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THE CANADIAN BAR ASSOCIATION.

At a meeting held in Ottawa on March 31st, a Dominion Bar Association was formed under the aboye title, and a draft constitution was adopted.

This meeting was attended by many prominent members of the profession from all parts of the Dominion, together with Mr. Charles T. Terry and Mr. Walter G. Smith, representing Mr. Taft, ex-President of the United States, who was invited to attend as President of the American Bar Association. Addresses were delivered by them and by the Rt. Hon. R. L. Borden, Premier of Canada, and others, after which the officers of the new association were elected. They are as follows:—

Honorary President, Hon. C. J. Doherty, K.C., Minister of Justice; Honorary Vice-Presidents, the Attorneys-General of the several Provinces; President, J. A. M. Aikins, K.C.M.P., of Winnipeg; Vice-Presidents, Humphrey Mellish, K.C., Halifax, N.S.; K. J. Martin, K.C., Charlottetown, P.E.I.; M. G. Teed, K.C., St. John, N.B.; R. C. Smith, K.C., Montreal, Quebec; James Bicknell, K.C., Toronto, Ontario; Hon. H. A. Robson, K.C., Winnipeg, Man.; James McKay, K.C., M.P., Prince Albert, Saskatchewan; James Muir, K.C., Calgary, Alberta; Gordon C. Corbould, K.C., New Westminster, British Columbia; Secretary, E. Fabre Surveyer, K.C., of Montreal; Associate Secretary, R. W. Craig, Barrister, of Winnipeg; Treasurer, John F. Orde, K.C., Ottawa. The council of the association is to be composed of eight members of the profession from Ontario, eight from Quebec and four each from the other Provinces.

It will thus be seen that the association is of a very representative character. The president is appropriately chosen from what

may be called the geographical centre of Canada. Personally the selection of these officers will be most acceptable to the profession.

The constitution adopted is as follows:—

ARTICLE I.—This Association shall be known as "THE CANADIAN BAR ASSOCIATION." Its objects shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces, uphold the honour of the profession of law and encourage cordial intercourse among the members of the Canadian Bar.

ARTICLE II.—Any member in good standing of the Bar of any Province shall be eligible to membership in this Association.

ARTICLE III.—There shall be elected at the meeting for organization and thereafter at each annual meeting for the year ensuing the following officers:—An Honorary President; a President (the same person shall not be elected President two years in succession); one Vice-President from each Province; a Secretary; an Associate Secretary; a Treasurer; and eight members from each of the Provinces of Ontario and Quebec and four members from each of the other Provinces. The Attorney-General for the time being of each Province shall be ex-officio an Honorary Vice-President of the Association. The said officers, Attorneys-General and members so elected shall compose the Council of the Association. Nine members of the Council shall constitute a quorum. Should any vacancy occur in the elected representation from any Province by reason of death, resignation or removal from the Province, the remaining elected representation from such Province may fill such vacancy by the selection of another member of the Association. The Council may appoint such committees of the Association and on such subjects as it may deem proper and fit by the quorum thereof.

ARTICLE IV.—Persons of distinction not members of the Bar of any Province may, without formal nomination or certification, be elected by the Council to be honorary members of the Association. Honorary Members shall be entitled to the privileges of the

floor during meetings, but shall not be entitled to vote, and they shall pay no dues.

ARTICLE V.—All members of the conference adopting the constitution, and all persons eligible and who are nominated by a member shall become members of this Association upon payment of the annual dues for the current year herein required.

ARTICLE VI.—By-Laws may be adopted at any annual meeting of the Association by a majority of the members present. It shall be the duty of the council without delay, to adopt suitable By-Laws, which shall be in force until rescinded by the Association.

ARTICLE VII.—Each member shall pay five dollars to the Treasurer as annual dues, and no person shall be qualified to exercise any privilege of membership who is in default. Such dues shall be payable, and the payment thereof enforced, as may be provided by the By-Laws. Members shall be entitled to receive all publications of the Association free of charge.

ARTICLE VIII.—The President shall open each annual meeting of the Association with an address upon such topic as he may select.

ARTICLE IX.—This Association shall meet annually, at such time and place as the Council may select, and those present at any session of such annual meeting shall constitute a quorum.

ARTICLE X.—This Constitution may be altered or amended by a vote of three-fourths of the members present at any annual meeting, but no such change shall be made at any meeting at which less than thirty members are present.

There will necessarily be many obstacles to overcome before the Association can be pronounced a success, but the beginning is a good one and augurs well for the future. Its usefulness of course can alone justify its existence, but it is in good hands, and we may hope for good results, not only to the profession but to the country at large.

It is to be hoped that the influence of the Association may be felt in bringing about desirable legislation for the betterment of our laws in connection with many matters wherein the profession could give good advice and assistance, for the better adminis-

tration of justice, for the keeping up to the highest standard our judiciary, and, to that end, as far as possible eliminating from the selection of judges all questions of party politics, and preventing the Bench from being used, as it has occasionally been, as a dumping ground for discarded, needy or clamorous politicians.

It is high time that lawyers should assert themselves and realise the dignity and importance of their calling, and that they should put the profession in the first place and party politics in the second place. It is only in this way that the status of both Bench and Bar can be maintained and improved, and the profession continue to be, as it has been in the past in this country, a beneficial factor for the general welfare.

There was a brilliant gathering at a banquet given in the evening of the last day of the proceedings, the Governor-General being present, together with guests from the United States, Mr. Terry and Mr. W. G. Smith. Other eminent guests were the Minister of Justice, the Minister of Finance, the Minister of Marine and Fisheries, the Minister of Inland Revenue, the Solicitor-General, Justices Idington, Duff, Anglin and Brodeur of the Supreme Court, Mr. Justice Cassels and Mr. Justice Audette of the Exchequer Court, Mr. Field, President of the Ontario Bar Association; Mr. J. E. Martin, K.C., Batonnier of the Montreal Bar, Mr. Drayton, Chairman of the Railway Commission, together with the principal officers of the Association. A number of distinguished members of the Bar from Prince Edward Island in the East to British Columbia in the West, also sat round the board.

The toasts and speakers at this banquet which was held at the Chateau Laurier were as follows:—following the toast of the King was that of the Governor-General of Canada, responded to by His Royal Highness the Duke of Connaught.

The High Court of Parliament.—Proposed by P. B. Mignault, K.C., Montreal, and responded to by Hon. J. D. Hazen, K.C., in the absence of the Prime Minister.

The American Bar Association.—Proposed by Hon. C. J. Doherty, Minister of Justice, and responded to by Mr. Walter George Smith, of Philadelphia.

The Canadian Bar Association.—Proposed by Mr. Charles Thaddeus Terry, of New York, and responded to by Mr. R. C. Smith, K.C., of Montreal, and Mr. A. Monro Grier, K.C., of Toronto.

These addresses were most interesting and rose to the important occasion which produced them. We make room for those given by Mr. Walter G. Smith and Mr. Charles T. Terry.

After referring to the inception of the American Bar Association, beginning with a very few, but now numbering thousands of members of the profession from all the States and dependencies of the United States, Mr. Smith said:—

"It is from the lawyers that the true spirit of the jurisprudence of the country on all subjects emanates. He pleads that the spirit of parties shall not question the foundation of our policy, the Constitution. In these days when a mysterious unrest pervades the whole civilized world, and premises that have been accepted for centuries are questioned, it is all the more important that a conservative spirit shall pervade the Bar. In an eloquent address by one of your own leaders to the lawyers of Pennsylvania, Mr. R. C. Smith, he showed in his own apt way that the principles of eternal justice are embodied in the common law, and while its forms of administration may well be the subject of change with the changed conditions of the time, we cannot without throwing away the lessons of experience and morality touch these principles themselves. How far the long years of usefulness of the American Bar Association have affected the public weal, it would be difficult to measure. Steadily pursuing its declared purpose, it has done much to advance the science of jurisprudence, as the great body of legal study treasured in its reports will reveal to any student. Its efforts to promote the administration of justice may be traced in the statutes of the United States and of the several States. When it was found that the docket of the Supreme Court was congested with undisposed appeals, by the aid of the various committees appointed to draft legislation, Congress was enabled to remedy this evil by the creation of the Circuit Court of Appeals. The record of the Conference of Commissioners on Uniform State Laws, a child of the Association, shews how uni-

formity has been brought about in many commercial and social branches of the law, and by no means the least of its achievements has been the bringing about of cordial intercourse among the widely separated members of our own common profession, which has enriched the lives of its members with friendships they would not willingly forego. To the young lawyer the Association has given the inestimable privilege of close intimacy with the veteran leaders that would otherwise have been impossible, and thus has carried on the traditions as no other agency could have done. The standard of legal education has been raised; the law schools have been brought into harmonious co-ordination and a code of ethics all but universally accepted, shows the pitfalls to be avoided, and the ideals to be cherished by all who aspire to the honors and respect of their brethren of the robe.

