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IS THE STATUTE OF FRAUDS ABOLISHED?

By F. P. Betts, K.C.

The above question will no doubt strike the ordinary reader as little short of absurd. The Statute of Frauds abolished! Such a time honoured institution as the Statute of Frauds abolished? Preposterous! That no doubt will be the mental attitude of every Ontario lawyer. But let us go softly. Sometimes even propositions that seem at first blush monstrous turn out on more careful consideration, to have only too much foundation.

This we confess seems to us to be a case in point. We are free to admit that, in our opinion, in point of fact, that time honoured institution the Statute of Frauds is, at the present moment, practically abolished, at least in Ontario. Our reason for this view is as follows:

Case Stated.

In the year 1906 the following question was propounded for solution to the Courts of Ontario: One Campbell, desiring to purchase the hotel of the plaintiff, an agreement was arrived at, and reduced to writing, as follows:—(We quote from the reported case, Mercier v. Campbell, referred to below.) "Memorandum of agreement entered into this 8th day of November, A.D. 1905.

"Between Mrs. Alex. Mercier, of the township of East Hawkesbury, conditionally.

"The said Mrs. Mercier agrees to sell the hotel property at Vankleek Hill for the sum of $5,800, consisting of the hotel stand and furnishings, together with double rig, bus, and harness, single buggy and single harness, 20 bushels of oats, and two tons of hay, which said agreement depends upon whether Mr. Carkner takes the farm recently sold to said Campbell back, according to the understanding between Campbell and Carkner.

"In case that Carkner takes the farm, as per the aforesaid understanding, then in such event Campbell takes the hotel stand and property without doubt.

"And in case Mrs. Mercier refused to carry out the sale of the property as aforesaid, she will have to pay to said Campbell the sum of $300.

"And in case said Campbell refuses to carry out the part assigned to him in accepting the title to said property, he will have to pay Mrs. Mercier a like sum of $300.

"Campbell is to make a deposit of $500 to bind the bargain when McInnes makes the writings.

"And for the due fulfilment of this agreement, each of said parties hereby bind themselves and legal representatives."

The question was whether this agreement for sale was valid, and, if not, whether the $300 clauses were severable from the main agreement and enforceable.

The matter first found its way into our Courts through the medium of an action brought by Mrs. Philomene Mercier in the County Court of the United Counties of Prescott and Russell. The learned County Court Judge after the most careful consideration of the case, evidenced by the fact that His Honour cited, as authorities consulted by him on the subject, no less than a page and a half of cases and references (his assiduity in that respect being characterized by the learned editor of *The English Law Times* in the following words: "The enormous care and pains taken by this learned Judge may be gauged from the fact that the bare list of authorities referred to in his judgment occupies about a page and a half of the Law Reports, and that it ranged over English, American and Canadian text-books and reports") decided, very properly as it seems to us, that, the agreement of sale being insufficient, by reason of failure to satisfy the requirements of the Statute of Frauds, the attempted parol agreement annexed to it fell to the ground also, and that the whole transaction was *nudum pactum*.

View of Divisional Court.

That, however, was not the view of the Divisional Court composed of Falconbridge, C.J.Q.B., Britton, J., and Riddell, J.) before which the above decision came by way of appeal.

That Court allowed the appeal, a lengthy and elaborate judgment on the question at issue being delivered by Mr. Justice Riddell, a shorter one by Mr. Justice Britton, while Chief Justice Falconbridge simply agreed with the views of his colleagues. (*Mercier* v. *Campbell*, 14 O.L.R., p. 639.)

That Court held that, although the written agreement in question was admittedly ineffective by reason of the Statute of Frauds, there was no reason why the supplemental agreement appended to it should not be perfectly valid and capable of enforcement, and that in point of fact it was so.

View of the Writer.

The opinion of these three eminent jurists would, under any circumstances, be entitled to the utmost possible respect; nevertheless it seemed to the writer that the effect of that judgment was, as we have said, to virtually abolish the Statute of Frauds; in other words that, if that judgment correctly interprets the law on the subject, a transaction of sale and purchase of land may be validly accomplished by word of mouth only, in the direct teeth of the statute, in the following simple manner:—A agrees verbally to sell Blackacre to B. for $5,000 and B. agrees to purchase the same. Both also agree that, in case either backs out of the bargain, he shall pay the other $5,000. The first part of the agreement is void as failing to satisfy the statute, but the second, under the decision mentioned, is valid.

It may be objected that our illustrative instance is hardly apposite, as the collateral agreement in question was in writing whereas the collateral agreement in our supposititious instance is verbal, but it must be borne in mind (a point which we fear is too often lost sight of by the profession) that a written agreement, not under seal (except in cases where writing is required by reason of the provisions of some statute), differs in no respect from a verbal agreement. Both are parol agreements and stand on precisely the same plane. It may be worth while digressing for a moment to make this quite plain.

Parol Agreements.

There is really no difference in essence between verbal and written agreements. In fact, as is well understood, the expression "parol" is applied indiscriminately to both.

The suggestion of a different view was thrown out by Lord Mansfield in the early case of *Phillans* v. *Van Mierop* (1765, 3 Burr. 1664 and Finch Sel. Ca. 269), who expressed the view that "there is no reason why agreements in writing, at all events in commercial affairs, should not be good without any consideration. A *nudum pactum* does not exist in the usage and law of merchants.

"I take it that the ancient notion about the want of consideration was for the sake of evidence only . . . in commercial cases amongst merchants the want of consideration is not an objection."

Of this dictum Sir Frederick Pollock says that its "anomalous character was rightly seen at the time and it has never been followed."

In 1778 it was distinctly contradicted by the opinion of the Judges delivered to the House of Lords in *Raun* v. *Hughes* (1778), 7 T.R. 350, as follows: "all contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. Langdell ingeniously argued that contracts governed by the law merchants need on principle no consideration, in short, that a negotiable instrument is a specialty.

It might have been better so. In this country one can only say *dis aliter visum*.

Effect of Divisional Court Judgment.

The result is that the verbal agreement to sell land accomplishes its object in spite of the statute, as the parties are compelled to carry it out as the only means of saving themselves from heavy loss. In point of fact the unfortunate defendant in the case

under discussion actually suffered the loss of $300.00 plus an indefinite amount of costs by reason of that decision.

The effect of this decision seems to be as follows: You have an agreement which is admittedly *nudum pactum*. Being *nudum pactum* (as being insufficient to satisfy the requirements of the Statute of Frauds) it is of course unenforceable, and it may be violated with impunity. Those propositions will no doubt be readily assented to. But you also have a collateral parol agreement which purports to liquidate the damages for breach of the invalid agreement. Under the decision in question you succeed in an action on the parol agreement, and recover the damages stipulated therein. In other words, you recover damages for the breach of the first mentioned agreement notwithstanding the fact that it is admittedly invalid; so that, in the final analysis, it turns out that the invalid agreement is not so invalid after all; the logical conclusion appearing to be that the first mentioned agreement is both invalid and valid at the same time, a result which seems to be somewhat in the nature of a paradox.

English Opinion.

The writer, on reading the decision of the Divisional Court above referred to, was under the impression that it would draw forth a heated discussion from the profession at large. But not so; on the contrary, it passed without a ripple. After an interval of three years the writer, with every possible deference to the opinion of the learned Judges who rendered the decision, ventured, in the February, 1910, number of this Journal, to present a diverse view upon the question.

Thereupon the matter was taken up by the English Legal Journals. The point at issue evidently struck them, as it had struck the writer, as being of unusual importance to our law.

The *Law Quarterly* edited by the eminent jurist Sir Frederick Pollock, K.C., expressed itself as follows, upon the point (26 *Law Quarterly Review*, 1910, p. 194): "The CANADA LAW JOURNAL (Toronto) of May 2, calls attention, rather late, to the law laid down by a Divisional Court in Ontario on appeal from a County Court (whereby the decision was final), in 1907, *Mercier* v. *Camp-*

bell, 14 Ont. L.R. 639. The Court appears to have decided that a liquidated damages clause annexed to an agreement subject to the Statute of Frauds is collateral and separable, and, if the statute is not satisfied, the agreement can nevertheless be indirectly enforced by suing for the liquidated damages assigned for its non-fulfilment. We agree with the learned commentator that the decision is wrong. The agreement in question was in writing and intended to be formal, but in fact inartificial amateur work. It was for the sale of real estate on a vaguely expressed condition, of which the uncertainty seems to have been the formal defect relied upon. We confess we should have thought it uncertain enough to spoil the agreement even apart from the statute. However the agreement was in fact admitted in the Divisional Court to be not enforceable by reason of the statute, but otherwise certain enough to support an action. In the body of the same document two short paragraphs were added to the effect (the exact words are not material) that either party refusing to perform his part of the agreement should pay the other $300. The action was brought by the vendor to recover that sum from the purchaser for non-performance. In the County Court the Judge said (*ex relatione* the writer in the CANADA LAW JOURNAL): 'This is an attempt to introduce a most startling principle. It amounts to this; that any contract within the Statute of Frauds, however informal it may be, may be the foundation of an action at law for damages, provided the parties have beforehand fixed and agreed upon what sum shall be recoverable in case of breach thereof . . . A stipulation in a contract as to liquidated damages cannot alter the nature of such damages nor indirectly validate a void agreement. Such stipulation must stand or fall with the contract itself.' This appears to us very sound, and we find no answer to it in the leading judgment in the Divisional Court, *per* Riddell, J., save the bare assertion that the promise to pay $300 is a distinct and alternative agreement. It seemed clear to the learned Judge that these reciprocal promises are severable from the body of the agreement of which, as a document, they form part. To us it seems clearly otherwise. Here is no more a separate contract than in the penalty of a bond, if

the agreement be read as a whole, as every instrument should be, to arrive at its true intent. No doubt collateral agreements have been held enforceable in many cases; but before such authorities become applicable we must be satisfied that the agreement in question is really collateral, and this is the point about which the Court says least.

