in different parts of the Dominion.

If some of the functions delegated to the quasi-judicial authorities were vested in them as subordinate officials of the Courts,

there would be some security and effective check on their proceedings.

The law Courts have in one or two instances discovered an unsuspected weakness in the official armour created by these Acts, but with these exceptions the rule of law has been suspended in the interest of those who wear it, and the Legislature promptly comes to the rescue of its protegé and passes an amendment. From such interference the ancient veneration for the rule of law has suffered in the last few years a marked decline.

H. P. BLACKWOOD.

CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION.

The object of this conference has been referred to in our summary of the proceedings of the Canadian Bar Association recently held at Winnipeg. It deserves more than passing notice as it is of great importance to the commercial world and this country, that the law on a variety of subjects should be uniform in all Provinces. The labors of the members of this conference deserve the attention and support of the Federal as well as the Provincial Governments, of Boards of Trade, of representatives of the various commercial associations, and of business men generally.

This conference is the result of the appointment by the various Provincial Governments of three lawyers from each Province; who are asked to discuss and recommend such legislation as may be desirable for the attainment of the end in view. Several of the Provinces have already named their representatives and these with others who have not yet any official sanction have begun the work which is proposed to be carried on. Members of the profession can materially aid those who are now voluntarily giving their time to this important matter by making such suggestions as may seem to them desirable. And here we may remark that Lord Bacon once said "Every man owes a duty to the profession to which he belongs." Here is an opportunity.

Mr. John D. Falconbridge, of Toronto, one of the commissioners appointed by the Province of Ontario, is acting as Record-

ing-Secretary, and has devoted much time and thought to the conference and has done much valuable work in connection therewith.

The following memorandum which introduces the second report of the conference gives further information as to its object and as to what has already been done:—

"It has long been generally recognized that the independent action of the various Provincial Legislatures has resulted in a diversity of legislation which, especially with regard to commercial law, raises a serious obstacle to commercial intercourse between different parts of the Dominion and is a source of embarrassment to British and foreign merchants doing business in Canada. In the United States, where a similar but perhaps more complicated situation exists, work of great value has been done by the National Conference of Commissioners on Uniform State Laws. For the past twenty-eight years these commissioners have met annually and have drafted various uniform statutes, and the subsequent adoption by many of the State Legislatures of these statutes has secured a substantial measure of uniformity on various subjects.

The obvious benefits resulting from the meetings of the State commissioners in the United States suggested the advisability of similar action being taken in Canada, and on the recommendation of the Council of the Canadian Bar Association several of the Provinces passed statutes providing for the appointment of commissioners to attend a conference of commissioners from the different Provinces for the purpose of promoting uniformity of legislation in the Provinces.

The first meeting of the commissioners appointed under these statutes and of representatives from those Provinces in which no provision has been made for the formal appointment of commissioners, took place in Montreal on the 2nd day of September, 1918, and at this meeting the Conference of Commissioners on Uniformity of Legislation in Canada was organized. Although the work of the commissioners at their first meeting was necessarily of a tentative and preliminary character, provision was made for the consideration of various subjects by committees during the ensuing year.

The second annual meeting of the Conference took place in Winnipeg on the 26th, 27th, 28th and 29th days of August, 1919.

Several sessions were devoted to the consideration of drafts of model statutes relating to the following subjects:—

(1) Legitimation by subsequent marriage.

(2) Bulk sales.

(3) Conditional sales.

(4) Fire insurance policies.

The Conference also considered and adopted the reports of committees on the following subjects:—

(1) Legislative drafting.

(2) Sales of goods and partnership.

As noted in the last mentioned report, the English Sale of Goods Act, 1893, has been adopted in New Brunswick and Prince Edward Island, as a result of the first meeting of the Conference. This statute is now in force in all the Provinces of Canada except Ontario and Quebec. The English Factory Act, 1889, has also been adopted in New Brunswick, and is now in force in six Provinces.

Statutes have been passed in some of the Provinces providing both for contributions by the Provinces towards the general expense of the Conference and for payment by the respective Provinces of the travelling and other expenses of their own commissioners. It is hoped that similar statutes will be passed by the other Provinces. The commissioners themselves receive no remuneration for their services.

It seems desirable to direct attention to the fact that the appointment of commissioners does not bind any Province to accept any conclusions arrived at by the Conference and that such uniformity of legislation as may be secured by the labours of the Conference will depend upon the subsequent voluntary acceptance by the Provincial Legislatures of the recommendations of the Conference."

DIVORCE APPEALS IN WESTERN PROVINCES.

Is there an appeal in divorce cases in Manitoba, Saskatchewan, Alberta and British Columbia? The point will undoubtedly arise soon in Manitoba and the other Western Provinces as to whether or not there is an appeal to the Provincial Courts of Appeal from the decision of a single Judge in divorce cases.

In the case of *Scott* v. *Scott*, 4 B.C.L.R. (1891), p. 316, the full Court of British Columbia held that there was no appeal to that Court in divorce matters because the Provincial Legislature which created that Court had not power to confer divorce jurisdiction on any Court, and hence it could not provide for an appeal in divorce matters. Again, in the case of *Brown* v. *Brown*, 14 B.C.L.R. (1909), p. 142, the full Court of British Columbia held that it had no jurisdiction to hear appeals final or interlocutory in divorce matters. This last case appears to have been fully argued with eminent counsel on each side. In the *Brown* case the decision in *Scott* v. *Scott* was affirmed and approved. From the reasoning of the Judicial Committee however in the *Walker* and *Board* cases it would appear that a Provincial Legislature can confer jurisdiction in divorce on a Court which it creates. This principle runs all through the argument and the judgments in *Walker* and *Board*. Hence if a Provincial Legislature of any of the above Provinces has provided for appeals from any judgment, decision, order or decree of a single Judge, etc., it would follow in the absence of Dominion legislation that there is an appeal to the provincial Court of Appeal in divorce matters.

Divorce has hitherto been viewed as a matter separate and apart from almost every other subject mentioned in the B.N.A. Act, but it is submitted that the effect of the discussions before the Privy Council in the *Walker* and *Board* cases and the judgments themselves indicate clearly that as matters stand at present the administration of the divorce law in the above four Provinces falls to the Provinces. Hence there can be an appeal to the provincial Court of Appeal in a divorce matter just as there can be an appeal in a matter arising out of bills and notes, banking etc., provided of course that the Act constituting the Court of Appeal so provides.

It would seem anomalous that a modern community should have no appeal from the finding of a single Judge in such an important matter as divorce. There would practically be no appeal if the *Scott* and *Brown* cases are rightly decided. There is of course always an appeal to the King-in-Council but such is too expensive for the average citizen.

Winnipeg, Man. JOHN ALLEN.

UNAUTHORISED PRACTICE OF LAW.