It has been well said that the law is the most democratic of professions. However adventitious advantages of birth or wealth may affect other callings, there is but one aristocracy recognized here. It is that of learning, character and intellect. The glorious prizes are in the grasp of those only 'who scorn delights and live laborious days,' whose aspirations are content with selfless devotion to the cause of justice. I often think of the fine tribute paid by Mr. Justice Holes to a Massachusetts judge whom he depicts as caring nothing that his work should be labelled with his name. It was reward enough to know that he had added now and then a stone to the pyramid of the law. The desire for posthumous fame is implanted in most of our hearts. To obtain it, men face death with cheerfulness. Although we know how evanescent it must be, still we strive for it. Yet to the lawyer, unless he had had the rare opportunity of a Mansfield or a Marshall, it must be known that his 'name is writ in water' so far as posterity will remember him. 'He is forever climbing up the climbing wave.' The edifice of learning erected about each case crumbles when it is ended. What then is the attraction of the law? Does it not consist in the great satisfaction of aiding the cause of order, and the application of the principles of justice by his ministry? Besides the satisfaction of a self-approving conscience, what human reputation can be compared?

There is another reward which is far sweeter than any outside of the profession can know—the privilege of meeting on the equal plane of a common gentlemanlyhood with men of intellect and heart. To feel, however insignificant he may be in comparison with the great leaders, that one is of the same calling and in a measure bound by the same responsibilities as those who 'walk with a free foot on the higher ranges of the law.' Courage and perseverance, 'the Gods yield all to labor.' Such is the lesson taught by the lives of all those whom we call great lawyers. They began in humble spheres like the pawn on the chess-board, but by skilful exercise of talent and by industry they reach the goal.

'So mergeth the true hearted
With aim fixt high,
From place obscure and lowly
Veereth he naughte,
His works he wroughte.
How many royal paths he trod
So many royal crowns hath God.'

Gentlemen of the Canadian Bar Association, I give you greeting and congratulate you that you have come into being. I have had some opportunity to travel in your glorious country, not like your Association in its infancy, but surely in an early and lusty youth. Your lofty mountains are an inspiration; your boundless prairies a prophecy; your lakes and forests and rivers are destined by Providence to minister to the wealth and prosperity of a mighty people. You are our kindred; you are born of the same great traditions; preserve them and believe that from our side of the imaginary boundary that separates us but in name, we shall rejoice in your growth and glory in your strength."

Mr. Terry in speaking of the function of law, said:—

"The simplest truths are often those which are most easily overlooked. It is the simplest of truths that law is made to live *under* and not *upon*. The only legitimate function for law is to provide a rule of conduct. It is not the function of law to provide a resting place or a support for those who, of individual initiative, would seek to substitute government for character.

Socialism is a short name for this attempt to rest everything on Government. It is a real danger which is presented in our time, and the danger is the danger of paternalism. While we have been overlooking the simple truth, which is obvious on every hand, special classes, each with its own particular interest, have been securing the enactment of their own selfishly desired laws, each intent only in securing for itself the largest measure of participation in government funds, government protection and government aid. It is clear that a set of individuals, enthusiastically determined to secure its own ends, should accomplish its purposes, in view of the indifference or neglect of the rest of the citizenship. It is, therefore, no more than might have been reasonably expected that our statute books have become the repository of an overwhelming mass of fragmentary, unconnected legislation. Law has become an obsession of our citizens. It has become the habit of anyone, who conceives a half developed idea about anything, from the preservation of the Commonwealth to the preservation of songbirds, or the treatment of cancer with radium, to rush to the legislature and hysterically demand a statute. And the pity of it is that they frequently get them enacted. We become concerned with little things and forget the big ones. We take account of statutes for the preservation of everything except the preservation of individual liberty. Government, meaning by that simply what it is, namely, the laws which the people themselves enact, has invaded the freedom of the individual to such an extent that we wonder whether any of it is left. He is regulated at every step he takes, from the time he rises in the morning until he retires at night, and also, in no small degree, during his sleeping hours. It may not be too much to say that law is fast becoming a collection of undigested chunks of legislation, unconnected and unrelated, except from the fact that they are contained in the same set of books. Such a condition is far from satisfying the true definition of a science.

I submit to you the proposition that our jurisprudence will, in no small degree, become great in something like the proportion in which we amputate from the body of the law the excres-

cences, the abnormal growths, and the diseased and swollen members, and give scientific treatment and readjustment to that which remains. It is not extravagant to say that, so long as we allow these abnormal foreign growths to remain, the very life of the body politic itself is threatened. The essence of law is liberty. The purpose of law is liberty.

It will not very much avail us to have a large body of law if, in accumulating it, we miss the very purpose of all law. Among the ancient Greeks there was a contest, which consisted in a race in which every contestant started from the line holding a lighted torch. Victory was to him who crossed the finishing line first, *with his torch still burning*. It was of no advantage to him to be fleet of foot and reach the goal first, if his light went out while he was running in the course. As nations, we must run the race and finish the course, but it will be of little avail to us if at the end we find that the light of liberty has been extinguished. There is danger that we become slaves of law, because of our failure to properly observe the function of law. We have taken it out of its proper sphere of furnishing an arena for untrammeled individual effort, to be a governmental lodging house, where anyone may secure sustenance, shelter and repose if he may beg, borrow or steal a ticket of admission.

The function of law, as has been said, is to act as Umpire. It is not the function of law to play the game for us. Its use is to see that there is no cheating, and no over-reaching, and that each man shall have opportunity to exercise his talents to the full in the contest. The law shoots the pistol for the beginning of the race, and regulates the course, but it cannot and should not carry the contestants over it. We have wandered far from that idea. Great as is the science of law, it must be kept within its province. It must be discriminated from those things which it is not, and it must be closely confined to those things which it is. Law is a thing to practise, not to practise upon. It is a science, and not a business. It is an ideal, and not a deal at a game of cards. It is a noble profession, and not a juggler's trick box. It inculcates, if it is true to its office, respect for the other fellow's point of view; and that is the beginning,

the end and the essence of the brotherhood of man. It has come to pass, or is rapidly coming to pass, that the law suffocates individuality, instead of supplying it with the refreshing air of freedom. Our governments, under the guise of the exercise of the police power, have obtruded too far into the realm of personal privilege. It is for us, as lawyers, to apply the remedy, and to unravel the red tape of legal procedure, and to check the flood of useless legislation.

May I mention to you, as a part of our effort to clarify the law and make it universal, the accomplishments of our Conference of Commissioners on Uniform State Laws. This body, to which I have the distinguished honour of belonging, is an offspring of the American Bar Association. For twenty-five years it has pursued its work to unify the laws of the various states of the United States on subjects of interstate concern—calmly, deliberately, patiently, but, withal, enthusiastically and without cessation.

Considering the temperament of state legislatures, the pressure that is brought to bear upon them for the enactment of legislation purely local, the engrossing special concerns which drive legislators during their session and the natural disinclination on their part to put aside matters of their own individual and their own state interest for the consideration of more general, even though equally, if not more important, matters which concern all the states taken collectively, it is little less than amazing that the acts proposed by the Conference as uniform acts for all the states should have met so cordial and ready a reception by the various state legislatures.

The Negotiable Instruments Act has been adopted by 46 states, territories and federal districts and possessions; the Warehouse Receipts Act has been approved and has become the law of 30 states, territories and federal districts and possessions; the Bills of Lading Act is now the law in 11 states, territories, and federal districts and possessions; the Sales of Goods Act in 11 states, territories, federal districts and possessions; the Certificates of Stock Act in 9 states, territories and federal districts and possessions; the Divorce Act in 3 states; the Family Deser-

tion Act in 4 states; and the Probate of Foreign Wills Act in 9 states, territories and federal districts and possessions. These results have been set forth in the chronological order in which the various acts have been approved by the Conference, and it will be seen that, in view of the time during which each of the acts has been under consideration by the various legislatures, the approval and adoption of them has been steady and regular in proportion to the opportunity afforded.

It is inevitable that, in the progress of thus making uniform the laws of the various states on subjects of interstate application, the study involved must, and does, result in the clarification of the law as expressed in the uniform draft of it, and likewise in the elimination therefrom of all unnecessary, confusing and divergent features.

If it is said that complete uniformity of law is a long way from accomplishment, and that the task is so colossal as to be well-nigh impossible of performance, it is answered that no task, however colossal, was ever accomplished nor could be accomplished until a beginning had been made, and that any degree of uniformity is better than no uniformity at all.