"A large number of cases are cited, mostly American which we do not profess to examine. But the English cases most nearly in point are easily distinguished. *Jeakes* v. *White*, 6 Ex. 873, 86 R.R. 527, was really this; 'In consideration that I investigate your title with a view to a loan will you pay my costs in any event?' *Boston* v. *Boston* (1904), 1 K.B. 124, C.A., comes to this; 'If you buy Whiteacre I will repay you the purchase-money.' In neither cases is there any contract for an interest in land at all; no one is bound to convey or to buy. We hope the doctrine of *Campbell* v. *Mercier* will be reconsidered by some Court of higher authority."

While the *London Law Times* after reprinting the writer's article at length commented as follows: "An article appears in the CANADA LAW JOURNAL of the 2nd May, which we print this week (see *post*, p. 223) discussing a case entitled *Mercier* v. *Campbell*, turning upon the construction of the Statute of Frauds. The facts of that case (as reported in 14 O.L.R. 639) were as follows. The plaintiff possessed a hotel and the defendant desired to purchase it. An agreement was accordingly entered into under the hands and seals of the parties whereby it was agreed that the plaintiff should sell it and the defendant should buy it. To this was added the stipulation that 'in case the plaintiff refuses to carry out the sale of the property as aforesaid, she will have to pay to (the defendant) the sum of 300 dollars. And in case (the defendant) refuses to carry out the part assigned to him in accepting the title to the said property he will have to pay (the plaintiff) a like sum of 300 dollars.' The defendant did eventually refuse to carry out his bargain, and was sued by the plaintiff for the sum of 300 dollars. Upon the facts it seems to have been felt clear that a part of the contract of sale was not binding by reason of the Statute of Frauds, and the question then arose whether another part of it, being alternative and distinct, was

enforceable. The senior County Court Judge of Prescott and Russell found that the agreement for the sale being insufficient, the same could not support the promise by the defendant to pay 300 dollars. The enormous care and pains taken by this learned Judge may be gauged from the fact that the bare list of authorities referred to in his judgment occupies about a page and a half of the Law Reports, and that it ranges over English, American and Canadian text-books and reports.

"On appeal to the Divisional Court, the arguments were admirably put in short and sharp propositions, and in the end it was held that though one part of the contract was bad the alternative part (providing that either party would pay the other a named sum should he not fulfil his agreement) was enforceable against the refusing party. The County Court Judge based his view largely on American cases, but the Divisional Court came to the conclusion that all the American cases depended either (a) upon the principle that, if a part of an entire contract is void, the whole is void, or (b) that a note or promise given for payment if a defendant omits to carry out a contract void under the Statute of Frauds is unenforceable for want of consideration or (c) that there is some doctrine under which in cases of alternative promises if one is unenforceable the other is so likewise. The Court held that the alternative promise here was good, and relied in support of this decision on *Mayfield* v. *Wadsley* (3 B. & C. 357), *Kerrison* v. *Cole* (8 East 231), *Green* v. *Saddington* (7 E. and B. 503), *Jeaker* v. *White* (6 Ex. 873), *Morgan* v. *Griffiths* (L.R. 6 Ex. 70) and *Boston* v. *Boston* (89 L.T. Rep. 468; (1904), 1 K.B. 124). The last named case disclosed an agreement between husband and wife by which she promised to make him a present of a house if he would buy it. This somewhat curious arrangement was due to the wife becoming entitled to a fortune and being wishful to live in a house which the husband felt himself to be unable to maintain. The agreement was not reduced to writing and there was no memorandum of it. The husband bought the house for £1,400 and the wife pleaded the Statute of Frauds. Held by the Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.) that the agreement was not a contract for the sale of an interest in land and that an action was maintainable, though not

in writing. Accordingly, the Divisional Court, in the Canadian case, held that judgment should be entered for the plaintiff for three hundred dollars with costs.

"The decision is one which seems to be in accordance with one already in the Canadian Law Reports (*Canadian Bank of Commerce* v. *Perran*, 31 O.W.R. 116), and it seems to mark a departure from a long line of American cases. It would appear as though some confusion has arisen in these latter cases through a lack of distinction between the words "void" and "voidable" but the American decisions seem somewhat variable. The case brought to our notice in the CANADA LAW JOURNAL seems to have abundant support in English decisions but we rather gather that it marks a departure from the accepted law obtaining in Canada. It would seem as though the Canadian decisions had been influenced by the current, albeit a variable current, of American opinion. We should be glad to see any doubts as to the validity of such alternative agreements solved in similar lines in the case of all English speaking communities, for the Statute of Frauds is one of those measures which seems essential to their well-being in all matters coming within its scope."

Conclusion.

In view of the opinion of these eminent English authorities it will probably be thought therefore that the question cannot be considered as free from uncertainty, and as it touches so important a matter as the Statute of Frauds; which as the *Law Times* says is "one of those measures which seems essential to the country's well-being," it seems highly desirable that some means should be found either by Legislative action or otherwise to have the law upon the subject elucidated in an unambigious manner. The question of course is whether the Statute of Frauds can be evaded by the simple expedient above indicated. If the views of the London *Law Times* and the *Law Quarterly* above set forth may be taken as a correct exposition of the English law on the subject it should seem that according to the law of that country it cannot. In Ontario on the contrary while the case of *Mercier* v. *Campbell* (*sup.*) stands it would seem that it can, and that the answer to the question that heads this article must, for the present at all events for all practical purposes, be in the affirmative.

PERMANENT FOUNDATIONS OF WORLD PEACE.

We are glad that the powers that be issued at the beginning of this year the following noble and most appropriate pronouncement as to the permanent foundations of world peace; a pronouncement which goes to the heart of the matter, and is in line with that which is the most potent factor in our national greatness. It should be widely circulated, in all parts of the Empire, which apparently it has not been.

It comes as an appeal of the Prime Minister of Great Britain and Ireland and of the Premiers of the outlying Dominions to their fellow citizens of the British Empire. We are glad to give it a place in our columns, It reads as follows:—

"The war, in shaking the very foundations of ordered civilization, has driven all thoughtful men to examine the bases of national and international life.

"It has become clear to-day, both through the arbitrament of war and through the tests of rebuilding a life of peace, that neither education, science, diplomacy nor commercial prosperity, when allied with a belief in material force as the ultimate power are real foundations for the ordered development of the world's life. These things are in themselves simply the tools of the spirit that handles them.

"Even the hope that lies before the world of a life of peace protected and developed by a League of Nations, is itself dependent on something deeper and more fundamental still. The co-operation which the League of Nations explicitly exists to foster will become operative in so far as the consenting peoples have the spirit of goodwill. And the spirit of goodwill among men rests on spiritual forces; the hope of a 'brotherhood of humanity' reposes on the deeper spiritual fact of the 'Fatherhood of God.' In the recognition of the fact of that Fatherhood and of the Divine purpose for the world which are central to the message of Christianity we shall discover the ultimate foundation for the reconstruction of an ordered and harmonious life for all men. That recognition cannot be imposed by Government.

"It can only come as an act of free consent on the part of individual men everywhere.

"Responsible as we are in our separate spheres for a share in the guidance of the British Empire as it faces the problems of the future, we believe that in the acceptance of those spiritual principles lies the sure basis of world peace. We would therefore commend to our fellow citizens the necessity that men of goodwill who are everywhere reviewing their personal responsibilities in relation to the reconstruction of civilization should consider also the eternal validity and truth of those spiritual forces which are in fact the one hope for a permanent foundation for world peace.

"D. LLOYD GEORGE,
United Kingdom of Great Britain and Ireland.

"W. M. HUGHES,
Australia.

"W. G. MASSEY,
New Zealand

R. L. BORDEN,
Canada.

LOUIS BOTHA,
South Africa

R. A. SQUIRES,
for E. N. B.,
"Newfoundland."

APPEALS TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

We have from time to time heard something about abolishing appeals to His Majesty in His Privy Council in civil cases, but so far the talk has been merely suggestive and founded chiefly upon the dislike of some corporation or municipality to a particular decision. The proposal has been advocated, if we may say it without offence, rather by the evening newspapers than by any one entitled to speak, or to reason, with authority on the subject. The suggestion has not met with favour among the general body of the profession and hitherto nothing concrete has come of it, and as regards civil cases the law stands very much as it did before Confederation.

