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DIVORCE IN CANADA.

During the first fifty years of Confederation the Dominion Parliament granted 307 divorces, 141 on the applications of women and 166 on the applications of men, or an average of 6.14 per annum. These figures do not, however, include all the divorces granted in the Dominion during that period.

In those Provinces where the Provincial Courts have a divorce jurisdiction, such as British Columbia and the Maritime Provinces, there is, of course, no need to apply to the Dominion Parliament for divorces, and we have no statistics at hand as to the number of divorces granted in those Provinces; but we are inclined to think that the number of divorces granted therein would not very materially add to those granted by the Dominion Parliament.

Probably about a similar number have been granted by Provincial Courts.

On the whole, we think the Dominion is to be congratulated that divorces have been so few. Probably the fact that the divorces on the applications of men exceed those on the applications of women does not indicate any superior virtue on the part of the male sex, but rather that unfaithfulness on the part of women to the marriage vow is not so readily concealed as the unfaithfulness of men. The dissolution of lawfully contracted marriages by Act of Parliament is no less objectionable from a Christian standpoint than are the sentences of civil courts empowered by Parliament to grant such relief. The Christian view of divorce which prevailed prior to the Reformation, and which still very largely prevails, is shortly expressed in the sentence "whom God hath joined together let no man put asunder," and all men and women joined together in Christian marriage are assumed to be joined together by Him, and "no man" includes any aggregation of men, whether sitting in Parliament or in Courts of Justice; and from this point of view, when Parliament assumes the jurisdiction to dissolve lawful mar-

riages, or to empower Courts of Justice to do so, and to authorize the parties to marry again in the lifetime of each other, it is assuming a jurisdiction to do something conceived by many to be contrary to the law of God, and is merely authorizing by law the commission of adultery.

This view, however, since the Reformation has not universally prevailed among Christian people, and, strange to say, among so-called Evangelical Christians it has been very greatly modified, and there are many to-day who regard divorce and re-marriage in the lifetime of the parties as permissible. This view has found many exponents in the United States, and the result there is only too apparent.

It is well known that by a large number of Christian people in every land marriage is called a "Sacrament." Protestants usually deny that it can properly be termed a sacrament, but that is due largely to the meaning they give to the word sacrament. It may be, and probably is, wholly immaterial whether marriage is or is not called a "sacrament," for after all the word "sacrament" is merely a technical theological term. What is really important is that the idea which the word "sacrament" is intended to convey, and did in its original application to Christian ordinances really import, should not be lost sight of. If we were to attribute to the religious ceremony of solemnization of the marriage vow the term "sacrament," Protestants would be right in saying that that is not a sacrament in any real or true sense, nor is it the original meaning of the term as applied to marriage. What is really sacramental about marriage is the mutual promise expressed or implied in Christian marriage that the spouses do take each other for husband and wife, to the exclusion of all others, and incur an obligation to be faithful to each other until death do them part. That promise the Christian Church regarded as in the nature of an oath or sacrament, and it is that promise or oath expressed or implied when entering into holy matrimony which really constitutes the sacramental character of marriage.

But however we may regard marriage, the statistics of divorce in Canada ought to lead Canadians to be wary of adopting any such policy as that which is now being agitated in the Mother

Country for facilitating the dissolution of the marriage tie. The true remedy for matrimonial unhappiness is the teaching more widely and effectively the sacred and indissoluble character of marriage, and its true sacramental character, and the necessity of entering into it with a serious and due realization of the nature of the obligations it involves, and of their lasting character, and the necessity of exercising mutual tolerance and forbearance and of maintaining that love and affection for each other which should mark matrimonial intercourse not merely during the first weeks of married life but all future time. Perhaps the abandonment of the foolish horseplay which too often follows a marriage might well be dispensed with by all who would exalt and reverence the holy estate of matrimony. The Protestant persuasion that marriage is not a sacrament has helped to rob the marriage tie, in the estimation of many, of its sacred character; and it has come to be regarded even by some who call themselves Christians as merely a contract for sexual cohabitation which ought to be made capable of termination, if not at pleasure, at all events whenever the parties have ceased to have pleasure in each other's society; and the agitation now going on in England is the work of men and women who have lost or perhaps never had any true conception of, or who do not believe in Christian marriage, but who regard marriage from a purely heathen standpoint.

Of course it is useless to hide our eyes from the fact that, although England is still a Christian country and largely governed by Christian ideals, it has, as have all parts of the Empire, a very considerable number of people within its borders who are not Christians and have not Christian ideals, and who not unnaturally agitate from time to time for a legal sanction for their heathen or anti-Christian ideals. But if their demand were acceded to we might have to witness polygamy or polyandry receive the sanction of law. But even admitting that Christianity is not a part of the law of England as the House of Lords has recently determined, and that it is not unlawful to establish societies to controvert its fundamental principles, even on the bare ground of public utility, and a fair consideration of what is best for the moral well-being of society, the State should steadfastly refuse to be a party to

lowering the ideal of Christian marriage. Can it fairly be said that the widespread facilities for divorce which prevail in the United States have improved the morality of its people? Is it not rapidly reducing the marriage tie there to mere licensed concubinage and lowering the stately dignity of wife to that of a concubine, and of husband to that of a paramour? Is it not sapping the morality of the people and teaching them to hold a degraded view of marriage? Is it not endangering the family, the very foundation of a well ordered State? We think it is. So great indeed has the scandal become that there the necessity of retracing their steps is becoming manifest.

MUNICIPAL LAW IN CANADA.

Of the many branches into which the law divides itself none is more important than the one which comes under the general head of "Municipal Law."

In the old days there was some little common law on the subject, together with isolated Acts of Parliament regulating various matters connected with Borough, Parish and Sherrif law in England, and there was occasionally legislation of a somewhat similar character in this country and in the Provinces which finally entered Confederation. Notably in the Province of Upper Canada was the Act of 1 Victoria ch. 21, containing 49 sections, passed March 6, 1838, entitled "An Act to alter and amend sundry Acts regulating the appointing and duties of township officers," which Act is referred to in the Index of the Revised Statutes of Upper Canada, 1843, under the heading, "Parish Officers." The same volume contains Acts as to roads, bridges, highways, etc. Also the Act of July 12, 1819, "to repeal civil laws now in force relative to levying and collecting rates and assessments in this Province (U. C.) and further to provide for the more equal and general assessment of lands and other rateable property throughout this Province."

The first Municipal Act in Upper Canada came into force in 1849, and appeared subsequently in the Consolidated Statutes of Upper Canada as chapter 54. Some of its enactments were ex-

perimental, and many thought they would not work advantageously, considering them too democratic, and this doubtless was so to those to whom the word "democracy" was as a red rag to a bull. The system, however, gradually worked its way into public favour and no other form of government for the purposes intended need now be discussed. Whatever its advantages and disadvantages are it is here to stay. Consequently the more it is shaped into practical use by further legislation or by judicial interpretation the more useful and workable it will be.

There is one thing, however, which must be said about this: whilst in rural districts our municipal system works smoothly and is successful in its operation, the same cannot be said where it touches large urban centres. The reason for this is not difficult to understand. Farmers and those living in villages as a rule know their neighbour's business almost as well as they do their own. Everyone knows what is going on. There is time to consider their small public affairs, and numerous eyes see and criticise the expenditure of public money. They are economical and saving, and any recklessness or unnecessary extravagance or attempted graft is soon detected and repressed. In cities, on the contrary, men are too busy looking after their own affairs to devote time or attention to public matters; and, again, we have but few of the class who have independent means and leisure, combined with business experience, which would enable them to devote their energies to the service of the public; and the few that may have these qualifications are not sufficiently public-spirited to struggle for aldermanic seats in competition with that class which has grown up in cities who are devoted to party politics and silly sectional strife, or who have personal aims in view, or who seek small salaries or possibly graft from prominence in municipal affairs. It cannot be said, therefore, that democracy has produced the best kind of municipal government.

There is a growing feeling that municipal affairs in cities should be regulated and controlled by an authority of a different character, such as a commission composed of a few men of larger attainments, greater capacity and wider business experience than find their way under our elective system into our city councils.

It is said that the best governed city on this continent is Washington, the capital of the United States of America. This city is under the control of three commissioners who are not appointed by popular vote and not directly responsible to the people, but rather to the powers that appoint them. They are free from all political and sectional influences; controlled by no clique. They are chosen as men of first-rate business ability with special qualifications for the position which they occupy. They are amply paid, and the position is one not merely of emolument but of high honour. They devote their whole time to the affairs of the city, and, not being elected from year to year, have time to thoroughly understand and deal with the various important matters which come before them, and they have the assistance of the highest class of experts and deputy heads which money can secure.

The management of civic affairs in the cities of the Dominion under our municipal system is said to exhibit the maximum of petty graft and the minimum of intelligent efficiency.

As might be expected from the nature of the subject and the multitudinous phases of it and the details of the practical working of the system and the judicial interpretation of various sections from time to time, a treatise on the subject soon became a necessity, and it is to the last of these we would now draw special attention.

