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CURRENT TOPICS.

Promotions have been rather in order of late years, in filling the higher positions on the English bench. Every member of the present Court of Appeal, except Lord Justice Rigby, has served as a judge of first instance before being elevated to the appeal bench. Out of twenty-eight Lords Justices since 1865, eighteen were promoted from lower courts. This system has the advantage of giving a safer field for the selection of those who have shown the highest judicial qualifications, but *per se* the system of promotion of judges has considerable drawbacks.

The name of Mr. Arthur Globensky, Q. C., has been mentioned in the press in connection with the proposed addition to the bench of the Circuit Court in Montreal. Mr. Globensky's eminent qualifications for the position cannot be doubted, and if the honor should fall to him the appointment would be extremely satisfactory both to his present *confrères* and to the public generally.

Even judges in these days seem to be affected by the desire to "break the record." Mr. Justice Field, of the United States Supreme Court, is said to have retained his seat some years longer than he otherwise would, because he wished to surpass Chief Justice Marshall in length of

service. He has now been on the Supreme Bench 34 years and seven months, whereas Chief Justice Marshall's term was 34 years and five months. Mr. Justice Field is to retire on 1st December.

The regents of the University of the State of New York have published, as bulletin 38, a compilation of all the laws, ordinances and by-laws pertaining to higher education in that state. It includes not only the University law, but also the educational articles from the constitution and the various statutes governing professional education and licenses to practise, and other allied matters. Its practical utility is increased by annotations and cross-references and by a very full index. Lawyers or others interested may obtain copies from the regents' office, post free, for 15 cents for the 108 pages.

The proposal that judges in the Courts of the United States shall wear gowns is not welcome in some quarters. Here are a few curious specimens of the arguments urged against the gown by legal journals. Says one:—"The rapid strides of civilization have done away with many useful customs, but there never was any use for a gown to be worn by a judge of any court. The uncivilized man might be excused for bedecking his body with ram's horns, buffalo tails, etc., but for a judiciary of an enlightened country, in this century, to be wrapped up in a gown—never! .... With as much reason, wrap a horse blanket around the country peace justice, when he sits in judgment on a $2 claim, as to robe the judges of our courts in black gowns during their sittings in court." Another contemporary is arithmetical and economical. "Gowns," he says, "cannot aid a court in the administration of justice; they are not only inconvenient but a tax upon the time of the judges. It is perhaps not too much to say that ten minutes to gown and ten minutes to ungown would not be an unreasonable time. If the court were in session 250 days in the year, there being seven judges, this would

be equivalent to the time of one judge, 583 hours spent in gowning and ungowning, or seventy-two days of eight hours each. Would not these seventy-two days of a judge's time be better spent in writing opinions than in gowning and ungowning?" The notion that a judge's whole time must necessarily be devoted to hearing and deciding cases is a mistaken one. The time spent by a judge in putting on or off a gown is no more wasted than the time spent in shaving, or in getting his hair cut. It does not take a single minute in the year from his sittings in court.

MARRIAGE—WIFE'S CONCEALMENT OF PREGNANCY AT TIME OF MARRIAGE.

Sir Francis Jeune, president of the English Probate, Divorce and Admiralty Division, gave judgment on the 5th June, 1897, in the case of *Moss* v. *Moss*. This was a suit in which the husband sought for a decree of nullity on the ground of the wife's fraud in concealing from him the fact that she was *enceinte* by another man at the date of the marriage. The suit was undefended, but, at the suggestion of the president, the attorney-general instructed the Queen's proctor to argue the case against the petitioner. The case was argued on May 20th last, and was fully reported in *The Times* on May 21st.

Judgment was then reserved, and on June 5th, 1897, the president delivered the following considered judgment:—

In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her. I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void. On these facts, the argument before me was that there was fraud.

by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favor was mainly based on the reasoning in decisions of some of the American courts. But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in certain States of America on the point in question.

In the case of *Swift* v. *Kelly*, 3 Knapp, 257, 203, decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Baron Parke and Vice-Chancellor Shadwell being members of the board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent never would have been obtained. Unless the party imposed upon had been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made." It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow (*Turner* v. *Meyers*, 1 Consist. 414), referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil con-

tract: *Mills* v. *Chilton*, 1 Rob. 684. Lord Hannen said: "Very many serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based on contract of the parties, but it is a status arising out of a contract." *Sottomayer* v. *DeBarros*, 5 P.D. 94.