Special reasons may perhaps be urged for sec. 1025 of the Criminal Code, prohibiting appeals in criminal cases; but this can hardly be said to be more than an invitation to the Crown not to exercise its prerogative in such cases.

Now, however, the Attorney-General in the new Provincial Government of Ontario has fathered a bill, the substance of which will be found below, and his position gives undue importance to the attempt thus made to change the existing order of things, and to sever perhaps the most important, and at all events the most notable and outstanding link which binds the great Dominion to the British Empire. We do not just now propose further to discuss the singularly phrased provisions of the bill as we understand that it is not to be pressed, or possibly not introduced at the present session.

Its language is really that of an Imperial Act and it is hardly to be supposed that a Provincial Legislature—large as its powers are—can abrogate His Majesty's prerogative to hear an appeal or the authority of the Judicial Committee to grant leave to petition to bring it.

The wording of the principal enacting clause of the Bill (the second section) is as follows:—

"2. Notwithstanding any Royal prerogative or anything contained in The Interpretation Act or any other Act, no appeal shall lie from any judgment, decision or order of the Supreme Court of Ontario, or of any other Court, or of any person, board, commission or body, exercising judicial authority, in any action or other proceeding brought, had, or taken in or before any such court, person, board, commission or body, to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard, and the authority of the Judicial Committee of His Majesty's Privy Council to grant leave to appeal to His Majesty in His Privy Council from any such judgment, decision or order and the prerogative of His Majesty to hear such appeals are hereby abrogated."

This provision of the Bill seems as unconstitutional as it would be abortive. The ancient right of the citizen to lay his grievance at the foot of the throne is as "old as the hills," and we trust may always remain as firmly fixed.

It is clear from the views expressed in the address of Mr. Gagné (*ante* p. 89) that the second largest of the Provinces which formed old Canada would have none of such changes and we do

not think that any of the other Provinces of the Dominion will follow the lead of the Attorney-General.

The Law Society of Upper Canada, elected by the profession, and speaking for them, have, we learn, protested against the Bill, and have presented, or are about to present, a petition to the legislature enforcing their views.

We would also call attention to the report presented to the Ontario Bar Association which appears in another place which was unanimously adopted.

We may refer to forcible and unanswerable arguments in favour of there being an appeal to England advanced by Sir Hibbert Tupper, K.C., K.C.M.G., in 1914, and to be found in full in these columns, *ante* vol. 50, pp. 211, etc., also we would refer to the admirable and well-reasoned address of Sir Allen Aylesworth, K.C., K.C.M.G., delivered before the Canadian Bar Association on this subject in the same year.

THE BOARD OF COMMERCE FOR CANADA.

After the retirement of the Chairman of the Board of Commerce, Judge Robson, we referred (*ante*. p. 95) to the unsatisfactory state of things that then prevailed in the administration of this Board. These conditions have not improved, and the Government should, at once, take the matter up. The Board (or Court, which it really is), has large possibilities for usefulness, but is drifting into a position which can be better described by the words friendless and inefficient.

There is no head to the Board, and the duties have devolved on the other two members of the Board, who have had no judicial experience and have not, as some claim, any special aptitude for the position they occupy. Water cannot rise above its source, nor can any undertaking, corporation, Board or Court be a success unless those in charge of it have the qualifications necessary for the best fulfilment of the duties imposed upon it. If not so qualified, disappointment, and it may be disaster, is a necessary result.

The Board of Commerce was entitled to receive from the Government which brought it into being adequate, proper and

generous support, and it was their duty to select and appoint as its judges the very best available men of business capacity and experience, combined with cool heads and far-seeing vision, combined with legal knowledge and judicial experience which always produces the best results.

The duties of the Board of Commerce are manifold and most onerous. It has to deal with most perplexing matters affecting trade and commerce, as well as the production and distribution of almost every article used in daily life; and all this at a time when unexpected and far-reaching changes have brought about difficulties and complications never known before.

In the United States it has been found necessary to appoint a Commission to deal with only one of the great problems which the Board of Commerce has to grapple with, namely, the live stock industry, with its ramification of trusts and combines and the tyrranical and selfish use of their great powers. These commissioners are paid large salaries and given every assistance, and have the Government at their back to help them to discharge effectively their responsible duties.

Our Board of Commerce, although given equally large powers and a much larger jurisdiction, has not been so supported or encouraged. It is naturally the object of attack by all the large trusts and combines whose rapacity and selfish ends it was formed to curb. It is alleged that many of the difficulties this Board had to contend with result from backstairs influence in the direction indicated. We all know the power of money, and how largely it is sometimes used for selfish purposes.

The Board of Commerce has met with another difficulty and one inherent in our constitution, viz., the division of jurisdiction of the Dominion. Exception was recently taken to the jurisdiction claimed by the Board in certain matters. The legal questions arising therefrom are now before the Supreme Court of Canada, and the work of the Board has been stayed for the time being.

We regret to notice that for some reason the Supreme Court desires the case before it to be re-argued, thus causing further delay in matters which are of pressing moment. This results in hardship and continued acts of piracy and injustice to innocent and

helpless people. It has become evident that under our constitution there must be joint action between the Federal and the Provincial Governments, if the best results are to be obtained. Is this joint action possible? It is demanded by the necessities of the case and in the interests of the country at large, for the protection of those who are greviously suffering from the present conditions of things.

These conditions it is claimed might be largely ameliorated by a strong Board, backed up by the Federal and Provincial Governments, and by the public press.

DIVORCE REFORM.

This branch of law is now well before the public and drastic changes will doubtless come into effect in this Dominion shortly.

In England legislation is, of course, in a much more advanced condition than in Canada; but there, also, amendments or at least changes in their divorce law are imminent.

These proposed changes are going before the British House of Parliament under Lord Buckmaster's bill which was based on the recommendation contained in the majority report of the Royal Commission in Divorce and Matrimonial causes.

The *Law Times* in a recent article refers to some of these changes expressing the view that permanent judicial separation should be abolished, as its effect is to bring about a *de facto*, but not a *de jure* divorce, with all its accompanying evils. Also that suits for restitution of conjugal rights should be done away with, as these proceedings are merely used by the well to do for the purpose of obtaining legal separation before the statutory period has expired. Further that the sexes should be placed upon absolute equality, so far as the grounds for divorce are concerned, there being no adequate reason why two persons who enter into matrimonial relationship should have a different standard of morality applied to them.

In speaking of the line for reform the above journal speaks as follows: "On purely secular grounds we are opposed to the creation of any new matrimonial offences but we strongly support an alteration of the law and procedure so as to give effective

remedies for existing offences. Giving jurisdiction to the County Courts, with the objectionable restriction based on the means of the parties, is to be deprecated, for matrimonial jurisdiction should be a High Court jurisdiction, although it should be exercised locally. Courts of summary jurisdiction should only have power to grant temporary separation and maintenance orders, and that only where they are necessary for the reasonable immediate protection or support for the wife and children. Again, permanent judicial separation and decrees for restitution of conjugal rights should be abolished and divorce granted for the three matrimonial offences—adultery, desertion, and cruelty—both husband and wife being placed upon absolute equality as to these. It will, of course, be necessary to define the offence of cruelty with reasonable precision—a matter of no great difficulty—and to provide safeguards against collusion in the case of wilful desertion. Finally, trial by jury must be retained in matrimonial cases, which, as heretofore, should be tried in open court. In addition to these main lines for reform, we think that the suggestions made by the report as to grounds for nullity of marriage and as to presumption of death might well be adopted."

LAW REFORM.

REPORT OF THE COMMITTEE OF THE ONTARIO BAR ASSOCIATION ON LAW REFORM—A. J. RUSSELL SNOW, K.C., CHAIRMAN OF COMMITTEE.

THE BANKRUPTCY ACT.

Since the last meeting of the Bar Association, the Bankruptcy Act, ch. 36, 9 and 10, George V., has been passed by the Dominion Parliament. One of the principal objects of this Act was to enable a debtor to procure a discharge from his liabilities, but a perusal of the Act shews that it will be scarcely possible for any bankrupt to get a discharge on account of the provisions of ss. 58, 59, 60, 61, 62.

1. The Court may suspend the bankrupt's discharge for not less than 2 years if the bankrupt's assets are not of a value equal

to fifty cents in the dollar of his unsecured liabilities, unless he can satisfy the court that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilties, has arisen from circumstances for which he cannot justly be held responsible.

2. If he has omitted to keep proper books of account.

3. If he has traded, after knowing himself to be a bankrupt.

4. If he has failed to account satisfactorily for his loss of assets.

5. If his bankruptcy was brought on by rash and hazardous speculations or by unjustifiable extravagance, gambling or culpable neglect of his business affairs.

6. If the bankrupt has put the creditors to unnecessary expense by frivolous or vexatious defence to any action brought against him.

7. If the bankrupt has, within three months preceding the date of the receiving order or assignment, incurred unjustifiable expense by bringing a frivolous or vexatious action.