Whilst there were some small manuals relating to various subjects which are now grouped under the general title of municipal law, there was nothing of a complete character until that most industrious worker and writer, Robert A. Harrison, afterwards Chief Justice of the Court of Queen's Bench, undertook the task of annotating the various Acts in the historic volume known as Harrison's Municipal Manual, published in December, 1858. The editor, in his preface to the first edition, said that "The municipal laws of Upper Canada are in importance second to none of the laws of the Province, and that every municipal corporation is a small Parliament, possessed of extensive but yet limited powers." It was then pointed out that to ascertain in every case the existence or non-existence of a power—the nature of it—its precise limit

and the mode in which it should be exercised is the object of all who are in any manner concerned in the administration of municipal affairs. He also said that as these matters are to be determined by municipal councils, seldom containing men versed in the laws and often acting without the aid of professional advice, the importance of a guide becomes manifest.

This Manual was found to be so useful that a second edition was called for nine years later, in March, 1867. His third edition was published in September, 1874. The fourth edition was edited by Mr. F. J. Joseph and came out in October, 1878, shortly after, as he says in his preface, the death "of the able and gifted Chief Justice of this Province, the original editor of this work." A fifth edition by Mr. Joseph appeared in 1889. A much larger volume (of 1128 pages) was the result of the industry and research of the late C. R. W. Biggar, Q.C., in 1900, and to this work the profession have since looked for light and assistance in the interpretation of the most important subject of municipal law in the Province of Ontario, and in other Provinces where similar enactments are in force.

Anyone who has followed the course of legislation knows something, though no man could keep track of them, of the amendments to the Municipal Act and the Assessment Act which kept the King's Printer busy from time to time until now.

The changes that have taken place since 1900 have been so numerous that the profession and those connected with municipal affairs have now demanded a new book on the subject. This brings us to the year 1917, when the Canadian Municipal Manual, edited by Sir William Ralph Meredith, Kt., Chief Justice of Ontario, saw the light.

The profession and those concerned in the administration of municipal and assessment law in their various subdivisions are fortunate in that one, who may safely be said to be the highest living authority on such subjects in the Dominion and perhaps on the continent, has devoted himself to their elucidation and explanation.

The intention of the authors and the editor of this great work was to produce, as they have done in an eminent degree, a book

of a practical character giving a compendium of the law as it stands. It is a safe guide to all municipal officers and is a mine of legal lore to the lawyer who consults its pages for light on difficult or doubtful points.

We would have been glad if the learned editor had given us (and no one could do it better or as well) some observations on the historical aspect of this branch of the law and the position it occupies in the large field of our national life, and had spoken of its value and its defects and given us such suggestions for its improvement as might be in the mind of one so well qualified for the task.

The research and industry displayed will be more and more appreciated as the practitioner has occasion to consult it. It is a great work and indispensable. Although all redundant matter has been eliminated it is necessarily a bulky volume, and the labour bestowed upon it will best be appreciated when it is noted that over 2,000 authorities are referred to and discussed. The scope of the work can be gathered from the title page given in another place, post p. 75.

ATTACHMENT OF DEBTS.

The report of the judgment of the second Appellate Division in *Rat Portage Lumber Co.* v. *Harty*, 40 O.L.R. 322, appears from the headnote to indicate that the Court decided more than it actually did, and we are inclined to think, having regard to the actual result of the appeal, that the expressions of opinion of Riddell and Rose, JJ., embodied in the headnote, ought only to be regarded as *obiter dicta*. The case was simply this: A railway company was indebted to the judgment debtor. This debt prior to the attaching order was assigned by the debtor to a bank to secure the present and future indebtedness of the judgment debtor to the bank. The attaching order attached all debts due and owing from the railway company, and the bank, to the judgment debtor. After the service of the attaching order the bank received from the railway company a sum more than sufficient to satisfy the bank's claim against the judgment debtor. The surplus amounted to over $1,300, and after the service of the

attaching order the judgment debtor had directed the bank to apply this surplus in payment of certain other claims against him. This, no doubt, amounted to a good equitable assignment of the surplus, and there was therefore a question of priority between the attaching creditor and the assignees of the surplus. These latter, however, were not before the Court, and it seems clear th. in their absence, no order could be properly made to pay over the surplus to the attaching creditor. The order of Masten, J., in appe'. had affirmed an order of the local Judge directing the bank to pay the money into Court to abide further order; and this order the Divisional Court affirmed. If the Divisional Court really intended to decide that the attaching creditor had no right to the money in the hands of the bank, the proper order would obviously have been to dismiss the motion to pay over and rescind the attaching order; because the Divisional Court was really bound to make the order which the local Judge should have made if they considered the order he made was wrong, or to affirm his order if it was correct, and they, as a matter of fact, affirmed his order by affirming that of Masten J.

NOTES FROM THE ENGLISH INNS OF COURT.

The Lord Chief Justice.

It has been announced that Earl Reading is to be sent as Ambassador to the United States. The legal profession, who said farewell to him on January 11, will be satisfied as to the abilities of England's representative at Washington. Since the war began he has already paid two highly successful visits to America, and this fact gives earnest that "the chief" (as the lawyers always call him) will do much to further the Allied cause.

It is now an open secret that Lord Reading supervised the drafting of many of the emergency Acts which have recently been passed. It is satisfactory to notice that his diplomatic career will only last during the war; and that when hostilities are brought to an end he will return to preside in the King's Bench Division.

Than Rufus Daniel Isaacs—or "Rufus"—when at the bar there was no more capable advocate in his time. He rose rapidly to the head of his profession. He was one of those who, to get on, "eschewed delights and lived laborious days." Once at a public dinner, when his health was proposed, it was stated that "he was wonderfully well, considering that he never went to bed except in the Long Vacation." He was popular amongst his professional brethren, and always ready to help a lame dog over a stile.

The Office of the Lord Chief Justice.

That an English Chief Justice should forsake the Bench to be sent forth as ambassador is probably quite unprecedented. His is the highest purely judicial office in the United Kingdom—for the Lord Chancellor (his only superior in legal precedence) performs functions other than judicial. The Lord Chief Justice is an *ex officio* member of the Court of Appeal; but unlike the other members of that Court he can also sit as a judge of first instance either in London or at Assizes. If he is a Peer of the Realm he can attend the House of Lords and act as a member of the Judicial Committee of that august tribunal. The Lord Chief Justice of England holds another office of which most people are unaware. He is our Chief Coroner. It is said that when the late Lord Russell of Killowen—one of the greatest of our recent Chief Justices—was staying in the country near Epsom, a visitor died suddenly in the house. The relatives were very reluctant to have an inquest, but Lord Russell pointed out that the local coroner was bound to do his duty and that he as Chief Coroner was bound to see that he did it.

The Coroner's Jury.

On many—alas! too many—occasions recently the coroner's jury has been summoned to inquire into the cause of death of air raid victims. Such inquests often appear to be a mere waste of time, but they are necessary all the same. The coroner and his jury exercise an important function. It is for them to inquire

into the cause of any violent or sudden death, wheresoever it takes place or howsoever it is brought about.

On the occasion of an air raid, when the attention of the police is fully occupied, murder might be done in the streets of London. It is therefore necessary that the coroner shall be at liberty to hold an inquest, although to all outward seeming the deceased could only have suffered death at the hands of an enemy airman.

The Duty of the Coroner.

And so it comes about that even in the twentieth century—in the midst of a European war—one whose office was established in the year of grace 1276, still has a useful function to perform! For many years there was a controversy in the law courts as to what circumstances justify a coroner in holding an inquest. According to some authorities, the coroner had no right to obtrude himself into a private household, without any pretence of the deceased having died otherwise than by a natural death. It is, however, now decreed by statute that a jury shall be summoned where a coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or has died a sudden death of which the cause is unknown, or has died in prison.

Our coroners, as a rule, exercise a wise discretion, and one seldom hears an objection being raised by relatives. There was a case a few years ago where a coroner inquired into the death of a "body" which was found in a box at a railway station. Half-way through the inquest was abandoned, no one being able to identify the remains. No complaint of these abortive proceedings is on record—possibly because it was proved that the bones were those of an Egyptian mummy 5,000 years old!

The jury, which formerly numbered from 12 to 23, has now by special Act been reduced to from 7 to 11, and will probably remain there. As the panel from which the jurors are drawn is large, it is not surprising to hear that their verdicts often reflect the popular sentiment. Early in the war some of these good men

and true who were summoned to an air raid inquest sometimes returned a verdict of "Wilful murder" against the Kaiser, but the coroners very soon pointed out that to return such a verdict was useless and likely to bring the administration of the law into ridicule. It has been said that the coroner is functionless without his jury, and so he is. The converse of this is that the jury cannot decide until they have heard the coroner's summing up. It is marvellous how seldom he fails to keep them to the point and to compel them to decide according to the evidence. One recalls a case where there must (to say the least) have been some misapprehension. There had been an inquiry concerning the death of a man who had died in hospital. The verdict was "Death owing to the visitation of Providence accellerated by an injudicious *post mortem* examination."

Statutory Rules and Orders.