This Journal has always taken the ground and frequently referred to the wrongs suffered by the legal profession at the hands of the host of unlicensed practitioners and conveyancers. No remedy has been found, or rather none seems possible when many of our Provincial legislators are the robbers or are in various ways in alliance with them. Although the subject is we fear of only academic interest we reproduce the words of a writer in the *Law Notes*, Northfield, U.S.A., as follows:—

"A collateral advantage which would flow from a better organization of the Bar is the check which might thereby be put on the many petty encroachments on the domain of the legal profession. Probably the great majority of the deeds and mortgages made in the United States are drawn by real estate brokers and the like. Sometimes, of course, nothing more is required than the mere clerical ability to fill out a blank form. In other cases, the utmost care and skill in the use of technical phrases is necessary to carry out the intention of the parties, and neither the average grantor nor the average real estate dealer is able to recognize such an instance when it arises. The security of land titles and the avoidance of legal disputes in respect to them is a matter which deeply affects the public interest. The evils of allowing a layman to conduct a proceeding in Court are in some respects less than those of allowing him to draw an instrument on which depends the title to landed property—perchance a modest home, the product of years of industry and thrift. There are few lawyers who cannot recall a case where a title has been thrown into liti-

gation, if not lost, because of an error in the deed which no member of the profession would have committed. There is possible, of course, the cynical view that the amateur draftsman brings into the profession fees for the litigation created by his blunders far exceeding those which could have been charged for the original service. This does not, however, represent the attitude of the profession, which has repeatedly shewn by its advocacy of workmen's compensation Acts and similar measures, its willingness to sacrifice its financial interest to the public welfare. Apart from the injury to the public from the blunders inevitable in the drawing of instruments of title by laymen, the practice works a distinct hardship to the younger members of the profession. The young lawyer, precluded by the code of ethics from soliciting employment, is forced to see this class of work which he has been specially trained to perform go into the incompetent hands of laymen who are bound by no restrictions of professional ethics, and to lose thereby not only the small though sorely needed fees, but also the valuable opportunity to lay the foundations for future employment by his skilful performance of these minor services. A suggestion recently made, which may go impracticably far yet is deserving of serious consideration, is that every lawyer should be *ex officio* a notary public, and that the office of notary should be confined to members of the legal profession. While the position of notary has lost much of its ancient dignity it still retains functions which are capable of use in the perpetration of fraud. The restriction of those functions to members of a learned profession subject to professional discipline would largely do away with the antedated acknowledgments and similar frauds which the practitioner occasionally encounters."

JUDICIAL CHANGES IN ENGLAND.

There have been many judicial changes in England recently. The following were announced on Nov. 1st. Sir Charles Swinfen Eady, Master of the Rolls, has retired much to the regret of the Bar, Lord Sterndale taking his place. Lord Justice Duke becomes President of the Probate, Divorce and Admiralty Division. Mr.

Justice Younger has been appointed to fill the vacancy thus created in the Court of Appeal. This selection has been criticised by some of the legal journals as other Judges of greater seniority and of at least equal merit have been passed over in his favour. This does not often happen in England, but is not unknown in this country, and this without public criticism. The probable reason for the lack is that in small communities criticism necessarily becomes more or less personal; which is a pity, as public sentiment should always be sounding in the ears of those responsible for objectionable appointments. Mr. Frank Russell, K.C., son of the late Lord Russell, is the new Chancery Judge taking the place thus vacated.

REPARATION FOR CRIME.

The assertion of the Common Law that "there is no wrong without a remedy" sounds very well, but is found in practice to have so many exceptions as to induce some of the wronged ones rather to submit quietly and to take comfort in another assertion that "Vengeance is mine, I will repay saith the Lord"—and so put them selus in the care of the Kings of Kings rather than take chances in the Courts of an earthly King.

The *Law Notes* (Northport, N.Y.), in an article under the above caption discusses an interesting question in the above connection, and refers to what is sometimes a failure of justice, in that there is no provision in the law for a person injured by a criminal, for the punishment of such criminal in such a way as to give reparation to the victim. Let us suppose the case of a man with a wife and family being incapacitated for work by some criminal act, and the man their only support. The criminal is sent to prison or penitentiary at hard labour; but the work he he does enures to the benefit of the state; or, perhaps, the prisoner is kept from productive work lest its product should come into composition with that of some Labour Union. The product certainly ought to go to his wife and family. Could not some legislation be devised to provide a remedy for this manifest wrong? Our Provincial Legislatures will soon be at work grinding out statute law, and some of the new members might like to have

a suggestion. The usual refuge for some destitute legislator from the rural districts who desires to shew his constituents that he is at work, is to bring in a Bill to amend the Municipal Act. Let him try his prentice hands on the above subject and make himself famous.

LIGHT LEGAL LITERATURE FOR LAWYERS.

Lord Finlay, in his address to the Bar on a recent occasion (*ante* p. 339), bore witness to the necessity of paying more attention to a much neglected branch of legal education or what might be called a necessary foundation stone in the building up of legal education in one who seeks to excell in the legal profession. He expressed his opinion that wide reading and literary culture outside of the reading of pure law, he expressed this in the following words: "Students should not confine themselves to the study of law alone, if you do, you will not be a good lawyer, you must remember that the law concerns itself with mankind and is as broad as that word."

We are reminded of this by a very bright little volume by Charles Morse, K.C., D.C.L., under the title of "Apices Juris," published a few years ago. We would recommend it to our readers. It is published by the Canada Law Book Company. We hope occasionally, as space permits, to make some extracts from its pages. We cannot begin better than by giving his fine testimony to the qualities of one of the greatest of all the leaders of the Canadian Bar, beloved and revered by all his brethren, the late Christopher Robinson, K.C. This reference is especially appropriate at this time as Mr. Robinson was an example of the kind of lawyer that would appeal to such a good judge of what a lawyer ought to be as the ex-Lord Chancellor of England:—

CHRISTOPHER ROBINSON, OBIIT, 31ST OCTOBER, 1905.

God is no niggard when He makes a man
To stand as an exemplar to his time.
The strength that crowns him, and the aim sublime
Moulding to every action that we scan

Persuade us that not here is our true clime:
Not here in this low vale where Life began
But ends not, no, nor ever sees its prime,
Shall we the Soul's high mansion build or plan.

Even such an one was he who late hath gone,
Beyond our greetings and beyond our ken,
Into the Master's peace and benison.
Careless of honours prized by lesser men,
From youth to age he held our homage, then
Ended at eventide his race well run.

It is often said, and truly, that marriage revokes a will. Sec. 18 of 1 Vict. c. 26, is explicit on that point, but it contains the following important exception: "Except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions." But a will made in exercise of a power is not revoked by marriage where the heir executor, or administrator, or statutory next of kin would not *in all events* take in default of appointment: (*In Bonis Fenwick*, L. Rep. 1 P. & D. 319). Nor is the will revoked if the gift in default of appointment is to the children of the testator, or to the next of kin simply, instead of statutory next of kin: (*In Bonis McVicar*, L. Rep. 1 P. & D. 671).—*Law Times*.

That the increase in the cost of living and in all the necessities of life over the cost at the time lower verdicts allowing damages for personal injuries were rendered must, to some extent, be taken into consideration in determining whether or not a verdict in such a case was excessive, is held in the Iowa case of *Noyes* v. *Des Moines Club*, 170 N.W. 461, annotated in 3 A.L.R. 605.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SHIP—CHARTERPARTY—HIRE PAYABLE IN ADVANCE—DEFAULT IN PAYMENT OF HIRE—WITHDRAWAL OF SHIP—RE-DELIVERY—APPORTIONMENT OF FREIGHT.

Italian State Railways v. *Mavrogordatos* (1919) 2 K.B. 305. A time charterparty of a vessel had been granted to the plaintiffs by the defendants subject to the condition that the hire should be paid monthly in advance, and in default the defendants should be at liberty to withdraw the vessel without prejudice to any claim they might have. The hire was payable until the vessel's re-delivery at a port in west Italy. On 10 January, 1917, a month's hire became due and was not paid; on 11 January, 1917, while the ship was on her way to Barry under the charterers' orders the defendants wrote to the charterers withdrawing the vessel from the service. The ship arrived at Barry on the 23 January, 1918, and the defendants took possession of her there. This action was brought claiming a declaration that the charterparty was still subsisting. The defendants counterclaimed for hire until the 23 January, when as they contended the ship was re-delivered to them; but Sankey, J., held that the defendants had cancelled the charterparty on the 11 January, 1918, and consequently were not entitled to recover any hire after that date; and the Court of Appeal (Bankes and Duke, L.JJ., and Lawrence, J.), affirmed his judgment.