8. If the bankrupt has, within three months of making the assignment, given undue preference to any of his creditors.

9. If the bankrupt has incurred liabilities with a view of making his assets equal to fifty cents on the dollar on the amount of his unsecured liabilities.

10. If the bankrupt has been previously adjudged bankrupt, or has made an assignment, composition or arranged an extension with his creditors, and *last*, if the bankrupt has been guilty of any fraud or fraudulent breach of trust.

The chief objection to the Act is the requirement that the assets of the bankrupt must be equal to fifty cents on the dollar of his unsecured liabilities. In many cases estates do not pay fifty cents on the dollar, and there should therefore be provision in the Act to the effect that if the debtor has acted honestly in the conduct of his business, and has not been guilty of any fraud or fraudulent breach of trust, he should be entitled to a discharge before two years even though his estate was not sufficient to pay fifty cents on the dollar on his unsecured liabilities.

Under sec. 90 of the Act, if an undischarged bankrupt obtains credit to the extent of $50 or upwards from any person without

informing that person that he is an undischarged bankrupt, or if he engages in any trade or business other than his own without disclosing to all persons with whom he enters into any business transactions the name under which he was ajudicated bankrupt, he shall be guilty of an indictable offence and liable to a fine not exceeding $500 and to a term not exceeding one year's imprisonment. This section is too drastic. After the debtor has been declared bankrupt, he surely should not be prohibited from buying $50 worth of goods, groceries or provisions, necessary possibly to maintain his family, without being subject to a penalty of $500 and one year's imprisonment, nor should he be prohibited from carrying on business either in his own name or any other person's name, and this Committee recommends that steps should be taken to have this clause modified. The effect of the Act is to supersede the Dominion Winding-up Act, but the Act does not in terms repeal it.

Under s. 63 of the Act, Bankruptcy Courts are constituted throughout the Provinces of the Dominion. Each Province is to constitute one Bankruptcy District, but it may be divided into two or more Bankruptcy Divisions, and a judge shall be assigned to each Division to exercise the powers and jurisdiction conferred by the Act. The Chief Justice may report to the Minister of Justice that it is impossible or highly inconvenient to assign a judge to preside over the Bankruptcy Court. In such case, the Minister of Justice may appoint a county or other judge, a judge of such court. Under the circumstances, if a judge in Bankruptcy has to be appointed, strenuous efforts should be made to see that he is properly remunerated.

Under s. 87 of the Act, barristers, solicitors and advocates may practise in the Bankruptcy Court and are declared to be officers of such court. The tariff of costs and fees is not satisfactory. A solicitor is to be paid such reasonable costs and fees as are fixed in a tariff provided by general rules. The costs are restricted to 5 per cent. where the gross proceeds of the estate exceed $5 000 over and above any costs that may be awarded against or payable by persons other than the trustee or the estate of the debtor. Where the gross proceeds of the estate are under

$5,000, the costs payable may by unanimous vote of the inspectors be increased to any amount not to exceed 10 per cent. of the gross proceeds of such estate. The solicitors' tariff is to direct by whom and in what manner costs are to be collected and accounted for and to what account they shall be paid. The effect of this provision, in view of the decisions of our courts, is that solicitors must look to the estate and not to the assignee personally for the payment of their costs and charges.

The Act also contains provisions for setting aside fraudulent transfers of property. These are new and original, and conflict with other statutes now in force in this Province relating to the fraudulent transfer of property under The Assignments and Preferences Act, and there will be no uniformity of law throughout the Dominion with regard to fraudulent assignments or transfers of property until each of the Provinces adopts similar statutes relating to transfers of this character.

Workmen's Compensation Act.

Complaints have been made to this Association from time to time by members that the Workmen's Compensation Board has ruled all lawyers out of practice in connection with claims under the Act, and that the Board even declines to answer communications from solicitors addressed to it. Not only does the Board treat the profession and their communications with contempt, but worse still it gratuitously casts unfair and undeserved reflections on the profession. In its report for the year 1918, Appendix "B," it cites one case of a certain solicitor who, in the early history of the Act, acted for a workman in a case as amanuensis and filled out all forms. Eventually the workman got a little over $100 and the solicitor rendered a bill of costs almost equal to the amount awarded, but which bill was subsequently taxed at $38.55. The Board says that the $38.55 was an exceedingly large amount for the services rendered and was a most unreasonable burden put upon the workman. For this reason, and other reasons assigned therein, it concluded to have nothing more to do with lawyers.

Mr. Samuel Price, the Chairman of the Board, is a barrister and solicitor, and at one time was an associate member of our

profession. Why, may we ask, because one member of the profession makes an overcharge for services rendered, should Mr. Price proclaim that the whole legal profession is tarred with the same stick? This requires some explanation from him. That he should libel the whole profession by sending broadcast throughout this Province a report of this character, to the detriment of the profession, is not commendable, and deserves severe censure by every lawyer in this Province.

The Workmen's Compensation Board is one of the most autocratic institutions in this Province. It is absolutely independent of all Government jurisdiction except by special legislative enactments. It handles all its own funds and investments, and in its report for 1919 it shews investments made in the bonds and debentures of loan companies and of towns and cities throughout Ontario of between five and six million dollars. These investments are made at rates of interest varying from five and one half to six per cent. The Province of Ontario was borrowing money at rates exceeding these rates of interest. There seems to be no reason why all these moneys should not be handed to the Province and the Province become indebted to the Workmen's Compensation Board for the advances, plus a reasonable rate of interest. The placing of a large amount of money, amounting now to between five and six millions, and which will be more in subsequent years, in the hands of a Commission is a matter to be commented upon, and the committee is of opinion that investments of this character should not be made by members of the Board itself.

[The Report then refers at length to a case which came before the Board and shewed the injustice which had arisen from the provision of sec. 9 of the Act and the interpretation placed upon it by the Board, and then continues:—]

The committee recommends that measures should be taken to have s. 9 repealed and that a workman should not only be entitled to compensation from the Board but to compensation by way of damages against any other persons who do not contribute to the compensation fund, and that anything recovered from such person in any action should be the absolute property of the person

bringing the action. In the case cited in the report compensation should have been fixed on the basis of the man's regular occupation (a stationary engineer), with an earning power of $200 a month, and not on the basis of shipper which was not his regular vocation. If a solicitor had been employed in the first place to look into this man's case and the workman had been well advised, he would never have made any claim under the Workmen's Compensation Act.

Your committee recommends that the attention of the Minister of Labor be called to the matters above referred to at the earliest possible moment, and the following recommendations made:—

1. That the Act be amended so as to give the workingman an appeal to a judge, with the right to call evidence if he is not satisfied with the Board's decision, as in the United States and in England.

2. That the clause 9, exonerating the real culprit from damages, should be eliminated.

3. That the amount of compensation be increased.

4. That solicitors should be allowed to present the claim and a tariff framed by the judges fixing the amount to be paid to a solicitor, for the reason that many men are incapable of presenting a claim to the Board in a proper, intelligent manner. The applicant may be uneducated, shy, thoughtless or careless in preparing his facts.

5. That the "Compensation Fund" should be handed over to the Government and they should be the custodians thereof.

Re Divorce Court.

In all the Provinces of this Dominion, with the exception of Ontario and Quebec, Divorce Courts have been established and there is no reason whatever why a Divorce Court should not be established in the Province of Ontario. Most of the time of the Senate at Ottawa is taken up with hearing divorce applications and there are more applications before Parliament this session than ever before. In conjunction with the Canadian Bar Association, this Association should make efforts to have a Divorce Court established in Ontario and steps taken to procure it at the earliest possible moment.

Re Amendment to Solicitors' Act to Dispense with Itemized Charges in Solicitors' Bills.

Since the last meeting of the Association vigorous efforts were made to have statutory legislation enacted to do away with giving itemized charges in solicitor's bills, and the matter progressed so far that the bill, with the assent of the judges and of the Attorney-General, reached the final stage and only required its third reading to become law, but some misunderstanding took place between the Attorney-General and the leader of the opposition, Mr. Proudfoot, with the result that the bill did not become law. Your committee recommends that this matter be allowed to stand for the present, and that the legal profession rely upon the present decision of the Appellate Division with regard to bills of costs not requiring itemized charges and approving of a lump sum being charged in lieu thereof provided sufficient details are given in the bill. The committee was also able to procure a percentage being added to solicitors' costs in actions. This percentage was wholly inadequate, but it was better than nothing.

The committee recommends that a joint committee, composed of some of the judges, members of this Association and Benchers of the Law Society, be formed for the purpose of going into the question of costs payable to solicitors and fixing a more just allowance to the profession, not only with regard to costs between party and party, but also with regard to costs between solicitor and client, and that efforts should be made to accomplish this result.

Re Public Trustee Act.

As directed by this Association, a representative from the Ontario Bar Association, together with representatives from the Law Society and trust companies attended before the late Premier and late Attorney-General and put up strong opposition against the Act in so far as it sought to take over the general administration of estates by having the Public Trustee appointed executor under a will or administrator by the court, with the result that s. 10 of the Act was not enacted, and the statute as now passed only permits the Public Trustee to administer escheated estates and estates vested under the Charities Accounting Act of 1915.

