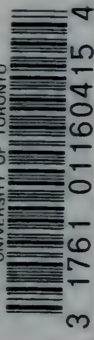
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[Essays and addresses]
by
William Renwick Riddell

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Reprinted from the Medical Journal and Record
for February 6, 1929

A NEW YORK MEDICAL MARTYR; A CENTURY AGO

Rendell Williams, N.O., M.D.
Toronto

Odium Theologicum? Well, yes, I suppose that universally reprobated thing is bad enough; but, *credo experto,* Odium Theologicum is not in it with Odium Medicum. List to the tale of Odium Medicum in old New York.

Pennsylvania Mag.-April 1928
-July 1928

cine and turned his mind "to study the great *Book of Nature,* and contemplate the wisdom of nature's God, instead of conning over the speculative whims and ambiguous nonsense which encumbers the volumes of . . . writers on the laws of medical science" —and this was the beginning of his troubles not fully to be realized for more than half a century.

After some fourteen years spent in study in that great college, he was confident of his ability to heal the sick of all kinds by the medicines he was able to manufacture "from vegetable substances, without the aid of any chemical process." He strenuously denies having anything in common with Samuel Thomson, his School or system; according to his own account, he was a "botanist," a "botanical physician," *sui generis.* I think, however, that no one can compare the respective medical works of

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Odium Theologicum? Well, yes, I suppose that universally reprobated thing is bad enough; but, *credo experto,* Odium Theologicum is not in it with Odium Medicum. List to the tale of Odium Medicum in old New York.

Of William Barber, the birthplace, like the birthplace of Homer, is unknown; the date is about 1760, and the place somewhere in New England. Anyway, he was born; and, according to his own account, he took part in the Revolutionary Wars to obtain the freedom of his country. From the age of twenty, he turned his attention to medicines. No, not Medicine; he scorned the Schools and Colleges of Medicine and turned his mind "to study the great *Book of Nature,* and contemplate the wisdom of nature's God, instead of conning over the speculative whims and ambiguous nonsense which encumbers the volumes of . . . writers on the laws of medical science" —and this was the beginning of his troubles not fully to be realized for more than half a century.

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the two empirics, without coming to the conclusion that one had a marked influence on the other; and I am equally confident that it is much more likely that Thomson was the leader (1).

However that may be, Barber took to himself the title and the rôle of Doctor, and set out to treat all and sundry.

He tells us that he "for a number of years rode through three of the New England states; and for twelve years from Vermont to Lake Erie, and practiced five years in the village of Auburn, and for five years in the western parts of Massachusetts and Vermont."

We have an account of some of his triumphs and tribulations in a little volume, a 12mo. of 108 pages, published at New York, November, 1829—he had removed to New York during that year from Cattaraugus County, near Lake Erie. The name of this delightful book is *The Improved System of Botanical Medical Practice and Vegetable Electricity, as demonstrated by Forty Years Experience and Careful Observation,* By William Barber, lately residing in the village of Auburn, now removed to this city, New York. Printed at No. 2 Frankfort street, November, 1829.

I said "delightful book," and so it is; but it contains a painful account of the malignant persecution of the ardent author by "the faculty," "the great beast with seven heads and ten horns," who, busy with "meditations," left "the humble task of nursing and curing the poor sufferers . . . . to be performed by those honest and persevering souls, whom they sneeringly call empirics and quacks."

This infamous crew got an Act passed by the Legislature of New York in 1827, "subjecting every person to fines and imprisonment, like a common

---

[1]For some account of the celebrated Empiric, Samuel Thomson, his School (not yet quite extinct) and his theories and practice, see an Article: *The Botanic Family Physician,* by William Renwick Riddell, LL.D., F.B.S. Edin., etc., in the New York Medical Journal for September 13, 1913. In Canada, at least, the Thomsonian School became Eclectics, and had some influence for many years.

felon, for attempting to relieve their suffering fellow citizens without obtaining a diploma." Yes, sir, they did just that—and, even worse, the Act relieved everyone who should be treated by one without a diploma, of the liability to pay for the treatment. This was an underhand and lowlived thing and was obtained in an underhand and lowlived way. How do you think, this was? You could never guess. "Dr. Foote was a member of the Legislature when that tyrant was created"; he "did the work with the Committee to bring in such a Bill. And assured them it would not affect any set of citizens but the medical society, when he knew he *lied*." That's straight from the shoulder, isn't it? Yes, sir, and straight goods, too—"for he knew it was to prevent the botanists from practicing." Was not Dr. Barber—I insist on calling him, Dr. Barber, New York law or no New York law—was not Dr. Barber, I say, perfectly justified in exclaiming, as he did, "And, now, what think you of this, my fellow-citizens? Must the Legislature make a law to guard the faculty and their practice from the botanists, and rob the citizens of the productions of their own country; and torture the sick to death with their minerals?"

Three successive sessions did Dr. Barber attend the Legislature to get this Bill repealed—but without success; the faculty was too powerful, and he was defeated.

In his little book, he publishes testimonials which would put to shame the advertisements of our modern quack medicines. He cured everything from cancer to wry-neck; consumption on the lungs or on the liver to numb-palsy; King's evil to swelled legs; jaundice, erysipelas, gravel, sore throat, exostoses to St. Vitus' dance, what not? And all by his simple vegetable medicines.

Take cancer. Now, he had had it himself twice and knew all about it. It was caused by living creatures, moving animals, in the blood; he had felt them, and I guess he knew. Besides, he took some

out of the cancer lumps of Mrs. Perry, from the cancered nose of Dr. Youngs—why, he showed them to the doctor! Then there were the two living animals about two inches long, he got out of the two pound cancer on the side of the head of Widow Silvers near Waterloo village; and half a gill of animals "about the size of skippers in a cheese," which he took from a cancer on the leg of a man in the town of Schuyler. One of the most shameful things in the whole disgraceful narrative is about a man whom he had cured of ten or eleven cancers. He told the patient that now he could not collect for medical attendance and would have to be paid in advance; the man, who was worth one hundred thousand dollars, said he had only five dollars cash; he paid that and promised to pay the balance shortly. Did he? The sweep not only would not pay any more but he actually denied that Dr. Barber had cured him and added insult to injury by saying that he was sorry that he had paid the five dollars. What do you think of that? The name of Robert Kennedy, of Clifton park, Saratoga county, must go down to the ages in infamy.