ADMIRALTY—SALVAGE OF NEUTRAL VESSEL BY WARSHIP—RESCUE OF VESSEL FROM GERMAN SUBMARINE—CLAIM OF SALVAGE BY KING'S SHIP—QUANTUM OF SALVAGE—NAVAL PRIZE ACT, 1864 (27-28 VICT. C. 25), S. 40.

The Svanfos (1919) P. 189. This was an action for salvage by the commander, officers and crew of H. M. Submarine G. 7. The defendants were the owners of the two vessels in question. Both were Norwegian vessels. They were attacked by a German submarine which was making preparation to destroy them when the G. 7 appeared on the scene and drove off the German submarine. One of the vessels on seeing the German submarine retire, steamed away under her own steam, the other was in a leaky condition and a crew was put aboard who with great difficulty stopped the leaks and enabled the boiler fires to be lit, and on a Norwegian war vessel subsequently appearing at the request of

its commander this vessel was handed over to his care and thereafter reached a Norwegian port. Hill, J., who tried the action, held that the plaintiffs were entitled to salvage in the circumstances having regard to the altered conditions of warfare arising from the German practice of destroying captured neutral vessels. He also held that the Naval Prize Act, 1864, has no application to foreign vessels. He fixed the salvage of the vessel which got off under her own steam at £1,000 and that of the one which was leaky at £1,300.

ADMIRALTY—PILOTAGE—COMPULSORY PILOTAGE UNDER DEFENCE OF THE REALM REGULATIONS—PILOT NOT SERVANT OF SHIP-OWNERS—LIABILITY OF SHIP-OWNERS FOR COLLISION UNDER PILOTAGE—PILOTAGE ACT, 1913 (2-3 GEO. V. c. 31), s. 15.

The Chyebassa (1919) P. 201. This was an action for damage occasioned by a collision. The ship at the time the collision took place was under compulsory pilotage under the Defence of the Realm Regulations. The owners sought to escape liability on the ground that the pilotage was compulsory and the pilot who caused the collision was not their servant; but Roche, J., who tried the action, held that the Pilotage Act, 1913, s. 15, had in effect deprived the owners of that defence.

PRIZE COURT—ENEMY PROPERTY SOLD TO NEUTRAL—CONTRABAND—PASSING OF PROPERTY—DECLARATION OF PARIS ART. 2—KNOWLEDGE OF NEUTRAL SHIP-OWNER OF NATURE OF CARGO—CONDEMNATION OF SHIP—INTEREST ON PROCEEDS OF SALE RELEASED.

The Dirigo (1919) P. 204. This was a proceeding in the Prize Court for the condemnation of several ships and cargoes in the following circumstances: The ships were neutral Scandinavian ships, the cargoes consisted of goods of a contraband character sold by a United States branch of a German firm to neutral firms in Scandinavia. The goods were sold and shipped in the United States to the order of the buyers in ships named by them. In some cases the property in the goods remained in the vendors at the time of the seizure of the vessels and in such cases the cargoes were condemned as prize. In other cases the property had passed to the buyers and the question arose how far the doctrine of prize law against the passing of property during a voyage applied. As to such cases Lord Sterndale, President P.D., held that where the shipment was made on the terms of payment on tender of documents at the time of shipment and such payment was made

that would be sufficient to pass the property even though the payment were not actually made until after the voyage had commenced and in such cases the goods were not liable to condemnation. It was also claimed on behalf of the Crown that under Art. 12 of the Declaration of Paris enemy goods carried under a neutral flag were liable to condemnation even if they were not contraband; but the learned President was of the opinion that under that article the goods of an enemy were protected from seizure when carried in a neutral vessel provided they have not an enemy destination. He also held that where a cargo has been seized and sold before condemnation, and the proceeds are subsequently released to the claimants thereof, the Crown is not as a rule liable to pay interest on the proceeds.

COMPANY—WINDING-UP—SEIZURE BY SHERIFF BEFORE PRESENTATION OF PETITION—RENT PAID TO LANDLORD BY SHERIFF—LANDLORD AND TENANT ACT, 1709 (8 ANNE, C. 14), S. 1. (R.S.O. C. 155), S. 55.—COMPANIES ACT, 1908 (8 EDW. 7 C. 69), SS. 139, 140, 142, 211.—(WINDING-UP ACT R.S.C. C. 144, SS. 5, 18, 2

The British Salicylates Ltd. (1919) 2 Ch. 155. This was a summary application by the liquidator of a company to compel a Sheriff to pay over the rent which he had paid to a landlord in the following circumstances: Prior to the presentation of the petition to wind up the company a writ had been placed in the Sheriff's hands against the company under which he had made a seizure of the company's property; after the presentation of the petition an application was made to the Court to stay the execution, which was refused; the Sheriff thereupon sold the goods seized, and out of the proceeds paid the claim of the landlord not exceeding one year's arrears of rent as provided by 8 Anne, c. 14, s. 1 (R.S.O. c. 155, s. 55) and after deducting the amount of the plaintiffs' debt and costs, handed the balance to the liquidator. Astbury, J., held that the Sheriff had properly made the payment to the landlord and rejected the application of the liquidator.

SETTLEMENT—LIFE POLICY—COVENANT BY HUSBAND—LAPSE OF POLICY THROUGH HUSBAND'S DEFAULT—RIGHT OF TRUSTEES TO IMPOUND HUSBAND'S INTEREST.

In re Jewell (1919) 2 Ch. 161. By a marriage settlement whereby the property of husband and wife were settled, a policy was assigned by the husband to trustees on the trusts of the settlement and the husband covenanted to keep it in force. Owing to the husband's default the policy lapsed. The settlement expressly provided

that the trustees might in their discretion apply the income of the wife's fund towards the payment of the premiums for "keeping on foot or restoring" the policy. The wife died in 1904 and there was one child the issue of the marriage. Two questions were submitted to Younger, J., for adjudication: (1) Did the provision as to the application of the wife's fund "for keeping on foot or restoring" the policy apply to a lapsed policy? and as a matter of construction, the learned Judge decided that it did not. The other question was whether the trustees were entitled to impound the husband's interest under the settlement towards making good the loss sustained by reason of his failure to keep the policy on foot, and this question the learned Judge answered in the affirmative, being of the opinion that on general principles of equity neither the husband nor his assigns could take anything out of the wife's fund without first making good to the trust estate the loss occasioned by the husband's default, and that the trustees were therefore entitled to retain the income of the wife's fund during the husband's life until a policy upon his life for the amount covered by his covenant had been effected in their names, or until there had been retained thereout the surrender value for the time being of the original policy which had lapsed.

WILL—CONSTRUCTION—BEQUEST OF CHATTELS "AT" A SPECIFIED HOUSE—"FURNITURE"—"OBJECTS OF VIRTU AND CURIOSITES"—RARE BOOKS AND MANUSCRIPTS—PLATE DEPOSITED WITH BANKER FOR SAFE KEEPING.

In re Zouche (1919) 2 Ch. 178. This was a summary application to Lawrence, J., on the construction of a will whereby the testatrix had bequeathed "the furniture, pictures, plate, articles of virtu and curiosities at Parham House at the time of my decease." At this house was a collection of books and MSS. arranged on shelves running all round a room in the house called the library, and it was held by the learned Judge that this collection did not as a whole pass under the will under the bequest of furniture, but that rare and artistic books and MSS. part of the collection might pass as "articles of virtu or curiosities" and an inquiry was directed on this point. The testatrix had a quantity of plate which she had sent to her bankers for safe keeping when she left Parham House furnished, and so remained at the time of her decease. She had also lent the British Museum some rare books and MSS. for exhibition and which were still there at the time of her death, and the learned Judge held that neither these nor the plate passed under the above bequest.

