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THE ONTARIO BAR ASSOCIATION AND OSGOODE HALL.

The Ontario Bar Association held its first luncheon at Osgoode Hall on Friday, May 17, and, with the permission of the Ontario Cabinet, made it the occasion of a formal opening of the new addition to Osgoode Hall for the use of the Court of Appeal for Ontario. The occasion was graced by Sir John Boyd, the Chancellor of Ontario, Sir Æmilius Irving, Treasurer of the Law Society of Upper Canada, the Hon. Justices Britton, Teetzel, Riddell, Latchford, Middleton, Sutherland, Kelly and Lennox, and the retired judges, Hon. Messrs. Maclennan and Osler. Hon. W. H. Hearst represented the Cabinet, and Messrs. E. F. B. Johnston, K.C., and John T. Small, K.C., honorary president, and president respectively, of the Ontario Bar Association and the County of York Law Society. In the absence of the president, Mr. W. C. Mikel, K.C., the vice-president of the Association, Mr. M. H. Ludwig, K.C., presided.

After explanatory remarks by the chairman as to the nature and object of the occasion a very interesting address was delivered by Sir John Boyd, as representing the Bench, which is well worth repeating here.

"I am glad to hear that the Treasurer is going to be called upon sooner or later for his reminiscences; probably they will go back far enough to entertain as well as instruct the present generation. They tell of an old gentleman in the States whose reminiscences would go back to George Washington, but, if he had a particular kind of drink before taking part in the discussion, they would go back to Christopher Columbus. But I do not think that our Treasurer can go back probably more than a century, because there was no such thing as Benchers or Treasurers a century ago. 1797 was the year in which the Benchers

came into existence in this country, so they are of some antiquity, although they are not old; they renew their youth perpetually; never new and never old, they still go on, fresh and buoyant, refreshing their strength, rejuvenated by the best young blood of the country. But as to myself, I am here not of right at all. Sir Charles Moss should have been here. In the brotherhood of judges there is a well understood rule that each one is ancillary to the other; so far as any question of work is concerned, he is always prompt. It made one hesitate, however, when they were going to extend the rule to festive occasions, when the penalty was to attempt to speak. But I thought on the equity of the situation that it might, perhaps, be equitably extended even to a festive occasion, but to attempt to make a speech, he should be here himself, because this room in which we are was intended chiefly and exclusively, perhaps, for the Court of Appeal and the judges of that court, and the Chief Justice of this province would have been, if well, present to-day. However, the brotherhood of judges, as I have indicated, is not the only brotherhood, but we are merged in this larger brotherhood represented here to-day—the Chief Justices and the judges and the ex-judges—I am glad to see some of them here—and the barristers and solicitors; but we are still students of the law. We are all members of one body; there will be the root and the branches and perhaps an occasional twig, but still they are all necessary to the completeness and development of the body. If Sir Charles Moss were here, he would speak as I cannot speak of the material advantages of this room and of this building, because the court has been sitting here for some time. To the lay mind it must seem strange that we should be called to attend here, at the formal opening of the north wing of this building, because there was an opening some months ago at which speeches were made and in which Sir Æmilius took part, and that seemed to be an opening to the ordinary mind; but the explanation is simply this, that there was no banquet then, it was an informal opening, and, therefore, the proper and right opening is to-day; the legal doctrine of nunc pro tunc applying. As you must understand, gentlemen, this meeting is to have a retroactive action which does not extend to the digestion of the lunch. However, I can only join with all the outsiders in admiring the fine and elegant proportions of this room; it is simplicity itself. I think there is good light, so that we can see. I think there is good air. I hope there is good drainage (we cannot see that); and, I hope, the room has good acoustic quali-

ties, because in a court judges have not only to determine, but, to do that, have to hear, and litigants and counsel have to hear what is determined. If there were time I would like to give you a little diary of dates, but there is not time. As I said, this Society began a century ago, 1797. The barristers then in the country got together and formed themselves into a society. Time went on, and they became an incorporated society and the members got the perpetual succession, which I hope will go on perpetually. That began in 1820. In 1823 was the great event when the Society at a solemn meeting adopted the seal which gives voice and substance to the indistinguishable corporation. But 1823 was another great event when the first report was issued by Thomas Taylor, Esquire, as he was called then. It took some time to get enough material for a volume of reports. I believe the Taylor reports were not issued in 1823, and the records of the Society report that there was a deficit. But what could we expect, for the first case in the first volume—Gentlemen, can you imagine the unsophisticated character of this report!—the first case is an application to strike an attorney off the roll for not accounting for his client's money! I would suggest that you should take a look at the book when you go out. There is a column that is said to be a Doric column on the top, and a beaver stationed on each side. On one side there is the figure of Justice with her eyes bandaged, of course, with the sword in one hand and the balance in the other. The other figure is that of Hercules and his club. These are some cases, even nowadays, where that bandage need not be removed from the lady's eyes, but the lady might request Hercules to step aside with his club. Not until 1832 did Osgoode Hall begin to exist as a building. We had no local habitation fixed. When Sir Emilius Irving gives his reminiscences, we shall ask him for particulars of these things, and if proper notice is served on him, and he does not find any just exceptions, he will give you the particulars. But I understand that Osgoode Hall, as a building, first began in 1832, that is 80 years ago, and that building was, or part of it was, of frame, the part we have just left after drinking the King's health. The east wing was the first part put up, and I am told that Sir John Beverley Robinson gave the land on which the building is, and John Beverley Robinson suggested the name by which the building is called "Osgoode Hall," in memory of the first Chief Justice of this province, whose successor Sir Charles Moss now is. Then some years afterward, in 1844, the west wing of the building was put up, and the

two, I believe, were joined together; and so it went on until about 1860, when the whole building was reconstructed and beautified with the façade of cut stone on the outside, the adornments of stone and balustrades and all this beautiful tiling, etc., on the inside. Dr. Scadding says that the whole pile was calculated to elevate and refine each successive generation of candidates for the legal profession, and to inspire amongst themselves a salutary esprit de corps. These are good words of my old teacher, Dr. Scadding, whose memory we all have in respect, and the very same epithet and notations may apply to the present building."

Further addresses of an interesting and reminiscent nature followed, by Sir Æmilius Irving, Hon. W. H. Hearst, Mr. E. F. B. Johnston, K.C., and Mr. John T. Small, K.C. The new addition and its acoustic properties were specially praised, and it was pointed out by Mr. Johnston that the court room needed only some proper wall decorations and hangings to give it comparative perfection.

After the luncheon the Council of the Association met and dealt with a matter important to the profession, namely, the revision of the County Court and Surrogate Court tariffs.

THE FRASER CASE.

This case which has been occupying the attention of the Courts for some time past recently reached another stage, when the Court of Appeal gave judgment granting a new trial of the issue as to the sanity of Mr. Fraser.

The case is somewhat unusual, and in its progress through the Courts has given rise to a good deal of comment. The real object of the proceedings is to obtain a judgment of nullity of marriage. For that purpose an action was instituted by Michael Fraser by his next friend against the alleged wife and her father. At the outset, the question naturally arises, by what statute is the High Court of Justice of Ontario empowered to entertain matrimonial cases? We confess we are unaware of any such statute and therefore are unable to see that the Court

had any jurisdiction to entertain the action at all. But the institution of such an action by one person as the next friend of another, can only be justified where that other person is by law regarded as a person who is not *sui juris*, but no adjudication had been obtained declaring that the plaintiff was not *sui juris*; the action being based on the assumption that the plaintiff was a lunatic, before any judicial finding that he was in fact a lunatic had been obtained; it was like putting the cart before the horse. For aught that appeared to the contrary, the plaintiff was *compos*, and therefore an action "by his next friend" was wholly incompetent. This difficulty appears to have been appreciated in the early stages of the action, so in order to get the horse into his proper position before the car, collateral proceedings in lunacy were instituted, in which an issue was ordered to be held to determine whether or not the plaintiff in the original action was sane, but to this issue, the wife, who was most vitally concerned was no party, and consequently as we judge would not be bound by the finding even if it were adverse to the sanity of her alleged husband. The trial of the issue before Britton, J., resulted in a finding of sanity, from which an appeal was had by the promoter of the proceedings to the Divisional Court. That Court instead of disposing of the appeal on the evidence adduced before Britton, J., proceeded *mero motu* to re-try the issue, and on the further evidence adduced on the re-trial, allowed the appeal, and adjudicated Mr. Fraser a lunatic and incompetent to manage himself or his estate. From this decision an appeal was had on behalf of Fraser to the Court of Appeal; and that Court, while holding that the Divisional Court, in re-trying the issue, had exceeded its powers, nevertheless, instead of disposing of the appeal on the evidence adduced before Britton, J., affirmed the Divisional Court so far as it set aside the judgment of Britton, J., and, on the strength of the evidence adduced at the re-trial which it held to be improper, granted a new trial of the issue. The result is curious, and we think unprecedented.