The progress made by the Conference in its twenty-five years of service has amply demonstrated, to the satisfaction of every one who has given the matter serious investigation, that the work is beneficent in its results, that distinct progress has been made, that full accomplishment is only a question of time, that every step of progress along this line makes the next step easier, and that the force of the movement is cumulative. It is superficial and pointless to ask the question whether absolute uniformity is attainable. It is superficial because the movement for uniformity of law does not depend upon the answer to the question. I repeat that the value of the movement rests upon the proposition that even partial uniformity is much better than none. The question is pointless, because there is no way of answering it except by actual trial. The trial made by this body has, during its twenty odd years of existence, answered the question emphatically in the affirmative and in the only way in which it can be answered. It cannot be answered by discussion, by argument or by debate. It can be answered only in practice.

All reforms, to be of permanent value, depend upon the breadth of vision with which they are approached. Provincialism and narrow-mindedness should be given no place in the minds of those who are charged with the duty of simplifying, unifying and clarifying law. Special enactments procured by special interests, intricacies of procedure which have grown up by inadvertence, and which have outgrown their usefulness, if they ever had any, divergences in laws of various jurisdictions when the conditions are essentially the same, and where what is good and salutary for one jurisdiction is equally good and salutary for the other, may be readily eliminated if the view of those who undertake the work is sufficiently comprehensive. We, in the United States, have been at work against no inconsiderable odds to establish this breadth of view. I would say that we have succeeded in bringing into existence a new kind of mind, which I would designate as the "interstate mind"—that is to say, the mind capable of grasping the mutual needs and rights of all the states at once. Similarly, you have demonstrated your possession of that kind of mind which is capable of grasping the mutual needs and rights of nations, and this is well called the "international mind." All praise to you for its cultivation. We are jealously competing with you in the cultivation of that kind of mind, and you may be sure that we shall omit no effort to at least keep abreast with you in this friendly rivalry.

Whether there be reciprocity between your country and ours with regard to material things and commercial transactions is of little or no importance. The thing which is of the utmost importance, however, is that there shall be reciprocity of intellectual fellowship, of brotherly love, and of legal and spiritual ideals. These things are not matters of geography. They are matters of humanity. Canada and the United States are not realms bounded by imaginary lines, but they are peoples, unbounded in capacity for affection, for attainments, for influences, for visions for the good of mankind. Considered in terms of influence, of genius, of aspirations for better things, there are no bounds to any country. Canada is not so much a place, a name, a thing, a country, as it is a spirit. So looked at, Canada and the United States are one and the same.

I give you, then, my theme, and it is: The international mind; reciprocity of kindred ideals; uniformity of aims; brotherhood of sentiment; common ambitions to improve our race."

PUBLIC WRONG AND PRIVATE ACTIONS.

I have been much interested in an article under the above heading in the February number of *The Harvard Law Magazine*, by Mr. Ezra Ripley Thayer.

The special matter discussed in this article is the conduct of an action claiming compensation for injury caused by breach of a criminal statute; or, consideration of the law of negligence in relation to criminal legislation. The former being a branch of the law which is constantly before the courts, I trust the learned writer will not take amiss some friendly criticism of a portion of his article.

Mr. Thayer treats his subject under two heads, namely, legislation prohibiting something and legislation directing something to be done. What I have to say will be confined to the first branch.

The article opens with this query: When does the violation of a criminal statute or ordinance make the wrongdoer civilly responsible? My answer to that question would be—Violation of legislation directing something to be done may, but violation of legislation prohibiting an act cannot produce civil liability. My reason for this will appear later.

I have no fault to find with the writer's remarks on the law of negligence except in one respect. On the trial of an action based on negligence the jury are frequently told, to enable them to determine whether or not the defendant was guilty of negligence to take as a test what an "ordinary prudent man" would do under the same conditions. Mr. Thayer seems to think that such direction is apt to induce perplexity and lead the jury to indulge in theory and make, or endeavour to make, subtle distinctions. I cannot see it. The jury must find, in order to exonerate the defendant, that his conduct was prudent under the

circumstances and there is little difference between submitting to them the question "Did the defendant act prudently?" or the other question "Would an 'ordinary prudent man' have acted as the defendant did?"

The article then proceeds to deal with the question which mainly interests me in his discussion on the effect of prohibitory legislation on civil liability. The proposition which he argues out to his own satisfaction may be stated thus: On the trial of an action for damages in consequence of injuries resulting from violation of a prohibitive statute, the issue of negligence or no negligence is settled by the statute and cannot be submitted to the jury.

The example of such legislation given by the writer is an ordinance making it a misdemeanour punishable by fine to leave a horse unhitched on a public highway. An unhitched horse runs away and injures the plaintiff. He asks—How does the breach of the ordinance affect the owner's civil liability?

Mr. Thayer says that to answer this question the first step is to construe the ordinance which means ascertaining the evil it was aimed at as well as its scope and meaning. I could agree with this if the proceedings were against the offender for violating the ordinance but in an action arising from commission of a prohibited act why construe the legislation further than to ascertain that it was prohibited? And what bearing can the object of the legislation have upon the question whether or not the plaintiff was injured through the defendant's fault? I confess that I can see none.

Then we come to the discussion of the proposition I have already formulated, which is reasoned out in the article in the following manner.

If there were no statutory prohibition of leaving unhitched horses on the highway the jury, on the trial of an action by a person injured by a horse so left, could not acquit the defendant of negligence without saying that an "ordinary prudent man would have left his horse unhitched under these circumstances;" that the issue of negligence or no negligence is for the jury and the reasonableness of the defendant's conduct was thus in the

eye on the law *an open question*. Changing, then, the situation by the single circumstance of the ordinance, the argument is that leaving the issue of negligence or otherwise to the jury would enable them to find for the defendant which would mean that it was a prudent thing for him to violate the ordinance; that it is "consistent with ordinary prudence for an individual to set his own opinion against the judgment authoritatively pronounced by constituted public authority." It follows, of course, that on this point of view such issue should not be submitted.

The first objection that I have to make to this reasoning is that, in one aspect at least, it is illogical. The writer at the outset speaks of the confusion arising from the judicial diversity of opinion as to a breach of a criminal statute, some judges holding that it is negligence *per se*, others that it is only evidence of negligence. He apparently leaves it an open question, yet the above reasoning.

My next objection is that the reasoning is based on a wrong view of the legislation which is treated as if it dealt in some way with the civil rights of persons using the highway. Thus when the writer says that exonerating the defendant whose unhitched horse has caused injury from the consequences, is equivalent to saying that it is "consistent with ordinary prudence for an individual to set his own opinion against the judgment" of the legislature he implies that the legislature has declared that leaving an unhitched horse on the highway is not "consistent with ordinary prudence." Now where does he find such declaration in the ordinance he deals with? He says it is found in the evil at which the ordinance is aimed, namely, the peril to persons using the highway from horses at large. But the ordinance does not create the peril. Leaving a horse free from control is a danger to persons using the highway whether forbidden by law or not and is none the more dangerous because forbidden. Mr. Thayer's reasoning must then lead to this conclusion, that in a case where the act causing injury is necessarily negligence, whether it was or was not forbidden by law, the issue of negligence or no negligence should not be left to the jury.

As to the position that breach of the statute constitutes

negligence *per se* I might quote the following sentence in the judgment of Lord Atkinson speaking for the Judicial Committee of the Privy Council in *McAlpine* v. *The Grand Trunk Ry. Co.* (1913) A.C. 838. At page 846 he says: "Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line or frequenting its premises, it will be responsible in damages to a member of any one of these classes who is injured by its negligent omission to discharge or secure the discharge of that duty properly, *but the injury must be caused by the negligence of the company or its servants.*" Lord Atkinson evidently did not think that the breach of the statutory duty was negligence *per se.*

At the beginning of this paper I said that I would give my reasons for the opinion that legislation directing an act to be done might, but that prohibiting an act could not, produce civil liability. I now proceed to do so.

One of the essential elements of the Law of Negligence is, that the person causing injury must owe a duty to the person injured. That duty is, I think, entirely expressed in the legal maxim *sic utere tuo ut alienum non lædas.* Then legislation directing something to be done may create a duty the non-observance of which may produce civil liability. To take the example suggested by Mr. Thayer in the second part of his article, a municipal ordinance compels every householder to remove the snow from the sidewalk in front of his premises. At common law the householder was not charged with the duty of keeping the sidewalk free from danger to pedestrians; by the ordinance he is and a person injured by neglect of that duty has a remedy by action. But by a statute or ordinance prohibiting something no duty is created. In the case of the ordinance as to unhitched horses the duty existed when it was enacted. According to the above maxim the owner of a horse must use it so as not to injure others.

C. H. MASTERS.

SANER TREATMENT OF MENTAL DEFECTS.