WILL—SPECIFIC LEGACY—ADEMPTION—ORDER IN LUNACY—MISTAKE—RULE IN CLAYTON'S CASE.

In re Hodgson, Public Trustee v. *Milne* (1919) 2 Ch. 189. An interesting little point, as Peterson, J., says, was presented in this case. A lady being of sound mind made a will specifically bequeathing a sum in consols. She subsequently became lunatic, and under a misapprehension that her income was insufficient to provide for her maintenance, an order was made in Lunacy for the sale of the consols and the application of the proceeds towards her maintenance. After the consols had been sold and proceeds paid into Court and a sum of £48.11.11 paid thereout towards her maintenance, it was discovered that there were dividends in Court to which she was entitled sufficient for her maintenance which were subsequently paid to the credit of her account under s.123(1) of the Lunacy Act, 1890 (see R.S.O. c. 68, s. 19(1)). The lunatic and his legatees are entitled to the same rights in the proceeds of the property of the lunatic ordered to be sold, as they would have in the property if it had not been sold, so that the right of the specific legatees in the balance of the proceeds of the consols was conceded, but they claimed that they should also get the £48.11.11 applied thereout for maintenance. On the other hand, the residuary legatees claimed that not only that sum but all subsequent payments out of the account should under the rule in *Clayton's* case be treated as payments out of the proceeds of the consols, notwithstanding sufficient sums from income had been subsequently paid into the credit of the bank account. But the learned Judge refused to give effect to this contention, but held that the £48.11.11 had in fact been paid out of the proceeds of the consols, and that though the specific legatees were entitled to the balance of the proceeds, they were not also entitled to be paid that sum.

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Viscount Haldane, Lords Buckmaster, Dunedin, Shaw and Scott Dickson.] [48 D.L.R. 1.

WALKER v. WALKER.

Divorce and separation—Imperial statute in force in Manitoba—Dominion legislation—Provincial legislation—Jurisdiction of Court of King's Bench to entertain divorce actions.

The Dominion Act of 1888, which was passed to remove certain doubts as to the application of certain laws to the Province of Manitoba so far as it extended to the subject of marriage and divorce, was within the exclusive power of legislation conferred on the Dominion Parliament by s. 91 of the B.N.A. Act. This Act provided that the laws of England relating to matters within the jurisdiction of the Parliament of Canada so far as the same existed on July 15, 1870, had been as from that date and were in force in Manitoba insofar as applicable to the Province, and unrepealed by Imperial or Dominion legislation.

Their Lordships held, following the *Watts* v. *Watts* case ([1908] A.C. 573), that this Act was sufficient to make the provisions of the English Divorce and Matrimonial Causes Act of 1857 part of the substantive law of Manitoba. The English Act of 1857 not only set up a new Court, but introduced new substantive law and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old Ecclesiastical Tribunals possessed, but a jurisdiction arising out of the principle then for the first time introduced into the law of England of the right to divorce *a vinculo matrimonii* for certain matrimonial offences.

The Court of King's Bench Act, passed by the Legislature of Manitoba in 1913, was sufficient to give the Court of King's Bench jurisdiction to entertain petitions for divorce, and in respect of matrimonial offences.

APPEAL by defendant from the judgment of the Manitoba Court of Appeal, 39 D.L.R. 731, which held that the English divorce laws in force in 1870 were in force in Manitoba, and that

the Court of King's Bench had full power to administer these laws. Affirmed.

F. H. Maughan, K.C., and *Horace Douglas*, for appellant; *Sir John Simon*, K.C., and *John Allen* (Deputy Attorney-General for Manitoba) for respondents.

ANNOTATION FROM 48 D.L.R.

EXISTENCE OF JUDICIAL DIVORCE IN MANITOBA, SASKATCHEWAN AND ALBERTA AS DETERMINED BY THE PRIVY COUNCIL IN THE *Walker* v. *Walker* AND *Board* v. *Board* CASES. BY JOHN ALLEN, DEPUTY ATTORNEY-GENERAL FOR MANITOBA.

The judgment of the Privy Council in the case of *Walker* v. *Walker and the Attorney-General of Manitoba* is most interesting as finally determining that judicial divorce exists in Manitoba and has existed, in any event since the year 1888 when the Dominion Parliament enacted the Act c. 33, of the Statutes of that year, entitled "An Act respecting the application of certain laws therein mentioned to the Province of Manitoba."

It was argued before the Court of Appeal of Manitoba that the right to judicial divorce had existed in Manitoba since Jan. 7, 1864, because the Ordinance of the Governor in Council of Assiniboia introduced the laws of England of that date so far as applicable to the old Hudson's Bay Colony, and there could be no question of the applicability of the English law of divorce and matrimonial causes (c. 85 of 20 and 21 Vict.) after the decision in *Watts and Att'y-Gen'l for B.C.* v. *Watts*, [1908] A.C. 573. (See judgment of Cameron, J., in *Walker* v. *Walker and Att'y-Gen'l* (1918), 39 D.L.R. 731, at p. 752.)

The Judicial Committee, however, refused to deal conclusively with the effect of the Ordinance of 1864 and rest their judgment on the 1888 Dominion Act.

In the argument before the Judicial Committee it was pointed out that the Ordinance of 1864 had already been interpreted by the decision in *Sinclair* v. *Mulligan*, 3 Man. L.R. 481 and 5 Man. L.R. 17, as referring only to procedure and not to substantive law. Hence their Lordships in the Judicial Committee doubtless hesitated to upset the *Sinclair* v. *Mulligan* judgment which was rendered over thirty years ago, and founded their judgment on the 1888 Dominion Act which is expressed in language which leaves no room for doubt.

It would have been interesting indeed if the Judicial Committee had finally determined just what was meant by the old Ordinance of Jan. 7, 1864, which caused so much trouble to the early lawyers and judges in the Prov. of Manitoba.

It would appear, however, that the judgment in *Sinclair* v. *Mulligan* is not correct for the following reasons: Killam, J., held that the

Ordinances of April 11, 1862, and of Jan. 7, 1864, introduced procedure only and not substantive law. The Statute of Frauds is procedure and hence if the reasoning of Killam, J., is correct, the 1862 and the 1864 Ordinances and similarly the Ordinance of 1851 (found at p. 378 of Oliver) couched in the same language would introduce the Statute of Frauds. Hence the finding in *Sinclair* v. *Mulligan* that the Statute of Frauds was not introduced would appear to be incorrect. It is worthy of note that neither court in *Sinclair* v. *Mulligan* touched on the 1851 Consolidation of the Ordinances of the Governor and Council of Assiniboia.

The 1888 Dominion Act is as follows:—

An Act respecting the application of certain laws therein mentioned to the Province of Manitoba.

(Assented to 22nd May, 1888).

For the removal of doubts, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows:—

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, insofar as the same are applicable to the said Province and insofar as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada.

2. Whenever, between the said day and the first day of March, one thousand eight hundred and eighty-seven, interest was payable in the said Province by the agreement of parties or by law and no rate was fixed by such agreement or by such law, the rate of interest was six per centum per annum.

3. Nothing in the first section of this Act contained shall affect any action, suit, judgment, process or proceeding pending, existing or in force at the time of the passing of this Act.