Events of importance calling for rapid treatment by the Legislature have caused the Government to give power to the executive to create a large number of statutory rules and orders. In effect many of the older Government departments, if not some of the new, have been given power to legislate on a small scale, and their "legislation" is being enforced every day. Various new "offences" have sprung into being.

Five years ago a dweller in these islands could have his house packed with food if he liked. Nowadays it is an offence to have a secret hoard of any kind. Owing, no doubt, to the fact that everyone fully recognizes the necessity for these sumptuary laws, their validity has not been seriously questioned, but in view of the drastic way in which the powers conferred by the Defence of the Realm Act have been exercised, it is more than likely that the Courts will be asked to interpret that measure before long.

The Bar Council.

The General Council of the Bar has recently published its annual report. This report generally contains a brief record of the proceedings of the Council for the past year.

Its powers are limited in that although it declares and interprets the rules of professional etiquette, it has no power to enforce them. Its powers are unlimited in the sense that it is always ready to advise any member of any Bar in the Empire as to what is or not "the thing to do" in a particular case. The report just issued, however, shews that the functions of the Council are not purely consultative. During the last year they have received reports of committees appointed to consider the following (amongst other questions) :—

(1) Who owns the statue of Erskine which stands in Lincolns Inn Library?

(2) The jurisdiction of the County Courts.

A large number of public bills of Parliament are considered by a committee of the Council while before the House of Commons.

The Limits of Cross-Examination.

Although many of the points of professional etiquette submitted to the Bar Council are of interest to English lawyers alone, there are some which must appeal to the advocate all the world over. What, for instance, are the rules to guide an advocate whose duty it is to cross-examine to credit? This is a matter upon which an English County Court Judge has recently asked the Bar Council to express its opinion. Adopting in the main certain principles formulated by Sir James Stephen, the Council have issued the following rules:—

1. Questions which affect the credibility of a witness by attacking his character but are not otherwise relevant to the actual inquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true.

2. A barrister who is instructed by a solicitor that in his opinion the imputation is well-founded or true, and is not merely instructed to put the questions, is entitled *primâ facie* to regard such instructions as reasonable grounds for so thinking, and to put the questions accordingly.

3. A barrister should not accept as conclusive the statement of any person other than the solicitor instructing him that the

imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement.

4. Such questions, whether or not the imputations they convey are well-founded, should only be put if in the opinion of the cross-examiner the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect or would not materially affect the credibility of the witness, the question should not be put.

5. In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions suggested to him.

The Dangers of Cross-Examination.

It is interesting to consider these very proper limitations to the powers of the cross-examiner from the standpoint of an advocate who desires to win his case. Keeping that object steadily in view, the advocate has always to remember that an attack upon some person who is no party to the suit may recoil upon the client of the person who makes the attack. This is more likely to be the case when a question to credit is met by indignant denial and is not followed up (as in many cases it cannot be) by further questions which elicit a discreditable admission. No doubt his instructions, as indicated in Rule 2, *supra*, ought to be sufficient to justify an advocate in presenting an attack; but there are very few advocates who venture in to the danger zone of "cross-examination to credit" without going very fully into the matter beforehand. It is to be observed that the Rules above indicated refer solely to the duties of the advocate *as such;* they have nothing to do with his relations to his client. In a criminal Court, however, counsel for the prisoner may put his client in grave peril by an attack upon a witness. For if the prisoner either personally or through his counsel attacks a witness for the prosecution, he may be himself attacked. A case occurred not long since

at the Leeds Assizes where a witness for the prosecution was asked questions tending to shew that he was dishonest. Counsel for the prosecution said nothing at the time, but when the prisoner had been called and examined, the first question put to him in cross-examination was, "When were you last convicted of perjury?" Note the pregnancy of the question. When it was answered the curtain fell upon this little legal drama.

The Advantages of Silence.

When one thinks a little more about them, do not these rules just published under the ægis of the Bar Council only warn the advocate to refrain from cross-examining unless he is quite sure of his ground? Ostensibly in giving this advice the General Council of the Bar are recommending that which should be the rule of an honourable profession; nevertheless, it is as if they say to the advocate "Beware! Silence may be the best policy!" It is a warning which might be more freely given by the professor of law to his pupil, by the barrister-at-law to his devil, and by the senior partner of a firm of solicitors who sends his managing clerk to conduct a small case in the County Court. More cases (not to mention costs) have been lost by asking too many questions than by asking too few—especially in cross-examination. In this matter the advocate is not always entirely to blame. He acts upon instructions, and the instructor, in the shape of an indignant attorney pulling at his gown, may be importunate. In the back of the Court sits the lay client, animated with a desire to see each witness flayed alive, and anxious to get what he calls good value for his money. If he only knew it, the questions which are being put may be piling up the damages against him.

The Dangers of Examination-in-Chief.

It is well to remember an aspect of this matter to which the rules above mentioned have no relation. It is examination-in-chief. This is an art which looks, oh! so easy, until you try it. "Shew me a witness who speaks up to his proof and I will shew you a remarkable man." In examining a witness the advocate

has not only to think out how to frame his questions so that they are not in leading form—but he has to decide what *not* to ask. A single injudicious query may upset a whole pile of valuable evidence. If the art of knowing what *not* to ask is important in civil cases, it is doubly so where a man is on his trial. An instance occurred only the other day at the Newcastle assizes. An officer was charged with an offence connected with recruiting. At the close of the case for the prosecution witnesses were called on the prisoner's behalf. To one of these, at the very end of his examination, counsel for the prisoner said, "Have you ever known him (the prisoner) do anything which was unworthy of the character of an officer and a gentleman?" The answer was "No." On the following morning counsel for the Crown proceeded to cross-examine, and in doing so he put in a large number of documents which reflected very seriously upon the previous character of the accused. And he was entitled to do this because the prisoner's counsel, by the question above mentioned, had put his character in issue.

Sir Frederick Smith, Bart.

His Majesty's Attorney-General is now in the United States on affairs of public importance. If he goes to Canada (which is likely) it may be hoped that the legal fraternity will see something of him. If he makes a speech (and he is *not* likely to remain silent) all who can do so should go to hear him. Sir Frederick Smith is the most nimble-minded speaker the English Bar can produce—never at a loss for a word—never to be vanquished in repartee. I never heard any one, be it judge, counsel, witness or "sturdy independent elector" interrupt "F. E." without coming off second best. Smith aimed high when he was called to the Bar, and got there. He started as a local barrister at Liverpool, and even in the early days his success was rapid. One of the Judges going circuit, seeing a vast new building in the centre of the town, said, "I suppose those are F. E. Smith's chambers." In fact, it was the new Corn Exchange!

Temple, London. W. Valentine Ball.

COMMON LAW, CASE LAW, CHAOS AND CODES.

In view of possible changes arising from the multiplicity of reported cases, and their burden, financial and otherwise, the following analysis of the contending opinions as to what law is, or ought to be, of two such great authorities as Coke and Bacon, will be of interest. It is taken from an editorial in a recent number of the *Central Law Journal*, of St. Louis, Mo. The writer says:—

"Lord Bacon said that within three hundred years the world would come to judge between himself and Lord Coke. The three hundred years have passed, and the world is reaping the fruit of its decision to follow Lord Coke. These two men held opposing views concerning the origin and nature of law—views so radically and fundamentally different that if the one set be true, the other must necessarily be untrue. Following these two leaders two opposing schools of thought have sprung up, each represented by its leading jurists, authors and teachers. The school of thought represented by the followers of Lord Coke has, up to the present time, greatly preponderated, in point of numbers. In fact, it may be said that, since the time of Lord Coke the legal world, as a whole, has followed in his footsteps, and, likewise as a whole, has repudiated the fundamental concepts of law held by Lord Bacon.

Up to the present time, however, the fundamental antagonism between the two schools of thought has been only dimly perceived by the great majority even of those who have ranged themselves on the one side or the other, while, so far as the profession at large is concerned, it may be doubted whether it has known that the antagonism exists.

The two ideas, like those of democracy and autocracy in the present world struggle, have until recently been accepted as consistent travelling companions, except for sporadic outbreaks of disagreement. Now, however, the real nature of the two ideas, as shewn by their results, is for the first time becoming evident.

Bacon's conception of law was that it consists of ideas which are not created by any human law-maker, but which exist as mental facts, independently of their recognition or non-recog-

nition by humanity. He perceived that as man apprehended or discovered these already existing ideas and incorporated them into his statutes or cases, the resultant system of law would be founded upon the rock of justice, so that when the winds and floods came and beat upon the house, it would stand; whereas so-called human laws, not founded upon principles of justice, were like a house built upon the sand, which, when the winds and rains should come, would fall and great would be the wreck thereof.

Coke, upon the other hand conceived of law as a thing created by statute or decision. He looked upon it as entirely local, as a matter of fiat of the particular Legislature or Judge considering the question at issue. He maintained that English law and custom were indigenous to English soil, and were not indebted to foreign sources.

These in the main were the differences between the two men. From these differences important results arose.