Whether the unfortunate Mr. Fraser will have to pay for all

these legal diversions is reserved for the consideration of the Judge who re-tries the issue.

We have referred to this case because it has an important bearing on the question of marriage, which has been recently much in the public mind.. Here is a case in which it is alleged that a marriage was solemnized in circumstances which make it null and void in law. But this *de facto* marriage is not *ipso facto* null and void; it must be duly annulled by judicial sentence in the lifetime of the parties, and as far as we can see there is no Court in this Province which has any jurisdiction to pronounce a sentence of nullity of marriage. All the litigation which has been going on, so far as its main object and purpose is concerned, appears likely to prove absolutely futile, whatever the result.

RELIGIOUS INSTITUTIONS ACT.

In the revision of "the Religious Institutions Act," passed at the last session of the Ontario Legislature, we find that s. 24 of the R.S.O. c. 307, has been omitted from the revised Act, and we understand that the reason of the omission was, that it was supposed that the provisions of s. 24, were sufficiently covered by the Mortmain Act, 9 Edw. VII. c. 58. A careful examination of the latter Act, however, will, we think, shew that it has not the supposed effect.

Section 24 enabled any religious society or congregation of Christians, to receive a gift, devise or bequest of any lands or tenements or interest therein not exceeding the annual value of $1,000. It provided that such gift should be made at least six months prior to the death of the person making the same, and that the land should be sold within seven years after its acquisition.

This section imposed no limitation as to the purpose or object for which the gift might be made and did not limit the gift in any way to purposes technically called "charitable."

The Mortmain Act on the other hand deals with gifts for

"charitable objects" among which "the advancement of religion" is included, see 9 Edw. VII., c. 58, s. 2 (2), but it does not, that we can see, enable any "religious society or congregation of Christians" to hold lands for other than "charitable purposes." On the contrary it expressly prohibits any corporation (and most religious societies are corporations) except by license of the Crown, from acquiring any land whatever, under penalty of its forfeiture to the Crown.

There are many objects for which a grant of land might be made whereby a religious society or congregation of Christians might be benefited, which would not be charitable, *e.g.*, for the payment of a debt: *Stewart* v. *Gesner*, 29 Gr. 629; *Smith* v. *Methodist Church*, 16 Ont. 199, or the superannuation of ministers: *Smith* v. *Methodist Church*, supra, or by way of endowment, see *Sills* v. *Warner*, 27 Ont. 266, etc., but we should fear that gifts of land to any religious society or congregation of Christians for any such purpose, not "charitable" would now be void unless the donees held a license from the Crown, or special statutory powers to hold and acquire land for such other objects.

THE INTERNATIONAL REGULATION OF OCEAN TRAVEL.

The Senate of the United States has just adopted the following resolution: "Resolved, that the President of the United States be, and he is hereby, advised that the Senate would favour treaties with England, France, Germany, and other maritime governments, to regulate the course and speed of all vessels engaged in the carrying of passengers at sea, to determine the number of lifeboats, rafts, searchlights, and wireless apparatus to be carried by such vessels, and to assure the use of such other equipment as shall be adequate to secure the safety of such vessels, passengers, and crews."

This resolution naturally attracts the attention of those interested in the study of International Law.

Uniform Treaties and Laws.

So far as these treaties deal with subjects of general importance and involve interests common to all nations, it is very desirable that they should be uniform. This uniformity can best be obtained by conference between representatives of different maritime nations, at which the delegates shall have ample opportunity to consider the subject in all its bearings, and then report their conclusion for ratification by the powers that sent them. Many such conferences, which have sometimes been called congresses, have been held. The one that is most in the public eye at present is the conference at the Hague, in 1899, which first made provision for the establishment of an international court of arbitration.

But long before this conference was held, there had been other conferences in reference to maritime matters which had led to greater uniformity in maritime law. As the commerce between different countries increased, the number and size of vessels trading between them increased in a corresponding ratio. The speed and power of ocean steamers have increased in equal ratio, and these mighty vessels have almost entirely displaced the sailing vessels which carried almost all ocean-bound commerce down to the year 1850.

Lights and Signals.

The risk of collision had increased in a corresponding ratio. Certain usages in reference to lights and signals had grown up in different countries. It is to the honour of the State of New York that one of the first acts of legislation prescribing lights and signals for the purpose of avoiding collision was adopted by that state in the year 1829. This Act provided for the range lights, the forward white light lower, the after white light higher, which were required on all the waters of the State of New York for many years, and were finally adopted by the international maritime conference of 1889. Before that time, and in or about the year 1861, many maritime nations had regulated the lights and signals, and precautions to be observed by ocean-bound

vessels, and these by common consent had become the law of the sea. (*The Scotia,* 14 Wall. 170, 20 L. ed. 822.) But experience shewed that these regulations were in some respects deficient, and the construction put upon them by the courts of different countries was to some extent diverse. Accordingly, by agreement of the great maritime nations, an international maritime conference was held at Washington in the year 1889. It revised the rules of navigation and the requirements as to lights and signals. The international rules as recommended by them were adopted by statute or by executive decree in all the principal maritime nations, and have become the law of the sea from that time to the present.

Ocean Lanes.

This conference also dealt with the subject of ocean lanes, and with that of life-saving systems and devices. Commodore Maury, before the Civil War, had made a careful study of the ocean currents on the route between New York and Liverpool under the climatic conditions which prevailed at different seasons of the year, and had recommended certain routes to be observed by ocean steamers plying between the United States, on the one side, and British, French, and German ports, on the other side, of the Atlantic. The great Civil War distracted attention from these recommendations. The subject was again taken up by Thomas Henry Ismay, who was one of the founders of the White Star Line, in a letter to the British Board of Trade on the 1st of January, 1876. In this letter he called the attention of the Board of Trade to these recommendations of Commodore Maury, recommended them strongly for adoption as means of preventing collisions and avoiding danger from ice, and declared that he had required the steamers of the White Star Line, sailing between New York and Liverpool, to observe them. This recommendation was again taken up by the firm of Ismay, Imrie & Company, of which Mr. Ismay had been the senior partner, in a communication to the British Board of Trade, dated December 12, 1889. The result has been that these

lanes have been adopted by all the trans-Atlantic lines. (Proceedings International Maritime Conference, 1889, vol. 3, pp. 269, 270, 277.)

At the conference of 1889 the subject of the enforcement of the agreement as to these ocean lanes came under consideration, and reference was made to the discussion which had taken place before the United States Naval Institute at Annapolis. In the course of this discussion, Ensign Everett Hayden made the following statement (Ibid, p. 278):—

"The mails are given to the fastest vessels. One steamer may take a safer route, traverse a slightly longer distance, and lose the mails. This very thing happened last year, when the Werra was beaten a few hours by the Servia, and Captain Bussuis complained that he had followed the route recommended and lost the mail in consequence. This question should, therefore, be carefully considered and postal regulations framed accordingly."

This statement of Mr. Hayden's expresses very clearly one intrinsic difficulty which had been perceived at the time of the conference, that is to say, the want of a sanction to any voluntary agreement that might be entered into between the steamship companies. It also points out very clearly the disposition of the several governments to encourage speed in the ocean transit, even at the expense of safety. It is obvious that any effective regulation of this subject could only be secured by international agreement.

Life-saving Devices.

The next subject that was dealt with by this conference of 1889 was that of life-saving systems and devices. The report of the committee on that subject is in Vol. 3 of the Proceedings, p. 182. This contains a report to the British Board of Trade of a commission which had been appointed by the Crown to consider the subject of life-saving appliances. The chairman of this commission was Thomas Henry Ismay. May I stop for a moment to say that I have known many men who were prominent in the

commercial world. I have never known one of keener and more comprehensive insight, more liberal views, and more resolute determination to achieve the best results for the public than the elder Mr. Ismay.

The report of this commission was adopted by the British Board of Trade.