S. 1 above is the important section. This s. 1 was re-enacted in the same form in the 1906 revision of the Statutes of Canada.

Now "Divorce" is one of the subjects assigned exclusively to the Dominion Parliament by sub-head 26 of s. 91, of the B.N.A. Act. Hence the 1888 Dominion Act enacted that for Manitoba from July 15, 1870, the law as to divorce should be the law of England as of July 15, 1870, if the same were applicable. The case of *Watts and Att'y-Gen'l* v. *Watts, supra*, decided that the English Divorce and Matrimonial Causes Act of 1857 (which became law in Jan., 1858) was applicable to British Columbia on Nov. 19, 1858. Hence the divorce law of England of July 15, 1870, must have been applicable to Manitoba on that date. Hence the effect of the 1888 Dominion Act was to introduce into Manitoba the substantive law of England of July 15, 1870, as to divorce.

The counsel for the appellant, however, before the Judicial Committee argued at great length that there was not, on July 15, 1860, and is not now, any Court in Manitoba with jurisdiction in divorce pleas.

As respects jurisdiction of the courts the *Walker* case differs from the *Watts* case, because prior to the entry of British Columbia into Confed-

eration one law-making body there had full power to enact the substantive law, and to give jurisdiction to its courts, and as was conclusively shewn by the *Watts* case and the cases on which it depended, the substantive law had been introduced and the courts clothed with the fullest power to try divorce and other pleas. After the entry of British Columbia into Confederation the same law as to divorce remained in force, and its courts still retained their power to adjudicate in divorce pleas.

Prior to July 15, 1870, however, there was no Province of Manitoba. Hence if the 1888 Dominion Act did introduce into Manitoba the substantive English laws of divorce of July 15, 1870, without creating any Court there still remained the question as to whether or not the Provincial Legislature of Manitoba had created a Court with jurisdiction wide enough to hear divorce cases. It might be said that the argument before the Judicial Committee turned largely on the question as to whether or not the Provincial Legislature had created a Court with jurisdiction in divorce. At one stage of the argument Lord Buckmaster stated to Mr. Maughan, K.C., "If a man has certain definite statutory rights conferred upon him by the Dominion Parliament do you mean to say that the Provincial Parliament can render them wholly inoperative by not providing any means by which they can be made effectual?" Mr. Maughan replied that the Dom. Parliament could confer jurisdiction on a Prov. Court (see *Valin* v. *Langlois* (1879), 5 App. Cases, 115) or create a Court of its own under s. 101 of the B.N.A. Act. Viscount Haldane then interposed as follows:—

"That is quite a different thing, this meant a Court such as the Court of Exchequer in Canada for settling disputes between people in different Provinces."

This might indicate that s. 101 of the B.N.A. Act does not give the Dom. Parliament the fullest powers in creating courts. Perhaps, however, Viscount Haldane did not intend to finally determine the point.

The Judicial Committee hence took the broad ground that once there is a substantive law in force in any province, that law cannot be rendered nugatory by any legislation of the province. The Supreme Court of the Province must administer the law where no other provision is made. Hence the Legislature of Manitoba could not now validly enact that the Court of King's Bench shall not adjudicate in divorce pleas. Such legislation would be *ultra vires* if one interprets correctly what was said in the argument before the Judicial Committee.

If one traces the history of the General Quarterly Court, which existed in Assiniboia prior to July 15, 1870, it would appear that it had jurisdiction to adjudicate in "All causes, civil as well as criminal." (See Hudson's Bay Company's Charter) and did adjudicate in all kinds of cases as the records in the Provincial Library at Winnipeg shew. Such cases as the following were heard before it:—Criminal conversation, defamation, theft, murder, assault, selling beer, supplying Indians with drink, giving false statements of imports, trespass, rape, false pretences, seduction, defamatory conspiracy, perjury, infanticide, concealing birth, breach of contract, debts, manslaughter, kindling a fire in open plains, all kinds of civil claims.

The General Quarterly Court tried more than one murder case, and it inflicted the death sentence, which was carried out.

The General Quarterly Court adjudicated in Probate matters after 1858—Oliver, p. 569, also in regard to Guardianship of Minors—Oliver, p. 558.

As to the power and jurisdiction of the General Quarterly Court see Recorder Johnson's charge to the first Grand Jury in Manitoba reported in *The Manitoban* newspaper of May 20, 1871; Wood, C.J.M., in *R. v. Lepine*, Provincial Library Volume; Recorder Johnson's evidence before the Committee of the Dominion House to investigate the dispute as to boundary between Ontario and Manitoba—Provincial Library Volume.

The General Quarterly Court was in existence and exercised full power and authority on July 15, 1870, and for some two years thereafter until the Manitoba Supreme Court was created and a Judge appointed.

The General Quarterly Court was recognized by Imperial, Dominion and Provincial legislation. See s. 5 of Rupert's Land Act, 1868 (Imp.), ss. 5 and 6 of 32-33 Vic., c. 3 (Dom.), s. 36 of 33 Vic., c. 3 (Dom.), s. 2 of 34 Vic., c. 14 (Dom.), ss. 39, 40 and 41 of 34 Vic., c. 2 (Man.) Schedule A to c. 13 of 34 Vic. (Dom.) by which the General Quarterly Court was given certain bankruptcy jurisdiction by the Dominion, s. 5 of 34 and 35 Vic., c. 28 (Imp.), s. 1 of 35 Vic., c. 4 (Man.)

Hence it is submitted that after July 7, 1864, the General Quarterly Court of Hudson's Bay days could have adjudicated on divorce pleas if same had been brought before it, and this Court was clothed with this power on July 15, 1870, and thereafter until it went out of existence in 1872. Hence on July 15, 1870, there was a Court in Manitoba with full power to adjudicate in divorce pleas.

After the creation of the Manitoba Supreme Court its jurisdiction and constitution were changed from time to time by the Provincial Legislature it is worthy of note that the first jurisdiction legislation of the Province after 1888 was in 1891. (See ss. 8 and 9 of c. 36 of 1891 Con. Stats. of Manitoba.) The foot note to said s. 9 has the reference "51 Vic. c. 33, s. 1 (D)." This is the 1888 Dominion Act which introduced the laws of England and shews conclusively that the draftsman of the 1891 Provincial Act had at his elbow the 1888 Dominion Act and drafted accordingly. The chairman of the board which consolidated the Manitoba Statutes in 1891 was Killam, J. Nowhere else in all the Statutes of Manitoba can one find a reference in a foot note to a Dominion Statute. The change which was made in the said jurisdiction s. 9 in 1891, together with this foot note referring to the Dominion Statute would indicate that the then Court of Queen's Bench was clothed with the fullest powers to meet the change in the law effected by the 1888 Dominion Act.

The Judicial Committee held that there is nothing in the present jurisdiction sections of the Provincial legislation cutting down the jurisdiction of the Court of King's Bench, and that it consequently has jurisdiction to adjudicate in divorce pleas. Hence the substantive law of Manitoba as to divorce and matrimonial causes must be found in the English Statutes in force on July 15, 1870. These are: C. 85 of 1857 Statutes (20 and 21

Vic.); c. 108 of 1858 Statutes (21 and 22 Vic.); c. 61 of 1859 Statutes (22 and 23 Vic.); c. 144 of 1860 Statutes (23 and 24 Vic.); c. 81 of 1862 Statutes (25 and 26 Vic.); c. 44 of 1864 Statutes (27 and 28 Vic.); c. 32 of 1866 Statutes (29 and 30 Vic.); c. 77 of 1868 Statutes (31 and 32 Vic.).