Bacon believed that the fundamental ideas of the law could be gathered and stated in the shape of maxims or principles, in small compass, perhaps with illustrative cases, explaining the field of operation of each.

Coke, on the other hand, believed in the case system. He issued his Reports, and the world has since then followed his lead, producing such a mass of reports, undigested and indigestible, that it has become well-nigh impossible to accommodate them on our shelves.

Likewise we have drifted away from Bacon's idea of establishing a few principles and basing decisions on them. Our authors for the most part refuse to cite maxims, our courts to listen to them, or our schools to teach them. The consequence is that the use of maxims is no longer understood, and instead their advocates are often derided.

Notwithstanding this general attitude, it can be demonstrated that the law can be taught from the maxims, as Bacon contended. But before such a demonstration can be made on a large scale, the attitude of the profession must change, and this change can be brought about only when the Bar understands the reasons for the present chaotic condition of the law.

As long as lawyers delude themselves with the idea that new principles of law are discovered every decade or so, just so long will we continue to be swamped by the publishing houses with ephemeral works designed to meet the appetite for quantity instead of quality. Publishers are capitalizing our credulous acceptance of their announcements that they are giving us five thousand new principles a year, and that the law is the latest statement of the latest decision.

The fact of the matter is that the fundamental principles of the law consist of a few ideas. They are not type on paper, and are not of human origin. Were this grasped, and these ideas stated sententiously, as the Romans stated them, and were our cases decided in accordance with them, the law would grow naturally and beautifully into an harmonious whole, instead of our having, as is the case in the United States, to-day fifty jurisdictions, each warring with all the others, and with itself also.

The fact of the matter is that whatever of our "American" law to-day is fundamental was reduced to maxim form by the Romans nearly two thousand years ago. This merely amounts to saying that the ideas which express themselves through us to-day, expressed themselves through men ages ago. Ideas are always expressing themselves through human agency, as that agency is able to apprehend and express them.

Take for instance the Baconian maxim, *Verba fortius accipiuntur contra proferentem* (Every presumption is against a pleader); and its cognate maxims, *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged); and, *De non apparentibus et non existentibus eadem est ratio* (—freely translated-Things not alleged are presumed not to exist)."

PAST AND PRESENT.

By One of the Ancients.

When John Doe and Richard Roe,
And people of that ilk,
Stravagued about the Courts of Law
With gentlemen in silk;

When lawyers plied their subtle minds,
To shew the reason why
A writ should not be in the *per*,
But in the *per* and *cui;*
Then pleading was a real art,
And built up reputations,
And characters were won and lost
In drawing replications.
The plaintiff's simple, homely plaint
Took various shapes and courses;
And driv'n about by subtle pleas
Got tangled in the process,
Until, at last, the issues were
Impossible to sunder,
Like nothing else upon the earth,
Or in the waters under.
Demurrers, too, and special pleas
Embarrassed and delayed it;
And perhaps the venue never should
Have been where he had laid it.
The spirit of the law was rendered
Subject to the letter;
The point was whether pleas were good,
Or other pleadings better.
The disappointed suitor oft
Was paralyzed with terror,
When told the place to right his wrong
Was in a Court of Error.
What wonder, then, that in the days
Which we have left behind,
Justice was represented as
A woman who was blind!
Then, too, *scintilla juris* shed
Its soft effulgent ray,
Illuminating uses, springing,
Shifting, on their way.
The owner, ousted from his land,
Quite regularly came
Just once a year, without his gate,
And made continual claim.
But, if disseisor's death occurred
While he did wrongly hold,
His heir, by law, was owner, and
The right of entry tolled.
The vagrant's death thus put the owner
In a different plight;
His right of entry barred, resort
Was had to writ of right.
And many more astounding things
Would shock you if I told them;

At any rate, I shall not try—
There isn't space to hold them.
In modern practice pleading is
Not either art or science;
And even rules of practice don't
Require strict compliance.
The plaintiff says a thing is so;
Defendant then denies it;
The Judge hears anything that's said;
And that's the way he tries it.
And Counsel's opening address
The Judge can do without;
He merely says:—"Well, gentlemen,
What is it all about?
First witness Mr. A.—How long
D'you think the case will run?
And Mr. B. can tell me his
Defence when you are done."
Attempts to rule out evidence,
Or ask for its rejection,
Are met with, "I'll admit it now,
But subject to objection."
The form and letter of the law
Give way to its intendment;
And any error made is now
Corrected by amendment.
Scintilla juris now yields to
Original momentum;
And uses spring and shift, because
There's nothing to prevent 'em.
For friends were made and friendships lost
In arguing about it,
Until at last, a Statute said
We must do without it.
The trespasser can rest in the
Possession of his plunder,
Unless a writ is issued in
Ten years—or something under.
To John Doe and Richard Roe
We long since bade farewell;
They had their work to do, and after
All they did it well.
Of all the ancient learning thus
Of which we've been bereft,
The Rule in Shelley's case is now
The only one that's left.
And many other things my pen
Might tell if I applied it;
But then one never knows what's what
Until the Court has tried it.

REVIEW OF CURRENT ENGLISH CASES.

LANDLORD AND TENANT—PAYMENT OF RENT—DEDUCTION BY TENANT OF PROPERTY TAX PAID BY HIM—PROOF OF PAYMENT BY TENANT.

North London and General Property Co. v. *Moy* (1917) 2 K.B. 617. The simple question involved in this case was whether a tenant who pays the property tax to the collector, when he seeks to deduct such payment from his rent, is bound to take the collector's receipt to his landlord, or whether the landlord must seek his tenant in order to inspect the receipt, if he wishes to see it. Low, J., who tried the action, which was brought by the landlord to recover rent, held that it was the tenant's duty to take the receipt to his landlord, and as the defendant had refused to do this before action he was ordered to pay the costs.

CRIMINAL LAW—EVIDENCE—CHARGE OF GROSS INDECENCY WITH BOYS—EVIDENCE OF POSSESSION OF POWDER PUFFS, AND INDECENT PHOTOGRAPHS OF BOYS.

The King v. *Thompson* (1917) 2 K.B. 630. In this case the defendant was indicted for committing acts of gross indecency with boys and in the commission of such acts it was proved that powder puffs were used. The accused was apprehended by a police constable in the street at a place where some boys alleged he had made an appointment with them, he gave them money and told them he had business that day and had no time and that they were to go away. He struck the police constable and endeavoured to run away. He was identified by the boys as the person who had committed the indecent acts charged, and on his person were found powder puffs, and in his rooms were also found indecent photographs of boys, and the question was whether the proof of his possession of these articles was admissible and the Court of Criminal Appeal (Lord Reading, C.J., and Darling, and Avory, JJ.) held that it was.

HUSBAND AND WIFE—AGREEMENT BETWEEN HUSBAND AND WIFE THAT ALL WEARING APPAREL WORN BY WIFE SHALL BE HUSBAND'S ABSOLUTE PROPERTY—JUDGMENT AGAINST WIFE.

Rondeau v. *Marks* (1917) 2 K.B. 636. In this case judgment had been recovered against the defendant who was a married

woman. The plaintiff seized the wearing apparel worn by the defendant which was claimed by the defendant's husband, who set up an agreement between himself and wife whereby it was agreed that all apparel worn by the wife was to be the husband's absolute property, and the question stated by the Master for the opinion of the Court was, whether such agreement, which he found to have been made, was valid as against the execution creditor, and Bailhache, J., who heard the motion, held that it was.

SHIP—CHARTERPARTY—CHARTERERS AGENTS FOR ALIEN ENEMIES—DISSOLUTION OF CHARTERPARTY BY OUTBREAK OF WAR.

Clapham S.S. Co. v. *Naamlooze, etc.* (1917) 2 K.B. 639. By a charterparty dated 13 January, 1913, the plaintiffs, as owners of a British steamship, agreed to let, and the Vulcan Co. agreed to hire, the vessel for five years. The Vulcan Co. was a Dutch company, but all its shares were held by Germans, and it was managed by German directors resident in Holland, who were subject to the supervisory control of a committee of Germans resident in Germany. The charterparty provided that the vessel should only be employed in lawful trades, and it contained the following clause: "27. That in the event of war between the nation to whose flag the chartered vessel belongs and any European Power, or any other Power operating or likely to operate in European waters, charterers and / or owners shall have the option of suspending this charter for the time during which hostilities are in progress." On the outbreak of the war with Germany the charterers gave notice suspending the charterparty during the continuance of hostilities. The plaintiffs brought the action to obtain a declaration that the charterparty was dissolved as being a contract with, or on behalf of, alien enemies. The defendants claim that they were a Dutch company and counterclaimed for a declaration that the charterparty was existing and binding on the plaintiffs. Rowlatt, J., who tried the action, held that the effect of the contract was to oblige British subjects to render services for the benefit of the enemy, that the charterparty was for the benefit of the enemy, and the outbreak of the war made it wholly illegal; because, if the enemy were entitled to retain his assurance of tonnage to be available at the end of the war, his commercial position would be fortified even during the war. He therefore came to the conclusion that, notwithstanding clause 27, having regard to the nature of the contract, the outbreak of the war had the effect of putting an end to the contract.