The late President Sir Charles Butt said, in the case of *Andrew* v. *Ross*, 14 P.D. 15, that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law." It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract: See *Hunter* v. *Edney*, 10 P.D. 98; *Durham* v. *Durham*, *ibid*, p. 80. Again, if both parties to the contract knowingly and wilfully marry without compliance with the law as to publication of banns, either can have the marriage declared null: *Andrews* v. *Ross*, 14 P.D. 15—a state of the law which drew from the late president the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract, but English courts have not resorted to these expedients, and while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognize characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization, so far as the law deems it essential. There must not be incapacity in the parties to marry, either as respects age and physical incapacity, or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.), renders the marriage void or voidable. It has been repeatedly laid down that a mar-

riage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulford's Case*, Ch. 482, 488, 493) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in *Reg.* v. *Burton-on-Trent*, 3 M. & S. 537, or a man assuming a name to conceal himself from the person to whom he is to be married. In *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 355, and *Harrod* v. *Harrod*, 1 K. & J. 4, the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract which (to use the phrase of Vice-Chancellor Wood in the latter case) he or she did not understand. *Browning* v. *Reane*, 2 Phill. 69, and *Wilkinson* v. *Wilkinson*, 4 N. of C. 295, are other cases of the same kind.

In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in *Reg.* v. *Mills*, 10 Cl. & F. 534, 735, of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is no consent, no fraud inducing that consent is immaterial. Lord Stowell has at least three times expressed this in the most emphatic language. In *Wakefield* v. *Mackay*, 1 Phil. 134, 137, that learned judge said—"Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage;" in *Ewing* v. *Wheatley*, 2 Consist. 183—"It is perfectly established that no disparity of fortune, or mistake as to the qualities of the person will impeach the *vinculum* of marriage," and in *Sullivan* v. *Sullivan*, 2 Consist. 248—"The strongest case you could imagine of the most deliber-

ate plot, leading to a marriage, the most unseemly in all disproportions of rank, of fortune, of habits of life, even of age itself, would not enable the court to release him from claims which, though forged by others, he has riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced." The only authorities which were before me, referred to as in any degree inconsistent with these views, are the case of Miss Turner's Marriage Act, and a *dictum* of the late president in *Scott* v. *Sebright*, 12 P.D. 21; neither of these deals with such facts as are relied on in the present case, and this case I put forward, at most. as sanctioning a somewhat wider application of this doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of Miss Turner the marriage was annulled by act of Parliament.

It is not possible to say exactly on what ground the votes of the legislators were given; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in *Templeton* v. *Tyree*, 2 P. & D. 420, it was an act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by this impossibility of placing the evidence of Miss Turner, as a party, before the Ecclesiastical Courts; Hansard, vol. 17, pp. 787, 1134. But a stronger observation, I think, is that duress is distinctly alleged in the petition (House of Lords Journal, vol. 59, p. 308), and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In *Scott* v. *Sebright*, 12 P.D. 21, 23, the late president said—"The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant.

But read in connection with the facts before the court, which showed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

The principles thus long and uniformly asserted by the English courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shown that authority to the contrary could be found in the canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the canon law. The canon law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and it goes far to declare that the only fraud which vitiates marriage is that which goes to the consent. Ayliffe in his "Parergon" (p. 361) says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void *ipso jure;* * * * for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. * * * I have just now observed that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And though there is nothing more contrary to consent than error, yet every error does not exclude consent, wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void *ab initio.* Now there are four species of error which are hereunto referred. The first is styled *error personæ,* as when I have thoughts of marrying Ursula, yet by my mistake of the person I have married Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting it. For deceit is oftentimes wont to intervene in this case, which ought not to be of any advantage to the person deceiving another. A second species is styled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman, and so *vice versa,* for by the canon law such an error is an impediment

to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now abolished among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman married a bondwoman, knowing her to be such, the church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call *error fortunæ*, and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But it is otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousand pounds, and the condition is not made good. The last species is styled an error of quality—viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflowered or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deemed to be simply voluntary as to the nature and substance of it, though in respect of the accidents it is not voluntary."