One will have to extract from these Statutes those parts which are applicable to Manitoba and such will constitute the substantive law of Manitoba as to divorce.

Those who next consolidate the Manitoba Statutes will have to go through the above mentioned English Acts and extract the divorce law of Manitoba. The same should be given the dignity of a chapter in the next Consolidation of the Manitoba Statutes (See c. 67 R.S.B.C. 1911, which is the English law of divorce of Nov. 19, 1858, so far as applicable to British Columbia.)

Unless the Canadian Parliament changes the law, Manitoba will continue to have as its divorce law the law of England of July 15, 1870, just as British Columbia continues to this day to have the law of England of Nov. 19, 1858. In the fifty years since Confederation no general divorce law has been enacted by the Parliament of Canada.

The 1856 English Act is the most important of the above. This enacted new substantive law and transferred all cases of divorce and matrimonial causes to the Court created by the Act and regulated the procedure of the Court. It in effect rendered unnecessary divorce by Act of Parliament for persons domiciled in England, and did away with the jurisdiction of the Ecclesiastical Court which jurisdiction was transferred to the new Court.

S. 27 of the 1857 English Act is important. It is as follows:—

> XXVII. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro* or of adultery coupled with desertion, without reasonable excuse, for two years or upwards, and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded; provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person being married to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

This shews that the new order of things does not effect any great change in the law. It is the method of administering the law which has been changed. Recently statements have been made in public to the effect that the *Walker* case will result in divorces being granted for reasons which have not prevailed hitherto. The Senate and House of Commons

have hitherto recognized adultery as the only valid ground for divorce, although in a few instances other reasons have prevailed. The woman was on the same level as the man in applications for divorce at Ottawa. Now, however, the Manitoba Courts will be compelled to give the man higher rights than the woman, as the above s. 27 indicates. Hence the Courts of Manitoba will not be able to grant divorces in some cases in which relief could be given at Ottawa.

It would appear that the Senate and House of Commons can still be appealed to by any Manitoba citizens who desire a private Bill. The Canadian Parliament did not surrender its rights to grant relief when it enacted the 1888 Dominion Act.

Perhaps where the wife cannot bring her case within the above s. 27, she will get relief by application to Ottawa, under the old procedure.

The *Walker* case was not one of adultery, but was one in which the wife asked for a decree on the ground of impotency. The Ecclesiastical Courts in England had jurisdiction to grant a decree of nullity for this reason, long before 1857. In the Alberta case of *Board* v. *Board* (*post* p. 13) adultery was alleged. Prior to the 1857 Act no court in England had jurisdiction to grant a decree of absolute divorce where adultery was proved. The decree in a case of impotency is given instanter while in cases of adultery a decree *nisi* is first given. This is in accordance with the law of England of July 15, 1870.

The Manitoba Judges will probably promulgate rules and regulations to govern the procedure for that Province. The Rules and Regulations of the English Courts of July 15, 1870, are no part of the law of England, and hence were not introduced into Manitoba by the 1888 Dominion Act.

Professor Oliver's work, "The Canadian North-West, its early Development and Legislative Records" was placed before their Lordships of the Judicial Committee, and would have been invaluable if the Judicial Committee had found it necessary to determine the authority and jurisdiction of the Governor and Council of Assiniboia and the General Quarterly Court of the Hudson's Bay Company's regime.

When the 1888 Act was introduced into the House of Commons by Sir John Thompson, the then Minister of Justice at Ottawa, David Mills, who was a member of the House of Commons, approved of the Bill, and pointed out the necessity for same. Mr. Mills had done much research work in assisting Oliver Mowat to prepare Ontario's case against the Dominion in the famous boundary dispute. Mr. Mills said, in part, in regard to the 1888 Act: "So that what particular law is in force in that country apart from our legislative declaration would be a matter of extreme doubt, whether it would be the old law of France or the common law of England, and whether it was the law of England in 1774 or 1791 is also a matter of doubt. Therefore it seems to me that the proposed legislation by the Minister of Justice is highly necessary to remove all doubt and determine what law does govern the people in that country within the jurisdiction of the Parliament of Canada."

From an historical standpoint one must regret that the Judicial Committee did not find it necessary to deal conclusively with the period prior to July 15, 1870.

In the Alberta case of *Board* v. *Board* (*post* p. 13) the argument covered much the same ground as in the *Walker* case. The main part of the argument was as to the capacity of the Courts, first of the North West Territories and later of the Province of Alberta, to adjudicate on divorce pleas after the substantive law was in force.

The Province of Saskatchewan took no part in these divorce cases, but the Courts of that Province will now have the same rights to adjudicate on divorce pleas as belong to the Courts of Manitoba and Alberta. The Judges in Alberta and Saskatchewan will also probably enact rules to settle the procedure for their respective Provinces.

As to whether or not the new order of things resulting from the decisions in the *Walker* and *Board* cases is as it should be one cannot do better than quote the words of Sir Richard Bethell (afterwards Lord Westbury) the then Attorney-General, in introducing the English Act of 1857:—

"He had abstained of course from dwelling on the evils existent in the present law, which has been so long admitted, so universally recognized, so frequently pointed out not only in Parliament but out of Parliament, not only by lawyers but by every writer upon the habits and manners of the people, that it would be a mere waste of time to enter upon so trite a subject."

What Sir Richard Bethell said in the English Parliament on that occasion is applicable to the system by which only Parliamentary divorces can be obtained in parts of Canada. Such a system in its operation means one law for the rich and another for the poor. The decisions in *Walker* and *Board* will place all classes in Manitoba, Saskatchewan and Alberta on an equality as far as getting a divorce is concerned.

Dominion of Canada.

SUPREME COURT.

Que.] RILEY v. APEDAILE. [Aug. 4.

Appeal—Leave—"Winding-up Act," R.S.C., 1906, c. 144, s. 106.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the Winding-up Act will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act nor any question of public interest is involved.

Motion dismissed with costs.

Chauvin, K.C., for the motion; *Elder, contra.*

B.C.] BRITISH COLUMBIA ELECTRIC R. CO. v. DUNPHY. [Oct. 20.

Negligence—Contributory—Collision—Automobile and street car—Jury's findings—Sufficiency.

The action is for damages for injuries suffered in a collision between an automobile driven by the respondent and appellant's street car. At the trial, one witness for the respondent, who was in the automobile, testified to having warned the respondent before the accident; and the respondent was not called to explain his failure to act upon this warning. The jury, after having found the appellant guilty of negligence, specified such negligence in the following terms: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

Held, that the jury's findings, if read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial Judge, were justified both as to appellant's negligence and as to absence of respondent's contributory negligence and were not too vague to support entering of judgment for respondent.

Judgment of the Court of Appeal affirmed.

Tilley, K.C., for appellant; *Mayers*, for respondent.

B.C.] THE KING v. JEU JANG HOW. [Oct. 16.

Appeal—Jurisdiction—Habeas corpus—"Criminal charge"—Person at large—R.S.C., c. 139, ss. 39(c) and 48 Supreme Court Act—8 & 9 Geo. V. c. 7, s. 3.

A Board of Enquiry, proceeding under the Immigration Act, ordered the deportation of the respondent, who thereupon applied for a writ of *habeas corpus*. The writ was refused by the trial Judge; but the Court of Appeal granted it and ordered the respondent's discharge.

Held, that an appeal from the Court of final resort in any Province except Quebec in a case of *habeas corpus* under sec. 39(c) of the Supreme Court Act will not lie unless the case comes within some of the provisions of sec. 48, as amended by 8 & 9 Geo. V. ch. 7, sec. 3. *Mitchell* v. *Tracey* (58 Can. S.C.R. 640), followed.