SHIP—CHARTERPARTY—GUARANTEE THAT "DEAD WEIGHT CAPACITY" IS SPECIFIED NUMBER OF TONS—MEANING OF EXPRESSION.

Millar v. *Owners of S.S. Freden* (1917) 2 K.B. 657. This was an action to determine the meaning of a guarantee given by the defendants that the dead weight capacity of a ship was 3,200 tons. The ship had a lifting capacity of 3,200 tons, but she had not cubic capacity to take on board a cargo of maize of that weight, which was the kind of cargo which she was hired to carry. Rowlatt, J., who tried the action, held that the primary meaning of "ship's dead weight capacity" was not her capacity to carry tons of maize, but her abstract lifting capacity, and that the mere fact that maize was mentioned as the cargo to be carried did not change the meaning of the phrase.

SHIP—BILL OF LADING—EVIDENCE OF QUANTITY SHIPPED—SHORT DELIVERY.

New Chinese Antimony Co. v. *Ocean S.S. Co.* (1917) 2 K.B. 664. This was an action against shipowners for damages for short delivery of goods. The plaintiffs relied on the bill of lading as evidence of the amount shipped. The bill of lading stated that 937 tons had been shipped on board; in the margin, however, was a typewritten clause: "A quantity said to be 937 tons" and in the body of the bill was printed in ordinary type the clause "weight, measure, contents and value (except for the purpose of estimating freight) unknown." Sankey, J., who tried the action, held the bill of lading to be evidence of the ore shipped and gave judgment for the plaintiffs; but the Court of Appeal (Lord Reading, C.J., and Pickford, and Scrutton, L.JJ.) held that having regard to the clause that "weight unknown," the bill of lading was not even *primâ facie* evidence of the quantity of ore shipped, and the evidence of the defendants, shewing clearly that they had delivered all the ore shipped, except such wastage as resulted from handling, of which there had been eight between Hankon and Newcastle, the decision of Sankey, J., was reversed.

PRIZE COURT—CONTRABAND—WOOL TO BE COMBED IN ENEMY COUNTRY—COMBED WOOL TO BE RETURNED TO NEUTRAL COUNTRY.

The Axel Johnson (1917) P. 234. This was a proceeding for the condemnation of a quantity of wool taken as prize. The evidence established that the whole of the wool was destined for Germany.

The claimants were a neutral firm in Sweden, and they claimed that the wool was only to be sent to Germany to be combed, and was to be returned to Sweden as combed, or spun wool, and was therefore not subject to condemnation, notwithstanding that the waste wool with its by products would be retained by the German spinners. Evans, P.P.D., however, held that as the wool in question was absolute contraband, and was captured on its way to enemy territory, a Court of Prize will not inquire what was ultimately to become of it. The wool was consequently condemned as lawful prize.

COMPANY—TRANSFER OF SHARES—RESTRICTIONS IN COMPANY'S ATRICLES ON RIGHT TO TRANSFER SHARES—REFUSAL OF ONE DIRECTOR TO ATTEND DIRECTORS' MEETING—INABILITY TO OBTAIN QUORUM—RECTIFICATION OF REGISTER—COMPANIES ACT, 1908 (8 EDW. 7 c. 69) 32—(R.S.C. c. 79 s. 64)—(R.S.O. c. 178 s. 60).

In re Copal Varnish Co. (1917) 2 Ch. 349. This was a proceeding by originating summons to compel a company to register a transfer of shares in the following circumstances: By the articles of association it was provided that no share should be transferred to any person not already a member without the consent of the directors. There were only two directors, viz., Percy Randall and Ernest Randall. Ernest being chairman and having in that character a casting vote, and the quorum necessary for the transaction of business was two. Ernest, without having obtained the consent of the board, executed a transfer of some of his shares to persons who were not members of the company, and sent the transfers to the company for registration. Percy refused to attend board meetings summoned to consider the transfers, in order to prevent a quorum being formed. The transferees applied to the Court to direct the transfers to be registered. Eve, J., heard the application. On behalf of Percy Randall it was argued that no transfer could be made until the consent of the directors had been obtained, and to ask them to consent to the transfers already made, was to ask them to ratify something already done, and not to consent to something being done; but the learned Judge held that that argument was based on an erroneous view as to the effect of the transfer, which was assumed to be effectual, whereas until registered it was ineffectual to convey any more than an equitable interest; and he held that Percy could not lawfully obstruct the consent of the directors being obtained, by refusing to attend board meetings, and in the exercise of the

power conferred on the Court by s. 32 of the Companies Act he directed the transfers to be registered, no valid reasons being given why the transfers should not be approved by the directors.

SPECIFIC PERFORMANCE OF PAROL AGREEMENT FOR LEASE—PAYMENT OF RENT IN ADVANCE—PART PERFORMANCE—STATUTE OF FRAUDS (29 CAR 2 c. 3) s. 4—(R.S.O. c. 102 s. 5).

Chaproniere v. *Lambert* (1917) 2 Ch. 356. This was an action to enforce specific performance of a parol agreement to grant a lease. The defendant set up the Statute of Frauds, and the plaintiff relied on payment of rent in advance as part performance of the contract entitling him to the relief claimed. On 22 April, 1916, the defendant gave the plaintiff a duly signed receipt for a sum of money as "one quarter's rent due 29 September, 1916, for premises situate Limbourne, Mundon." The premises in question consisted of a farm known as "Limbourne, Mundon, in the County of Essex." Eve, J., held that the receipt was not sufficient to satisfy the statute, and that the payment of rent in advance was not such a part performance as would take the case out of the statute; and with this conclusion the Court of Appeal (Eady, Bankes and Warrington, L.JJ.) agreed and in so doing approved of the decision of Bigham, J., in Thursby v. Eccles, 49 W.R. 281, 282.

WATERCOURSE — OBSTRUCTION OF WATERCOURSE — INTERFERENCE WITH NATURAL COURSE OF STREAM—EXTRAORDINARY RAINFALL—DAMAGE—VIS MAJOR.

Greenock v. *Caledonian Ry.* (1917) A.C. 556. This was an appeal from a Scotch Court, but the point involved is one of general interest. The action was brought by the Railway Company against the City of Greencok to recover damages for flooding the plaintiff's premises in the following circumstances: A natural stream flowed through a public park of the defendants, and the corporation constructed in the stream a concrete pond where children might paddle and in so doing altered the course of the stream and obstructed the natural flow of water therein. A heavy rainfall took place, and the stream overflowed at the pond, and as a consequence a great stream of water which would have been carried off by the stream if it had been left in its natural course, without mischief, poured down a street into the town, and flooded the plaintiff's premises. The defendants contended that the damage was due to *vis major* for which they were not re-

sponsible, but the House of Lords (Lord Findlay, L.C., and Lords Dunedin, Shaw, Parker & Wrenbury) held that the defendants, by interfering with the natural course of the stream, and not providing an adequate channel, were liable for the damage resulting, and the decision below was affirmed.

PRIZE COURT—NEUTRAL CLAIMANT—TRANSFER TO ENEMY AFTER SEIZURE—BILL OF LADING AGAINST ACCEPTANCE—PURCHASER, OR AGENT FOR SALE.

The Prinz Adalbert (1917) A.C. 586. This was an appeal by neutral shippers, carrying on business in the United States, against the condemnation of 2 parcels of lubricating oil consigned by the appellants in the German ship Prinz Adalbert to a German company at Hamburg, and seized at Falmouth on August 5, 1914. The appellants produced a copy of the invoice for 290 barrels which referred to them as "consigned for sale" by the German company "with returns to" appellants, and a copy of the invoices for 86 barrels referring to them as "sold f.o.b. ex Steamship Hamburg." Evans, P.P.D., held that the property in both parcels passed to the German company on shipment, and consequently condemned them as lawful prize. It was contended on behalf of the appellants that the German consignees were merely agents for sale, rather than purchasers, but that, in either case, the handing of the bills of lading against acceptances indicated that no property was to pass in the goods until the drafts were accepted, which did not take place until 10 August, 1914, after the date of seizure. The Privy Council (Lords Parker, Sumner, Parmoor, Wrenbury and Sir Arthur Channell) were unable to agree with the Judge below that the property in the goods passed on shipment, but agreed with the appellants' contention that the property in the goods did not pass until the drafts were accepted. When the drafts were in fact accepted did not clearly appear, but their Lordships hold that the property certainly passed to the consignees before the appellants made their claim as owners, and therefore their title failed, and the appeal was dismissed.

INSURANCE (ACCIDENT)—SPRAINED WRIST—LATENT TUBERCULOSIS—TOTAL DISABLEMENT—"EXCLUSIVELY OF ALL OTHER CAUSES."