Worse was to follow. The unfortunate doctor was brought before the Court for breach of the Medical Act. He had pretty near cured a lady of cancer, when a regular doctor got hold of her; he was brought before the Court; twelve doctors swore against him, and he was fined twenty-five dollars. Thinking—nay, knowing—that he had not had fair play, he put up bail and appealed to the Court of Common Pleas. Here it was worse, for seventeen doctors turned up to give evidence against him and there were five more in reserve. Worst of all, however, the Chief Judge was that very Dr. Foote, who by his lying had the Committee bring in the infamous Bill of 1827. And this time it cost Dr. Barber one hundred dollars.

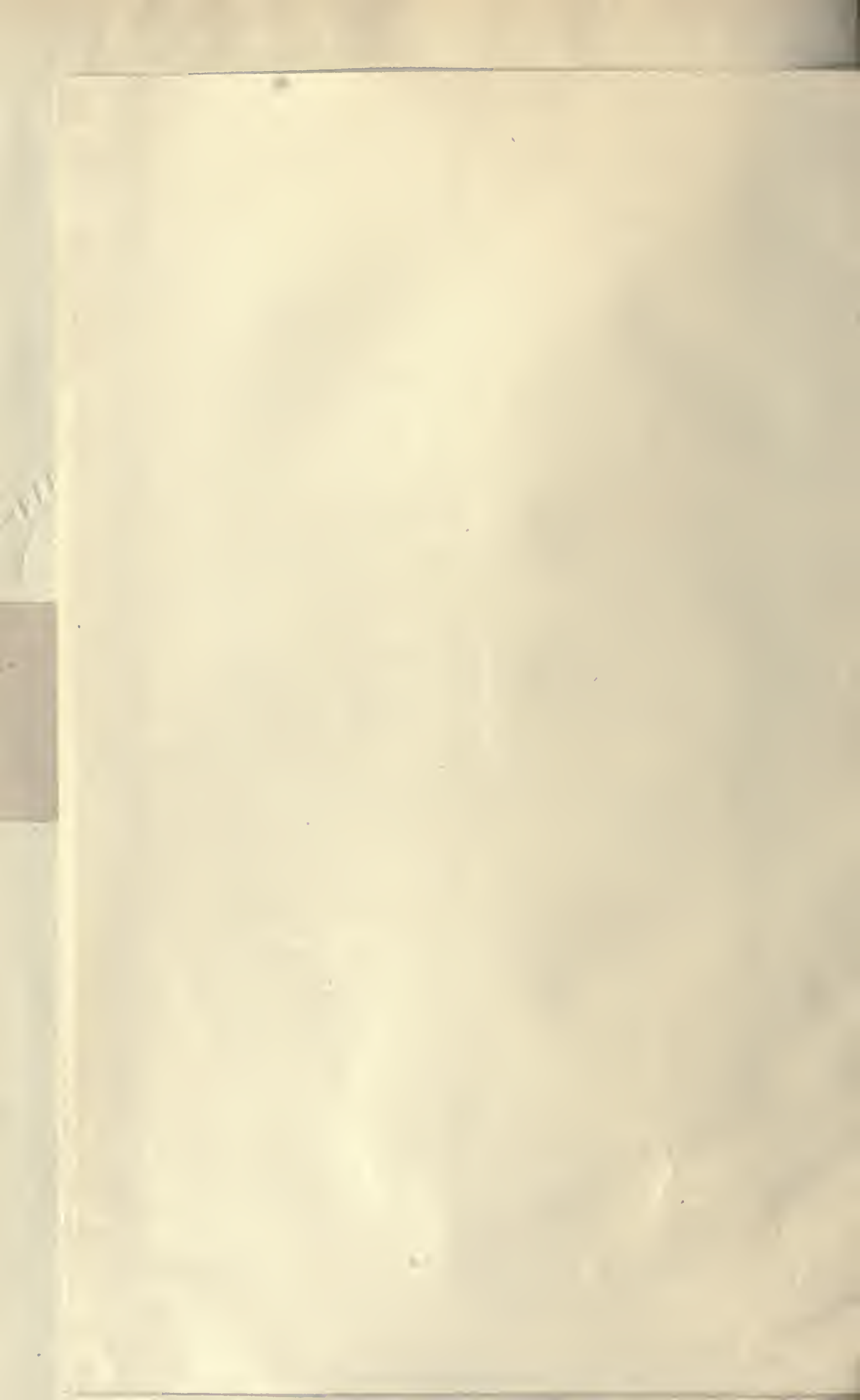
Dr. Barber did not bleed his patients, nor did he, like Thomson, puke them; he did not give active

physic, or blister, sweat or steam them; he did not give calomel—he gave his vegetable and animal medicine along with his vegetable electricity (of unknown and undisclosed ingredients, but all animal and vegetable, none mineral). That alone was enough to condemn him as a quack at the time; the proper methods of treatment fully appear by the beautiful lines of Dr. Lettsom:

> "When patients sick to me apply,
> I physics, bleeds and sweats 'em.
> If after that, they choose to die,
> What's that to me? I. Lettsom."

His treatment for cancer was simplicity itself—just yellow dock and plaintain. Of course, he had to vary the treatment, as there were some eleven kinds of cancer.

Well, the persecution of the doctors cost him one thousand dollars; and an indefinite amount from the patients not paying him; so he had to go to New York. There he started a hospital where "patients from a distance could be accommodated with board and nursing, when needed," and on the principle "no cure, no pay for nursing will be demanded"—he does not say "no pay," but only "no pay for nursing"—so *Caveat emptor.*



The "STAR CHAMBER ACT" *and* THE IMPERIAL CONFERENCE OF 1928

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL
LL.D., D.C.L., Etc.

Toronto, August 18th, 1928

THE "STAR-CHAMBER ACT" AND THE IMPERIAL CONFERENCE OF 1926.

It is a far cry from 1641 to 1926 and from the Dominions of King Charles I. to those of King George V.; but the political conceptions of the race have not changed—*semper eadem* in State as in flag.

Early in the reign of the first Stuart King of England, the great case of *The Postnati* fixed the relation of subject to King. The Scottish laddie, the Postnatus, was the natural-born subject of him who was King of England but not the subject of him *quâ* King of England. The man of flesh and blood called James was the King of the boy, not a metaphysical entity, an abstract "King of England."