Per Duff and Anglin JJ.—The words "criminal charge" in sec. 39(c) of the Supreme Court Act mean a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation; and the Board of Enquiry

under the Immigration Act is not a tribunal by which the respondent could have been convicted of criminal offence.

Per Duff and Anglin JJ.—The right of appeal given by sec. 39(c) in cases of *habeas corpus* does not exist where the Court below has ordered the release of the person, the legality of whose custody was in question in the Court below and that person is at large. *Cox* v. *Hakes* (15 App. Cas. 506), followed.

Mignault, J., *dubitante.*

Reporters' note. See also *Fraser* v. *Tupper* (Cout. Dig. 104.)

Appeal quashed with costs.

Sir Charles Tupper, K.C., for motion; *Sinclair*, K.C., *contra.*

Ont.] HONSBERGER v. WEYBURN TOWNSITE CO. [Oct. 14.

Constitutional law—Provincial company—Status ab extra—Comity—Right of action—License—Extra-provincial Corporations Act (R.S.O. [1914] c. 179).

Item 11 of sec. 92 B.N.A. Act, 1867, empowering the Legislature of any Province to make laws in relation to "the incorporation of companies with provincial objects" does not preclude a Legislature from creating a company with capacity to accept extra-provincial powers and rights. *Bonanza Creek Gold Mining Co.* v. *The King*, followed.

Such capacity need not be expressly conferred. It is sufficient if the intention of the Legislature to confer it can be gathered from the instruments creating the company.

A Saskatchewan company may, on obtaining a license under the Extra-provincial Corporations Act (R.S.O. [1914] ch. 179), enforce in the Ontario Courts the performance of a contract entered into with a resident of that Province and an action therefor may be maintained though the license was not granted until after it was instituted.

Judgment of the Appellate Division (45 Ont. L.R. 176), reversing that on the trial (43 Ont. L.R. 451), affirmed.

Hellmuth, K.C., and *Kingstone*, for appellant; *Tilley*, K.C., and *Payne*, for respondent.

Alta.] LOCAL UNION NO. 1562 v. WILLIAMS. [Oct. 14.

Trade Unions—Inducing dismissal of non-unionists by threatening strike—Right to damages—Liability of individual members—Practice and procedure—Unincorporated body—Representative action.

The respondents being miners and members of the Local Union appellant, were employed by the Rose-Deer Mining Com-

pany. The manager of the company becoming dissatisfied with the actions of the Union, closed the mine down; but he opened it again, and the respondents returned to work, agreeing to the condition not to pay any Union dues. The respondent Williams then received an anonymous letter calling him a "scab"; and when a new Local Union was organized, both respondents refused to join until the matter of the letter was "cleared up." Later on, the manager of the Mining Company advised the respondents that they would be discharged unless they settled with the Union as he had received notification that the Union would declare a strike if they continued to work. This notification was given by the appellants Young and Stefanucci. The respondents being subsequently discharged, took an action against the individual appellants on ground of conspiracy to injure them by inducing their dismissal and against the Local Union for unlawful intimidation by the threat of a general strike. The Local Union was not incorporated nor registered under the Trades Union Act; and an application was made at the close of the trial to amend the statement of claim by making the individual appellants defendants in their representative capacity, but this was not granted.

Held, that upon the evidence, the respondents' action should be dismissed, except as to the appellants Young and Stefanucci; Idington and Mignault, JJ., dissenting; Duff, J., would have dismissed the action *in toto*.

Per Duff, J. The conduct of the appellants cannot be construed as intimidation or coercion by "threat" and did not expose them to an action in damages in the absence of the characteristic elements of a criminal conspiracy to injure. *Quinn* v. *Leathem* (1901), A.C. 495, discussed.

Per Anglin and Brodeur, JJ. In the absence of legal evidence that they were present at the meetings where the acts complained of were authorized or that they otherwise have sanctioned them, the mere membership in the Local Union would not render the other appellants personally and individually answerable in damages for the results of these acts.

Per Anglin, Brodeur and Mignault, JJ. The dismissal of the respondents was the direct and intended outcome of the action of the Local Union's committee, such action amounting to a coercive threat and being therefore an unlawful means taken to interfere with the respondents' engagement; and the liability of the Local Union appellant, if being susceptible of being suable, has been established, but the delivery of the message of the committee by the appellants Young and Stefanucci to the manager of the mining company, having regard to all the circumstances, makes them presumably liable towards the respondents.

Per Anglin and Brodeur, JJ. The issue of want of entity was sufficiently raised by the explicit denial of the allegation that the Local Union was a body corporate.

Per Anglin and Brodeur, JJ. No action lies against an unincorporated and unregistered body in an action of tort such as the present one. Mignault, J., *dubitante*.

Per Anglin and Brodeur, JJ. The rule of practice by which, when numerous persons have a common interest in the subject matter of an action, one or more of such persons may be sued on behalf of all persons interested, which rule was invoked in support of the application for an order for representation, cannot properly be applied in an action of tort such as the present one and without evidence that the individual appellants could fairly be said to be proper representatives. Idington, J., *contra*.

Per Mignault, J., dissenting. The Local Union having throughout the litigation acted as if having been validly sued, it is too late now to urge the objection of want of entity; and, moreover, the judgment of the trial Judge should not be interfered with on a matter of procedure.

Appeal allowed, except as to the appellants Young and Stefanucci, Idington and Mignault, JJ., dissenting; Duff, J., would have dismissed the action *in toto*.

A. M. Sinclair, K.C., and *H. Ostlund*, for appellants.

E V. Robertson, for respondents.

Province of Ontario

SUPREME COURT, APPELLATE DIVISION.

Full Court.] RUBBERSETT CO. v. BOECKH BROS. [49 D.L.R. 13.

Trade name—"Rubberset"—Descriptive word—Monopoly—Expiry of patent—Acquisition of secondary meaning.

The word "Rubberset" being clearly a descriptive word, invented to express the exact article produced by a patented process, a monopoly in its use cannot be asserted after the patents covering it have run out.

In view of the short time since the expiry of the patents the word could lose its primary and descriptive character and acquire a dominating secondary meaning as describing the product of the appellant's factory.

Robertson and *Pickup* for the plaintiffs, appellants; *Anglin*, K.C., and *McKeown* for defendants.

ANNOTATION FROM 49 D.L.R.

Name of Patented Article as Trade Mark.

By RUSSEL S. SMART, B.A., M.E., of the Ottawa Bar.

The right of the public to make free use of the name of a patented article after expiration of the patent has often been sustained.

In the leading case of the *Singer Mfg. Co.* v. *Hermann Loog* (1882), 8 App. Cas. 15, Lord Selborne, L.C., said at p. 27:—

"The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right under colour of the former, to invade the latter, neither have the plaintiffs any right under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way."

See also *Singer Mfg. Co.* v. *Wilson* (1876), 2 Ch. D. 434, 456, and *Winser & Co., Ltd.* v. *Armstrong & Co.* (1898), 16 R.P.C. 167.

In another case of *Singer Mfg. Co.* v. *Stanage*, 2 McCrary, 512, Treat, J., said at p. 514: "When a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person at the expiration of the patent has a right to manufacture and vend the same under the designation thereof by which it was known to the public . . . The original patentee or his assignees have no right to the exclusive use of said designation as a trade mark. Their rights were under the patent, and expired with it."

Other United States cases were *Singer Mfg. Co.* v. *Larsen* (1878), 8 Bissell 151, and *Singer Mfg. Co.* v. *Riley* (1882), 11 Fed. Rep. 706.