The principle of these rules was approved by the conference (Ibid, vol. 2, pp. 1091, 1903), and it recommended: "That the several governments adopt measures to secure compliance with this principle in regard to such boats and appliances for vessels of 150 tons and upwards, gross tonnage."

Unfortunately the several governments did not adopt these recommendations. A great diversity came to prevail in the equipment of ocean steamers belonging to different countries. Some nations were exacting, some were lax. The result was an unfair discrimination against the vessels of those countries which had adopted more stringent regulations.

Salvage.

Another subject that has been considered at the third international conference on maritime law is that of salvage. The ratification of the salvage treaty was consented to by the Senate, January 18, 1912. The text of the Convention is in Vol. 4, Am. Journal Int. Law Supp., p. 126.

But unfortunately this conference did not go far enough in reference to the important subject of compensation for saving life at sea. By the ancient maritime law, salvage compensation for the saving of life at sea, unconnected with the saving of property, was not allowed. This is still, I regret to say, the law of the United States, although it is true that our courts will grant more liberal compensation for the saving of property when it is accompanied by the saving of life. This was so held by Judge Ware in *The Emblem*, 2 Ware 68, in 1840, and by Judge Benedict in *The George W. Clyde*, 80 Fed. 157, in 1897.

The case of *The Emblem* is a remarkable illustration of the

growth of the spirit of humanity during the last sixty years. The Emblem was a schooner that was dismasted and thrown on her beam ends in a storm. She drifted for five days, was passed by twenty-three vessels, no one of which went to her relief. Finally one vessel did succor her. Alas! all her crew died of exposure. The captain's wife alone survived.

The British Parliament made some provision by statute for the amendment of the law of salvage in this particular. The first enactment proved inadequate. The British Merchant Shipping Act of 1894, s. 544, sub-s. 1, authorized the court to award salvage compensation for saving life from a foreign vessel, if "the services are rendered wholly or in part within British waters," and for saving life from a British vessel wherever the services were rendered. If it had not been for this Act, the Carpathia would have no right to compensation for saving the lives of the shipwrecked survivors of the Titanic.

That great admiralty lawyer, Sir Francis Jeune, held, in *The Pacific*, [1898] P. 170, 67 L.J. Prob. N.S. 65, 79 L.T.N.S. 125, 46 Week. Rep. 686, 8 Asp. Mar. L. Cas. 422, that a British vessel was entitled to compensation for saving the passengers and crew of a Norwegian ship that had been wrecked on the high seas, on the ground that they were brought into England by the salvor. The British Parliament did not think itself justified in extending to foreign vessels the liberal rule it applied to British ships, unless the service was partly rendered on British waters.

It is reserved for international agreement to extend this beneficial principle to the commerce of all nations.—EVERETT P. WHEELER, in *Case and Comment*.

CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR.

Although the Statute of Frauds came into operation so long ago as the year 1677, the true construction of its provisions is still being tested from time to time by the courts. Section 4 provides, inter alia, that no action shall be brought upon any agreement that is not to be performed within one year from the making thereof unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

The first reported case on this section appears to be *Peter* v. *Compton,* Skin. 353, which laid down the principle that the statute only applied to agreements which were in their terms incapable of performance within the year, or, in other words, the effect of the decision appeared to be that the statute only applied to contracts which could not, as distinguished from might not, be performed within the space of one year. Similarly, although an agreement contains a provision which may determine it within the year, yet, if its general terms are such that it is incapable of performance within the year, no action can be brought in respect of it unless it is in writing: *Birch* v. *Earl of Liverpool,* 9 B. & C. 392.

On the other hand, money payable under a contract which would ordinarily be within the statute may be recoverable on some other ground. In *Knowlman* v. *Bluett,* 29 L. T. Rep. 462; L. Rep. 9 Ex. 307, the defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay £300 a year so long as she maintained and educated the children. After making the payments for several years, the defendant discontinued his payments, and, on the plaintiff bringing an action for two and a half years' arrears, it was held that, the consideration being executed, she was entitled to recover as for money paid at the defendant's request at the rate fixed by the verbal agreement, although the agreement might be one

which was not to be performed within a year. Lord Justice Bowen, in commenting on this case in *McGregor* v. *McGregor*, 58 L. T. Rep. 227; 21 Q. B. Div. 424, at p. 433, said he found some little difficulty in understanding the effect of that decision, and expressed no opinion about it; but the ratio decidendi appears to have been that the plaintiff, having expended the money claimed on behalf of the defendant, was entitled to succeed on the claim as money paid at the defendant's request, the court holding that although the declaration was in form upon a special contract, yet in substance the claim was for money paid.

The court really appears to have amended the pleadings, and held that an indebitatus count could be successfully pleaded, although another cause of action co-existing with it might be avoided by the operation of a statute within a year.

A decision similar to that of *Birch* v. *Earl of Liverpool* (*sup.*) was arrived at in *Dobson* v. *Collis*, 27 L. T. Rep. O. S. 127; 1 H. & N. 81. There the defendants engaged the plaintiff until the 1st Sept. 1855, and for a year thereafter, unless the said employment were determined by three months' notice given by the plaintiff or defendants respectively. Before the 1st Sept. 1855, the plaintiff was dismissed. Chief Baron Pollock expressed the opinion that *Birch* v. *Earl of Liverpool* (*sup.*) was exactly in point, which, no doubt, it was, and Baron Alderson explained that the very circumstance that the contract exceeded the year brought it within the statute, and, if it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, which might come into operation before the end of the first year.

In *McGregor* v. *McGregor* (*sup.*) the facts were that a husband and wife, having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children. The husband having failed to make the agreed payments, the wife successfully sued him in the County Court, and, on appeal, one

of the points taken on behalf of the husband was that the agreement came within section 4 of the Statute of Frauds. On the facts it is a little difficult to distinguish this case from *Knowlman* v. *Bluett* (*sup.*), as, indeed, was expressly pointed out by Lord Justice Lindley, but the court decided the case on the line of previous decisions, including *Murphy* v. *Sullivan*, 11 Ir. Jur. N.S. 111, where the Exchequer Chamber in Ireland held that a contract to maintain a child for life was not within the statute, because it might determine within the year, and thus overruled *Davey* v. *Shannon*, 40 L. T. Rep. 628; 4 Ex. Div. 81, where Mr. Justice Hawkins held that an agreement was within the statute, although performance might take place within the year, if at the time when the agreement was entered into the parties contemplated that it could or might have to be performed beyond the year.

It is also observed that a contract to serve for one year, the service to commence on the day following that on which the contract is made, is a contract which is to be performed within a year, and therefore the Statute of Frauds has no application: *Smith* v. *Gold Coast and Ashanti Explorers Limited*, 88 L. T. Rep. 202, 442; (1903), 1 K.B. 285, 538. This decision was founded on dicta expressed in *Cawthorne* v. *Cordrey*, 13 C. B. N. S. 406, and *Britain* v. *Rossiter*, 40 L. T. Rep. 240; 11 Q. B. Div. 123. It must be confessed that this decision seems to do violence to the express language of the section, but the court seems to have been considerably influenced by the following dictum of Lord Justice Brett in *Britain* v. *Rossiter* (*sup.*), where he refers to *Cawthorne* v. *Cordrey* (*sup.*): "There was, however, a dictum of Mr. Justice Willes, which seems to be supported by the opinion of Mr. Justice Byles; these are great authorities; and that dictum seems to have been that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract; but that, inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the

service to be performed within 365 days after that, the law did not count that half-day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year. This view was founded upon a fiction—namely, that the law does not take notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum, and carry it to the length of a decision." The Divisional Court and Court of Appeal in *Smith* v. *Gold Coast and Ashanti Explorers Limited* (*sup.*) applied to the dictum referred to by Lord Justice Brett the force of a decision.

A curious point in connection with this subject, and one which must necessarily affect innumerable contracts of a certain class, arose in the case of *Reeve* v. *Jennings*, 102 L. T. Rep. 831; (1910), 2 K.B. 522. The facts of that case were that on the 11th April, 1908, the defendant entered the service of the plaintiff, who was a dairyman, upon the terms of a verbal agreement which provided that the employment might be determined by either party giving to the other one week's notice, and that the defendant should not within thirty-six months after leaving the plaintiff's service carry on the business of a dairyman within a certain specified area. On the 6th Feb., 1910, the defendant quitted the plaintiff's service, and started a dairyman's business within the prohibited area. It will thus be seen that the mere hiring was weekly, but the inclusion of a provision that the defendant would not within thirty-six months after leaving the plaintiff's service be concerned in a similar business turned it into an agreement which certainly could not be performed within one year of the making thereof. Mr. Justice Coleridge in the course of his judgment said he preferred to rely on the decision of Mr. Justice Abbott in *Bracegirdle* v. *Heald*, 1 B. & Ald. 722, where the learned judge defined a contract which does not fall within the statute as one where "all that is on one side to be performed . . . is to be done within a year."