Re the Augmentation of Judges' Salaries.

Members of this committee and of the Council took active steps during the past year to have the salaries of the County Court and Supreme Court judges increased. Representatives of this Committee and of the Association appeared before Mr. N. W. Rowell and the Premier and Attorney-General of this Province, and the President likewise personally attended at Ottawa as representative of the Association for the purpose of having legislation enacted which would increase the salaries of the persons above named. The committee is not satisfied with the result so far obtained. The Government did not increase the salaries of the Supreme Court judges in Ontario but the salaries of the County Court judges was put upon a better basis by concurrent legislation passed by the Province and the Dominion. Your committee still recommend that vigorous efforts be put forth to have the salaries of the Supreme Court judges very much increased. The amount paid to them now might have been adequate in 1894 when the salaries were fixed, but at the present time, Parliament should take into account the high cost of living, and all judges' salaries, and more particularly the judges of the Supreme Court, should be increased.

Re Appeals to Privy Council.

The committee recommends that no interference whatever should be made with the right of appeal to the Privy Council, and the committee is not in accord with the views expressed by the Attorney-General of this Province. The committee believes that it would be an injudicious act to embarrass in any way appeals to the Privy Council, more particularly in view of what was said by Sir Robert Finlay in his recent address in Toronto before the Law Society.

OUR BROTHERS AT THE FRONT

Every part of Canada was represented on the firing line in France and Belgium during the Great War; and, in "Flander's Fields" lie the mortal remains of many gallant and loyal men of our profession who left their far-off homes in Canada, Australia,

New Zealand, South Africa and other parts of the Empire to fight and die side by side with their professional brethren of the British Isles.

With these thoughts in mind we are glad to publish some extracts from the Report of the Historian of the Ontario Bar Association (Mr. W. S. Herrington, K.C.), which were read at its last meeting. This paper was an interesting review of the work of the Ontario legal profession during the war. Although it has special reference to the members of the Law Society of Upper Canada there is much of interest to the profession generally. It begins as follows:—

"In times of peace if we had been confronted with the question 'in the event of war what would be expected from the members of the Law Society?' we probably would have answered that very little could be hoped for; as the habits of our profession were not such as to qualify us for a military life. We might compare favourably from a physical standpoint with some of the other professions; yet we would have questioned our ability to keep pace with the mechanic, tradesman and farmer who were more enured to trials of endurance. Grave doubts also might have been entertained as to the morale of a class of men whose daily training has no tendency to qualify them to subscribe to the maxim of the soldier—

" 'Their's not to make reply, their's not to reason why.' "

The successful lawyer would soon lose his reputation as such if he did not in his practice follow a rule quite contrary to that laid down for the guidance of the soldier on active service.

"What a revelation was it then, even to ourselves, to find members of the Society responding by hundreds to the first call to arms, and undergoing a course of drill that taxed the strength of others who had been accustomed to manual labour for years! Their bodies responded to the physical culture, so that after a few months' training in camp there were no hardier soldiers to be found in the ranks than those men, many of whom for years had performed no more difficult physical feat than the handling of the Revised Statutes of Ontario. These same men, too, were capable of taking an intelligent view of the whole situation, and realized the necessity for the maintenance of discipline and were able to lay aside the habit of arguing out the why and wherefore of the orders of their superiors and to set a good example of obedience to their comrades in arms.

"Before the introduction of conscription, not only did the profession furnish hundreds of volunteers from its ranks, but no class of men was more active in pointing out to others their duty to their country. In every county in the Province the lawyer was the willing horse that was worked almost to death in securing recruits. Week days and Sundays he went hither and thither from town to town, and in the back concessions from village to village. Wherever he felt he could do any good, there you would find him haranguing audiences large and small upon the necessity of each man doing his bit. By his own exemplary enthusiasm and willingness to serve he did much towards inspiring in others that same spirit of sacrifice that characterized Canadians as a whole. And when it was found necessary to pass the Military Service Act its enforcement fell almost exclusively upon the legal profession. It may be that our calling qualified us to serve upon the Exemption and Appellate Boards, but be that as it may, the fact remains that scores of lawyers and judges from one end of the Province to the other were engaged for weeks in endeavouring to determine who could best be spared from the army of young men who were willing to remain at home. There may be isolated cases, but I have yet to learn of a single instance where a lawyer or a lawyer's son claimed exemption under the Act.

"No less than 695 members of the Law Society enlisted in either the Canadian or Imperial army, and what meant as great a sacrifice by the profession was the large number of lawyers' and judges' sons who responded to the call. I understand no reliable statistics have been gathered in this connection but I believe I am safe in estimating the number at 600.

"The work of the profession in raising funds to prosecute the war did not end with their personal subscriptions to the war loans. Many of the local committees throughout the country obtained their most faithful workers from the local members of the Bar, who displayed a genius for organization which, up to their assuming these new duties, had never been suspected. While the individual canvassers received liberal commissions upon the subscriptions secured; the committeemen rendered their services free. There were meetings to be held, speeches to be delivered, hundreds of letters to write, reports to fill out, explanations to be made and snarls to unravel, and the poor lawyer was never expected to be so busy but that he could drop everything and take up any branch of this work that might be assigned to him. The success of the loan depended very largely upon the tact, patience and energy of these willing workers, who for weeks at a time devoted themselves to the supervision of the hundreds

of details in connection with the work. There was no special reason why the lawyer should be chosen for this particular line unless it be due to the general belief that he can adapt himself to any kind of work. The fact remains that from the beginning of the war to the end, no matter what work was in hand the lawyer was invariably saddled with a very large portion of it. If it happened to be of a professional character he, of course, was expected to render his services gratis. If it entailed a trip to the country or a neighbouring town there was rarely any provision for the payment of his expenses. While his living expenses had doubled, his fees remained the same until a late hour when a portion were increased by 20%. He rarely complained that he was bearing more than his share of the burden and may tender me no thanks for now commenting upon the fact.

"Upon the whole we may well congratulate ourselves upon the fact that the legal profession had, from the inception of the war, a clear and intelligent grasp of the situation and of the demands made upon every citizen of Canada and that they arose to the occasion and answered those demands in full. We need have no fear that the noble traditions and splendid record of the profession established during the period of the war will be maintained by the students now in attendance at the Law School. Among those now enrolled there are no less than 200 who wear the coveted overseas button.

"To single out for especia' comment a few members of the profession is a very difficult task. Our natural inclination is to make our selection from those who made the supreme sacrifice. If we were to call the roll of the Law Society to-day no response would come from 110 of our members over whose graves the "Last Post" has been sounded. Each is worthy of individual notice, and I hope a complete record of every member of the Society who laid down his life for the Empire and the great issues at stake in the war will be secured and preserved among our archives. I cannot, however, conclude this brief resumé of the war effort of the Law Society without recalling the names of a few of our members who so worthily represented us in our overseas forces. There is no pretence that the list presented by me includes all of those whose prominence in the profession or brilliant military record entitles them to especial mention. Quite naturally I have selected those whose names are most familiar to me or whose records have been most prominently brought to my notice. It is quite certain, but unavoidable, that many others just as worthy of individual notice have been passed over. My object is, not to discriminate, but to place on record in this report brief sketches

of a few to serve as types of that vast number of our brethren who unhesitatingly laid aside their practice, left the comforts of their homes for the hardships of a soldier's life and braved the dangers of the battlefield to find in so many instances a hero's grave in Flander's Fields.

"With generous hands they paid the price
Unconscious of the cost;
But we must gauge the sacrifice,
By all that they have lost."

"The joy of young, adventurous ways,
Of keen and undimmed sight;
The eager tramp through sunny days,
The dreamless sleep of night."

"No lavish love of future years,
No passionate regret,
No gift of sacrifice or tears,
Can ever pay the debt."

The Historian then mentions the following: Major-General Malcolm S. Mercer, C.B.; Lieut. Matthew M. Wilson; Lieut.-Colonels George T. Denison, Jr., Frederick H. Hopkins, A. A. Miller, Samuel S. Sharpe, D.S.O.; Majors Jeffrey Bull, James M. Langstaff, Roderick W. Maclennan, Charles A. Moss, John R. Meredith, and Featherston Aylesworth.

A brief but interesting sketch is given of the legal and military life of those named, describing how each one did his duty. The Historian then makes a plea for the erection of a memorial "to the memory of all members of our profession who have passed to the Great Beyond as a result of their participation in the Great War—something enduring to perpetuate for all time the glorious example and heroic sacrifice of these our brothers who freely gave their lives for the principles of Liberty and Justice, the principles which the Bench and Bar are trained to administer."

FAIR RENTALS COURT.