An effort in the above direction has, in England, resulted in legislation on the subject which has produced the Mental Deficiency Act, just coming into operation.

The necessity for the care of the feeble-minded has received some attention in this country but there had been no legislation on the subject until the last session of the Ontario Legislature, when the Industrial Refuge Act, 1913, was passed. That Act and the Auxiliary Classes Act, just introduced, may be taken as indicating that Ontario is in the lead of the mother country. The Auxiliary Classes Act of Ontario is certainly advanced legislation along modern lines for social improvement. The Board of Education in any city may hereafter establish and conduct classes for backward children up to the age of 21 years, may acquire a site and erect suitable buildings for school and residence, may establish courses of instruction for mental and physical development of those sent to such an institution, and may appoint such teachers, attendants and special instructors as may be required.

Ever since Confederation the duty of each Province to care for those who are certified to be insane has been recognized, and the Provinces have made provision in this regard. In Ontario there is an excellent system of Provincial Hospitals for the Insane under the direction of the Provincial Secretary. The Legislature of that Province several years ago placed on the Statute Book an Act known as The Houses of Refuge Act by which the erection and maintenance of a House of Refuge in every country became imperative. If such an Act had not been passed the counties would have been slow to move in the matter and the splendid system of County Houses of Refuge from one end of the Province to the other would not to-day be in existence. Probably if the Legislatures would take up the question of the care of mental defectives in such a way as to render it compulsory for every county or separated city or town to provide for its feeble-minded under a similar system to that of the County Houses of Refuge, Canada might deal with this question along the lines which are

finding support in other countries. There seems to be little use merely urging that something should be done. The Legislature will have to say it must be done or there is little hope of our being as progressive in this as it is in other social reforms.

The recent legislation in England is referred to by *The Times* as follows:—

"The Mental Deficiency Act came into operation on Wednesday in England and Wales, and next month a similar measure takes effect in Scotland. The Act is second in importance to none placed in recent times upon the Statute book.

It gives effect, with some variations, to the recommendations of a remarkably strong Royal Commission originally appointed in 1904. Its report revealed a condition of extreme gravity, alike in town and country districts.

'We find large numbers of persons who are committed to prisons for repeated offences which, being the manifestations of a permanent defect of mind, there is no hope of repressing, much less of stopping, by short punitive sentences. We find lunatic asylums crowded with patients who do not require the careful hospital treatment that well-equipped asylums now afford, and who might be treated in many other ways more economically and as efficiently. We find, also, at large in the population many mentally defective persons—adults, young persons, and children—who are, some in one way, some in another, incapable of self-control, and who are therefore exposed to constant moral danger themselves, and become the source of lasting injury to the community.'

It is this large miscellaneous class, outside the narrow and antiquated divisions of the insane known to the Common Law, and unprovided for by the lunacy jurisdiction of Chancery, which the new statute seeks to protect and to control for the benefit of those unfortunates themselves, as well as for that of others.

Power is given to place an idiot or imbecile in an institution at the instance of parents or guardians; and this may be done at the instance of a parent in the case of a 'defective,' not an idiot or imbecile, if under 21 years. To prevent possible abuses, the certificates of two duly qualified medical practitioners are required,

and in the case of those who are not idiots or imbeciles a certificate must be signed, after inquiry, by a 'judicial authority' as defined by section 19 of the Act. It may be set in motion by a petition at the instance of any relative or friend of the 'defective' or by an officer of the local authority (that is, the county or borough council); and precautions are taken to guard against an order being obtained upon insufficient evidence or for some sinister object. Very often mental infirmity comes to light in the course of criminal proceedings, in which case the Judge himself may take action: he may direct an inquiry, or he may make such order as the judicial authority under the Act would have made. The working of one section in this connection will need to be carefully watched 'where it appears to the police authority that any person charged with an offence is a defective, they shall communicate with the local authority, and it shall be the duty of the police authority to bring before the Court such evidence as to his mental condition as may be available.'

The governing body or central authority is a Board of Control consisting of not more than 15 members, invested with large powers as to the supervision protection, and control of 'defectives'; as to the administration by local authorities of their functions; and also as to certifying and inspecting institutions and homes for 'defectives.' Upon the county and borough councils (assisted by the local education authority) devolve the duty of ascertaining what persons within their areas are 'defective,' and providing suitable accommodation for them. Practically the local administration will be in the hands of 'the committee for the care of the defective,' composed partly of members of the council, but strengthened by outsiders having special knowledge and experience of 'defectives.'

We have said nothing as to the important changes effected by the new Act in the criminal law relating to 'defectives.' It is enough here to say that for the first time from Wednesday last effect is given to the principle that persons who cannot take a part in the struggle of life, whether they have or have not property, whether they have or have not committed crime, are to be protected by the State against themselves and others. For the first

time, too, it may be said, enlightened medical opinion has obtained a recognition on the Statute-book of the modern scientific view as to insanity and mental infirmity."

THE JUDICIAL SYSTEM OF SOUTH AFRICA.

Information on this subject is obviously of interest to us in the Dominion of Canada. We gladly, therefore, give our readers the benefit of a paper by Mr. S. B. Kitchin, advocate, of Kimberly, South Africa. He writes as follows:—

"For judicial purposes South Africa may be said to include the Union of South Africa (consisting of the Cape of Good Hope, Natal, Orange Free State and Transvaal Provinces) and the separate colony of Southern Rhodesia. With the exception of the native protectorates, which are under Imperial administration, and where, as a rule, native laws and customs are in force, the common law of South Africa from Cape Point to the Zambesi is the Roman-Dutch law as it was at the time of the annexation of the Cape in 1806, modified by local judicial decisions and statutes. Of this body of law, which was first introduced into South Africa by the Dutch settlers at the Cape in the sixteenth century, Lord De Villiers, C.J., has said:

'They are not to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony, at the date of the British occupation in 1806, may be briefly stated. The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but rea-

sonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognized and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse.'

This *dictum* has been characterized as 'a bold decision,' but it may be regarded as authoritative, and may serve to indicate the difficulties of administering the law and the important discretion which the judges have in declaring it. The bulk of the law is contained in the writings, in Latin or Dutch, of authorities such as Voet and Grotius, and in the placaats or statutes passed in Holland mainly about the time of the Reformation. Occasionally the legal and lay world is startled by the unearthing, by a too learned judge, of some long-forgotten placaat or manuscript, and the hand of the clock of justice is put back accordingly. The legislature becomes aware, but does nothing. Such antiquarian escapades, however, though disconcerting, are fortunately rare, and the judges have held the telescope to their blind eye, generally preferring to administer justice in accordance with modern ideas, to a pedantic adherence to the letter of the written law of mediaeval Holland. The doctrine of *stare decisis*, on the whole, prevails, and thus by a steady stream of decisions, the law which is as flexible as the English law, has been moulded into a more modern form. The basis of the law is the civil law and Germanic customs. In the reported cases, Story occupies an honorable place with Pothier and the Roman-Dutch writers such as, Grotius, Voet, Van Der Linden and Van Leeuwerf. The general law is much akin to that of Scotland. In the early reports, references to Scottish authorities are frequent. The influence of the English law is due to the frequent citation of English text-writers and reports, especially the reports of the Privy Council which are binding.

The statute law has been largely taken from that of England. The law of crimes, contract, tort, evidence and insurance differs little from that of England and America. The marriage law favours the liberty and equality of spouses more than that of England. The Deeds Registry, imported from Holland, facili-

tates business. There is no Statute of Frauds, except in Natal, though in the Transvaal Orange Free State agreements for the sale of fixed property must be in writing signed by the parties or their agents. There is no law of primogeniture or any remnant of the feudal system in the law of property.

The highest court is the Appellate Division of the Supreme Court of South Africa, which is the final court of appeal for the Union and Southern Rhodesia. There is, however, a right of appeal from the decisions of this court to the Judicial Committee of the Privy Council on leave being given by that Committee, a right which has not been exercised since the Union in 1910. The Appellate Division is a strong court consisting of a chief justice and two ordinary judges of appeal, who, when not occupied in this Division, pursue their ordinary duties in a Local or Provincial Division. Southern Rhodesia is not represented on the bench of this court, though there is nothing to prevent one of its judges being appointed, if so desired. On the hearing of appeals from a court consisting of two or more judges, five judges of appeal form a quorum; but in appeals from a single judge, the quorum is three. Appeals may be made from any divisional court, except from orders made on motion or as to costs, where, however, an appeal lies by consent of parties. In criminal matters there is no appeal from the finding of a jury, but only on legal points or irregularities appearing in the procedure or on the record. The Appellate Division also hears appeals from the Native High Court of Natal. The process of this court extends and is executable throughout the Union. Upon this court devolves the important work of unifying the divergent decisions of the various provinces, so far as such unification is possible by a non-legislative body. This is generally regarded as one of its most important functions and in one case a long series of Natal decisions was upset and an old Cape decision followed which was regarded as being more in conformity with the old text-writers. With the exception of a few consolidating statutes dealing mainly with administration, the legislature, since the Union, has shirked the essential duty of codification. The administration of justice in South Africa is more uniform than its law, and is largely

based upon that of England with a few important modifications. This uniformity is due to the fact that the Cape system has spread to the remaining parts of South Africa.