Fidelity & Casualty Co. v. *Mitchell* (1917) A.C. 592. This was an appeal from the Appellate Division of the Supreme Court of Ontario affirming a decision of Middleton, J. The action was

brought on a policy of insurance against accident. The statement that the plaintiff was in a sound condition mentally and physically was made a warranty by the policy. After the issue of the policy the plaintiff severely sprained his wrist. The defendants for seven quarters paid him the amount provided in the policy for total disablement, and then refused to pay him any more. It appeared that ten or fifteen years before the date of the policy the plaintiff had suffered from a tubercular affection of a small part of his left lung which had caused a lesion which had been healed. There were concurrent findings that at that date there had been no active tuberculosis in the plaintiff's arm, but that there was in his system tuberculosis, which was latent, and would have remained harmless, had it not been for the accident; and that, apart from tubercular affection, the wrist would have recovered within six months of the accident. In consequence of tuberculosis having developed in the arm, the plaintiff was permanently disabled. The defendants contended that this disablement was not exclusively due to the accident, and, therefore, was not covered by the policy; but the Privy Council (Lords Haldane, Dunedin and Shaw and Sir Arthur Channel) agreed with the Court below, and adopted with approval the view of Middleton, J. "T is diseased condition is not an independent and outside cause, but is a consequence, and effect of the accident." The appeal was therefore dismissed, and, as leave to appeal had been granted on the terms that if the appeal failed the respondents should get costs as between solicitor and client, it was so ordered.

BRITISH COLUMBIA—RAILWAY—EXEMPTION OF RAILWAY LANDS FROM TAXATION—FILING OF PLANS AND BOOK OF REFERENCE —APPROVAL OF PLANS—CONDITION—R.S.B.C. (1911) c. 194, ss. 17, 18.

Canadian Northern Ry. v. *New Westminster* (1917) 1 A.C. 602. By an Act of the Legislature of British Columbia the appellant company and . . . all properties and assets which form part of, or are used in connection with, the operation of its railway were exempt from taxation. The Railway Act of British Columbia (R.S.B.C. c. 194) provides that a company proposing to make a railway shall make a plan, profile and book of reference which are by s. 18 to be submitted to the Minister, who, if satisfied therewith, may sanction the same. The Court of Appeal of British Columbia, affirming the judgment of Murphy, J., held that land purchased by the appellant company with the intention of using it for the purposes of its railway was not exempt from taxation,

until the plan, profile and book of reference of the railway proposed to be constructed thereon had been submitted to, and approved by, the Minister, and with this judgment the Privy Council (Lords Haldane and Dunedin and Sir Arthur Channell) concurred. The appeal therefore failed.

COMPANY—AGREEMENT—VALIDATING STATUTE SUBJECT TO CONDITION—NON-OBSERVANCE OF CONDITION—DEFECTIVE NOTICE OF MEETING—ACQUIESCENCE IMMATERIAL—ULTRA VIRES—DELAY.

Pacific Coast Coal Mines v. *Arbuthnot* (1917) A.C. 607. This was an action by certain shareholders of a limited company, and the company, to set aside a certain agreement made between certain shareholders and directors with the company, whereby an action against the directors, as promoters, was dismissed, and certain shares were to be surrendered in exchange at par, for debentures to be created and issued by the company, and the capital of the company was to be reduced from three to two million dollars. A private Act had been passed validating the agreement on condition that the same was adopted by a resolution passed by 75 per cent. of the shareholders present personally or by proxy at any meeting of the shareholders called for the purpose. A resolution was passed by the required majority but the notices calling the meeting omitted to state the purpose for which it was called, and the proxies of shareholders, who had no means of knowing the contents of the agreement, were used in support of the motion. The articles of association provided that in case of special business the notice calling a meeting should state its general nature. Four years later the company and two shareholders brought the present action to set aside the trust deed, and the debentures issued thereunder. It was contended that the plaintiffs by acquiescence, and by their acts and conduct, had ratified and approved the transactions sought to be impeached. The Judicial Committee of the Privy Council (Lords Haldane, Dunedin and Sumner), however, held that the agreement was originally *ultra vires*, that the Act had validated it upon condition that it should be approved by the specified majority of shareholders; and that that condition had not been validly complied with, because the calling of the meeting without notifying the shareholders of the special business to be transacted thereat, was fatal to its validity, and that subsequent acts or conduct could not make the transaction valid. The appeal was consequently allowed.

CANADA—CRIMINAL LAW—NUISANCE—OVERCROWDING STREET CARS—APPEAL—"CRIMINAL CASE"—CRIMINAL CODE (R.S.C. c. 146) ss. 221-223, 1025.

Toronto Railway v. *The King* (1917) A.C. 630. The appellants in this case were indicted for committing a common nuisance by permitting their street cars to be overcrowded, whereby the property and comfort of the public, passengers in the cars, were endangered. The appellants had demurred to the indictment, but their demurrer was overruled, and they were convicted, and the conviction was affirmed by the Appellate Division of the Supreme Court of Ontario. By special leave, an appeal was taken to His Majesty in Council on a case stated by Riddell, J. It was contended *in limine* that the case was a criminal case, and as such not appealable, and the Criminal Code s. 1025 was relied on. The Attorney-Generals of England and Canada were therefore ordered to be notified, and were represented on the hearing of the appeal. The Judicial Committee of the Privy Council (Lords Haldane, Dunedin, Atkinson, Parker, Parmoor and Wrenbury and Sir Arthur Channel) held that it was not necessary to determine whether s. 1025 of the Criminal Code had effectually taken away the prerogative right of the Crown to entertain appeals in criminal cases, because the present proceeding though in form criminal was by section 223 of the Criminal Code expressly declared not to be deemed "a criminal offence." Consequently, it was really a civil proceeding, though *quasi* criminal, and, on the merits, they held that the offence charged did not amount to a public nuisance, because the public in general was not prejudiced, but only that part of it who happened to be passengers in the defendants' car. Their Lordships therefore held that the demurrer should have been allowed, and a verdict of acquittal entered, and the cause was remitted to the Court below for that purpose.

Reports and Notes of Cases.

Dominion of Canada.

EXCHEQUER COURT

Audette, J.] NORTHERN SHIRT CO. *v.* CLARK. [38 D.L.R. 1.

Patents—Invention—Combinations.

The application of a well-known contrivance to an analagous purpose is not invention and is not good ground for a patent.

T. J. Murray and *E. K. Williams*, for plaintiff; *Russel S. Smart*, for defendant.

ANNOTATION ON ABOVE CASE FROM 38 D.L.R.

This case turned principally on the question of invention which is a difficult one to determine.

The question of whether a given application or new use of an old contrivance is of such a character as to amount to invention is a familiar one to the Courts.

The mere application of an old contrivance to an analogous use without novelty in mode of application is not invention (*Losh* v. *Hague* (1838), 1 W.P.C. 200; *Kay* v. *Marshall* (1841), 2 W.P.C. 71, 8 Cl. and Fin. 245), and this may be so even if the commercial success is met with (*Thermos, Ltd.* v. *I. da, Ltd.* (1910), 27 R.P.C. 388).

An old principle applied in a new way, however, or by new means may involve invention. (*Proctor* v. *Bennis* (1887), 36 Ch.D. 740; *Gadd* v. *Mayor etc., of Manchester* (1892), 9 R.P.C. 513; *Brooks* v. *Lamplugh* (1898), 15 R.P.C. 33; *Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1895), 12 R.P.C. 23[illegible]; *Bush* v. *Fox* (1856), 5 H.L.C. 707, 10 E.R. 1080, *Harwood* v. *G.N.R.* (1865), 11 H.L.C. 654, 35 L.J.Q.B. 27; *Siddell* v. *Vickers, Sons & Co.* (1888), 5 R.P.C. 416; *Curtis* v. *Platt* (1863), 3 Ch.D. 135; *Lister* v. *Leather* (1858), 8 E. & B. 1004; *Saxby* v. *Clunes* (1874), 42 L.J. Ex. 228; *Dudgeon* v. *Thomson*, 3 App. Cas. 34; *Nordenfelt* v. *Gardner* (1884), 1 R.P.C. 61; *Hocking* v. *Hocking* (1888), 6 R.P.C. 69 H.L.; *Osram Lamp Works* v. *Z-Electric Lamp Co.* (1912), 29 R.P.C. 421.

Lindley, L.J., in *Gadd* v. *Mayor, etc. of Manchester, supra*, at p. 524, thus states the law:—

"1. A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties, is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no invention: no manner of new manufacture within the meaning of the statute of James. 2. On the other hand, a patent for a new use of a known contriv-

ance is good, and can be supported if the new use involves practical difficulties which the patentee has been the first to see and overcome by some ingenuity of his own. An improved thing produced by a new and ingenious application of a known contrivance to an old thing, is a manner of new manufacture within the meaning of the statute."

For other cases see *Lane-Fox* v. *Kensington & Knightsbridge Electric Lighting Co.* (1892), 9 R.P.C. 416; *Losh* v. *Hague* (1838), 1 W.P.C. 200; *Kay* v. *Marshall* (1841), 8 Cl. & Fin. 245; *Ralston* v. *Smith* (1865), 11 H.L. Cas. 223; *Wills* v. *Dawson* (1863), 1 New Rep. 234; *Main* v. *Ashley & Co.* (1911), 28 R.P.C. 492; *Thermos Ltd.* v. *Isola Ltd.* (1910), 27 R.P.C. 388; *Crane* v. *Price* (1842), 1 W.P.C. 393; *Stepney Spare Motor Wheel Co.* v. *Hall* (1911), 28 R.P.C. 381; *British Liquid Air Co.* v. *British Oxygen Co.* (1909), 26 R.P.C. 509, H.L.; *Blackett* v. *Dickson & Mann* (1909), 26 R.P.C. 120; *Marconi* v. *British Radio Telegraph Co.* (1911), 28 R.P.C. 181.