A modern has difficulty in getting into the atmosphere of those days, whether in Law, Medicine, Philosophy—what not. Matter composed of four elements, earth, air, fire and water; the animal world having the serpent which slew at a distance by its glance and the little fish which checked the course of a ship in full sail. The vegetable kingdom boasted its mandrake-root which shrieked when drawn from the earth—and there were the four "humors" of the body, Blood, Phlegm, Yellow Bile and Black Bile, whose predominance determined the "temperament." Even in Mathematics, Cardan is not always wholly intelligible if Cocker is—although we had to wait for Gauss and Bolyai for real transcendentalism.

It was no wonder then that the relation of subject to King was discussed in language scarcely intelligible to the modern lawyer. But there is no difficulty in understanding the decision: and it may be stated thus—anyone born in Scotland after James (who was and continued to be King of Scotland) became King of England, was a natural-born subject for all purposes of that King but not a subject of the Kingdom of England.

Every student of our or any other British Constitution must read and digest *Calvin's Case: the Case of the Postnati.*[1]

The historical result is the constitution of the British Empire—the Canadian is the subject of him who is the King of Great Britain and Ireland, but in no sense a subject of the United Kingdom or of the people of the United Kingdom and as a corollary thereto, *Civis Britannicus Sum, non Civis Canadensis.*

[1] (1608) 7 *Coke's Reports*, 6 *b*: 2 *Howell's State Trials*, 607.

When in 1640, the people of England determined to abolish the Court of Star-Chamber established in 1487 by the Act 3 Henry VII., cap. 1—the first "Judicial Committee of the Privy Council"—and also the Common Law appellate jurisdiction of the King-in-Council, the language of the repealing Act was carefully selected. The Court of Star Chamber was "clearly and absolutely dissolved" for all purposes; but not so the jurisdiction of the King and his Privy Council. What was taken away was their authority to determine as to the property "of any of the Subjects of this Kingdom"—that is the Kingdom of England.

This "Star-Chamber Act," (1640), 17 Car. I, c. 10, did not interfere with the existing right outside of England; whence it was that the appellate jurisdiction was exercised in the Channel Islands and later in the American Colonies including Canada. This has sometimes, absurdly enough, been represented as something tyranically imposed on the people of the Colonies, instead of what it really was, a continuance in favour of these people of their Common Law rights as British subjects in a British country.

When Canadian statesmen framed the written Constitution which they desired for the proposed Kingdom of Canada, they purposely omitted to take for Canada the power to change the Constitution. At that time the right to appeal to the Foot of the Throne existed, and the "Fathers of Confederation" did not take power for Canada to take it away. Consequently it has remained.

But there never has been a time, when Canada wished for a change in her Constitution, that the change was not made immediately and without question or discussion; and there never was a time when if Canada wished the right of appeal to the King-in-Council to be abolished that it would not have been abolished immediately and without question or discussion.

At many times, the question of appeals to the Privy Council has been discussed in Canada, especially since she has sloughed off her "Colonial" status and taken her position as a self-governing State, one of the component parts of the New British Empire. No change has been agreed upon; but that it was a Canadian and not an Imperial question has long been obvious. As the English Star-Chamber Act of 1640 forbade appeals from England only without interfering with any other part of his Empire, so it came to be felt that any and every self-governing part of the Empire should decide for itself whether the King should be shorn of his Common Law

power, the subject should be deprived of his Common Law right, in that part of the Empire.

When the Imperial Conference met in 1926, it was thought well to express this in clear terms, and accordingly we find it said:

> "Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."

Whether there ever will be an abolition of the right to appeal to the Privy Council from Canada is doubtful, but the question should be discussed upon its merits—it is to be hoped not in the heat of political controversy or as a test of loyalty.

William Renwick Riddell.

Osgoode Hall, Toronto.

An Address

BY

THE HONOURABLE

WILLIAM RENWICK RIDDELL

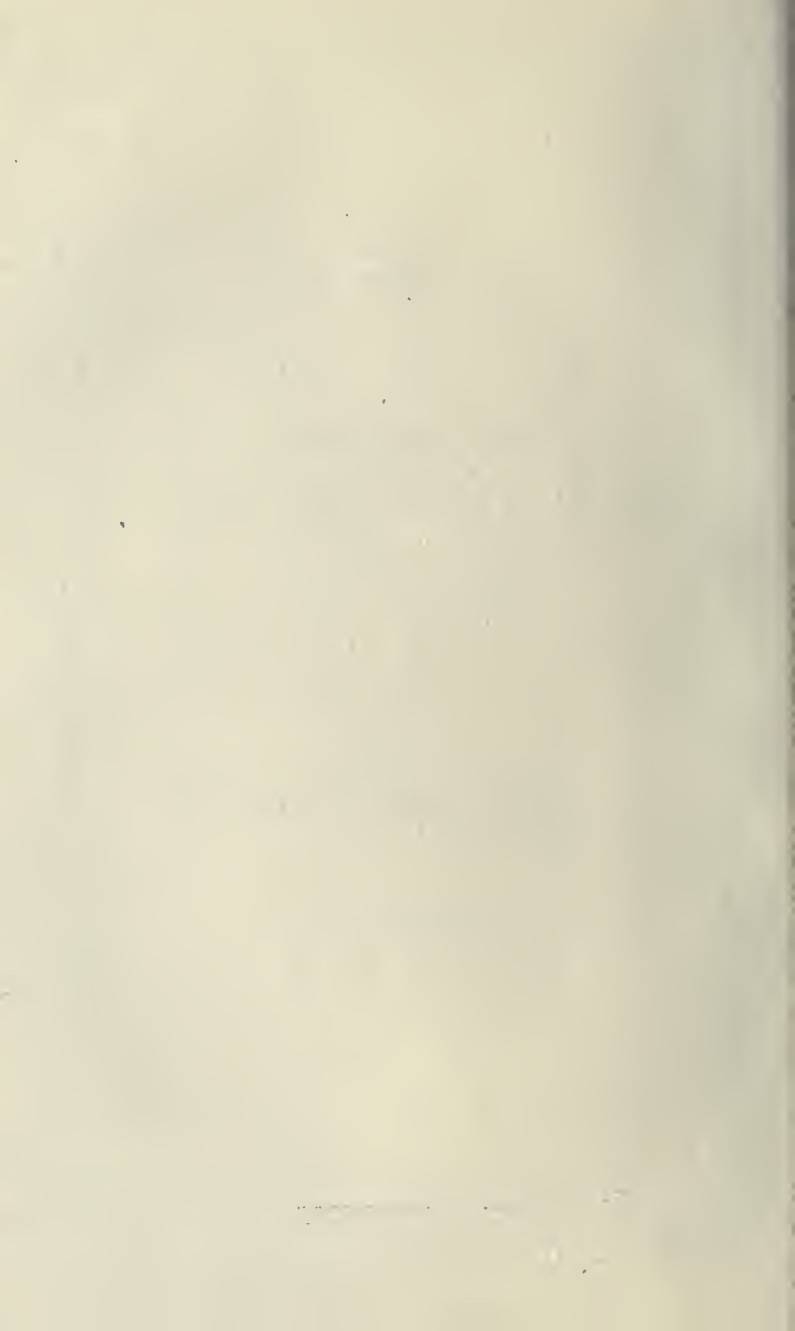
LL.D., D.C.L., F.R.S.C., Etc.