Civil Jurisdiction.

The inferior courts are those of magistrates, known in Southern Rhodesia as resident magistrates. The magistrate is generally at the same time a fiscal official known as the civil commissioner. He is a civil servant, his only legal qualification as a rule being that he must have passed an examination on the elements of law equivalent to the attorney's examination (for the more important appointments an examination equivalent to the degree of Bachelor of Laws is a recommendation, but is not essential. Only occasionally is a legal practitioner appointed to this post. Magistrates generally receive their appointments according to seniority; and a man who has spent years in a financial department may find himself called upon to administer, as a magistrate, an abstruse and complicated system of law, aided by an inadequate library. The only solution is codification and the appointment of magistrates who have had an adequate legal or judicial training. The magistrate resides in his district, and holds his court, which is a court of record, at the principal town and a periodical court in outlying parts of his district. In some of the larger towns there are several magistrates.

The magistrate's jurisdiction is limited by the amount sued for, varying in the different provinces and colonies, and not exceeding two hundred and fifty pounds in illiquid and five hundred pounds in liquid cases. Within this limit the magistrate has jurisdiction in all causes except where the validity of a will or the title to land, tenements, fees, duties or offices is in question, or whereby rights in future can be bound (*e. g.*, matrimonial rights). As a rule he cannot grant specific performance. Duties corresponding to those of the sheriff are exercised by the messenger of the court. From the magistrate's court there is an appeal to the Local and Provincial Divisions in civil and criminal cases, on the law and facts, and the superior courts have the power to review the proceedings of all inferior courts, including licensing and assessment courts.

The High Court of Southern Rhodesia consists of two judges, one at Salisbury and the other at Bulwayo, each with concurrent jurisdiction. The suitor has the choice of forum. One of these judges travels on circuit twice a year. The Supreme Court of South Africa consists of the Appellate Division and the Local and Provincial Divisions. The Cape Provincial Division (formerly the Supreme Court of the Cape of Good Hope) sits at Cape Town, and has an original and appellate jurisdiction over the Cape Province. At present there are five judges of this Division, who sit either as single-judge courts or as three-judge courts. In the Cape Province there are also the Eastern Districts Local Division (formerly the Eastern Districts Court) at Grahamstown, which consists of three judges who may sit as single-judge or three-judge courts; and the Griqualand West Local Division (formerly the High Court of Griqualand) which at present has one judge at Kimberly. The Natal Provincial Division, at Maritzburg, consists of three judges. There is also a single-judge court which sits at Durban, Natal, and is called a Circuit Court. The Orange Free State Provincial Division, at Bloemfontein, consists of three judges. In the Transvaal Provincial Division (formerly Transvaal Supreme Court), at Pretoria, there are five judges. This Court sits as a three-judge court. The Witwatersrand Local Division (formerly Transvaal High Court) at Johannesburg, Transvaal, is a one-judge court.

One of the judges of each Provincial Division is known as the Judge President and, except in appeals from a Local Division or a single-judge court when three judges must sit, any two judges of a division form a quorum. In appeals from magistrates' courts to the Provincial Divisions, as a rule at least two judges sit together. The various Provincial and Local Divisions and the High Court of Southern Rhodesia have jurisdiction over all persons residing and being in their respective areas, and all causes whatsoever, including cases in which the government is a party and those in which the validity of a statute is called in question. Where a cause arises or a person resides in the area of a Local Division, the action may be in either the Provincial or Local Division at the option of the plaintiff, and a case which

has been commenced in one court may be removed to another court which has jurisdiction. Twice a year single-judges from most of the centres travel on circuits and have all the powers of a Provincial or Local Division of the Supreme Court, civil and criminal, within the area of the circuit districts which are fixed by the Governor-General.

This same official appoints and removes the judges of the Supreme Court of the Union. Judicial appointments in the Union cease when the judge reaches the age of seventy-five years (except in the case of judges appointed before the Union, who are appointed for life). The salaries of judges are fixed by Parliament. An elaborate pension scheme allows of the retirement of judges at the age of sixty-five years after ten years' service. The Governor-General has power to remove judges of the Union on an address from both Houses of Parliament in the same session praying for such removal on the ground of his behaviour or incapacity. The term Governor-General here means Governor-General-in-Council, *i.e.*, the Cabinet. In Southern Rhodesia appointments are made by the Administrator.

Opinion in South Africa is divided as to whether the superior courts of original jurisdiction should sit as single judges or as three-judge courts. The practice varies in the different provinces of the Union as it did before the Union. As trial by jury in some provinces is rare and means additional expense and probably less satisfaction to all concerned, the old practice of two or three judges sitting together commends itself to the lay and legal mind. There are not a few who would extend this practice to criminal matters, especially in cases in which aboriginal natives and coloured persons (who do not sit on juries) are concernd. In Southern Rhodesia there is a special jury panel for the trial of cases of assaults by natives on white women. In all the courts, except in certain criminal cases concerning children in the Union, all trials must take place in open court and evidence must be given *viva voce*.

Criminal Jurisdiction.

The foundation of the procedure in criminal cases was laid by a Scottsh judge, specially appointed for that purpose as a

judge of the Cape Colony early in the nineteenth century. The summary jurisdiction of magistrates is limited as to the amount of punishment. This does not, as a rule, exceed a fine of ten pounds or imprisonment for three months, and on second conviction, thirty-six lashes. In some remote parts where there is no magistracy, the work of the magistrate is done by a special justice of the peace who has similar powers, though somewhat limited. The magistrate, in some of the provinces and colonies, holds inquests in the case of fires and murder, and forwards the papers to the Attorney-General, who may take action, if so advised. In serious crimes or where the magistrate in the course of a summary trial considers the offence to be of a serious nature, a preparatory (or preliminary) examination is taken by the magistrate who either discharges the accused or commits him for trial. He sends the depositions to the Attorney-General or Solicitor-General of the Province, who is a permanent Union official.

The Attorney-General who has also the power of originating or taking up prosecutions at any stage before a final acquittal, if he decides to prosecute, remits the case to the magistrate who after hearing all the evidence has the power of final acquittal or conviction. The magistrate in remitted cases has power by statute to pass a sentence not exceeding two years, or a fine of one hundred pounds or thirty-six lashes. If the Attorney-General, on reading the depositions, decides that the case is one which ought to be tried by a judge or jury, he indicts and prosecutes either in person or by deputy at the criminal sessions or circuit court. The right of trial by jury is in the discretion of the Attorney-General in all provinces except Natal, where a prisoner in a remitted case has the right to insist upon being tried by a judge and jury. The Attorney-General cannot remit a case in which the only punishment is death or, in Natal, in cases of murder, rape or treason (which are punishable by death in all parts of South Africa). A jury consists of nine men. The prisoner has the right of three peremptory challenges, and any number for cause shown, but challenges are rarely exercised.

The ordinary mode of prosecution is at the instance of the

Crown, through the Attorney-General in the superior courts, and through the police in the inferior courts. A private person may prosecute if he is able to show that he has suffered some injury in consequence of the commission of the offence. If he prosecutes in a superior court, he must produce a *nolle prosequi* from the Attorney-General, and enter into a recognizance to proceed to the final determination of the trial. The Attorney-General may take up the prosecution of such a case at any stage of the proceedings. Private prosecutions, however, are practically unknown.

In the conduct of civil and criminal trials the procedure and practice are very similar to that of England, and rules of court are made from time to time by the whole body of judges, regulating the procedure and practice in the various courts. The English and Dutch languages are on an equal footing, though in the large preponderance of cases the English language is the forensic medium.

The general machinery of justice in the Union is under the supervision of the Minister of Justice, who is a member of the Cabinet. The practitioners in the inferior courts are generally attorneys and law agents, although advocates (barristers) have the right of audience. In the superior courts advocates alone have the right of audience on behalf of a client, instructed by an attorney, as in England. Women are not allowed to practise as advocates, attorneys, notaries or conveyancers. The fees of all practitioners, save where a specific agreement is made, are subject to detailed taxation by an official. There is an extensive system of *in forma pauperis* practice. In criminal cases, wherever death is a penalty, the judge has the power of assigning counsel who defends *pro deo* for a nominal fee paid by the Crown. In civil cases in which either of the parties does not possess more than ten pounds, if an advocate certifies that there is *probabilis causa*, the court, on application, assigns as advocate and attorney, who give their services gratuitously.