The formation of new courts seems to have fired the imagination of a member of the Ontario Legislature. This time the desire is to establish a "Fair Rentals Court." We fail to see any virtue in the proposition. If a man chooses to build a house and pay his taxes

he is not bound to rent it at all if he does not want to. He can, on the same principle, charge what rent he thinks proper. If he asks an exhorbitant price it will remain unrented. But that is his business; the law of supply and demand should settle the value of rentals. Why not establish a court to fix the price of land, and compel the owner to sell at that price, although such price may be half what he paid for it, or not sufficient to pay the mortgage on it? If such a court had the power to compel some one to buy at that price, many owners might be glad to be brought into court. Equally objectionable is another member's proposal, to give powers to Courts of Revision to fix fair rentals, with various court-like powers. This Act is to apply to cities of not less than 200,000 inhabitants. Why? Does this legislator desire to throw obstacles in the way of house building? We thought the object nowadays was to encourage building.

We are quite aware that rent restriction has been discussed in England and that there is some legislation there on the subject; but changes are in prospect, and it is questioned whether the results are satisfactory. However, what is desirable there may not be desirable or just here. We certainly question the wisdom and fairness of rent restriction in this country.

The Board of Commerce goes far enough in the attempt to fix fair prices under legislative authorization, and so far it has not met with the success that was hoped for.

RIGHT TO BAIL ON COMMITMENT FOR A MISDEMEANOUR.

(ANNOTATION FROM D.L.R.)

The criticism made in *R.* v *Russell*, reported 50 D.L.R. 633, of the *dictum* in *ex parte Fortier* (1902), 6 Can. Cr. Cas. 191, 13 Que. K.B. 251, appears to have no further authority than *obiter dicta*, for the Court having concluded to allow the bail to Russell and others charged with seditious conspiracy it made no difference in the result of the case whether the Court's conclusion was based upon a judicial discretion under Code, sec. 698, or upon the habeas corpus practice apart from that section under the Habeas Corpus Act, 31 Car. II., ch. 2, and the common law. The difference of opinion between the Court of King's Bench of Quebec

and the Court of King's Bench of Manitoba may be said to depend upon the question whether or not Code sec. 698 (former sec. 602 of the Code of 1892), has any limitative effect upon bail of persons committed for trial who apply for bail by means of the writ of habeas corpus. If it does not, then the Habeas Corpus Act, 31 Car. II., ch. 2, has still to be construed in its reference to felonies and misdemeanours. As regards the mode of prosecution, the distinction between felony and misdemeanour was abolished by the Canadian Criminal Code of 1892, sec. 535, and this enactment is now sec. 14 of the Criminal Code, 1906. Notwithstanding the statutory abolition of the distinction, it may still be necessary to limit the effect of prior statutes dealing in terms with misdemeanours so that it will not apply to a Code offence which but for Code sec. 14 would be a felony. *R.* v. *Fox* (1903), 7 Can. Cr. Cas. 457, 2 O.W.R. 728. The Criminal Code did not re-enact or repeal the Habeas Corpus Act, and it may be questioned whether Code secs. 698-701 were intended to interfere in any way with the powers and duties of a superior Court exercising habeas corpus jurisdiction. The procedure appears to have been intended as an alternative one, involving less delay and expense than that of habeas corpus. The title to the first Canadian Act, in which these Code provisions appeared, 32-33 Vict. (1869), ch. 30, was "An Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences." The statutory power of bail to which the discretion was attached was not limited to Courts or Judges of Courts having power to entertain a habeas corpus motion. It included, with some limitation of the class of offences. Judges of the County Courts which had no habeas corpus jurisdiction, and as to Judges of superior Courts enabled them in their discretion to order bail before justices, which powers, before the enactment, might have been exercisable on habeas corpus by the Court in term or by a single Judge sitting for and exercising the functions of the Court, or by a single Judge in the special contingencies provided for by the Habeas Corpus Act. The distinction between the class of functionaries given special powers under Code sec. 698 and a provincial superior Court of criminal jurisdiction is made in Code sec. 699 in its reference to the "order of a superior court of criminal jurisdiction for the *Province* in which the accused stands committed" The statute from which Code sec. 698 is taken conferred its enabling powers in furtherance of the assimilation of the laws of Quebec, Ontario, Nova Scotia and New Brunswick (32-33 Vict. 1869 (Dom.), ch. 30), and the same phraseology has been followed throughout: "Any Judge of any *superior* or

county court, having jurisdiction in the *district* or county within the limits of which the accused is confined." Compare 32-33 Vict. (1869) (Dom.), ch. 30, sec. 53; R.S.C. 1886, ch. 174, sec. 82; Cr. Code, 1892, 55-56 Vict. (Dom.), ch. 29, sec. 602; Cr. Code, R.S.C. 1906, ch. 146, sec. 698.

And throughout all this legislation is the enactment contained in the present Code, sec. 701, that the same order concerning the prisoner being bailed or continued in custody shall be made as if the prisoner was brought up upon a habeas corpus. This, it is submitted, was intended to preserve all the rights to bail which could be had on habeas corpus. The disposal of the case is to be in like manner to the disposal on a habeas corpus although the power under sec 698 to direct that the justices take bail probably would not involve the penalty to which a Judge would be subject under the Habeas Corpus Act for improperly refusing bail for a misdemeanour.

Another consideration which favors the view that in Canada for a misdemeanour bail is a matter of right, is that sec. 23 of the Indictable Offences Act, 1848 (Imp.), which was probably the basis of the Canadian Act of 1869, was interpreted so as not to displace that doctrine in England. Under that Act it was declared that a justice of the peace might, *in his discretion*, admit to bail for certain felonies and certain misdemeanours; but it was held that such special power and discretion made it none the less obligatory on a Judge to bail on habeas corpus as theretofore in the case of a commitment for trial for a misdemeanour. *Reg.* v. *Bennett* (1870), 49 L.T.J. 387; *Reg.* v. *Atkins* (1870), 49 L.T.J. 421; and see *Re Frost* (1888), 4 T.L.R. 757.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

POST NUPTIAL SETTLEMENT—WANT OF CONSIDERATION—PURCHASER FOR VALUE—INSOLVENCY—FRAUD ON CREDITORS.

In re Macdonald (1920) 1 K.B. 205. This is a bankruptcy case which is deserving of attention. By an ante nuptial settlement made in 1900 the debtor settled certain property upon trust (*inter alia*) for himself for life. In 1913 by an arrangement with his wife the income from the trust property was thenceforward paid to her. In March, 1914, they agreed to separate and, in order to secure the wife the continued payment of the income, in March, 1915, the husband surrendered to his wife his interest under the marriage settlement and gave her power of appointment which might act in derogation of the husband's ultimate reversion in the trust property. There was no agreement that the wife should take no proceedings against the debtor—and though the wife testified that she had no knowledge that the husband was not at the time of the surrender able, apart from the trust property, to pay his debts in full, yet there was no evidence that he was in fact so able. In July, 1917, the husband committed an act of bankruptcy and his trustee in bankruptcy now claimed the trust property to the exclusion of the wife. In these circumstances Horridge, J., held that the surrender to the wife was without consideration and was the mere substitution of a voluntary settlement for a voluntary allowance to the wife which was void as against the trustee so far as was necessary for the payment of the husband's debts and the cost of the bankruptcy.

CRIMINAL LAW—CHARGE OF MURDER—DEFENCE INVOLVING IMPUTATIONS ON DECEASED—CROSS-EXAMINATION OF PRISONER AS TO OTHER OFFENCES—ADMISSIBILITY OF EVIDENCE—CRIMINAL EVIDENCE ACT, 1908 (61-62 VICT. c. 36) s. 1—(CANADA EVIDENCE ACT, R.S.C. c.145, s. 5 (2)).

The King v. *Biggin* (1920) 1 K.B. 213. This was an appeal from a conviction for manslaughter, on the ground of the improper admission of evidence. The appellant was charged with murder, and as a witness in his own behalf he stated that the deceased had made improper overtures to him and that he had killed him in self defence. Questions were addressed to him in cross-examination which had no relevance to the charge of murder, but which tended to shew that the appellant had previously committed

some other offence than that for which he was being tried. No evidence had been given as to the good character of the appellant. The questions were objected to, but admitted, on the ground that the dead man was the prosecutor and that the defence involved an imputation on his character, and also because they tended to shew that the appellant did not always speak the truth. The Court of Criminal Appeal (Lord Reading, C.J., and Avory, and Sankey, JJ.) held that the questions, in the circumstances, were inadmissible under the Evidence Act, 1908, and quashed the conviction: and it would seem that they would in the like circumstances have been inadmissible under the Canada Evidence Act, R.S.C. c. 145, s. 5 (2).

GAMING—PLAYING TENPINS FOR PRIZE—PRIZE PRESENTED BY OWNER OF PREMISES—MONEY SUBSCRIBED BY PLAYERS—(R.S.C. c. 146, s. 226).