Justice of Appeal, Ontario

TO

THE EMPIRE CLUB OF CANADA

March 17th, 1927



APPEALS TO THE PRIVY COUNCIL

AN ADDRESS BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., D.C.L., F.R.S.C., etc.
JUSTICE OF APPEAL, ONTARIO.

(Links of Empire Series)

17th March, 1927.

The President introduced the learned lecturer who said:—I have been asked to give the Empire Club some account of the Privy Council, especially in relation to appeals from "the British Dominions beyond the Seas"—with a reference to some Canadian cases of interest or importance.

So much has recently been printed by certain sections of our Press, that it may be well to say something historically of the Privy Council and the theory and basis of its appellate jurisdiction.

It is to be remembered that in all but one (1)* of the Provinces of Canada, the foundation of all the law is the Common Law of England—and in all the Provinces, the Constitutional Law is based upon that of England.

From time immemorial in England it was the duty of the King to see to it that his subjects suffered no injustice from his Judges, or others. Whatever may have been the primeval practice, when history begins it was already impossible for the King to perform this duty and make the investigations necessary in person—he could not sit in the gates and judge his people.

He selected such of his subjects as he chose, and so formed his Council. With this Council he generally sat and, in form at least, considered with them affairs of State including appeals made to him of injustice done by Courts or other agency. He might, indeed, proceed on his own views of the merits and requirements of the case and sometimes did so.

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* For notes to the text of this address see pp. 27-31.

This, the original King's Council, has often been called the Privy Council; but recent investigations seem to show that the appellation "Privy Council" is not proper until well within Tudor times. (2)

This Council had a varied history: We find it sometimes almost all-powerful, in the time of the last Lancastrian King it almost suffered shipwreck:—"owing to the incapacity of Henry VI. . . . Suffolk used his influence over the weak mind of the King much in the same way as Northumberland did a century later. . . . in 1550 when Edward VI was twelve years old."

However, it is reasonably certain that both Edward IV and Richard III had fairly efficient Councils.

It must not be supposed that this Council—the Magnum Consilium, Consilium Regium—had no other than judicial or *quasi*-judicial duties. It was a part of the King's Household and was to advise the King on all matters administrative, legislative, judicial, national and international.

In matters judicial, as a rule, the Judges, or some of them, were consulted as also were the King's Attorney and Serjeants at Law: they, however, acted or advised only and did not decide.

When the king was at Westminster, the Council sat at the White Hall, south-west of Westminster Hall, or the Starred Chamber, the *Camera Stellata*, in the Palace of Westminster. (3)

In the Council the King had his Court—Rex habet curiam suam in consilio suo—and from its sitting in the Starred Chamber it was not infrequently called the Court of Star Chamber or simply the Star Chamber.

The first Tudor King, Henry VII, made a very important change: he had an Act passed, the Act (1486) 3 Henry VII, Cap. 1, which in the copy from the Rolls of Parliament printed in the *Statutes of the Realm* is intituled "Pro Camera Stellata." (4)

This is "An Acte geving the Court of Star Chamber authority to punnysshe dyvers mysdemeanors"—it gave authority to "the Chanceller and Tresorer of England . . . and Kepyr of the Kynges Pryvye Seall

or too of theym, calling to hym a Bisshopp and a temporall Lord of the Kynges Most Honorable Councell and the too chyeff Justices of the Kynges Benche and, Comyn Place . . . or other too Chyeff Justices in their absence. . ", to call before them by Writ or Privy Seal anyone charged by Bill or Information of "eny mysbehavyng" in the way of "unlawful mayntenannces, gevying of lyveres. . . . embraciaries . . . ontrue demeanynges of Shrevys in makyng of panelles and other ontrewe retournes . . . takyng of money by jurreys . . . great riots and unlawful assemblez . . . " The "misdoers" could be punished by this Court "after their demerites after the forme and effecte of Statutes . . . in like maner and forme as . . . if they were thereof convycte after the due ordre of the lawe . . ."

The "mysbehavyng afore rehersed", in which the Court of Star Chamber was thus given jurisdiction, shows wherein consisted much of jurisdiction previously exercised by the King's Council—interference with and intimation of the regular Courts of Justice by noblemen in favor of their retainers, actual or pretended, partial conduct of Sheriffs, bribery of juries, riots in or near Courts, etc., whereby "the Polyce and good rule of the realm is almost subdued, and for the nowne punyshement of this inconvenience and by occasion of the premyssis nothyng or litell may be found by enquerry, wherby the Lawes of the land in execucion may take litell effecte to the encies of murdres, roberies, perjuries and unsuerties of all men lyvyng and losses of their landes and goodes."

That there was frequent interference with the Courts of Justice by "great men" and that often the best assurance for the safety of life, limb and property was to be found in some powerful nobleman's protection evidenced by "lyveres, signs and tokyns," is all too certain: the regularising of a body with jurisdiction to deal with abuses of such kind,—forming a Court with Writs and other regular process—was undoubtedly a sane and laudable measure. And had this Court of Star Chamber kept to its original functions it would

have earned respect, and the infamous connotation now attached to the name would not have arisen.

It was useful; as is shown by extant records, it functioned as a settled Court of Justice and did good work in its proper field. (5) Indeed, Hallam long ago said of it: "It might in a certain sense be called a Committee of that body" (*i.e.* of the Privy Council), consequently it may with little impropriety be considered the original "Judicial Committee of the Privy Council." (6)

While the Court of Star Chamber sat at fairly short intervals when occasion required, the King's Council was not wholly effete; it continued to sit from time to time independently of the Court of the Star Chamber. Apparently it was in the reign of Henry VIII that the Great Council, the Magnum Consilium, ceased to be summoned : an inner ring grew up in the Great Council in that reign which is properly called the "Privy Council" —a name which still continues—this was properly an executive and administrative body.