While the above is, as I believe, the correct view of the English law, there is no doubt, not only that the law of other countries is not the same on the point in question, but also that in America the difference has been arrived at by arguments which proceed on principles embodied in the English law. It is not, of course, necessary to examine in any detail the positive enactments of any other country nor the law of any country whose system of jurisprudence is not the same as our own. The law of the Civil Code of France, the German Protestant Ecclesiastical law, the Prussian, Austrian, and Italian Codes will be found collected in Fraser on Husband and Wife, according to the law of Scotland (vol. 1, p. 452). It is, however, curious to observe how the tribunals of some of these countries have deduced from the principle of nullity of marriage on account of error in the person (which English law treats only as a question of identity) the conclusion that concealed pregnancy, or even loss of virginity, vitiate marriage.

Thus, a French court, applying the language of the Code, *erreur dans la personne* to the case of *erreur sur la personne morale*, has held a marriage void on account of concealed pregnancy, a view rejected by the commission which prepared the Italian Code, and a Prussian tribunal appears by a similar interpretation of similar (perhaps somewhat wider) words in their Code to have included the case of unchastity. There is a remarkable decision on the Roman-Dutch law in the Supreme Court of the Cape of Good Hope, to which Mr. Deane referred me *Horak* v. *Horak*, Searle, Vol. 3, 389). The facts there were the same as those in the present case, and the court held the marriage void, following, it would seem, the authority of Voet against what Voet admits to be the authority, though he disputes the reasoning, of the canon law. I will only point out that the learned judges feel compelled to repudiate the length to which Voet carries his argument—namely, the annulment of marriage on the ground of unchastity alone, and the language of their judgment recognizes what difficult questions their decision raises and leaves for future solution. Although, however, the question of annulment of marriage by reason of concealed unchastity has been discussed by Scotch text writers, one authority only, Bauhton, appears to have given in his adhesion to the doctrine of Voet as regards ante-nuptial incontinence in a wife, but he courageously overcomes the objection of parity between the sexes by remarking, "A breach of chastity in a man before marriage is not so heinous or scandalous as in a woman; nor is there a presumption that the woman would have refused the man on that ground, though she had known it." Lord Stair, on the other hand, has laid down, "If one married Sempronia supposing her to be a virgin, rich as well nurtured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid." See Fraser I. 451. There is no decision, so far as I am aware, of any Scotch tribunal annulling a marriage on the ground either of concealed unchastity or concealed pregnancy, nor has any distinction between the two ever been suggested.

The decisions in the American courts on which the learned counsel for the petitioner places his main reliance do no doubt cover the present case; and the more important of them are, I think, decisions professing to be based on the same principles as we recognize. Speaking with all respect, these courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only

fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage, but they lay down that there is one fraudulent representation, or fraudulent concealment, which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another. The leading decision to this effect was given by the Supreme Court of Massachusetts in 1861, *Reynolds* v. *Reynolds*, 3 Allan, 605, a case decided on demurrer. It is not quite clear whether the chief justice by whom the case was decided conceived himself to be deciding according to the principle of the ecclesiastical law of England, because he was acting under a statute of the State, (Stat. 1855, C. 27, re-enacted by Gen. Stats., C. 107, section 4), which authorized a decree of nullity, "when a marriage is supposed to be void or the validity thereof is doubted either for fraud or any other legal cause," and he stated that "this statute was founded on the assumption that a marriage into which one of the parties was induced to enter through the fraud and deception of the other is null and void, and like other contracts, may be annulled and set aside by the defrauded party." The learned and eminent American text writer, Mr. Bishop, however, considers that this statute was "merely jurisdictional" (Bishop on Marriage, Ed. 1891, Vol. 1, 485),and I think,therefore,that it may be assumed that this enactment was not considered to enlarge the law. The argument of the chief justice, as I understand it, is that fraud vitiates a marriage just as it does other contracts, but that the fraud must be "in the *essentialia* of the marriage relation," and that the fraud of a woman in concealing her pregnancy by a man other than her intended husband at the time of her marriage is such a fraud. It is, he considered, a fraud in the *essentialia* of marriage for two reasons—first, because a child may be born, which, according to the presumption of law, will be the husband's, though not really his; and, secondly, because the woman, at the time of marriage, is incapable of bearing a child to her husband.