Welton v. *Ruffles* (1920) 1 K.B. 226. This was a prosecution for permitting a game of chance for gain to be played on licensed premises. The facts were as follows: The landlords of the premises were brewers and they offered a copper kettle as a prize for a tenpin contest. In order to take part in the competition players had to pay 6d. each to one Whiting who had been asked by the appellant to collect the money, and something in excess of 18s. was so collected. This sum was paid to the appellant and the balance retained by Whiting. On the transaction being called in question the appellant, on the advice of the brewers, paid the 18s. to a hospital. The magistrates convicted the appellant. On an appeal from the conviction it was contended that the kettle having been provided for by a third party and not paid for out of the entrance fees, no offence had been committed. On the other hand, it was claimed that the payment of the entrance fees shewed that money had been staked, and that constituted gaming. A Divisional Court (Lord Reading, C.J., and Avory, and Sankey, JJ.) affirmed the conviction, being clearly of opinion that what had been done amounted to gaming.

PRACTICE—ADMISSION OF DOCUMENTS—PLAN PREPARED FOR PURPOSE OF ILLUSTRATION—ABSENCE OF NOTICE TO ADMIT—COSTS OF PROVING—(ONT. RULE 671).

Hayes v. *Brown* (1920) 1 K.B. 250. The simple point involved in this case was whether a plan prepared for the purpose of illustrating the locality where a horse was killed, which was the subject of the action, should have been included in a notice to admit in order to entitle the plaintiff to the costs of it. The County Court Judge allowed the plaintiff the costs of the plan

and of the subpoena and witness fees for proving it; and on appeal to a Divisional Court (Lush and Sankey, JJ.) his decision was affirmed on the ground that such a plan is not a "document" within the C.CC. Rules and need not be included in a notice to admit documents.

COMPANY—ARTCILES—ALTERATION—POWER TO EXPEL SHAREHOLDER CARRYING ON BUSINESS COMPETING WITH COMPANY—ALTERATION IN ARTICLES FOR BENEFIT OF COMPANY.

Sidebottom v. *Kershaw* (1920) 1 Ch. 154. This was an action by a shareholder of a limited company to set aside a resolution of the company to alter its articles of association by providing that the directors should have power to require shareholders who carried on business in competition with the company to transfer their shares to nominees of the directors on payment of their fair value. The Vice-Chancellor of Lancaster held the resolution to be bad, and gave judgment accordingly, but the Court of Appeal (Sterndale, M.R., Warrington, L.J., and Eve, J.) unanimously reversed his decision on the ground that the company might validly alter its articles as proposed where the alteration is bona fide made in the interests of the company as a whole; and that, on the evidence in this case, the resolution was passed bona fide for the benefit of the company as a whole, and was therefore valid and enforceable by the majority against the minority of shareholders.

WILL—RIGHT GIVEN TO "USE AND OCCUPY" RESIDENCE FOR "HER OWN PERSONAL USE AND OCCUPATION" AND ALSO THE FURNITURE THEREIN—EFFECT OF SALE OF RESIDENCE OR FURNITURE.

In re Anderson, Halligey v. *Kirkley* (1920) 1 Ch. 175. This was a case for the construction of a will whereby the testator directed that his widow should during life or widowhood be entitled to use and occupy his residence "for her own personal use and occupation" and also the furniture in or about the same. The wife never lived in the house and when it was sold she joined in the conveyance to the purchaser, which recited that she had signified her intention of not wishing to use the house and her willingness to renounce such right. In addition to the house, part of the furniture had also been sold by the trustees, the part of the purchase money attributable to the house was estimated at £6,000. The widow claimed to be entitled to the income of this fund and also of the proceeds of the sale of the furniture. But Sargant, J., who heard the motion, was of the opinion that

the right conferred by the will was simply a right of personal enjoyment, and that having renounced that right as regards the land she had no right to the income of the proceeds, nor to the income of the proceeds of the furniture which had been or might be sold.

WILL—CONSTRUCTION—GIFT OF INCOME ON TRUST TO APPLY ALL OR ANY PART FOR MAINTENANCE—ACCUMULATIONS—CAPITAL OR INCOME.

In re Woolf, Public Trustee v. *Lazarus* (1920) 1 Ch. 184. By the will in question in this case the testatrix gave a legacy upon trust to accumulate the income until Frances Myers attained 21 or married, and thereafter to pay the income to her for life, and after her death to hold the capital for her children who should attain 21 or marry, and in default of child or children it was to fall into the residue. The testatrix also gave her residue to be invested in trust, to apply the income or any part thereof for the maintenance of Frances Myers, until she attained 21 or married, and thereafter to pay her one-half of the income, and the other half to another person; and after the death of Frances one-half was to be held in trust for her children. Frances married in 1917 and attained 21 in 1918. She claimed to be entitled to the accumulation of the settled legacy and she also claimed the accumulations of income of the secondly mentioned residuary trust fund. It was contended on her behalf as to the secondly mentioned fund, that the direction to apply the whole or any part of the income for her maintenance entitled her to the accumulations of income: but Sargant, J., who heard the motion, was clear that the accumulations of income of the settled legacy were accretions to the capital, and he also rejected the contention as to the residuary fund and held that, notwithstanding the direction for maintenance, the accumulations of income of that fund also were accretions to the capital.

WILL—CONSTRUCTION—RESIDUARY ESTATE—"STATUTES OF DISTRIBUTION"—INTESTATES ACT, 1890 (53-54 VICT. C. 39) S. 2—(R.S.O. C. 119. SS. 3, 12).

In re Morgan, Morgan v. *Morgan* (1920) 1 Ch. 196. This was also a proceeding for the construction of a will whereby the testator had provided that in certain events, which happened, his trustees should hold the net proceeds of his residuary estate in trust for the persons or person who would be entitled at the time of the failure or determination of the prior trusts to his personal estate "under the statute for the distribution of the personal

estate of intestates if I had died at the time of such failure or determination intestate." Under this clause the widow claimed to be entitled to be paid £500 out of the whole estate under s. 2 of the Intestates Estates Act, 1890 (see. R.S.O. c. 119, s. 12), on the ground that the latter Act was included in the term of statutes for the distribution of the personal estate of intestates; but Eve, J., who heard the motion, was of the opinion that the term "statutes of distributions" used in the will only included the Act of Charles II. which, by the Short Titles Act of 1896, may be cited as "the Statute of Distribution" and the confirming and amending Act, 1 Jac. 2. c. 17. He thought the Act of 1890 did not come within the term because it did not apply to intestates generally, but only those leaving a widow but no issue, and the further provision thereby made is not payable solely out of the personal estate, but rateably out of real and personal estate: and further, is only applicable where a person dies intestate, whereas the present case was not a case of intestacy; and that although the persons to participate in the residuary estate were to be ascertained and their interests determined by reference to the statutes applicable to an intestacy, they nevertheless do not take by virtue of those statutes, but solely under the will.

BRITISH COLUMBIA—RAILWAY—EXEMPTION FROM TAXATION—LAND FORMING PART OF RAILWAY—APPROVED PLACES—FAILURE TO CONSTRUCT RAILWAY.

Armstrong v. *Canadian Northern Pacific Railway Company* (1920) A.C. 216. This was an appeal from the Court of Appeal of British Columbia. The question involved was a simple one. By an Act of British Columbia the plaintiff's company was authorised to construct a railway, and its properties and assets which form part of, or are used in connection with, the operation of its railway "were exempted from taxation." The plaintiff's company had acquired land for the purposes of its railway, and had obtained approved plans for its construction, but had taken no steps whatever to construct the railway, and the action was brought by the railway company against a municipality claiming a declaration that the lands thus acquired were exempt from taxation. The Judge who tried the action held that they were part of the plaintiff's right of way and were exempt, and the Court of Appeal affirmed his decision, but the Judicial Committee of the Privy Council (Lords Haldane, Buckmaster and Dunedin, and Duff, J.) were unable to agree with that conclusion, being of the opinion that so long as the land in question was not actually used as a part of the railway actually constructed, the exemption did not their Lordships consider the case, was governed by the previous decision of the Board in *Canadian Northern Pacific Co.* v. *New Westminster* (1917), A.C. 602.

BRITISH COLUMBIA—MINING LEASE—PROVISO FOR FORFEITURE OF LEASE—VOIDABLE, NOT VOID.

Quesnel Forks G. M.Co. v. *Ward* (1920) A.C. 222. Is also an appeal from the Court of Appeal of British Columbia and involved the construction of a mining lease which provided "if the said lessee shall cease for the space of two years to carry on mining operations upon such premises, then this demise shall become absolutely forfeited, and these presents and the term hereby created, and all rights, privileges and authorities hereby granted, shall *ipso facto*, at the expiration of the times aforesaid, cease and be void as if these presents had not been made." The lessees had in fact ceased for two years to carry on mining operations, but rent was accepted by the Crown (the lessor) after the alleged cause of forfeiture was complete. The Quesnel Company were entitled to the benefit of seven placer mining leases covering the same ground as the lease, and if the lease was no longer subsisting there was no question as to the plaintiff's title. The action was brought by them against the defendants who claimed under the lease and contended that it was still subsisting. This depended on the construction of the forfeiture clause above referred to. Macdonald, J., who tried the action gave judgment for the plaintiff company, but the Court of Appeal reversed his decision, the Chief Justice dissenting: The Judicial Committee of the Privy Council (Lords Haldane, Buckmaster and Dunedin, and Duff, J.) affirmed the judgment of the majority of the Court of Appeal; their Lordships holding that the true effect of the forfeiture clause was to make the lease voidable at the option of the lessor, and, the lessor not having exercised the option, the lease was still subsisting.