Even where no patent is obtained a person who produces a new article and is the sole maker of it may, unless care is taken, lose his exclusive right to the name. As pointed out by Fry, J., in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801 at p. 813:—

"It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from."

On this theory "Valvoline" as the name of an oil was held not a good trade mark in *Re Leonard & Ellis* (1884), 26 Ch. D. 288, and so also "Albion" has been held to indicate metal goods of a particular pattern, and not that of a particular manufacture in *Re Harrison, McGregor & Co.'s Trade Marks*, (1889), 42 Ch. D. 691.

The law has been thus summed up by Rigby, L.J., delivering the judgment of the Court of Appeal, in *In re Magnolia Metal Co.'s Trade Marks*, [1897] 2 Ch. 371, 391: "When the article is made under a secret process or its manufacture is protected by a patent, no person who has not acquired the secret or obtained a license from the patentee can manufacture it. Accordingly,

it is established as a general rule that, when an article is made under a secret process, or when the manufacture of it is protected by a patent, the manufacturer or patentee cannot, by any means, entitle himself to a monopoly in the use, after the secret process has been discovered or the term of the patent has expired, of the name by which the manufactured article is exclusively known whilst the secret is undiscovered, or the term of the patent is unexpired."

Another valuable statement may be found in the judgment of Parker, J., in *Burberrys* v. *Cording & Co. Ltd.* (1909), 26 R.P.C. 693, at p. 701: "The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name, or indeed in any other way, to represent his goods as being the goods of another to that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt granted to protect property, but the property, to protect which it is granted, is not property in the world or name, but property in the trade or goodwill which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure another in his trade or business. If no case of deception by means of such misrepresentation can be proved, it is sufficient to prove the probability of such deception, and the Court will readily infer such probability if it be shewn that the word or name has been adopted with any intention to deceive. In the absence of such intention, the degree of readiness with which the Court will infer the probability of deception must depend on the circumstances of each particular case, including the nature of the word or name, the use of which is sought to be restrained. It is important for this purpose to consider whether the word or name is *primâ facie* in the nature of a fancy word or name, or whether it is *primâ facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others. If the word or name is *primâ facie* descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased. Again, if the person who seeks the injunction has not used the word or name simply for the purpose of distinguishing his own goods from the goods of others, but primarily for the purpose of denoting or describing the particular kind of article to which he has applied it, and only secondarily, if at all, for the purposes of distinguishing his own goods, it will be more difficult for him to establish the probability of deception.

In another leading case of *Cellular Clothing Co. Ltd.* v *Maxton and Murray*, [1899] A.C. 326, Lord Davey said, at 343:—

"The other observation which occurs to me is this; that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason

that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the plaintiff. And on this point I adopt what was said in felicitous language by Fry, J., in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801, at p. 813: "That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article; all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *primâ facie* use the name by which the article is known in the market."

The Supreme Court of the United States states the rule as follows:—

"(U.S. Sup. Ct., 1896). It is the universal American, English and French doctrine that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary, or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created; but such name must be so used as not to deprive others of their rights as to deceive the public, as by clearly indicating that the thing manufactured is the work of the one making it. *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169; 16 Sup. Ct. 1002; 41 L. Ed. 118, 75 O.G. 1703; 1896 C.D. 687. *Singer Mfg. Co.* v. *Bent* (1896), 163 U.S. 205; 16 Sup. Ct. 1016; 41 L. Ed. 131; 75 O.G. 1713; 1896 C.D. 711."

The following United States cases indicate the viewpoint of the Courts on this subject:—

"Lanoline" for a preparation of wool fat.

"(N.Y. Sup. Ct. 1902). Plaintiffs manufactured under letters patent a preparation of wool fat which they called 'Lanoline' which became the generic name of the article after the expiration of the patent. Defendant, a British corporation, manufactured a similar article which it called 'British Lanoline.' *Held*, that the patent having expired it had the right to call the article manufactured by it 'Lanoline' and that it violated no rights of plaintiffs by selling its product at 20 cents a can while plaintiff's was sold at 60 cents a can. *Jaffe et al.* v. *Evans & Sons, Ltd.* (1902), 75 N.Y. Supp. 257; 70 App. Div. 186."

"President" for patented suspender—name not generic.

"(U.S.C.C.A. 2nd Cir., 1916). On expiration of a patent for suspenders sold under the name and trade mark 'President,' such name and trade mark does not pass to the general public, the name never having constituted a generic description; consequently rights in the trade mark were not affected by the expiration of the patent. (For other cases, see Trade Marks and

Trade Names, Cent. Dig., p. 23, par. 15; Dec. Dig. 11). *President Suspender Co.* v. *Macwilliam* (1916), 238 Fed. Rep. 159." See headnote.

"Excelsior" for step-ladders—name of patented article.

"(App. D.C., 1908). Between 1870 and 1884 several patents for improvements in step-ladders were issued to C G. Udell, the predecessor in business of The Udell Works. Udell adopted as his trade mark the word 'Excelsior.' The Excelsior ladder embodied features of several, but not of all, of the patents. Six other styles of ladders were manufactured, some of which closely resembled the Excelsior ladder and all of which embodied features of the Udell patents. Held, that the word 'Excelsior' did not become during the life of the Udell patents the generic designation of ladders manufactured thereunder. *Udell-Predock Mfg. Co.* v. *The Udell Works* (1908), 140 O.G. 1002." See headnote.

Same—that a trade mark is generic not to be presumed.

"(App. D.C., 1908). While care should be taken lest a monopoly be continued beyond the life of a patent through the agency of a trade name which has come to indicate to the public the patented article, the Patent Office would not be justified in presuming that a trade mark was generic. In the present case the appellee company has built up a trade in ladders because of the superior excellence of the product and the fair dealings of the company. Manifestly it would be unjust to deny the company the benefit of its reputation unless convinced that to do so would prolong a monopoly."

"Bethabara Wood" generic and descriptive term.

"(U.S. D.C. Pa., 1919). Where the name 'Bethabara Wood,' invented by plaintiff, by general use became the descriptive name for a certain wood many years before he secured a registered trade mark for it and before it had become associated with plaintiff's product, he acquired no exclusive right to the name, preventing defendant from handling and selling wood under that name. *Shipley* v. *Hall* (1919), 256 Fed. Rep. 539." See headnote.

"Tabasco"—Name of patented article—Patent abandoned before expiration.

"(U.S. C.C.A. 5th Cir., 1918). At the expiration of a patent the public has the right to use the name which was employed to identify the patented article during the life of the patent, but where a patent was granted for pepper sauce and the process of preparing it, and the patentee manufactured and sold a sauce under the name 'Tabasco' which, prior to the expiration of the patent, is made in a way to bring it without the protection of the patent, the use of the name continuing, the general rule does not apply, since the right to the name as a trade mark had been acquired with respect to a product which was not the subject of the patent. *McIlhenny Co.* v. *Gaidry, Gaidry* v. *McIlhenny Co.* (1918), 253 Fed. Rep. 613."

It has been held by the United States Supreme Court that the principle involved in the *Singer* cases applies, notwithstanding the fact that the patent is a foreign one. *In Re Holzapfel's Compositions Co.* v. *The Rahtjen's American Composition Co.* (1901), 183 U.S. 1; 22 Sup. Ct. 6; 46 L. Ed. 49; 97 O.G. 958; 1901 C.D. 500, the trade mark claimed was used to describe a composition patented in England and it was held that when the patent expired the right to make the composition and the right to describe it by that name is open to the public. The principle involved in the *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169, applied notwithstanding the fact that the patent was a foreign one.

ANALYTICAL INDEX.