The departure, as I venture respectfully to think, from the law of England consists not only in extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold. According to English law, as I have above said, the only material circum-

stance by operating on which fraud vitiates a marriage is the reality of consent. The law of Massachusetts appears to me to add another, not, indeed, the want of chastity in the wife, but such want of chastity as results in pregnancy at the time of the marriage. But are the grounds on which this circumstance is singled out sufficient? The most effective criticism of them appears to me to be supplied by the writer, Mr. Bishop, whom I have above mentioned. He analyzes the judgment in *Reynolds* v. *Reynolds* with great minuteness, and with regard to both the points above mentioned he gives what appears to me to be conclusive answers. He points out, as to the presumption of paternity, that a man who has evidence to prove the marriage void can prove the child not to be his. It may be added that the birth of the child after makes but little difference, according to English law, in the pecuniary liability of the husband, as 4 and 5 Will. IV., c. 76, section 57, throws on him, at least during his wife's life, the maintenance of her illegitimate children whenever born. As to the incapacity of the woman at the time to become pregnant by her husband, he replies that such incapacity (unlike the sexual incapacity for which the courts annul marriages) is temporary only. He is of opinion, therefore, that the reasoning, when looked at in all its parts, is unsatisfactory. In this opinion I respectfully agree.

It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage. I could understand a broad principle that unchastity before marriage should vitiate the contract, as some States of America have, I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and unless there is to be one law for a man and another for a woman it is impossible to suppose it ever could be. But I do not understand why the accidental circumstances—first, of misconduct resulting in pregnancy, and, secondly, of that pregnancy continuing to the marriage—should constitute the momentous difference between a valid and invalid marriage. I think I ought, in fairness, to add that, although Mr. Bishop disapproves the judgment of the court of Massachusetts when looked at in its parts, he nevertheless approves of it as a whole. "Though the reasoning," he says (494), when thus examined, step by step, "appears inadequate, few in our American profession will reject

its conclusion. The true view plainly is that here is a cord of several strands, no one of which has any strength to sustain the result when put upon it alone, but duly combined they do sustain it. The effect of combination pervades equally the law of nature and the law of the land. In the latter it is frequently manifest, for example, in conspiracy, both civil and criminal, and it is manifest in every part of the law where there is occasion for its presence." I will only say that metaphor and analogy in legal reasoning are apt to be dangerous guides. The above decision was followed, though under special statutes, in the cases of *Morris* v. *Morris*, Wright, 630; *Ritter* v. *Ritter*, 5 Blackford, 81, and *Carris* v. *Carris*, 9 C. E. Green, 516.

Some of the American courts have, however, felt bound to limit the application of the principle that concealed pregnancy at the time of marriage vitiates it. In *Scroggins* v. *Scroggins*, 3 Dev. 535, the husband would not swear that he believed his wife chaste at the time of the marriage. Both parties were white. After marriage a mulatto child was born. The marriage was, however, held to be valid on the ground, it would appear, that the husband should have detected his wife's condition. In a later case, *Scott* v. *Schufelt*, 5 Paige, 43, it appears to have been suggested as the reason for this decision that the woman could not be proved to have deceived her husband, as she might not, at the time of marriage have known whether he or the negro was the father. In *Crehore* v. *Crehore*, 1 Brown, Mass. 330, and in *Foss* v. *Foss*, 12 Allen, 26, the wife was pregnant at marriage by a man other than her husband, but the husband had been guilty of antenuptial incontinence with her, and it was held that he was "put on his guard" or "put on inquiry," and so a decree in his favor was refused. On the other hand, in a case in California, *Baker* v. *Baker*, 13 Cal. 87, it would appear that the decision in *Scroggins* v. *Scroggins* was disapproved of. I refer to these cases chiefly to show that it has been felt that even the comparatively narrow principle that a marriage is voidable by pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of the legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage or the

child died? Could he many years after annul the marriage? It is difficult to see why not if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law.

My belief is that to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and be believed to be, certain, a new principle not resting on any sound basis, and develop as it must in several directions, sure to give rise to many doubts and much confusion. To show that this apprehension is not visionary, I venture to quote the experience of the American text-writer to whom I have already referred, expressed in the last edition of his work: Bishop, Vol. 1, 452. Speaking of the subject of fraud in relation to marriage, he writes: "Such judicial utterances upon it as we have are largely conflicting, and otherwise muddled. So that, should an author discussing present all those views, and those only, which have occurred to the judges and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which the practitioner could not readily discover a path." I hope that I may be pardoned for declining to take a step which, apparently, leads to such consequences. I have to express my acknowledgments to the learned counsel on both sides for the great aid which their researches have afforded to me. I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed.

RETIREMENT OF THE MASTER OF THE ROLLS.