The leading American case of *Potts* v. *Creager*, 155 U.S. 597, deals with the transfer of a device from one branch of industry to another as follows:—

"But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to enquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one the court will undoubtedly be disposed to construe the patent more strictly and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless the patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him, but the person who has taken his device and by improvements thereon has adapted it to a different industry, may also draw to himself the quality of inventor." (See also *Pensylvania* v. *Locomotive*, 110 U.S. 480; *Ansonia* v. *Electrical*, 144 U.S. 11; *Fisher* v. *American*, 71 Fed. 523; *Loom Co.* v. *Higgins*, 105 U.S. 580; *Topliff* v. *Topliff*, 145 U.S. 156; *National* v. *Interchangeable*, 106 Fed. 693.)

In *Bicknell* v. *Peterson* (1897), 24 A.R. (Ont.) 427, it was held that the application to a new purpose of an old mechanical device out of the track of its former use and not in nature naturally likely to suggest itself to one skilled in the art was patentable. The case related to the application of rolling contact to an oil pump. Rolling contact was old but its use in a pump for the purpose of avoiding friction was held to be new.

This case was followed in *Woodward* v. *Oke* (1906), 7 O.W.R. 881. In the judgment it was stated, "No doubt the swivel is an old mechanical device, but the application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of its former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study." *Abell* v. *McPherson* (1870), 17 Gr. 23,

(1871), 18 Gr. 437) is to the same effect. In this case it was held that if the patentee's invention had never before been applied to the same class of machines, but had been applied to other machines he can claim invention. (For Canadian authorities see also *Meldrum* v. *Wilson* (1901), 7 Can. Ex. 198; *Rolland* v. *Fournier* (1912), 4 D.L.R. 756).

In *Penn* v. *Bibby* (1866), L.R. 2 Ch. 127, 36 L.J. Ch. 455, the patent related to "an improvement in the bearings and brushes for the shafts of screw and submerged propellors."

It was objected against the patent that it was a case of mere analogous use of bearings known in connection with grindstones and water-wheels. Lord Chelmsford, L.C., to whom there was an appeal for a new trial, in reference to the question of invention said (L.R. 2 Ch. 135): "It was objected that the finding was erroneous, because the alleged invention was merely a new application of an old and well-known thing. It is very difficult to extract any principle from the various decisions on this subject which can be applied with certainty to every case; nor indeed is it easy to reconcile them with each other. The criterion given by Lord Campbell in *Brook* v. *Aston*, 8 E. & B. 478, 485, 120 E.R. 178, has been frequently cited (as it was in the present argument), that a patent may be valid for the application of an old invention to a new purpose, but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy in his Lordship's words, because according to the proposition, as he stated it if the invention be applied to a new purpose, there cannot but be some novelty in the application.

In every case of this description one main consideration seems to be whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test to the present case, it appears to me impossible to say that the patented invention is merely an application of an old thing to a new purpose."

Thomson v. *American Braided Wire Co.* (1889), 6 R.P.C. 518, was a case near the border line, but the patent was upheld by the House of Lords on the ground that there was quite sufficient invention in the mode of application. Lord Herschell's judgment contains the following passage (6 R.P.C. 527): "It cannot be denied that both the prior patents to which I have referred afford some colour to the defendant's contention that the patentee has done nothing more than apply a known substance in a manner and to a purpose analogous to that in and to which it had been already applied, and that the patent therefore cannot be supported. If I thought that the patentee had claimed the mere use of tubular sections of braided wire as a bustle, however fastened or secured, I should arrive at the conclusion that the defendants' contention was well founded, but I do not thus construe the specification. I have already stated that in my opinion it is the combination alone for which protection is sought, and that the method of fastening the ends by clamping plates is an essential part of that which is claimed. Taking this view of the patent, I think that, even with the state of knowledge which existed at the time the patent was applied for, some invention was required

to produce the bustle claimed to be protected by it. All the learned judges in the Court of Appeal, although they arrived at the same conclusion, stated that they had done so with hesitation, and expressed the opinion that but little invention was requisite, and that the case was near the border line. I entirely agree, and have not been without doubt as to the proper decision to be arrived at."

The effect of a disclaimer under s. 25 of the Patent Act has not been considered very frequently by Canadian Courts. S. 25 reads:—

25. Whenever, by any mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has,—

(*a*) made his specification too broad, claiming more than that of which he or the person through whom he claims was the first inventor; or,

(*b*) in the specification, claimed that he or the person through whom he claims was the first inventor of any material or substantial part of the invention patented, of which he was not the first inventor, and to which he had no lawful right;

the patentee may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment there...

2. Such disclaimer shall be in writing, and in duplicate, and shall be attested in the manner hereinbefore prescribed, in respect of an application for a patent; one copy thereof shall be filed and recorded in the office of the Commissioner, and the other copy thereof shall be attached to the patent and made a part thereof by reference, and such disclaimer shall thereafter be taken and considered as part of the original specification.

3. Such disclaimer shall not affect any action pending at the time of its being made, except in so far as relates to the question of unreasonable neglect or delay in making it.

4. In case of the death of the original patentee, or of his having assigned the patent, a like right shall vest in his legal representatives, any of whom may make disclaimer.

5. The patent shall thereafter be deemed good and valid for so much of the invention as is truly the invention of the disclaimant, and is not disclaimed, if it is a material and substantial part of the invention, and is definitely distinguished from other parts claimed without right; and the disclaimant shall be entitled to maintain an action or suit in respect of such part accordingly: R.S. c. 61, s. 24.

The language of the Canadian statute follows that of the United States R.S. 4917. In *Dunbar* v. *Myers*, 94 U.S. 187 and 194, the Supreme Court of the United States points out that after disclaimer the "construction must be the same as if such matter had never been included in the description of the invention, or the claims of the specification." Authorities on this may also be found in Robertson on Patents, vol. II., p. 9, and Walker on Patents, 5th ed., p. 268.

In *Graham* v. *Earle*, 82 Fed. Rep. 740, it was held that the deleted portion of the specification should not be referred to for the purpose of construction.

The English cases on this point are to the same effect (*George Hattersley & Sons* v. *George Hodgson*, 21 R.P.C. 517 and 524, affirmed in the House of

Lords, 23 R.P.C. 192; see p. 204.) This case is referred to later in the case of *Lake* v. *Rotax Motor Accessories*, 28 R.P.C. 532; see p. 538.

A disclaimer may go too far and defeat the patent. The subject-matter left after the disclaimer must possess patentable novelty. In *Copeland-Chatterson* v. *Paquette* (1906), 10 Can. Ex. 410, 38 Can. S.C.R. 451, the claim sued on was held invalid as possessing no novelty over one which had been disclaimed.

The portion of the specification disclaimed must be readily distinguishable from the remaining portion, so that there may be no ambiguity as to what is actually disclaimed and what is still left: (*Tuck* v. *Bramhill* (1868), 6 Blatch. 90; *Electrical Accumulator Co.* v. *Julien Electr' Co.* (1889), 38 Fed. 134; *Taylor* v. *Archer* (1871), 8 Blatch. 318).

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Book Reviews.

Municipal Manual comprising the following:—The Municipal Act; The Local Improvement Act; The Municipal Arbitrations Act; The Arbitration Act; The Municipal Franchises Act; The Public Utilities Act; The Municipal Electric Contracts Act; The Patriotic Grants Act; The Bureau of Municipal Affairs Act; The Planning and Development Act. By JOHN REDMOND MEREDITH, K.C. of Osgoode Hall, d WILLIAM BRUCE WILKINSON, K.C., of Osgoode Hall, Law Clerk of Municipal Bills, Legislative Assembly of Ontario. Edited by SIR WILLIAM RALPH MEREDITH, Kt., Chief Justice of Ontario. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company, 1112 Chestnut Street. 1917.

This important work, which comes with the endorsement of the Chief Justice of Ontario, is referred to at length in our editorial columns, *ante*, p. 44.

Waiver Distributed Among the Departments, Election, Estoppel, Contract, Release. By JOHN S. EWART, K.C., LL.D., author of "Estoppel by Misrepresentation" and other works. With a foreword by ROSCOE POUND, Ph. D., LL.D. Cambridge: Harvard University Press. London: Humphrey Milford, Oxford University Press, 1917.

The author divides his subject into sixteen chapters, the first, however, being only introductory. It is not an ordinary law book; but rather a critique of 291 pages on the use of the

term "Waiver." The author's visible aim is to demonstrate the almost universal misuse and misconception of the term "waiver" as embodied in the opinions in many reported cases; and more than eight hundred cases are cited.