The judges are appointed from the members of the Bar. Both the magistrates and the judges have always been distinguished for that impartiality and independence which is characteristic of

the British administration of justice. The extra remuneration of judges who are appointed on non-judicial commissions was forbidden by the Cape Charter of Justice, but statutory provision has since been made for such remuneration. There is too great a tendency to appoint judges on such commissions, but this may be due to the fact that it is not easy to obtain impartial men for such work, and is in itself a tribute to their impartiality

In a country like South Africa, where legislation is slow, and not always in the direction of progress, the task of improving the substantive and adjective law devolves largely upon the judiciary. It is to their excellent work, and principally to the long and untiring efforts of the present Chief Justice, Lord De Villiers, that the law and practice of the Roman-Dutch system in the various parts of South Africa has been evolved into a comparatively uniform and efficient organ for the even distribution of justice according to the needs of modern society. Codification, which must come, is all that is required to complete the fabric."

It has been stated by a journal published in New York that 350,000 persons were freed from the manacles of matrimony last year in the United States. Divorce is an easy matter in most of the States of the Union, but a judge in Brooklyn gives a further suggestion, which has already been acted on. A man was convicted for murder in the second degree and sentenced to life imprisonment. He was subsequently pardoned, but his wife, desiring a change of masters, applied for a marriage license on the ground that her husband was legally dead, and that therefore she had a right to marry again. This contention was upheld by the judge and a license was issued accordingly. Whilst this gives further facilities for getting rid of marriage ties, it will add but little to these automatic divorces, for, though murders are many in the United States, convictions are few.

REVIEW OF CURRENT ENGLISH CASES.

DEED—CONSTRUCTION—TITLE—LEASE—MINES AND MINERALS—CONVEYANCE OF REVERSION—SEVERANCE OF MINERALS—RENT—APPORTIONMENT—STATUTE OF LIMITATIONS, 1833 (3-4 W. 4, c. 27), s. 9—(R. S. O. c. 75, s. 6 [5]).

Mitchell v. *Mosley* (1914) 1 Ch. 438. This is an important decision under the Statute of Limitations. In 1740 the defendant's predecessors in title granted to a coal company a lease of the coal under certain lands for a term of 200 years at a specified rent dependent on the amount of coal extracted. By two indentures dated in 1791, the defendant's predecessors in title conveyed to the plaintiff's predecessors in title portions of the land; neither of these conveyances excepted the minerals and no mention of the lease of 1740 was made except in the covenant against incumbrances from the operation of which it was excepted. In 1828 part of the land comprised in the deeds of 1791 were reconveyed to the defendant's then predecessor in title and in exchange he granted to the plaintiff's then predecessors in title certain other parts of the lands to which the minerals in the lease were subjacent. This deed did not except the minerals. The defendant and his predecessors in title had always received the whole of the rents as they accrued due under the lease and had never accounted for any part thereof to the plaintiff or any of his predecessors in title. The present action was brought to recover the plaintiff's share of the rent as part owner of the reversion in the lease. The defendant contended (1) that the reversion of minerals expectant on the termination of the lease was not comprised in the conveyances under which the plaintiff claimed; (2) that the rent was not apportionable; (3) that the plaintiff's claim was barred by the Statute of Limitations, 1833, s. 9, (R.S.O. c. 75, s. 6(5).) Eve, J., who tried the action, negatived each of these contentions and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Eady and Phillimore, L.JJ.) The Master of the Rolls points out that the only persons who could receive the rent were the lessors and their successors, and consequently there never was any wrongful receipt; the plaintiff and her predecessors were entitled to their proportion of the rent from time to time received, and the Statute of Limitations, though not a bar to the action, was a bar to the plaintiff recovering more than six years' arrears prior to action.

SHIPPING—REGISTERED SHIP—SALE OF SHIP—CONTRACT TO GIVE DELIVERY ORDER FOR SHIP—BILL OF SALE—MERCHANT SHIPPING ACT, 1894 (57-58 VICT., c. 60), ss. 24, 530.

Manchester Ship Canal Co. v. *Horlock* (1914) 1 Ch. 453. The plaintiffs under the statutory powers of the Merchants Shipping Act, 1894, s. 530, had raised a vessel which had sunk in their canal and patched it up and thereupon sold it to the defendant. The contract contained the printed words "the seller will deliver to the purchaser a legal bill of sale of the vessel," but the words "legal bill of sale" had been struck out and the words "delivery order for" substituted. The defendant on coming to complete his contract claimed that notwithstanding the striking out of the words above mentioned, he was entitled to demand and receive a legal bill of sale in order to get himself registered as owner. The plaintiffs contended that in the circumstances the vessel must be regarded as a constructive total loss, that a new register should be opened, and the old register was in fact closed at the instigation of the company, and thereafter the plaintiffs offered the defendant a bill of sale which he refused to accept because the plaintiff had caused the register to be closed and he would be put to extra expense to open another. Eve, J., who tried the action, held that the defendant's claim was well founded, that the change in the wording of the contract did not exonerate the plaintiffs from giving a bill of sale as required by s. 24 of the Act. The action therefore failed.

RESTRAINT OF TRADE—CONTRACT OF SERVICE—AGREEMENT NOT TO ENGAGE IN SIMILAR WORK WITHIN TEN MILES—RESTRICTION FOR LIFE—REASONABLENESS OF RESTRICTION.

Eastes v. *Russ* (1914) 1 Ch. 468. This is another action to enforce a covenant by an employee not to engage in similar work to that of his employer within ten miles of the plaintiff's place of business. In 1912 the defendant's employment by the plaintiff ceased, and shortly afterwards the defendant set up a similar business, namely, that of bacteriological microscopist, within half a mile of the plaintiff. Sargant, J., who tried the action, construed the restriction to apply merely during the continuance of the employment, but the Court of Appeal (Cozens-Hardy, M.R., and Eady and Phillimore, L.JJ.) disagreed with him on that point and held that the restriction lasted during the whole of the defendant's life; but they also held that it was wider than was necessary for the plaintiff's reasonable protection, so that in the result the judgment of Sargant, J., was affirmed for other reasons than he gave.

COMPANY—PREFERENCE SHARES—ORDINARY SHARES—DISTRIBUTION OF PROFITS—RIGHTS OF DIFFERENT CLASSES OF SHAREHOLDERS INTER SE.

Will v. *United Lankat Plantations Co.* (1914) A.C. 11. This was an appeal from the decision of the Court of Appeal (1912), 2 Ch. 571 (noted ante vol. 49, p. 104) reversing a judgment of Joyce, J. The simple question was whether shares entitled to a cumulative preferential dividend of 10 per cent. per annum, in priority to ordinary shares, were entitled also to participate further in the profits of the company available for dividends. The Court of Appeal held that they were not entitled to anything more than the 10 per cent. and the House of Lords, Lord Haldane, L.C., and Lords Loreburn, Kinnear and Atkinson affirmed the decision.

MORTGAGE—COLLATERAL AGREEMENT—CLOG ON REDEMPTION—WHETHER COLLATERAL AGREEMENT ENFORCEABLE AFTER REDEMPTION.

Kreglinger v. *New Patagonia M. & C. S. Co.* (1914) A.C. 25. The law relating to mortgages has undergone considerable change by reason of the repeal of the usury laws, and the doctrines of equity which, in conformity to those laws, had imposed restrictions on a mortgagee stipulating for any other advantage than interest on his money, have had to be modified so that, although any stipulation for more than interest was formerly void in equity, a collateral advantage may now be stipulated for by a mortgagee, provided that he does not act unfairly or aggressively, and provided that the bargain does not make the security irredeemable, or restrict or clog the right to redeem. So that it is now no longer true, as was said in *Jennings* v. *Ward*, 2 Vern. 520, "that a man shall not have interest for his money and a collateral advantage beside the loan of it." The Lord Chancellor points out, that as statutes are altered or modified, the rules of equity which have been framed with regard to them, must also needs be modified; the jurisdiction of equity being of an elastic character. In the present case the mortgagees had stipulated at the time of making the loan, which was secured by a floating charge on the mortgagee's undertaking (the mortgagor being a limited company), that the mortgagor should not for a period of five years from that date sell sheepskins to any person other than the mortgagees, so long as the latter were willing to buy at the best price offered by any other person, and that the mortgagor should pay to the mortgagees a commission on all sheepskins sold by the mortgagor,

to any other person during the five years. The loan was paid off before the five years had elapsed, and the question was whether this collateral agreement could nevertheless be still enforced, and the House of Lords (Lord Haldane, L.C., and Lords Halsbury, Atkinson, Mersey and Parker) were unanimous that it could, and the judgment of the Court of Appeal to the contrary was therefore reversed. In *Biggs* v. *Hoddinott* (1898) 2 Ch. 307, it had been decided that such a stipulation was good during the continuance of the security, and this case therefore not only affirms that decision, but decides that redemption does not put an end to such agreements.