Lord Esher's long judicial career, says the *London Law Journal*, has at length closed. He will be seen at least no more in that branch of the Court of Appeal over which as Master of the Rolls he has presided with so much vigour and geniality, though we may hope that he will still lend his experience to the Privy Council and the House of Lords. At such an event there will be but one sentiment—that of sincere and widespread regret; for his retirement removes from the Bench a great judge, whose unique personality it will be impossible to replace. These are the days of specialists. We have the company lawyer, the Admiralty lawyer, the commercial lawyer, the bankruptcy lawyer; Lord Esher was all these and more in one. He knew Admiralty law

as well as any expert practitioner in Mr. Justice Barnes' Court; as a commercial lawyer he hardly had a rival; he was a match for the Old Bailey advocate in the technicalities of the criminal law or the rules of evidence; in bankruptcy he was as much at home as the judge in bankruptcy himself, and needless to say he was a master of the common law under which he was nurtured. And to this versatility Lord Esher has added a quality without which learning may avail little for the administration of justice; he has been ever "rich in saving common-sense." He once declared that the business of a judge is to find a good legal reason for the conclusions of common-sense, and this dictum is the key to the success of his judicial career. He has never been one of the Pharisees of technicality who think that man was made for the law, and not rather the law for man; he has ever striven to mould the law to meet the exigencies of business and the changes in civil society. His shrewdness, his knowledge of the world, has enabled him to see what justice required, and he has bent all the resources of his fine intellect and his legal learning to do that justice.

This freedom from technicality, this readiness to welcome reforms and loyally carry them out, is the more remarkable and the more honourable when we remember the system and the traditions under which Lord Esher was trained; that his career reaches back to the days when "right and justice and substance," as Lord Russell of Killowen lately said, "were sacrificed to the science of artificial statement," the pseudo-science of special pleading; to the days when *Jarndyce* v. *Jarndyce* was dragging its weary length along in an unreformed Court of Chancery, and law and equity were on worse terms than Katherine and Petruchio in the early days of their courtship. Called to the Bar more than half a century ago, what a retrospect is his; what kaleidoscopic changes of law and life have passed before his view! Yet through them all Lord Esher has come, not only ripe in experience, but almost unscathed by time. With all his burden of more than eighty years, the Master of the Rolls is still —or was till yesterday—the youngest judge on the Bench, the most light-hearted, and the most popular. Whatever attractions there might be in other Courts, Court of Appeal No. 1 was always full. His genial wit played round all alike—his brothers on the Bench, Attorneys-General, eminent Queen's Counsel, confident juniors—piercing often to the heart of the case; *ridentem dicere verum quid vetat?* But it was "beautifullest sheet-lightning," as

Carlyle says, "never condensed into thunderbolts." Those who were hardest hit never felt the sting rankle, for no venom winged the shaft, as they knew, and kinder heart never beat beneath the ermine. The anecdote which we recently reproduced showed how keenly he could feel for those whom it was his duty judicially to condemn.

Retirement must always be blended with sadness, both for the judge who quits his illustrious post and for those who remain behind to regret him; but it ought to be no slight consolation to the Master of the Rolls to feel, as he may justly feel, in retiring that he has added not a little to the greatness and glory of the noble edifice of English law by his judicial record, and that he carries with him into his well-earned repose the respect, the admiration, and the love of every member of the legal profession.

THE ENGLISH AND UNITED STATES PRACTITIONER.—The writer of an article in the *American Law Review* on "American Lawyers and their Making" says: "As to the relative merits of the English and American practitioner, it is almost impossible to speak. Nothing could be less worthy of praise than the lower type of lawyer in the United States. It is not exacted or expected that he should be a gentleman, a man of education or intelligence, and the safeguards against dishonesty or bad character are almost as slight as against incompetency. A Western chief justice, however, recently said in my hearing that an American lawyer of distinctly secondary rank in this country had, when nearly fifty years of age, been called to the English Bar, and been able thereafter to win, perhaps, the first place at that Bar, if we may judge by the consideration of his fellows or by his fee-book. He referred, of course, to the late Mr. Benjamin. No similar case of an English lawyer winning the first eminence at the American Bar is recalled." The honour of being the most candid critic of the American Bar among the foreigners who have discussed its character is given to Mr. Bryce, who in his "American Commonwealth" writes, "Notwithstanding this laxity, the level of legal attainment is, in some cities, as high or higher than among either the barristers or the solicitors of London. This is due to the extraordinary excellence of many of the law schools. I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education."