In the reign of Edward VI in 1550 the authority of this Privy Council was by the influence and machinations of the Duke of Northumberland much impaired: but it regained and increased its power and importance in the succeeding reigns.

In the times of the first Stuart Kings, James I and Charles I, the executive Privy Council and the judicial Star Chamber were practically identical—their excesses are historical. At length the people of England could stand the tyranny no longer; and in 1640 was passed the famous Act, 16 Car. I, cap. 10, entituled : An Act for the Regulating of the Privy Council and for taking away the Court commonly called the Star Chamber."

This Act by section 3, directed that the Court commonly called the Star Chamber should from and after August 1, 1641, be abolished and its power and authority absolutely revoked and made void. So that the Star Chamber, what may be called the original of the "Judicial Committee of the Privy Council" erected in 1487 by Statute of 3 Hen. VII, cap. 1, came to an end. Section 5 of the Act of 1640 provided that "neither his Majesty

nor his Privy Council have or ought to have any jurisdiction, power or authority . . . to examine or draw into question, determine or dispose of the Lands, Tenements, Hereditaments, Goods or Chattels of any of the Subjects of this Kingdom, but that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary Course of Law." Section 3 having abolished the only Court of Privy Councillors, there has been no Court in the Privy Council since—either of the Privy Council or of any of the Committees: There are no longer Writs of Subpoena, no Privy Seals calling anyone before it. The members of the Judicial Committee do not, to-day, sit as Judges nor are they robed as Judges—they call themselves a Board; they sit as Committeemen to advise, not as Judges to decide, and are garbed as ordinary gentlemen. But the prohibition in section 5 is against meddling with the property of "Subjects of this Kingdom" (7) and does not extend to the subjects of his Majesty, not of that Kingdom—the right to take grievances to the foot of the throne was taken away from Englishmen in the Kingdom of England but continued for all subjects outside the Kingdom, *e.g.*, the Channel Islands. The Channel Island sent the first appeals in the 17th Century: but early in the 18th Century, appeals began to come in to the King in considerable numbers from the Colonial Courts of the American Colonies, and these kept up until the eve of the Revolution.

Before Confederation, there were appeals to the Sovereign from all the Colonies which were united in the Dominion of Canada in 1867: and when the compact was made for these Colonies by their representatives, which was put in legal and binding form by The British North America Act of 1867, it was decided *sub silentio* to leave to Canadians that right intact. If and when Canadians decide through their Parliament that the right should be taken away, it requires but a representation of that kind to effect the abolition without delay, trouble or expense. For reasons which seemed to them

good, the Canadians who framed the written Constitution of Canada considered it proper that the new Dominion could not change its Constitution by its own legislation; but a request for a change has always been immediately acceded to without question or debate. (8) I shall return to this subject later.

All applications by way of appeal are technically to the King—"at the Foot of the Throne"—but for centuries the Sovereign has not personally interfered; the applications in the form of Petitions go to the Privy Council.

Originally dealt with by the whole Council, a system of Committees gradually developed. At first these Committees, often with sub-Committees, were temporary and *pro hâc vice*: but in 1660, a quasi-permanent Committee was formed to deal with the American Colonies: it was to sit twice a week "to receive, heare, examine, and deliberate upon any Petitions, propositions, memorialls or other Addresses which shalbee presented or brought in by any person or persons concerninge the Plantations, as well in the Continent of America: And from tyme to tyme make their Report to this Board of their proceedings." This was in effect a Standing Committee: "it assumed entire control of Trade and Plantation affairs in 1675, a control which it exercised until 1696" (9) This Committee was officially known as "The Right Honourable the Lords of the Committee for Trade and Plantations."

After the Revolution of 1688, the appeals increasing, it was in 1691 ordered "That all appeals be heard as formerly by the Committee who are to report the matters so heard by them and with their opinion thereon to the King in Council."

It is not necessary here to give a full account of changes made in detail: When Canada became British *de facto* in 1759-60, the system was in full operation. A Petition complaining of a Colonial Court was drawn up addressed to the King: this was read, or at least presented to the Privy Council, and by the Privy Council referred to a Standing Committee generally called "The

Committee for Trade and Plantations" or, shortly, "The Board of Trade." This Committee, if a question of law was involved, generally called for the advice of the Law Officers of the Crown, *i.e.*, the Attorney-General and Solicitor-General in the Common Law, and the Advocate-General in the Civil and Admiralty Law. If necessary the parties were heard: the Committee decided the question and reported to the Privy Council, whereupon an Order in Council was made.

The constitution of the Committee to pass upon appeals—the "Judicial Committee of the Privy Council" —was fixed by Statute in 1833, 3, 4 William IV, Cap. 41: before that Statute Members of the Committee were all inhabitants of the British Isles; but it was provided by the Act that two ex-Judges from India or beyond the Seas might be added: in 1876, by the Act 39, 40 Vict., Cap 59, s. 14(Imp.) a Provision was made for four Lords of Appeal in Ordinary who, if Privy Councillors, became members of the Judicial Committee, while in 1895 by the Act, 58, 59 Vict., Cap. 44 (Imp.) it was provided that any Judge or ex-Judge of the Supreme Court of Canada or any Superior Court in any Province of Canada, of the Provinces of Australia, Tasmania, New Zealand, Cape of Good Hope or Natal who should be a Privy Councillor should also be a member of the Judicial Committee.

In 1908 by the Act, 8 Edw. VII, Cap. 51, this provision was extended to Judges and ex-Judges of any High Court in India, the Transvaal and Orange River Colony —and in 1913 by the Act, 3, 4 Geo. V., Cap. 21, two further Lords of Appeal were added—and it was provided that the maximum number of Judges or ex-Judges from Canada, etc., was to be seven instead of five as fixed by the Act in 1895.

We must always distinguish between the Privy Council and the Judicial Committee of the Privy Council. The Privy Council is composed of some four hundred persons, members of the existing and past British Governments, the Archbishops, the Bishop of London, many Peers, some Dominion Statesmen and

Judges, and many persons who have been given the rank in appreciation of political, literary or scientific merit or services. They have all the title "Right Honourable." The Privy Council as a whole is rarely called; the former functions of the Privy Council are practically all performed by the Cabinet. We have a *faienant* Privy Council in Canada of much the same kind. The Judicial Committee, however, so far as Canada is concerned, consists of the Presidents of the Council, present and past; the Lords Chancellors, present and past; all the Judges; six Lords of Appeal, and not more than seven Judges or ex-Judges from India or the Dominions. Four Canadians, Members of the Privy Council, have the proper qualifications and two have sat in the Judicial Committee.