HIGHWAY—DEDICATION—DEPOSITED PLAN—USER BY PUBLIC—ADJOINING OWNER—RIGHT OF ACCESS TO HIGHWAY.

Rowley v. *Tottenham* (1914) A.C. 95. This was an appeal from a decision of the Court of Appeal (1912), 2 Ch. 633 (noted ante vol. 49, p. 107). The action was brought by a municipal body to restrain the obstruction of a highway by the defendants. The facts were briefly, that the defendant had laid out a building estate and deposited a plan thereof with the plaintiffs, on which the road in question was indicated as being forty feet wide. One half of the road was thereafter made up and metalled by the defendant, the other half was left as a foot path. Thereafter the public used the road and as a rule preferred the metalled part. The plaintiffs owned property abutting on the unmetalled side of the road and opened an entrance therefrom into the highway, which the defendant obstructed. The Court of Appeal affirmed the decision of Joyce, J., that there had been a sufficient and effective dedication of the road as a highway, and that the plaintiffs were entitled to access thereto as claimed, and the House of Lords (Lords Dunedin, Atkinson, Parker and Sumner) have now affirmed their decision.

MORTGAGE—PAYMENT OF MORTGAGE—RECONVEYANCE AND NEW MORTGAGE WITHOUT NOTICE OF INTERMEDIATE MORTGAGE—MERGER—PRIORITY.

Whiteley v. *Delaney* (1914) A.C. 132. This was an appeal from a decision of the Court of Appeal in *Manks* v. *Whiteley* (1912) 1 Ch. 735 (noted ante vol. 48, p. 454), in which Moulton, L.J., dissented from the other members of the Court and our suggestion that his was the better opinion has turned out to be correct, for the House of Lords (Lord Haldane, L.C., and Lords Kinnear, Dunedin and Atkinson) have reversed the judgment of the Court

of Appeal. The facts were, that two mortgages were in existence on certain property and Whiteley purchased the equity without notice of the second mortgage. He then borrowed money from one Farrar, to pay off the first mortgage, the intention being that Farrar should stand in the place of the first mortgagee, but the solicitor, in order to carry out the transaction, took a reconveyance to Whiteley from the first mortgagee and Whiteley then gave a mortgage to Farrar to secure the advance. The Court of Appeal held that this mode of carrying out the transaction had the effect of clearing off the first mortgage for the benefit of the second mortgagee, who thereby became entitled to priority over Farrar, but their Lordships held that the second mortgagee was not entitled to priority claimed, because, owing to a common mistake induced by the mortgagor in concealing the existence of the second mortgage, the deeds between Whiteley and Farrar did not carry out the true intention, which was that Farrar should have a first mortgage on the property and that the documents could have been rectified in this action to carry out the true intent of the parties if that relief had been claimed; but that in such circumstances a court of equity could not, in favour of a mere volunteer, enforce a right based upon deeds framed under a common mistake and, secondly, because Farrar, having in equity acquired the priority of the first mortgagee by paying off his debt and obtaining the deeds, the second mortgagee could not take advantage of the wrong of the mortgagor, through whom he claimed to deprive Farrar of that priority.

CANADA—LEGISLATIVE AUTHORITY OF PROVINCIAL LEGISLATURE—FISHING RIGHTS IN TIDAL, OR NAVIGABLE NON-TIDAL RIVERS—RAILWAY BELT—TERRITORIAL WATERS.

Attorney-General, B.C. v. *Attorney-General, Can.* (1914) A.C. 153. The judicial committee of the Privy Council (Lords Haldane, L.C., Atkinson and Moulton) determine that fishing rights in the tidal, or navigable non-tidal rivers, within the railway belt of the Province of British Columbia are not within the legislative control of the Provincial Legislature, but, under the B.N.A. Act, ss. 91, 92, 109, are within the exclusive control of the Dominion Parliament. The committee also determine that the Provincial Legislature has no authority over rights of fishing in the sea or arms of the sea and estuaries of rivers flowing into the sea, and that the right to fish in the sea does not depend on any right of the Crown in the subjacent land. Their lordships also intimate that the question as to the rights of the Crown in the territory lying

between the low water mark and the three miles limit from the coast, is a question which belongs not to municipal law alone, and that it is not at present desirable that any municipal tribunal should pronounce upon it.

REVENUE—SUCCESSION DUTIES—PROVINCE OF QUEBEC—POWERS OF PROVINCIAL LEGISLATURE—LEGISLATIVE JURISDICTION OVER PROPERTY OUTSIDE OF PROVINCE—DIRECT TAXATION—ULTRA VIRES—CODE CIVIL ARTS. 1191 B AND 1191 C—B.N.A. ACT, S. 92.

Cotton v. *The King* (1914) A.C. 176, is a most important deliverance of the Judicial Committee of the Privy Council as to the powers of Provincial Legislatures to impose taxes, and the property in respect of which they may be imposed. The litigation arose on the claim of the Province of Quebec to the payment of succession duty in respect of the estates of Charlotte, and Henry Cotton, her husband. Charlotte died in 1902, leaving an estate, part of which was within the Province of Quebec and part of which consisted of bonds, debentures and shares of industrial companies and other movable property locally situate in the United States, she being, at the time of her death, domiciled in Quebec. After certain specific bequests she gave the residue of her estate to her husband. At the time of her death the only Succession Duty Act then in force in the Province, Code Civil, s. 1191*b*, provided that, "all transmissions owing to death, of the property in usufruct and enjoyment of, movable and immovable property *in the Province*, shall be liable to the following taxes," etc., etc. The Government of Quebec claimed and received from Henry Cotton succession duty at the statutory rate upon the whole net property passing under the will of his wife. After her death the Code was amended by s. 1191c, which provided that, "the word 'property' within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, and whether the transmission takes place within or without the Province, and all movables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death." After this amendment, Henry Cotton died and the Provincial Government claimed from his executors statutory duties on the whole net property passing under his will. The executors brought a petition of right claiming $31,492 and interest, being the aggre-

gate amount of succession duties paid in respect of the estates of Charlotte and Henry Cotton for movable property locally situated outside the Province. Malouin, J., who tried the petition, held that the petitioners were entitled to the amount claimed because the Province had no right to tax movable property outside the limits of the Province. On appeal the King's Bench thought that the debts should be deducted from the total assets and not merely from those in the Province and with that variation the judgment of Malouin, J., was affirmed. The Crown appealed, and the executors as to the modification cross appealed from that decision to the Supreme Court of Canada. The appeal of the Crown was allowed by the Supreme Court of Canada, so far as the estate of Henry H. Cotton was concerned, but dismissed as regards the estate of Charlotte Cotton; and the cross appeal as to the modification was dismissed; 45 S.C.R. 469. The majority of the judges of the Supreme Court thought that the effect of the change made in the law as to the meaning of "property" was to render property outside the jurisdiction taxable, and they thought the principle *mobilia sequntur personam* rendered such property subject to Provincial jurisdiction. Davies and Anglin, JJ., were in favour of dismissing the appeal as to both estates. The Crown appealed so far as the estate of Charlotte was concerned and the executors appealed as regards the estate of Henry. The judgment of the Judicial Committee (Lord Haldane, L.C., and Lords Atkinson and Moulton) was delivered by Lord Moulton. With regard to the appeal of the Crown, he says, no question as to the applicability of the principle mobilia sequnter arises, because at the time Charlotte died the law in force was expressly limited to property in the Province, and even if the Province had the right to tax property situate beyond its territorial limits, it in fact did not do so. *Ergo* the appeal of the Crown was dismissed. As regards the appeal of the executors, he was of the opinion that the amendment of the law had not had the effect which the majority of the judges of the Supreme Court of Canada supposed. It had extended the meaning of "property" to include property out of the jurisdiction, but it had not extended the operative clause by striking out from s. 1191*b*. the words "in the Province," which still limited the class of property subjected to taxation. His Lordship points out that really the amendment added nothing to the meaning of the word "property" because it already had the meaning which the amending statute purports to give it, and the fact of it having this extended meaning in the earlier Act, tended to emphasize the limitation of the operative clause to property within the Province; and to the suggestion that the definition

could only have been inserted in the Act to indicate the property on which taxes were to be levied, he answered that it might be referable to other provisions of the Act which require declaration to be made as to the property of the deceased. But his Lordship goes further and discusses the important question, whether a succession duty of the kind imposed by the Act in question is within the competence of a Provincial Legislature, and he comes to the conclusion that it is not, because such Legislatures can only impose "direct taxation." Applying the prior decisions of the Board as to the meaning of "direct taxation" in the B.N.A. Act, the conclusion is reached that the tax in question is "indirect taxation," because under the Act the tax is payable not by the person who is intended or desired should pay it, but by persons in the expectation and intention that they shall indemnify themselves therefor at the expense of another. As is pointed out, there is nothing in Quebec law answering to our probate of wills, but the tax is payable by the person making a declaration as to the property of the deceased, who may be a notary before whom the will was executed, who is obviously not intended to bear the tax himself, but to obtain indemnity therefor from some other persons interested in the estate. The appeal of the executors was allowed and the appeal of the Crown was dismissed. The importance of the case must be our apology for so lengthy a note.