Another case in which the contract of employment was for a period beyond that prescribed by the statute, but determinable

by notice which might enable the contract to be performed within one year. is *Hanau* v. *Ehrlich,* 105 L.T. Rep. 320; (1911), 2 K.B. 1056; 106 L.T. Rep. 1; (1912), A.C. 39. The net result of that decision is that an agreement to employ a servant for a term of two years, subject to six months' notice on either side during that period to determine the employment, is an agreement that is not to be performed within the space of one year, and therefore within section 4 of the Statute of Frauds. On the face of it, this agreement certainly came within the statute, but the plaintiff's contention was that *Dobson* v. *Collis* (*sup.*) and that class of cases only decided that a contract for a definite term exceeding one year is within the statute, although it may be fully performed within a year; and it was suggested that these cases were overruled by *McGregor* v. *McGregor* (*sup.*). Lord Justice Buckley in his judgment expressed the opinion that *McGregor* v. *McGregor* was nothing but an investigation of what the law had theretofore been declared to be, and that *Dobson* v. *Collis* (*sup.*) correctly described the law as ascertained by decisions of the Court of Appeal. Lord Alverstone, C.J. puts the matter quite neatly in his judgment in the House of Lords where he says: "The one class of cases says that if there is no mention of time, and the time is uncertain, the agreement is not within the statute. The other class of cases decides that if the time mentioned is more than one year, but there is power to determine, it is within the statute. I have never been able to see why that is not a perfectly good working construction for this statute."

It might, perhaps, be too bold to suggest that the principles upon which the section should be construed have been finally laid down by the cases referred to above, but the dictum of Lord Alverstone, C.J. quoted above should be a sufficient guide in the majority of cases which arise in connection with the ambiguous language in which this important section is couched.—*Law Times.*

THE JUDICIAL CHARACTER, AS MADE BY ENGLISH JUDGES.

To a real lawyer this must be an absorbing subject. He generally desires and looks forward to the possibility of judicial service. If such promotion comes, apart from the fitness that must depend primarily upon his own qualities, exertions, and experience, he will find no better light for his path than that which shines from the lives of the great judges of the past. To condense some of this precious light within a narrow compass is the purpose of these comments. They consist of but passing a word as to most of the names mentioned, based upon reading not exhaustive, but perhaps sufficient to give at least a partial view of some of the great men of the English bench and to afford opportunity to learn something of the more obvious lessons of their lives.

As almost every lawyer did until more modern days, we begin with Coke. His will be a great name in the law always—certainly as long as the English common law is known and studied. The imperfections of his character, so apparent in his earlier life, were held more in restraint while he sat on the bench, and he exemplified much that a Judge ought to be. Nothing in his judicial life is more interesting than his encounter with James the First—that paradox of a monarch, whose own judicial discrimination was so exquisite, we are told, that he could taste of the water from the cauldron in which some poor wretch had been boiled to death and pronounce the unhesitating judgment: "This was a witch," or "This was not a witch." The incident is well known but is always worthy of repetition. In a case where his own interests were involved, the King sought to overawe the Judges of England and to commit them to a certain course in advance. The oth ~ Judges expressed compliance. Coke's answer was: "When the case happens, I shall do that which shall be fit for a Judge to do." It was the noblest illustration of the independence that marked his whole life. Yet, admirable as was Coke's conduct, it has many parallels in English judicial history. The time has not come often since those days

of intensified royal prerogative when the test would have been similarly applied, but, to the credit of the English bench, few of the Judges who have succeeded Coke would have been less true to duty. Lord Chelmsford's firm refusal, at a much later time, to submit to interference at the hands of Disraeli with his judicial appointments, is but one of a number of instances shewing that Coke's spirit has ever since been alive in England.

Sir Matthew Hale, that modest, virtuous man, who gravely warned his grandchildren against the evil influence of "pledging healths," is in many respects the antithesis of Coke, the grim, militant lawyer, who, with all his merits, neither possessed nor cultivated those gentler virtues for which Hale was so conspicuous. But they stand on common ground in the high conception of a Judge's duty that both held and exemplified. Hale's views were expressed in a series of rules for judicial conduct which he composed and closely followed. They embody the essentials of strict uprightness, industry, independence, self-restraint, and that rarer quality of the open mind, which, in his words, is to be not "prepossessed with any judgment at all, till the whole business and both parties be heard." He has given an example to both Judges and lawyers in the practice that he observed of speaking "in few words and home to the point." No purer character is to be found in England's judicial annals, and perhaps none have been more learned and enlightened. His virtues stirred the heart of the Puritan Richard Baxter to write of him in words of unmeasured praise, in part as follows:—

"Sir Matthew Hale, that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice—(who would not have done an unjust act for any worldly price or motive)— . . . . that pattern of honest plainness and humility, who, while he fled from the honors that pursued him, was yet Lord Chief Justice of the King's Bench, after his long being Lord Chief Baron of the Exchequer; living and dying, entering on, using, and voluntarily surrounding his place of judicature with the most universal love, and honour, and praise, that ever did English subject in this age, or any that just history doth record."

All lawyers do homage at the shrine of Holt. In America there is a custom to speak of the "Great Chief Justice." In England, though no single Judge stands out with such pre-eminence, probably the name of Holt as naturally rises to the thoughts when this term is used as that of Marshall does in this country. He stands for strength, for soundness, for courage, for common sense. He lived at a time when witchcraft and supernatural appearances were yet believed in, and the individual who announced himself as the messenger of the Almighty, charged with a demand that a *nolle prosequi* be granted for a certain prisoner then awaiting trial, had reason to hope that he might overawe the Chief Justice. But Holt, observing that the Almighty would never have given to him a direction which should have been addressed to the Attorney-General, rebuked the deceit and committed the false messenger to prison. He has a peculiar interest for American lawyers, because, unlike most of those who have reached high judicial office in England, he did not combine political activity in the Houses of Parliament with the discharge of his duties as a Judge. In the words of Lord Campbell, he was a "mere lawyer," possessing a "passion for justice" and a "genius for magistracy"—qualities displayed during a long judicial service and resulting in a record that has made Holt "the model on which, in England, the judicial character has been formed."

As Chief Justice Holt's days were drawing to a close, Lord Hardwicke, against the judgment of his mother, who wished him bred to some "honester trade," was entering on those studies, which, aided by his great powers of mind and long experience, were to give him the consummate knowledge and mastery of equity for which he is pre-eminent. It was not unfitting that as the great Judge who knew so well and so soundly administered the common law was laying down his work, he who was to expound so admirably and in a large measure to create the present system of English equity, was taking up his own. Individual judgments will differ, but Chief Justice Holt and Lord Hardwicke, each in his own sphere, are perhaps the highest types in the two great branches of English law. But Lord Hardwicke

was greatly superior to Holt in culture and general fitness for high judicial position. He succeeded by persistent efforts, which were characteristic of everything he undertook, in making himself an admirable English scholar, a quality which his judgments reflect; and he spared no pains to inform himself on all subjects that would furnish any direct aid in the discharge of his duties as a Judge. The result of such thoroughness, aided by such ability, was the creation of a type to serve as a model for all Judges who have followed him. His self-control, his desire to do justice, his courtesy and consideration, left nothing to be desired in his demeanor on the bench. More learned and more gifted perhaps than any who appeared before him, he was yet ever patient and attentive, anxious to gather any light that counsel might give, and, without untimely suggestions and interruptions, he heard the case through to the end, when a complete grasp of the facts considered in the light of the law, which none knew better than he how to apply, enabled him to give a sound judgment.