ONTARIO—LEGISLATIVE POWER—SEPARATE SCHOOLS—APPLICATION OF FUNDS BY INVALID COMMISSION—VALIDATION BY STATUTE, 7 GEO. 5, ch. 60, ONT.—B.N.A. ACT, SEC. 93 (1).

Trustees of R.C. Separate Schools v. *Quebec Bank* (1920) A.C. 230. This was an appeal from the Supreme Court of Ontario, 43 O.L.R. 637. The case arose out of the Separate School controversy in Ottawa and the question for decision was whether or not the Provincial Act, 7 Geo. 5, ch. 60, was *intra vires* of the Ontario Legislature, and the Judicial Committee (Lords Haldane, Buckmaster and Dunedin, and Duff, J.) have affirmed its validity and dismissed the appeal.

UNITED STATES DECISIONS.

With annotations from "American Law Reports" (A.L.R.)

ATTORNEY AND CLIENT—DEATH OF LAW PARTNER—SHARING IN FUTURE BUSINESS.

The estate of a partner in a law firm is not entitled to share in the earnings of the surviving partners in closing up the business on hand at his death, which was held on a general retainer basis, and not on contingent fee.

Puffer v. *Merton*, 163 Wis. 366, 170 N. W. 368, annotated in 5 A.L.R. 1288.

AUTOMOBILE—FAMILY CAR—LIABILITY OF OWNER FOR INJURIES.

One who has provided an automobile for use in his family is not liable for injuries caused by it to a stranger, when it is being driven by a member of the family who is using it for a purpose of his own.

Arkin v. *Page*, 287 Ill. 420, 123 N. E. 30. [See also 5 A.L.R. 216, on the liability of an owner under the "family purpose" doctrine for injuries caused by an automobile while being used by a member of his family.]

BANK—EFFECT OF NOTICE IN PASS BOOK.

The mere printing in a bank pass book of a provision, among many others, releasing the bank from liability in case complaint is not made of forged indorsements within ten days after return of vouchers, does not bind the depositor unless he is required to sign it or his attention is particularly called to it.

Los Angeles Investment Co. v. *Home Savings Bank*, 182 Pac. 293. [See also 5 A.L.R. 1193, as to printed statement of rules in a pass book as affecting the rights of the bank and depositor.]

BANK—RIGHT TO CHARGE BACK FORGED PAPER.

A bank cannot charge back to the account of its depositor a forged check upon itself which it has credited to such account.

Woodward v. *Savings & T. Co.*, 100 S. E. 304, annotated in 5 A.L.R. 1561.

CARRIER—RIGHT TO RE-ENTER TRAIN AFTER EJECTION.

A passenger once lawfully ejected for nonpayment of fare, at a point where the train would not otherwise have stopped, has no right to re-enter the train upon tender of fare; nor has he a right to continue his journey by tender of fare after the signal for stopping the train has been given.

Mangum v. *Norfolk & W.R. Co.*, 99 S. E. 686, annotated in 5 A.L.R. 346.

CARRIER—TRANSFER COMPANY—LOSS OF BAGGAGE—EXTENT OF LIABILITY.

The placing by a baggage transfer company of a notice on the back of its claim checks that it will not be liable for loss of baggage in excess of a specified amount does not relieve it from liability for the full value of baggage stolen by its agent.

Fessler v. *Detroit Taxicab & Transfer Co.*, 171 N. W. 360, annotated in 5 A.L.R. 983.

CRIMINAL LAW—CONCURRENT SENTENCES.

Two or more sentences of a convict to the same place of confinement run concurrently, in the absence of specific provisions in the judgment to the contrary.

Zerbst v. *Lyman*, 255 Fed. 609, annotated in 5 A.L.R. 377.

DAMAGES—INJURY TO FREIGHT—CHARGES.

In an action against a carrier for damages on account of injury to an animal in transit, where delivery was made at the point of destination, the plaintiff is not entitled to recover for freight charges paid, although the animal was so injured as to be entirely worthless, and the amount of recovery was limited by the value stated in the bill of lading.

Kennedy v. *Atchison, T. & S. F. R. Co.*, 104 Kan. 708, 181 Pac. 117.

DOMICILE—SENDING FURNITURE TO OTHER COUNTY.

Sending one's household furniture into the county in which he intends to establish his residence is not sufficient to establish his domicile there.

Reynolds v. *Lloyd Cotton Mills*, 99 S. E. 240, annotated in 5 A.L.R. 284, on the subject of domicile while in itinere from old to new home.

EVIDENCE—STATEMENT TO ATTORNEY AFTER TERMINATION OF RELATION—PRIVILEGE.

A communication made by a party to an attorney after the latter's employment has terminated is not privileged, and the attorney may be compelled to disclose the information so acquired.

Fox v. *Forty-Four Cigar Co.*, 90 N. J. L. 483, 101 Atl. 184, annotated in 5 A.L.R. 723.

EVIDENCE—SUFFICIENT TO SUBMIT TO JURY.

An action for injury to a passenger in an automobile through the overturning of the car cannot be submitted to the jury where there is nothing to shew whether the accident was caused by negligent driving or the blowing out of a tire.

Klein v. *Beeten*, 172 N. W. 736, 5 A.L.R. 1237 [with a note on *res ipsa loquitur* as applied to automobile accidents].

Correspondence

LEGISLATIVE CONUNDRUM.

To the Editor, CANADA LAW JOURNAL:

Dear Sir:—The legal fraternity are a proverbially long suffering and sweet-tempered community, but ought not some limit to be assigned to the tribulations they are called upon to endure?

To attempt to understand and assimilate the immense and ever-increasing burden of legislation our statute books are called upon to bear is bad enough, but to be compelled to puzzle out the intended meaning of the statutes themselves is even worse. Might we not, at least, ask that they be expressed in intelligible and unambigious language. Take the following as an example:

The Infants Act, sec. 21 (1): "The Supreme Court by an order to be made on the application of the guardian of an infant in whose name any stock or money, by virtue of any statute for paying off any stock, is standing, and who is beneficially entitled thereto, or if there is no guardian, by an order to be made in any action, cause or matter depending in the court, may direct all or any part of the dividends in respect of such stock or any such money to be paid to the guardian of such infant or to any other person for the maintenance and education or otherwise for the benefit of the infant."

1. What is the meaning of the words "by virtue of any statute for paying off any stock?" What is the meaning of "paying off" stock? A debt may be "paid off" and thereupon becomes extinguished; but can you "pay off" stock? If so how is it done, and what becomes of the stock when it is "paid off?" Is it also extinguished?

2. Does the clause above quoted relate only to the word "money" immediately preceding it, or does it relate also to the words "any stock" immediately preceding the word "money?"

3. Incidentally the word "whose" in the second line of the section would seem, under the ordinary rules of grammatical construction, to relate to the preceding word "guardian," though the context seems to make it clear that it is intended to relate to the preceding word "infant."

It appears that statistics reveal that, in the matter of suicides on this continent in the year 1919, the legal profession heads the list in point of numbers. It is understood that the endeavour to understand statutes was a main contributory cause. It is stated that the members of the other learned professions succeeded in retaining their equanimity by positively declining to make any attempt to pretend they understood the law.

F. P. B.

Bench and Bar.

THE CANADIAN BAR ASSOCIATION.

We are glad to receive the Proceedings of the 4th Annual Meeting of the Association held in Winnipeg last August. It is a book full of interesting and valuable information, carefully selected and admirably put together. It is unnecessary to refer to it in detail as it doubtless will be in the hands of the profession. We recommend them to read it carefully, as its contents will help not only to create a further interest in the Association itself, but will tend to foster that feeling of comradeship amongst the members of the profession so necessary to its protection and development.

Flotsam and Jetsam.

RIGHTS OF WAY.

In this journal for the 21st Dec., 1912, we had occasion to consider the best form to adopt in granting a right of way so far as regards the persons who are to be entitled to use the same; and the views there expressed were confirmed by the recent decision of Mr. Justice Eve in *Hammond* v. *Prentice Brothers Limited* (122 L. T. Rep. 307; (1920) 1 Ch. 201), in which he decided that under a grant of a right of way to the grantees, their heirs and assigns and "their servants, customers and workmen, and the tenants and occupiers of the dominant tenament," the grant extended to licensees, and was not limited to the class of persons specifically mentioned. As pointed out by his Lordship, a grant of a right of way to "A. B., his heirs and assigns," would include A. B.'s licensees, citing *Metcalf* v. *Westaway* (34 L. J. C. P. 113) and see *Baxendale* v. *North Lambeth Liberal Club* (87 L. T. Rep. 131; (1902) 2 Ch. 427), in which it was held by Mr. Justice Swinfen Eady (as he then was) that a grant of a right of way to a lessee, "his executors, administrators, and assigns, under-tenants, and servants," extended to all licensees of the grantee lawfully going to and from the dominant tenement.—*Law Times.*