In an Address I made in 1909, I gave the following account of the jurisdiction and practice of this Committee:

"At the present time this Judicial Committee hears appeals in English cases only in Ecclesiastical matters. Upon every appeal of this character, at least three Bishops must sit as Assessors, under the provisions of a rule made in 1876. The ultimate appeal in other matters goes to the House of Lords. In Scottish and Irish matters the Committee does not exercise any appellate jurisdiction whatever. But from Courts all over the world, wherever the map is marked with red, come appeals. In Europe, from the Channel Islands, the Isle of Man, Gibralter and Malta as well as from Cyprus; in Africa from the Cape of Good Hope, Natal, the Transvaal, the former Free States, the Gold Coast, Sierra Leone, Zululand, Rhodesia, St. Helena, Lagos, Basutoland, Bechuanaland, the Falkland Islands, Mauritius, Gambia, Griqualand and other "lands" more or less unknown: in Asia from Bombay, Calcutta, Madras, the N.W. Territory, Aden, Assam, Beluchistan, Burmah, Upper and Lower Oudh, Punjaub, Ceylon, Mauritius, Hong Kong, Borneo, Labuan; in Australasia, Australia, New Guinea, Fiji, New Zealand, Norfolk and Pitcairn Islands and in America from Canada and

her Provinces—Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta, British Columbia, and from Newfoundland, Bermuda, the Bahamas, Jamaica, British Honduras and from Guiana in South America and many another British Island lying in the Caribbean Sea.

"The laws of a score of self governing communities must be interpreted, the English Common Law of the English-speaking colonies modified by local Statutes; in Quebec the Coutume de Paris with similar modification; the many varying and various laws of the many East Indian peoples, the Roman Dutch law of the South of Africa, the still more complex law of Malta—all these and more come before that Assembly of Jurists.

"I have said more than once that this body is not a Court, it is a Committee appointed to consider certain legal questions and report thereon to His Majesty's Privy Council. There is no instance in which all those who are qualified actually sit ; I have never seen more than seven—nor less than four; three exclusive of the Lord President constitute a quorum. These Privy Councillors are clothed as ordinary English gentlemen without official garb of any kind, although Counsel appearing before them must wear the black gown, silk or stuff, according—as he is or is not a King's Counsel, bands of white lawn and wig of horse hair. In Ontario, we wear all these except the wig, but I found that one becomes accustomed to the wig very quickly and very easily. I presume it strikes the Englishman with the same sense of incongruity when he enters our Courts and sees Judges and Counsel with gown and white bands but without wig as it does an Ontarian when he sees certain American Judges sitting in Court with a gown but also with a black necktie.

"Being a Committee and not a Court, the decision is a report, no dissent is expressed—one of the Committee gives the opinion of the Committee—and no one knows in any case how the members of the Committee were divided or if they were divided. While the House of Lords is bound by its own judgments, such is not the

case with the Judicial Committee—the Committee may and sometimes does decline to follow the law as laid down in previous cases. Their Lordships consider themselves at liberty and, indeed, bound to examine the reasons upon which a previous decision was arrived at, and if they find themselves forced to dissent from those reasons, to decide upon their own view of the law.

"The Committee sits in an old building on the north side of Downing Street, Westminster, not far from the Abbey and the Parliament Buildings. The Board is on the floor toward the middle of the room; the Counsel upon a raised platform to the east side, communicating with the robing rooms, etc. The platform is accommodated with a small reading desk upon which Counsel addressing the Board may rest his books and papers—all the proceedings in the Courts below are in printed form as also the points relied upon by each side. Whenever a case cited is not thoroughly well-known the report is brought at once from the book cases lining the walls of the room; and each point as a rule is thoroughly threshed out at the time by Court and Counsel, so that even if judgment should be reserved, Counsel generally know pretty well what the result will be.

"In addition to appeals heard, there are a great many petitions for leave to appeal. These are generally disposed of on the spot—I have seen four in one short forenoon.

" And what kind of cases come before them ? I take up a June number of the Law Reports, Appeal Cases, and find the following: an appeal from New South Wales upon the construction of a Will; from the Supreme Court of Nova Scotia as to the interpretation of a contract involving millions; from the Supreme Court of Hong-Kong, China, as to whether certain alleged perjurers could be committed to prison without certain formalities; from the Straits Settlements as to the effect of an Ordinance forbidding the importation of chandu; from the Supreme Court of Canada as to whether the Grand Trunk Railway must carry passengers third-class between Toronto and Montreal for one

penny a mile as provided by the Statute of 1852; from the Court of King's Bench, Quebec, as to the right of a corporation owning certain patents to enforce the provision in a lease of machines built on the patents, that no other machines should be used by the lessee; from the High Court of Australia in respect of the construction of a Customs' Act; from the Cape of Good Hope on the construction of a Will; from the High Court of Australia as to the rights of a civil servant to compensation on retirement; from the Supreme Court of Canada as to the admissibility of a railway map upon a trial and the effect of its admission; from the Straits Settlements (the Settlement of Penang) upon a bill of lading; from the Supreme Court of Ceylon as to the illegitimacy of children procreated in adultery (this depends upon the Roman-Dutch law, the common law of Ceylon.)

"I have not said anything about the cases from India, as these appear in another series and not in the Appeal Cases. It may, however, be of interest to mention some of these cases reported in 1906, (the report I have at hand).