Scotland has given some eminent Judges to England. Of these, when every point is considered, Lord Mansfield is easily the greatest. It would require more than a paragraph or two to do justice to what he was. From the beginning he applied his remarkable mental powers to the acquisition of a broad and thorough learning, seeking to liberalize and to strengthen his mind by gaining a real acquaintance with history, literature, philosophy, and the classics, and by association with men of literary attainments and culture. In his study of law itself he did not tread merely in the narrowest circle of professional learning, but sought out and made his own the Roman civil law, international law, and the systems of modern European countries other than England. These habits of study he continued throughout a long life, covering nearly the whole of the eighteenth century; and so when at fifty-one, after many years of experience at the head of the English bar and in parliamentary life, he was called to preside as Chief Justice of the King's Bench, he was fitted as few have been at any time to fill so important a post. But his attainments, his rare mental powers,

would not alone have made him, as some have thought him, the greatest of English Judges. Lord Mansfield loved justice, he felt his obligation as a servant of the public, he was unflinching in his courage and independence, and he had in marked degree that somewhat rare combination of qualities which make up what may be called the judicial faculty—something capable of no exact definition, heaven-born, perhaps, and certainly, by some, not to be acquired. The administration of his Court was beyond criticism, and he presided with a dignity and consideration unsurpassed even by Lord Hardwicke. Coke, Holt, perhaps others, were more deeply learned in the common law, had greater reverence for it, and are more thoroughly identified with it. But Lord Mansfield's accomplishments for jurisprudence went much beyond the work of any of these. With a breadth of vision impossible for men whose only learning was the common law, he saw the need of something more expansive to apply to changing commercial conditions, and, building on other systems with which his extensive studies had given him familiarity, he instituted, and in large measure perfected, a new system of law for the world of trade and business. Judicial history has few instances of opportunity so admirably embraced. He well deserves to be characterized, in the terms so often used of him, as "the Great Lord Mansfield."

Lord Camden is hardly to be placed among England's greatest Judges, but there is a charm about him that some greater names do not possess. It is the attraction of noble character, always nobly exerted, rather than of uncommon powers. While Attorney-General he thus expressed his conception of his duty as public prosecutor in an important capital case before the House of Lords: "My Lords," he said, "as I never thought it my duty in any case to attempt at eloquence where a prisoner stood upon trial for his life, much less shall I think of doing it before your Lordships: give me leave, therefore, to proceed to a narrative of the facts." Living long, as most of the noted English Judges did, he was true always to this spirit of justice and moderation; and in all his conduct, both as Judge and legislator, he acted on the belief that he was charged with an obligation

to aid in making the law the servant of truth and freedom. Indeed, there was about him, as one of his contemporaries has recorded, a "kind of benevolent solicitude for the discovery of truth." Approaching his duties in this spirit, when called to fill the highest judicial office in England, and possessing much more than ordinary powers and attainments, he did not need the more brilliant qualities of some of his greater contemporaries to make of him the trusted and respected Judge that he became.

If we may trust Lord Campbell's narrative, Lord Thurlow enjoyed a reputation as a great Judge that he did not deserve. His immense self-confidence, his overbearing and often threatening manner, his oracular and contemptuous method of speech, awed those who came in contact with him and impressed them with a belief in his possession of powers which a critical consideration of his acts and utterances does not support. Yet even Lord Campbell, who, whether in the spirit of the impartial historian or for some other reason, finds little to praise in Lord Thurlow, admits the native vigour of his intellect and the influence which he could exert over the minds of men. And it could not well be that the man, alone of all others, of whom Dr. Johnson admitted that when he had to meet him "he should wish to know a day before," was otherwise than the remarkable being which, in his own day, he was certainly thought to be. But purely in his character as a Judge—and it is in this aspect that we are concerned with him—Lord Thurlow suffers by comparison with others. He had the opportunity of practice before both Lord Hardwicke and Lord Mansfield, but apparently the admirable example of judicial propriety which they set failed to impress him. Unusually fitted by nature to preside with dignity and to incite respect, he often failed to do either; and though the trespass of his undisciplined nature on the rules of strict decorum sometimes excites amusement, it transcends all notions of what should be expected from the first magistrate of a great country. It was hardly possible that so vigorous a mind and forceful a character should not have been reflected in judgments that command respect, but there is little to indicate that he imitated his great contemporaries in their ambitious

efforts to fit themselves for their important work and to improve the systems of law which they administered. He was careless and immethodical, and, if current report spoke the truth, he was even sometimes content to deputize the writing of his opinions. No taint or suspicion of corruption ever rested upon him, but impartial consideration of his conduct forces the conclusion that to Lord Thurlow the holding of his high office was more important than its efficient and useful administration.

It is not often that from one family come two such men as the brothers William and John Scott. Both won great reputations as Judges and both lived to extreme old age. The elder, Lord Stowell, died past ninety and was hardly less honoured for his charming and cultivated personality than for the soundness and learning of his judgments in admiralty and international law. John Scott, familiar to every lawyer as Lord Eldon, almost reached his brother's years, for he died in 1838, in his eighty-seventh year. Although his judicial life had closed ten years earlier, for more than twenty years prior to his relinquishment of the Great Seal he had sat continuously in the Court of Chancery, a longer tenure of that high office than any Chancellor enjoyed except Lord Hardwicke. Lord Campbell has thought fit to call attention to many serious defects that Lord Eldon possessed as a Judge, and it is certain that he was dilatory in the discharge of judicial business and was of that turn of mind which abhors all change and opposes reform intended for the correction of existing abuses. But difference of political views, and the sharp antagonism that this frequently brought about, may explain much of Lord Campbell's unfavourable comment. It is well to remember also that the latter's trustworthiness as a biographer has been severely questioned. Even the somewhat hostile atmosphere of the "Lord Chancellors" does not becloud the great qualities that marked Lord Eldon's judicial career, and that explain the reverence in which his name is held. Probably no one has surpassed him in that characteristic which a Judge ought to acquire, if he does not possess it by nature, of courteous and patient consideration for the counsel who appear before him. His complete knowledge and understanding of the

law which he administered, the soundness of his application, and his desire to do justice, which never yielded to any other motive, ensured a right judgment in every case. In the clearer light of later years some faults he had are more apparent, but all who seek judicial excellence would do well to study his life on the bench and, in large measure, to follow the path by which he passed to the great eminence that he reached.

The year 1750 is the birth year of two noted English lawyers —Erskine and Ellenborough. The first, the foremost advocate of his own and perhaps of any time, was also Lord Chancellor, and the other became Chief Justice of the King's Bench and as such enjoyed an ascendancy that few Judges have had. Erskine's enthusiastic, gifted and intrepid nature fitted better into the stress and excitement of life at the bar, and the administration of the dry doctrines of the Court of Chancery, with which his previous experience had not made him familiar, added nothing to his reputation during his short term of office. But Lord Ellenborough's is a name to conjure with. In him the law seemed to be vitalized. When he spoke men rendered respect and obedience. Like a true successor of Lord Coke, he was unwavering in his independence as faultless in his understanding as he was thorough and comprehensive in his knowledge of the law. Yet with all his gifts and learning his qualities of manner and presence entered largely into his judicial reputation, and there is perhaps no more striking instance among English Judges of the part that mere personality plays in the respect and authority which a Judge acquires. In his strong and able hands all felt a sense of security, and he ruled without question in the Court of King's Bench. His career on the bench was marred only by his rough and overbearing manner, a thing apparently inseparable from some natures when raised to high position, and a fault common to more than one English Judge of justly great reputation. In Lord Ellenborough's case, as Lord Campbell has well said, the defect is forgotten, "while men bear in willing recollection his unspotted integrity, his sound learning, his vigorous intellect, and his manly intrepidity in the discharge of his duty."

When death ended Lord Ellenborough's tenure of office, it was fortunate for the public interests that the high post which he had filled passed to the no less able keeping of Lord Tenterden. Without the gifts and accomplishments that give a charm to the lives of so many men of reputation, and having accomplished nothing brilliant in his whole career, Lord Tenterden is yet one of the most interesting characters among English Judges. Judging by his inheritance alone, life did not open a very wide prospect to him. The son of a barber in a small town could not have a reasonable hope of reaching the Chief Justiceship of England. And so, many adverse conditions had to be overcome. But he surmounted them all. When he entered upon his office he was ripe in legal learning, thoroughly disciplined in mind, impressed with a high sense of the trust committed to him, and possessed of a just estimate of its requirements. His attitude towards judicial duty is nobly expressed in his comment to a friend, who congratulated him on his promotion from the bar, that "the search after truth is much more pleasant than the search after arguments." The period during which he presided in the Court of King's Bench is described by Lord Campbell as a "golden age" in which "law and reason prevailed." And while he suffered at times from the same infirmities of temper that had marked Lord Ellenborough, the administration of his Court was in most respects beyond exception. Discipline was maintained, argument kept within proper bounds, the just limits of decision observed, and law and justice made the basis of all.