TRESPASS—JUS TERTII—TIMBER RIGHTS IN MINING LANDS—DEFENDANTS RECEIVING BENEFIT OF TRESPASS—RATIFICATION OF ACT OF INDEPENDENT CONTRACTOR—CROWN TIMBER ACT (R.S.O. 1897, c. 32) ss. 1, 2—MINES ACT (R.S.O. 1897, c. 36), ss. 39, 40.

Eastern Construction Co. v. *National Trust Co.* (1914) A.C. 197. This was an action brought by the plaintiffs, as the owners of a mining location, against the appellants and a firm of Miller & Dickson, to recover damages for cutting and carrying away a quantity of pine timber from the plaintiffs' mining location. The construction company had a license under R.S.O. 1897, c. 32, to cut timber on certain lands, but not those of the plaintiffs'. The company employed Miller & Dickson to cut the timber to which they were entitled under their license, and that firm proceeded to carry out its commission, but in doing so, without any authority or direction from the construction company, cut the timber on the plaintiffs' land in respect of which the action was brought. The timber cut was manufactured into ties and de-

livered by Miller & Dickson, in performance of a contract therefor made by the construction company. On February 24th, Miller & Dickson were notified by the Crown timber agent to desist, but they had then removed all but a very few ties. On March 6, 1909, the Crown gave the construction company permission to remove the remaining ties and they were charged the usual dues in respect of all timber cut by Miller & Dickson, including that cut on the plaintiffs' land. The plaintiffs did not demand the return of the ties. By the Mines Act the property in all pine, trees on the lands subject of a patent or lease, is reserved to the Crown who may grant licenses to cut them, the patentee or lessee, however, having the right to cut them for mining purposes or for clearing the land for cultivation. The judge at the trial found that the timber on the mining location of the plaintiff would not have been sufficient for the requirements of any mines which might thereafter be made or worked on such location, and that the construction company when informed of the taking of the timber had adopted the act and had the benefit of the timber so taken, and were therefore liable to the plaintiffs. The Court of Appeal reversed his decision and the Supreme Court of Canada restored it. The Judicial Committee (Lords Atkinson, Moulton and Parker) now reverse the Supreme Court and restore the judgment of the Court of Appeal, their Lordships holding that the property in the timber in question was under the Mines Act vested in the Crown, both before and after it was felled, that if the plaintiffs had any right of action it would be merely as bailees of the Crown and would be accountable to the Crown for the damages, if any, recovered; but here, before action, the Crown had clothed the wrongdoer with the ownership and therefore the plaintiffs could not recover in respect of the pine trees; but as to tamarack trees cut on the plaintiffs' location their Lordships thought the plaintiffs might have some claim, and ordered the defendants to pay the costs of the trial, provided the plaintiffs made no further claim in respect of such tamarack trees.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Audette, J.] BROCHU *v.* THE KING. [March 12.

Negligence—Government railway—Injury to the person—Trespasser—Liability.

B., in going towards a station of the Intercolonial Railway, instead of using a safe public way or road thereto, entered, contrary to the provisions of s. 78 of the Government Railways Act, upon the track of the railway, drawing behind him a small sled containing two valises. It was dusk at the time, but there was light enough for him to see, as he did, a train approaching him. This train consisted of a locomotive and tender, with a snow-plough attached. B., instead of getting out of the way as soon as he saw the train, attempted to pick up one of the valises that had fallen from the sled, an act which rendered it too late for him to escape being struck by the train. Upon the trial of his petition of right for damages, it appeared that the suppliant had at the time an unreduced fracture of the right leg, which impeded his movements. On the other hand, the fact that the place where the accident happened being a "thickly peopled district" within the meaning of s. 34 of the said Act, was not established beyond question; nor was it shewn conclusively that the track there was not properly fenced. The engine-driver had complied with all statutory requirements as to whistle and bell, and his train was running at a rate of about twelve to fifteen miles an hour. He did not see B. on the track until he was some fifteen feet from him, and the emergency brakes were at once applied.

Held, that, inasmuch as B. was a trespasser on the track, the only duty cast upon the engine-driver was to abstain from wilfully injuring B. while so trespassing, and, further, that, inasmuch as the engine-driver had applied the emergency brakes as soon as he saw B. on the track, he had done all he could to avoid the accident, and there was no negligence attributable to him.

O'Bready and *Panneton*, solicitors for suppliant. *J. B. L. Moreau*, solicitor for defendant.

Audette, J.] [March 25.

IN THE MATTER OF THE PETITION OF RIGHT OF ALEXIS BRILLANT.

Negligence—Government railway—Crossing—Omission by railway employees to comply with requirements of sec. 37 of the Government Railway Act—Faute commune.

B., the suppliant, in the afternoon of a clear winter day, was driving a horse attached to a double sleigh along a road crossed by the Intercolonial Railway. He was followed by his son, aged eleven, who was driving a horse attached to a small single sleigh. The view of the track on the north-eastern side, until arriving within 25 feet of it, was obstructed by wood-piles. After passing the wood-piles, B. looked to the south-west to see if any train was coming down, but did not look in the opposite direction, *i.e.*, from which a train was coming. When he was in the act of crossing the track, he heard the alarm signal of a train coming upon him from the north-east at about thirty to forty feet away; then, but not before, the engine-driver sounded an alarm signal. B., by urging his horse, was just able to clear the train, but the boy was unable to stop his horse and sleigh, with the result that the train struck them, killing the horse, smashing the sleigh and severely injuring the suppliant's son. The train hands had omitted to sound the whistle and ring the bell on the approach to the crossing, as provided by sec. 37 of the Government Railways Act.

Held, that the proximate or determining cause of the accident was the negligent omission of the railway employees to comply with the provisions of the said section; but, inasmuch as the conduct of B. in not looking both ways before entering upon the track, while not contributing to the proximate or determining cause of the accident, yet amounted to negligence justifying the application of the doctrine of *faute commune* under the law of Quebec.

2. That, upon the facts, the suppliant was entitled to recover against the Crown, under sec. 20 of the Exchequer Court Act, such damages as might be fixed conformably to the above-mentioned doctrine, having regard to the nature and extent of the negligence of the respective parties.

3. The doctrine of *faute commune* does not obtain under the law of Quebec where the claimant contributes to the proximate or determining cause of the accident.

Potvin and *Langlais*, solicitors for suppliant. *L. Bérubé*, solicitor for respondent.

Audette, J.] BURM *v.* THE KING. [March 28.

Revenue—Customs—Smuggling—Goods belonging to another seized along with smuggler's property—Release.

Upon an application from the decision of the Minister of Customs, under sec. 179 of the Customs Act, confirming the seizure of certain jewelry smuggled by the claimant through the Customs at the port of Montreal, it was shewn that four of the articles seized were part of the personal belongings of the claimant's wife, having been given to her by her father as a wedding present and entrusted to the husband for safekeeping merely.

Held, that, in view of the provisions of sec. 180 of the Customs Act, requiring the court to decide "according to the right of the matter," such of the smuggled articles as belonged to the claimant's wife should be released from seizure and restored to her.

Reg. v. Six Barrels of Ham, 3 All. N.B. 387, considered and not followed. *The Dominion Big Co. v. The Queen*, 4 Ex. C.R. 311, referred to.

L. C. Meunier, solicitor for claimant. *H. J. T. Frihey*, solicitor for respondent.

Book Reviews.

A History of Divorce. By S. B. KITCHIN, B.A., LL.B. Cape Town: J. C. Juta & Co. London: Chapman & Hall.

Very interesting reading. The object of the book is to explain how the extraordinary diversity of laws and opinions which exist in various countries as to divorce, came about, and to ascertain the principles which according to the teaching of history ought to be applied to modern legislation on the subject. The volume before us will be a helpful introduction to those who wish to study the subject in greater detail or in relation to any particular country. The volume shews great research and will be a valuable addition to all libraries as we know of no other book which gives a concise and simple account of the history of divorce. The writer moreover gives his information in an interesting and lucid manner. The typographical execution is above the average.