The work is not for a mere novice in the law. Its perusal requires the closest attention. The author is indisputably a logician. Most of the cases cited are from the United States. Attention is directed usually to the language used in the opinions of cases as to whether or not the erroneous use of the word "waiver" has resulted in an erroneous result in the cases criticised, we are left in the dark; but I am of the opinion that an erroneous result, because of an erroneous use of the word—as where a transaction is treated on the ground of Waiver when it should have been decided upon the ground of Election—has not been reached in every case because of such misuse. I am also of the opinion that in the cases correct results were very often reached notwithstanding an erroneous or misuse of the word.

But it does not follow that the work will not be of great benefit to lawyers and judges. With clear conceptions of the doctrines of Election, Estoppel, Contract and Release where the doctrine of Waiver is almost habitually attempted to be applied, transactions would be more easily solved by the practioner, and he would escape the haze of obscurity involved in many opinions of the courts, and even in English and American authors (for Mr. Ewart does not hesitate to criticise law text writers of great reputation); and be able to much more easily and clearly apply the law to the transaction he has in hand, thereby enabling him more firmly, accurately, clearly and easily to present the law to the court. And if this be true of lawyers, how much more true is it of the judges in the preparation of opinions.

The work is readily divided into two parts, although not so expressed by the author. The first part is divided into eight chapters, after the introduction, on "Waivers," Aliases, Void and Voidable, Forfeiture, Election, Contract, Landlord and Tenant, and Vendor and Purchaser of Real Property. The second part on Insurance, divided into eight chapters, viz: Insurance, Breaches Contemporaneous with Delivery of Policy, Non-payment of Dues, Demanding, Accepting or Returning Premiums, "Waivers" of Breaches Prior to Loss by Subsequent Activities, "Waivers" of Proofs of Loss, Time for Commencement of Action, and "Waivers" of the "No-Waiver" Clauses.

The author uses a quotation from Termes de Ley, 1642 edition, p. 285, concerning Waiver as then applied to an abandonment by

a thief of goods he had stolen when the Hue and Cry were raised. The word was then "Waife." The Reeve or Baylife of the Manor where the goods were might "seize the goods so waived to their Lord's use, who may keep them as his own proper goods" until claimed by the true owner, in which case "the first owner shall have restitution of his goods so stolen and waived."

He then makes the following quotation: "A woman is called 'waive' as left out or forsaken by the law, and not an outlaw as a man is; for women are not sworn in Duties to the King nor to the law as men are, who therefore are within the law, whereas women are not, and for that cause cannot be said outlawed, in so much as they never were within it." He then makes this statement, which is the key to his work: "These are the only sorts of 'waiver' or 'waive' that the author knows of; and that is all he is able to say about them." And he adds, "All else that is usually spoken of as 'waiver' is, in the judgment of the author, referable to one or other of the well-defined and well-understood departments of the law, Election, Estoppel, Contract, Release. 'Waiver' is, in itself, not a department."

Mr. Ewart gives no definition of "Waiver." "No one has been able to assign it explanatory principles," says he. "The word is used indefinitely as a cover for vague, uncertain thought." He quotes a number of judicial definitions, only for the purpose of showing their inaccuracies. A few instances will illustrate his method: "In dealing with Election, the courts frequently say, that when you choose one alternative you 'waive' the other. The doctrine of election of remedies applies, that, one having been chosen, all others are deemed waived." (Pratt v. Freeman, 115 Wis. 660; 92 N.W. 368.) "That is inaccurate, for you to have no right to both remedies. You have a choice between them. You exercise the choice. And you 'waive,' or throw away, nothing. But the inaccuracy is very popular."

In construing what is usually termed a "forfeiture clause" in a policy of insurance which declares if a certain element in it should be violated the insured should "forfeit" his rights under the policy, the Nebraska Supreme Court said that the breach "merely afforded ground for forfeiture at the option of the insurer." On this quotation the author says: "There would be no forfeitures until the option had been exercised, and, consequently, no room for 'waiver' of the forfeiture. The insurer had a right to elect or continue or determine the contract; by continuing to recognize the policy as in force, he elected to continue it. There was no forfeiture, and no 'waiver.'"

It is pointed out that a "waiver" "cannot be the result of

contract," and it "cannot terminate a contract." A contract may be rescinded; but that rescision is a new contract,—a contract of rescission. A Waiver is a unilateral act of one of the parties to a contract; and does not require the act or consent of the other.

The author quotes the following clause from a Pennsylvania decision: "The doctrine of Waiver seems applicable properly speaking only during the currency of the contract . . . . . After a policy is forfeited, I see not how it could be renewed or revivified except by an express agreement of the insurers." This is his comment on the quotation, which will serve as an example of his method: "The court appears to mean that an insurer can 'waive' a condition prior to forfeiture, but that after forfeiture, he can do nothing—there must be a new contract. If it meant that, prior to default, the condition may be 'waived', the reply is that a condition cannot be got rid of by 'waiver,' but by new contract, by release, or by estoppel only. If it means that, after default, 'waiver' cannot revivify the contract, the answer is that default has not affected the contract. But if it means only, that after *termination* of the contract, 'waiver' cannot re-establish it, we may agree."

The eight chapters on Insurance are probably the most practical part of the book; and of greatest interest to practitioners. It is pointed out that the average policy, when its terms are violated, is voidable at the option of the company, although it declares that on the happening of the conduct forbidden it shall be "void." The "person insured does not 'forfeit' his policy. He gives the company a right to terminate it, a right which may never be exercised, and very probably never will be—unless a loss happens. There is therefore no 'forfeiture' of the policy, and consequently no 'waiver' of forfeiture. The contract is not void, but voidable only. It continues until the company elects to terminate it. Election once made is irreversible. And lapse of time, without election to terminate, is evidence of election to continue."

Now, as a corollary to this view, the author states that when the insurer company pleads that by a default the policy has been "forfeited," and asks (as it were) the insured to prove a "waiver" of the forfeiture, if he can, the insured should refuse to accept the issue, and put it up to the company to show whether it ever elected to terminate the policy, and if it did, how, when and by whom. Consequently the company's plea ought not to be forfeiture; and the insured's reply ought not to be 'waiver.' On the contrary," says our author, "the company, if it would succeed, must plead default, and election, consequent upon the

default, to terminate the policy. Upon that plea issue will be joined." This illustration and this quotation give an idea of Mr. Ewart's method of treatment of questions of insurance.

One remarkable thing about the book is that it does not inform the reader how the case under discussion was actually decided. The author does not say whether a right or a wrong result was reached in the case cited. A case is cited in order to criticise it and show an erroneous line of reasoning adopted in the opinion. It is the erroneous use of the terms "waiver" and "forfeiture" that he is after; and their illogical application to the transaction involved in the case.

The lawyer who follows the lines of the author's reasoning should escape the confusing maze of the cases upon the subject of Waiver as well as those upon the subject of Forfeiture.

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The Law applied to Motor Vehicles, citing all the reported cases decided during the first fifteen years of the use of Motor Vehicles upon the public thoroughfares. By CHARLES J. BABBITT of the Massachusetts Bar. Second edition by ARTHUR W. BLAKEMORE of the Massachusetts Bar. John Byrne & Co., Washington, D.C., 1917.

Although this is a second edition we must give it a little fuller notice than is usually accorded to a second edition.

The subject matter is one that grows apace in importance and in the volume of litigation which results from increased business as well as from the many developments in various lines of that business.

It is a subject which largely comes under the rules affecting municipal law, using that word in its widest sense; it nevertheless brings up questions of contracts, torts, trespass, negligence, damages, warranties, highway law, etc. Personal injuries as well as injuries to property are necessarily dealt with. It is not to be wondered at, therefore, that any work attempting to deal with these varied subjects has to cover a wider range than most law books; and must necessarily be a somewhat ponderous volume. This work occupies over 1250 pages.

For the reason above mentioned it is a compendium of the latest decisions on a variety of subjects, and so will be useful to the practitioner in hunting up law in matters which are only incidentally connected with motor vehicles, and which arise in reference to this new development of science and mechanics.

The table of contents alone occupies some 50 pages; and the cases cited are, of course, very numerous. As to these the *ipsissima verba* of the judges are very generally given, and lend additional value to the work. Motor vehicles are as important in war times as in times of peace; but what their development will be on the earth, over the earth and under it time alone can tell.

No lawyer in these days can afford to be without such a work as this to guide him and enlighten him on a branch of law so increasingly important.

Bench and Bar.

The summary of legal events of the year 1917, appearing in an English contemporary, gives a long list of the changes in the personnel of those who have occupied prominent positions in connection with Bench and Bar, with other information of interest, especially, of course, to those in the Motherland. One item is connected with the longevity of men in the legal profession, from which we learn that one of the fraternity died at the good old age of ninety-six, and that some twenty-five passed away who were over eighty years of age.

Flotsam and Jetsam.

In western Georgia a jury recently met to inquire into a case of suicide. After sitting through the evidence, the twelve men retired, and after cogitating returned with the following verdict: "The jury are all of one mind—temporarily insane."