As we approach more modern days, few, if any, of the figures in the forefront are more attractive than that of Lord Lyndhurst. Born in Boston, though brought up and living all his life in London, he is one of the two native American lawyers who have won great distinction in the law in England, the other being Judah P. Benjamin. He possessed the acutest of intellects, and was able, on occasion, to master and apply the law at the bar with singular skill and to administer it on the bench with equal force and clearness. But he was more of a statesman than a lawyer, and it has been questioned whether he was really great as a Judge. Whatever his deficiency, however, in completeness

of legal learning, there can be no question, perhaps, that, as became the successor of Lord Eldon, he was as well fitted by nature to hold high judicial office as any who preceded or followed him. His clear head, his ready perception, his willingness to hear argument, his open mind, his thorough self-command, made a fortunate combination of qualities that resulted in his admirable manner on the bench and in the sound and satisfactory judgments that he rendered. It is probably true that many surpassed him in technical learning, and it may be, as some have asserted, that his heart was not in the law. He has at least given an example of judicial propriety and fitness that suffers in comparison with none. Lord Westbury, whose searching intellect and bitter tongue made him the keenest and least favourable of critics, expressed the opinion, near the close of his long life, that Lord Lyndhurst's was the finest judicial intellect that he had known.

Few can reach the heights won by the great names so briefly touched on here, because, in truth, there is not room there. Many must be content to find the end of their journey on the slopes below. Opportunity is not impartial of her favours, and lends her aid to only a few. But all may hope to rest upon the heights; for it is a lesson of judicial history, not only in this country of supposedly greater opportunity, but in England as well, that from the smallest beginnings have come names forever great in the records of Westminster Hall and Lincoln's Inn. Lord Tenterden's rise to greatness from the humble position of the son of a barber of Canterbury, has been recorded. The great Sugden began life under the same conditions. But he who reads the latter's life in the spirit of emulation will find little of encouragement except in the fact of his humble origin and small prospects; for Sugden was no ordinary being carried to the front merely by determination and strict application, aided, as is usual in such cases, by good fortune. No doubt he had his full share of these qualities and exerted them to his advantage; but he must have been gifted with powers of mind which not the most patient and intelligent cultivation will develop in most men. What lawyer within the experience of any of us could in

an evening examine and digest for appropriate action on the morrow no less than thirty-five briefs; and then, regardless of the rest that most would seek after such labours and in view of those to come, would proceed to a late sitting of the House of Commons for a contest of wits with those who were shaping the course of a great nation? Our wonder increases when we learn that he lived to the age of ninety-four. Upon the bench he carried the same extraordinary powers. His "piercing intelligence," as one of his biographers has called it, penetrated to every nook and corner of the case and cast light upon the whole pathway to be travelled in delivering judgment. Argument before such a Judge could not have been always an unmixed pleasure. Consciousness of knowledge and mental grasp greatly inferior to that of the listener must have been far from comforting to many of the counsel who addressed him. At least, we learn that Sugden was not always patient and considerate under such circumstances. But in spite of such faults, which are scarcely inseparable from the possession of a mind so powerful and independent, he must be regarded as among the first of English Judges. Deep and accurate learning, an experience such as few lawyers have had, and a remarkable intellect, combined to make him a Judge who, for soundness and force of decision, has perhaps not been surpassed.

The roll is not complete: only a few high points have been touched, and many great names remain- Lord Nottingham, the first to make of English equity a real system; the gifted and scholarly Somers, who so well knew a Judge's duty, as exemplified by the simple but noble answer with which, on a noted occasion, he met the argument of hardship, that a Judge "ought not to make the parties' case better than the law has made it": Lord Kenyon, pictured in no enviable light by Lord Campbell, but whom Lord Campbell himself compels us to respect in describing the courageous and honourable course that he always pursued; Brougham, with mental endowments rarely surpassed, more versatile, perhaps, than any of the great men of English history, but too undisciplined and eccentric to attain the essentials of high judicial character; Lord Cottenham, comparatively

unknown when made Lord Chancellor, but found to have rare gifts as a Judge, and who, because of his admirable judicial demeanour and the excellence of his judgments, has left the highest reputation; Lord Westbury, the very embodiment of intellectual power, under whose touch the most abstruse and difficult of legal problems appeared simple and easy of solution, but whose deficiency of moral faculty led him into errors that have inevitably dimmed his great reputation; Lord Campbell himself, the biographer of most of those mentioned here, who was not without some of the faults which he so faithfully recorded of others, but whom to hear in his best moments on the bench was "like listening not only to law living and armed, but to justice itself"; Lord Cairns, of intellectual force not inferior to Lord Westbury's, though of a different order, pronounced by Mr. Benjamin to be the greatest lawyer before whom he ever argued a case, and who to learning and mental power added all the other more serious qualities that make up judicial excellence; Lord Selborne, celebrated not only as a remarkable Judge, but as one of the chief benefactors to English law in the Judicature Act of 1873, for which he was chiefly responsible; and many others—especially among those who did not reach the foremost places in the judiciary, some of whom, in their less conspicuous posts, exhibited qualities that might well have accompanied the highest judicial honours that England could confer. Blackstone was a *puisne* Judge. Buller, thought by most of his contemporaries the superior of Lord Kenyon and Lord Mansfield's choice for his successor, held a subordinate Judgeship until his death. Sir William Grant, a great master of equity, stopped short of the first prize in the Court of Chancery. There are many other instances.

As we look back on them all, some things stand out most prominently. A superficial but interesting fact is the great age that so many reached. The sound mind and the sound body seem to have met. Of those mentioned all but six reached their seventieth year. Lord Mansfield died in his eighty-ninth year. Lords Lyndhurst, Brougham and St. Leonards (Sugden) each lived until past ninety. Coke was eighty-two, Camden eighty,

Lord Chelmsford eighty-five. Lord Eldon and his brother, Lord Stowell, have already been mentioned. Of fourteen Judges who held the office of Lord Chancellor during Queen Victoria's reign the average length of life was over seventy-nine. One, Lord Halsbury, still survives and is strong of body and clear of head at eighty-six. It is promised to those who serve the higher law that "length of days, and long life, and peace" shall be added unto them. May we not believe, from the facts here briefly recorded, that the scriptural promise has been given a wider application?

Looking somewhat more deeply, a study of their lives leaves the conviction that, with rare exceptions, they owed their promotion, not to mere chance circumstances, but to their appreciation of the difficulties of their calling and to the perseverance and industry which they applied in overcoming them. Native mental gifts played their part, but of their success the language of Lord Campbell, in speaking of Lord Hardwicke's great achievements, may be used, that "like everything else that is valuable, it was the result of earnest and persevering labour." The account of Lord Mansfield's great exertions to prepare himself for his legal career would cast a damper over the spirits of most young men looking to the law as the avenue to success and distinction. The statement is made of Lord Eldon that so thorough and comprehensive had been his preparation that before he had ever pleaded a cause he was fit to preside on the bench. Lord Nottingham, Lord Somers, Sir Edward Sugden, indeed all who won real distinction, laid out their lives on the same principle and reaped the fruits of it.

Such preparation must have preceded true success; but any real knowledge of the history of English Judges will impress one with how well in almost all respects the great majority measured up to a high standard of judicial fitness—in natural ability, in knowledge, in independence, in general judicial demeanour, in the labour and practical skill necessary for the thorough and efficient administration of the large duties they were called to fulfill. Individual faults have been recorded. Occasionally a poorly fitted or even incompetent selection was made. Owing

also to the parliamentary duties required of those filling the highest Judgeships, political considerations in a measure controlled in the appointments to these posts; but even in these instances the choice was nearly always made from men whose mental worth and accomplishments had raised them to a position of leadership at the bar. The object appears to have been that the Judge should be a real expert—the very best that his country could afford for the work to be done.