"Appeal from the Judicial Commissioner of Oudh as to the power of a Hindo widow to execute deed to her son-in-law under the custom amongst certain Chattris; from the High Court at Allahabad as to the effect of words "malik wa khud ikhtiyar" in a deed of gift; from the High Court of Bengal as to whether a plaint must be stamped; from the Judicial Commissioner of the Central Province as to the construction of a foreclosure decree; from the Chief Court of Lower Burma as to Buddhist marriage and the status of "monkey wife"; from the High Court of Bengal whether the English law as to champerty and maintenance is part of the law of India; and again as to the Mahomedan law of gift under apprehension of death (our donatio mortis causa,) and again as to gifts to daughters and their sons; from the Chief Court of the Punjaub in respect of a partition of the property of a Hindu Joint family; from the Supreme Court of Mauritius as to certain wakf properties in Port Louis bought for the Mahomedan

congregation of the Soonee School, being composed of Indian immigrants from Cutch, Hallal and Surat, the Hallaye and Soortee classes quarreling with the Cutchees; from Lucknow as to family records proving pedigree, and the rights of a sister's son; from the High Court at Madras as to the rights of the Nadar or Shanar caste to worship in the temple of Shiva at Kamudi; from the High Court at Bengal again as to jhum rights, *i.e.*, rights in land in wild and jungly tracts on the frontier which were never brought under settlement by the Revenue authorities but were left waste to be occupied by 'squatters'; from the Chief Court of the Punjuab in a suit by Hindu minors to set aside their father's deed of sale on the ground that the lands were ancestral.

"With all these varied forms of action, all the different systems of law to be considered—Common Law, civil law, Mahomedan law, Roman-Dutch law, and all the bewildering customs of India, there is no delay in giving judgment. The case is a rare one in which the appellant does not know his fate within a few weeks at the outside. A case may start in Toronto to-day and be finally decided by the Privy Council in a year or eighteen months from now. No delay is tolerated—cases do not dally along year after year by arrangement of Counsel—an appeal is decided promptly. The great eminence of their Lordships—their unquestioned ability and impartiality—make their decisions worthy of all respect; and they are respected."

It is now time to turn to cases from Canada: and I give a few very early and one more modern:

When in September, 1759, after Wolfe's victory, Quebec was surrendered, the surrender carried only the City and a non-defined territory in its immediate vicinity—de Ramazey, the French Commander, was only "Commandant Les Hautes et Basse Ville de Quebec." De Vaudreuil in Montreal was "Gouverneur et Lieutenant General pour Le Roy en Canada"; and when he surrendered Montreal in September, 1760, all Canada went with it. (11)

But until the Treaty of Paris, 1763, (12) the country was held by the sword only and the rule was Military: it was not until 1764 that the Civil Courts came into existence—the interval from the conquest is generally called La Régime Militaire or Le Régne Militaire.

But even before the creation of the Civil Courts, the people of Canada were subjects of the King, while British subjects who came to Canada did not lose their status, and both classes were entitled to his protection.

The first case, after the conquest of Canada, of an appeal to the Privy Council arising out of transactions in Quebec was not an appeal from a Quebec Court, but from a Court in Nova Scotia which was *de jure* as well as *de facto*, British territory.

Curiously enough, it savoured of what we now call "boot-legging."

A snow (13) called the *Two Brothers*, built in the American Plantations, was owned by James and John Le Roy of Guernsey and commanded by Nicholas Le Mesurier of the same island. James Le Roy and James Major (also of Guernsey) loaded the snow in May, 1761, at Guernsey with Wine, Brandy, Cider and Stockings with other things for Quebec. Sailing from Guernsey, May 17, she arrived at "The Isle of Beck" (14) in the St. Lawrence, July 19; and was prevented from going higher by contrary winds. Major who acted as Supercargo, landed and went to Quebec to see General James Murray, the Governor of Quebec. On Major's request, Murray, July 29, gave written permission to land the cargo (the Brandy excepted) and carry it to Quebec. August 1, Major began to unload the snow, when Captain Burnett of H.M.S. *Rochester* seized the snow and cargo, notwithstanding Murray's permission. He took his prize to Halifax, Nova Scotia, out of Murray's jurisdiction and libelled snow and cargo in the Vice-Admiralty there. Notwithstanding the contentions of law and fact of Captain Le Mesurier and Major, the Judge in Admiralty at Halifax, September 23, 1761, decreed the ship forfeited and ordered a public sale. Snow and cargo

were sold, the net proceeds being £3178:12:7¼, Nova Scotia Currency (15) (say $12,714.50). Major for himself and James LeRoy and Le Mesuirier for the owners of the Ship, filed a Petition to the King in Council, June 2, 1762: this was referred to a Judicial Committee who reported, March 12, 1763, and March 16, 1763, the sentence was reversed and ship and cargo ordered to be restored.

The ultimate cause of this seizure was the same as the ultimate cause of the American Revolution itself. The former Empire of England (the Old British Empire) was built upon the model of the Roman Empire—the Colonies and Provinces were not considered to exist for the sake of the Colonists or Provincials but for the sake of the Mother Country—a theory wholly vanished in the New British Empire which rose on the ruins of the Old which was irretrievably destroyed by the American Revolution leaving no one to mourn but the reactionary and the *laudator temporis acti.*

England was not alone in this view—the other European Powers acted on the same principle and kept the trade of their overseas possessions for themselves.

The first Statute of importance in this connection is that passed by the Commonwealth, October 9, 1651, the famous Act of Navigation. This was chiefly aimed at Holland and was an Act really intended to improve the condition of English Shipping as it was said that out of forty ships engaged in the West-India trade, thirty-eight were Dutch. (16). It forbade the importation of any goods or commodities, the growth, production, or manufacture of Asia, Africa or America into England, Ireland or any English Plantation, etc., except in ships of England or her Plantations—a special provision being made for goods, the growth, etc., of Europe. Of course, this Act lost the force of law on the return of the Monarchy. But very shortly after the Restoration, in 1660, the matter was taken up and in that year was passed what is usually called "The Act of Navigation" to distinguish it from other Acts with the same object and policy: it is (1660) 12 Car. 2, Cap. 18; and its full

name is, An Act for the Encouraging and Increasing of Shipping and Navigation. The provisions and much of the language of this Act are the same as those of the Act of 1651. This was supplemented three years afterwards by (1663) 15 Car. 2, Cap. 7, *An Act for the Encouragement of Trade.* This Act says bluntly, sec. 5.

"V. And in regard his Majesty's Plantations beyond the Seas are inhabited and peopled by his subjects of this his Kingdom of England; for the maintaining a greater Correspondence and Kindness between them, and keeping them in a firmer Dependence upon it, and rendring them yet more beneficial and advantageous unto it in the further Imployment and Increase of English Shipping and Seamen, Vent of English Woollen and other Manufactures and Commodities, rendring the Navigation to and from the same more safe and cheap, and making this Kingdom a Staple, not only of the Commodities of those Plantations, but also of the Commodities of other Countries and Places, for the supplying of them; and it being the Usage of other nations to keep their Plantations Trade to themselves."