But as judicial integrity is the foundation stone of any administration of justice so better than all else is the record of high character. Abuses have existed. Justice has been sometimes delayed, and many Judges who, with the opportunities before them, should have been the initiators of reform, were slow to take steps for the simplifying of the complicated and expensive legal machinery of the Courts and for the abolition of outworn and unjust laws. But it has been rare in the last two or three hundred years that an Englishman might not feel assured, in approaching a Court of justice, that no consideration in the mind of the Court would outweigh the desire to reach a right judgment. Perhaps the mere fact that the Judges kept themselves honest does not merit praise, but even in England the same high standard has not always been maintained. A reminder of a time when less creditable conditions existed is found in the words quaintly spoken of Sir Randolf Crewe, that Chief Justice of the King's Bench who forfeited his office rather than sanction the illegal practices of Charles the First in obtaining supplies of money. Contrasting his independent conduct with that of the corrupt Judges who yielded to the King's wishes, Hollis, a member of Parliament, finely said: "He kept his innocency when others let theirs go . . . . which raises his merit to a higher pitch. For to be honest when everybody is honest, when honesty is in fashion and is trump, as I may say, is nothing so meritorious; but to stand alone in the breach—to own honesty when others dare not do it, cannot be sufficiently applauded, nor sufficiently rewarded."

It is an honourable record, the making of which has counted

much in the creation of the English national character and in the strength and permanence of the English Government. And with those qualities in individual Judges that have most fixed attention now in mind, from the rapid summary that has been made, the typical judicial character may be builded. More than one noteworthy trait existed in all, in some nearly all were combined. But selecting some quality that was marked in each, and choosing only from the best that England's proud record of judicial history gives, the qualifications might be these: The purity of motive and exalted virtue of Hale; the independence of Coke; the rugged strength and common sense of Holt; the great professional learning of Eldon and of Campbell; the humanity, the love of truth of Camden; the majesty of presence and authority of Ellenborough, without his tendency sometimes to pervert these gifts; the mental acuteness and power of expression of Sugden and of Westbury; the open mind, the courtesy of manner, the remarkable memory, the readiness to hear argument of Lyndhurst; the ceaseless industry of Cottenham; the self-command, the close but restrained attention to argument of Lord Cairns; the discipline, in a wide sense, maintained by Tenterden; Lord Nottingham's hatred of a delayed cause; the innate judicial faculty of Hardwicke and of Mansfield, as well as their general culture and enlightened attitude toward their profession; the integrity, the desire to do justice, the courageous firmness in the discharge of duty that marked them all. Such a standard might not be exacted, but it is one to be contemplated and striven for.—Henry C. Riely, in *Green Bag*.

REVIEW OF CURRENT ENGLISH CASES.

CRIMINAL LAW—EVIDENCE—WIFE OF PERSON CHARGED COMPELLABLE WITNESS—CRIMINAL EVIDENCE ACT, 1898 (61-62 VICT. C. 36), S. 4.

Leach v. *Rex* (1912) A.C. 305 deserves to be noticed as marking a distinction between Canadian and English law in a matter of evidence on criminal prosecutions. By the Evidence Act, 1898, s. 4, a wife or husband "may be called as a witness either for the prosecution or defence and without the consent of the person charged" in, among other cases, prosecutions for incest. In this case the appellant was indicted for incest and his wife was called as a witness in support of the indictment. She objected to give evidence, but Pickford, J., the presiding judge, ruled that she was compellable to give evidence and directed her to give evidence which she did, and this ruling was upheld by the Court of Appeal (Lord Alverstone, C.J., and Hamilton, and Bankes, JJ.), but the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten, Atkinson, Shaw and Robson) have reversed the decision, holding that though the wife was a competent witness, yet, in the absence of explicit words in the statute to that effect, she was not compellable. Under R.S.C. c. 145, s. 4, in such circumstances husbands and wives are both competent and compellable witnesses.

ADMIRALTY—SHIP—COLLISION—LAUNCHING VESSEL—NEGLIGENCE —TAKING LESSER OF TWO RISKS.

The Frances v. *The Highland Loch* (1912) A.C. 312. This was an admiralty action to recover damages for a collision which took place between the plaintiffs' and defendants' vessels in the following circumstances. The "Highland Loch" was about to be launched on the Mersey, and the defendants arranged with the owners of a buoy which was in the way to remove it, which was accordingly done, but its mooring chains were left at the bottom of the river. The "Frances," which was sailing up the river, finding the wind failing her, let go her anchor, which caught in the mooring chains of the buoy. The defendants notified the plaintiffs to get the "Frances" out of the way of the launch and suggested slipping its anchor, but the master, unable to free his anchor, refused to slip it, unless the defendants agreed to be

answerable for it, which they declined to be. The preparations for the launch having been made, and the risk of postponing it involving a possible loss of life and property, as the chart found, and the risk of colliding with the "Frances" being considered to be slight, the launch took place and resulted in a collision with the "Frances" owing to the "Highland Loch" taking a different course to what was expected. Evans, P.P.D., who tried the action, held that the defendants were solely to blame, but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) reversed his decision and held the plaintiffs to be solely to blame and with this conclusion the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Macnaghten and Atkinson) agreed. Their Lordships considered the conduct of the master of the "Frances" had been unreasonable and that the defendants had been put in the position in which they had to take one of two risks, and that they had taken the lesser.

RAILWAY ACT, CAN., 1906 (R.S.C. c. 37), s. 8(*b*)—ULTRA VIRES PROVINCIAL RAILWAYS—DOMINION RAILWAY COMMISSIONERS —JURISDICTION—B.N.A. ACT, s. 92(10).

Montreal v. *Montreal St. Ry.* (1912) A.C. 333. This was an appeal by special leave from a decision of the Supreme Court of Canada on the question as to the legislative competence of the Dominion Parliament to enact R.S.C. c. 37, s. 8(*b*), so far as it assumes thereby to affect railways under provincial control. The Supreme Court decided against the power, and the Judicial Committee of the Privy Council (Lords Loreburn, L.C., Macnaghten, Atkinson, Shaw and Robson) have affirmed the decision. The question arose in reference to a federal and provincial street railway which were connected with each other and over whose respective lines through traffic was carried. For the purpose of preventing discrimination by the federal railway in favour of the inhabitants of a certain locality served by the two railways, the Railway Commissioners, under the sub-section in question, had made an order that the federal railway should discontinue the discrimination complained of, and that in order to carry out the order the provincial railway should enter into any agreement or agreements that may be necessary in respect of the through traffic carried over its line as to the rates to be charged. It was contended by the appellants that the jurisdiction of the Dominion Parliament to pass that enactment was a necessary incident to its legislative control over federal railways; but their Lordships negative that position.

CONTEMPT—STRIKING BARRISTER'S NAME OFF ROLL—IRREGULARITIES WITHOUT FRAUD—ABUSE OF PROCESS.

In re Taylor (1912) A.C. 347. This was an appeal by a barrister from an order of the Superior Court of Sierra Leone striking him off the roll of barristers for alleged contempt of court and improper practices. The appellant was retained by a client who claimed to have been assaulted by shooting by one Wright, and he commenced an action accordingly in the Circuit Court. He then made an offer of settlement which was declined and he then applied to arrest the defendant on civil process, which was refused; he then went with his client before a magistrate and obtained a warrant for the arrest of Wright on a criminal charge of shooting with intent to murder. He did not conceal anything, but the magistrate had no jurisdiction to act without the fiat of the governor; on the accused being brought before the magistrate the appellant asked for an enlargement to enable him to get the governor's fiat in order to give the magistrate jurisdiction. This was refused, and the accused was discharged. A summons was then issued by the acting Chief Justice calling on the appellant to shew cause why he should not be committed for contempt of court in having procured the arrest of Wright, and on the hearing of the summons the appellant was adjudged to have been guilty of contempt of court. It also appeared that the appellant in another case had been retained to defend three persons, and for the purpose of the defence had issued a subpœna directed to two specified witnesses, but subsequently, after service, finding that these persons knew nothing about the matter he struck out their names and substituted two other names and caused the subpœna so altered to be served on them. Proceedings were taken against the appellant on a charge of forging the subpœna served on the latter two persons. On the charge coming on for trial no plea was entered, but the accused admitted his guilt and submitted to a fine of £20. A proceeding was then instituted to strike him off the rolls for contempt of court and forgery, founded on the above-mentioned matters when the order appealed from was made. The Judicial Committee of the Privy Council (Lords Macnaghten, Mersey, and Robson) reversed the order, being of the opinion that the facts above-mentioned constituted neither contempt of court nor forgery. That the alteration of the subpœnas having been made without any fraudulent intent was at most a mere irregularity, and that the laying of a criminal charge after an arrest on civil process had been refused could not be properly regarded as a contempt of court.

TRUST FUND FOR REDEMPTION OF BONDS OFFERED AT "LOWEST PRICE"—CONSTRUCTION.

National Trust Co. v. *Whicher* (1912) A.C. 377. This was an appeal from the Court of Appeal for Ontario reversing by a majority the judgment of Riddell, J. The question in controversy was concerning the proper construction of a trust deed providing for the redemption of the bonds of a company. The deed in question provided that the trustees were by advertisement to call for offerings of bonds and from those offered they were, out of the proceeds of the trust fund, to purchase those offered at "the lowest price." The trustees having published an advertisement, offers were sent in by various bondholders, among others, by the respondent, who offered $10,000, for which he agreed to accept $82 per $100, and by one Untermeyer, who offered $195,700 at $86.8 per $100. The aggregate amount offered below $86.8 was $143,000, but Untermeyer refused to agree that the $143,000 bonds should be redeemed and to offer sufficient bonds at $86.8 to make up the balance of the sinking fund at the disposal of the trustee, the total amount available for redemption being only $170,000. It was ultimately agreed between the trustees and Untermeyer that $39,400 of bonds should be redeemed at rates less than $80 per $100, and that he would offer bonds of the par value of $160,000 for the balance of the sinking fund. By this means the trustees were enabled to pay off a larger amount of bonds with the money at their disposal than they would have been had they accepted all offers (including that of the plaintiffs) below $86.8. Riddell, J., was of the opinion that the meaning of the words "lowest price" in the provision for redemption meant the lowest price as to the whole block purchased; and with this view the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Robson) agreed. The decision of the Court of Appeal was, therefore, reversed.

DAMAGES FOR BREACH OF CONTRACT — LIQUIDATED DAMAGES OR PENALTY.

Webster v. *Bosanquet* (1912) A.C. 394. This was an appeal from the Supreme Court of Ceylon reversing a judgment of the District Court of Colombo as to the proper construction of a contract which provided that on breach thereof a specified amount should be paid "as liquidated damages, and not as a penalty." The court below had held that the sum

specified was, notwithstanding the terms of the contract, as a penalty. The contract in question was made on the dissolution of partnership between the plaintiff and defendant which contained a provision that the defendant would not for ten years sell the whole or any part of the crops of certain estates without first offering to the plaintiff the option of buying the same, and if the defendant should commit a breach of the contract he should pay to the plaintiff £500 as liquidated damages and not as a penalty. The defendant committed a breach of the contract. The Judicial Committee of the Privy Council (Lords Macnaghten, Shaw, Mersey, and Robson), following *Clydebank Engineering Co.* v. *Castaneda* (1905), A.C. 6, hold that in such cases it is impossible to lay down any abstract rule, but that the facts and circumstances of each case have to be considered, and the court has to consider whether or not the amount fixed as damages is extravagant, exorbitant or unconscionable at the time when the stipulation is made, that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract. In the present case their Lordships thought that at the time the contract was made it was impossible to foresee the extent of the injury which the plaintiff might sustain by the defendant's breach of the contract, and that the damages, though very substantial, might be difficult of proof; and that the amount fixed in the present case, having regard to the circumstances, could not be reasonably regarded as extravagant, or unreasonable; they, therefore, held that the amount named was recoverable as liquidated damages.

WILL—CHARITABLE BEQUEST—GIFT TO BISHOP—GIFT "FOR THE GOOD OF RELIGION"—RELIGIOUS PURPOSES.

Dunne v. *Byrne* (1912) A.C. 407 was an appeal from the High Court of Australia. The question involved was whether a residuary gift to an Archbishop and his successors "to be used and expended in whole or in part as such Archbishop may judge most conducive to the good of religion in his diocese," was a good charitable gift. The Australian court held that it was not a valid charitable gift and the Judicial Committee of the Privy Council (Lords Macnaghten, Shaw, Mersey, and Robson) affirmed the decision: their Lordships being of the opinion that a gift "for the good of religion" is not equivalent to a gift "for religious purposes."

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] MARTIN *v.* FOWLER. [May 7.

Construction of statute—Creditors' Relief Act—9 Edw. VII., c. 48, s. 6, ss. 4 (Ont.)—Contesting creditor's lien—Assignments and Preferences Act—10 Edw. VII., c. 64, s. 14 (Ont.).

Sec. 6, sub-s. 4 of the Creditor's Relief Act of Ontario provides that "Where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute pro rata in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates." Sec. 14 of the Assignments and Preferences Act is as follows:—

"14. An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands."

Held, that the preferential lien given by the former Act to the contesting creditor is not taken away by said sec. 14 of The Assignments and Preferences Act.

Appeal dismissed with costs.

Lefroy, K.C., for the appellant. *Watson*, K.C., and J. *Grayson Smith*, for the respondents, Fowler and others. *D. J. M. McDougall*, for respondent Sheriff of Toronto.

Que.] SHEARER *v.* HOGG. [March 21.

Will—Universal legacy to wife—Devise of what is undisposed of at wife's death—Substitution.

S. by his will gave all his property absolutely to his wife

with a direction that their children should be suitably maintained and educated. The will then provided "that should my said wife die leaving any of my said property or rights in her possession or not disposed of that upon her said decease the same should be divided among our said children" in the manner specified.

Held, affirming the judgment of the Court of Review (Q.R. 40 S.C. 139, sub nom. *Shearer* v. *Forman*) that this provision did not empower the wife to dispose of the residue by will but created a substitution in favour of the children.

Appeal dismissed with costs.

Dr. L. H. Davidson, K.C., for appellant. *W. H. Lighthall,* K.C., for respondents.

Que.] OUIMET *v.* BAZIN. [May 7.

Constitutional law—Quebec Sunday Act—7 Edw. VII., c. 42, amended by 9 Edw. VII., c. 51—Prohibition of theatrical performances—Penalty.

The provision in the Quebec Sunday Act, 7 Edw. VII., c. 42, as amended by 9 Edw. VII., c. 51, which prohibits every person from giving or attending theatrical performances on Sunday, on pain of fine and imprisonment for default in payment thereof, is a measure dealing with criminal law and ultra vires of the legislature.

Appeal allowed with costs.

Aimé Geoffrion, K.C., and *J. O. Lacroix, K.C.,* for appellant. *Lafleur,* K.C., and *Donat Brodeur,* K.C., for respondent.

N.S.] SYLVESTER *v.* THE KING. [May 7.

Criminal law—Speedy trial—Charge other than that for which prisoner was committed—Consent of judge—Translation of Evidence—New Trial.

By sec. 834 of The Criminal Code relating to Speedy Trials as amended by 8 and 9 Vict., c. 9, a prisoner may, with the consent of the judge, be tried for an offence other than that for which he was committed although such new charge is not set out in the depositions.

Held, that the consent of the judge in such case need not be formally announced but will be assumed by his proceeding with the trial.

Where several prisoners, foreigners, were on trial, one of them gave evidence against the others. His examination-in-chief was translated for benefit of the others, but not his cross-examination.

Held, that as it appeared that nothing on his cross-examination which did not appear in his evidence in chief was so material that its non-translation occasioned any substantial wrong or miscarriage on the trial, the conviction should stand.

Appeal dismissed with costs.

O'Connor, K.C., for appellant. *Newcombe*, K.C., for respondent.

B.C.] BENTLEY *v.* NAISMITH. [March 21.

Principal and agent—Real estate broker—Listing property for sale—Option to sell or purchase.

N., a real estate broker, being informed by B. that he had some land which he wished to sell, noted the particulars of the property and on returning to his office listed it for sale in the usual manner. Three months later, having reason to believe that this property would advance in value, he obtained from B. an option for 30 days to sell or purchase it at a price named which included his commission if he sold. Four days afterwards he effected a sale as owner for double the price named which B. refused to carry out. In an action for specific performance of the agreement giving him the option.

Held, per FITZPATRICK, C.J., that by the terms of said agreement, N. became an agent for sale with an option to purchase; that he could not purchase until he had divested himself of his character of agent; that as agent he was bound to disclose to his principal the knowledge he had of the prospects of the property, and the exercise of his option to purchase did not relieve him from such obligation.

Held, per DAVIES, IDINGTON, ANGLIN and BRODEUR, JJ., that N. was B.'s agent when he procured the option and having failed to disclose to his principal the knowledge he had acquired as to the land he could not have the agreement enforced for his own benefit.

Judgment of the Supreme Court of British Columbia, 16 B.C. Rep. 308, reversed.

Appeal allowed with costs.

J. E. Bird, for appellant. *E. A. Lucas*, for respondents.