This Act by sec. 6 enacted that "no Commodity of the Growth, Production or Manufacture of Europe shall be imported in any Land, Island, Plantation, Colony, Territory or Place to His Majesty belonging . . . in Asia, Africa or America . ... but what shall be laden and shipped . . . in English built Shipping . . . under Penalty of the Loss of all such Commodities . . . and . . . of the Ship . . . in which they are imported."

Immediately after passing The Act of Navigation the Lord Admiral was ordered to give it in charge to all the Commanders of the King's Ships specially to attend to the execution of this Act. As occasions called for it, similar orders were given to the rest of the King's Officers. (17)

The Act of 1696, 7, 8, Will. i. e. and Mar., Cap. 22, by sec. 2, forbade the importation of any goods into His Majesty's Colonies or Plantations unless the "built" was of England or Ireland or the Colonies or Plantations but in

the latter case the Ship must be wholly owned by "the People thereof or any of them."

It was under these Acts that the seizure was made (18) —it was claimed that the goods were "of the growth production or manufacture of Europe" and that was admitted: it was not Plantation owned and that was admitted—then it was said that the law had been broken by the importation of these goods into a place at which such importation was prohibited.

The argument of the appellants in the Committee was "that the above Acts do not prohibit the importation of the growth, production or manufacture of Europe, in Ships properly Navagated into any of His Majesty's Dominions subdued by Conquest—for that during the present War Canada is not within the meaning of the Statutes, His Majesty not being restrained to rule it by any particular Laws, but according to his pleasure, and that the Government of Canada had, from its conquest, been under the terms of Capitulation by such Proclamations, Military Rules, Orders, and Regulations as His Majesty's Governor there had thought proper for the Service of His Majesty. That the General not only permitted the Importation of the Snow's Cargo (Brandys excepted) but the Sale thereof, and that if it had been His Majestys Pleasure that the Acts of Trade should extend to this new Conquest, the General would have been sworn to the observation thereof."

It was claimed that there was no breaking of bulk, no importation, until the permission of the Governor had been obtained.

What is meant by "Colony" or "plantation" in the legislation had, before the Treaty of Utrecht, 1713, been discussed in the case of Newfoundland: the Solicitor General, Sir John Hawles, (1695-1792), said that he would have thought Newfoundland was neither a Colony nor a Plantation of the King but for certain Statutes of the times of Charles II which expressly reckoned it among His Majesty's Plantations. (19)

Even taking the words "Territory or Place" as *ejusdem generis* with "Plantation, Colony", the Judge of

the Vice Admiralty Court at Halifax cannot be blamed for finding that Quebec was a forbidden place for importing such goods in such a vessel.

The Privy Council, however, reversed the decision—Canada was not within the meaning of the words employed in the legislation, and did not become so until the formal Cession by the Treaty of Paris, 1763. (20).

The first appeal from a Quebec Court to the King-in-Council was brought in 1763 by William Johnstone, Captain-Lieutenant in H.M. Royal Regiment of Artillery, then in Quebec. Johnstone had bought certain Bills of Exchange from Sieur Houdin of Quebec; they were dishonored, and Johnstone sued Houdin, recovering in the Court of first instance; but on appeal to the Military Court at Quebec, that Court, August 22, 1762, reversed the trial Court : Johnstone then appealed to the King-in-Council.

Thoroughly to understand this case it will be necessary to explain the system of Courts. It is, of course, perfectly clear law that on the conquest of territory it becomes, *ipso facto*, under the sole governance of the King, and so continues until Parliament passes legislation relating to it—the King being part of the Parliament. (21.) Consequently, it rests with the King, or in practice, with his General or other representative, to erect such tribunals as seem to him proper. Accordingly, shortly after the surrender of Quebec, Murray, the British Commander, erected Courts of Justice for the maintenance of good order in the part of Canada under his control. After the Capitulation of Montreal in 1760, which carried with it the remainder of Canada, Amherst, the Commander-in-Chief, charged the Governors, whom he had placed over Montreal and Three Rivers, to authorize the Officers commanding the Militia in each parish or district to hear all complaints and settle them if he could, with all due justice and equity ; if he could not, then he was to send the parties to the Officer Commanding the Troops in his District. Murray in his part of the conquered country, October 31st, 1760, erected a Court of his own. Until the establishment of

Civil Government, effective in 1764, there were Courts of first instance, presided over by local Militia Officers, generally French-Canadian, with an appeal to a Military Court of British officers. Naturally, there was an appeal from this Court to His Majesty, Canada not being in the Kingdom of England.

When the time came for the institution of Civil Courts —for, of course, all these Courts were Military Courts— Murray by an Ordinance of September 17, 1764 (22), created a Court of King's Bench with full civil and criminal jurisdiction with an appeal to the Governor and Council in cases above £300, and to the King and Council in cases of the value of £500 sterling or upwards.

An Inferior Court was also erected by this Ordinance with similar appeals in cases where the said sums were in dispute.

And from the Courts of Quebec an appeal has always lain to the King-in-Council in proper cases. It is true that in the troublous times before the Canada or Constitutional Act of 1791, there was a movement looking to a different appellate tribunal. In a numerously signed Petition to the King from Quebec, 1783-4, one of the requests was "That Appeals from the Courts of Justice in this Province to the Crown be made to a Board of Council or Court of Appeals, composed of the Right Honourable the Lord Chancellor and the Judges of the Courts of Westminster Hall". The answer was that "This Article appears to cast a reflection wholly unmerited on the decisions of the Privy Council, and the proposal is certainly incompatible with the other duties of the persons named." (23)

Another case may be briefly mentioned :

In 1759, Johnstone bought of Anthony Peter Houdin, merchant, of Quebec, a Bill of Exchange for 60,000 livres due in 1761. He transferred it to John Ord, Jacob Rowe and William James, who sued in the King's Bench and recovered, August 19, 1765. An appeal was taken to the Governor and Council o. Quebec, and it was successful April 18, 1766. The plaintiffs appealed to the King-in-Council, but did not prosecute the

appeal; and it was dismissed for want of prosecution July 24, 1777.

The next case I shall mention convulsed early British Canada :

Thomas Walker, the hero and victim, was a merchant and a Justice of the Peace—an Englishman by birth but, from a long residence in Boston, infected with New England sentiments. In Montreal, in 1764, there was a quarrel between the Military and the Magistrates in respect of billetting, in which, be it said, the Magistrates seem to have been in the right. Walker committed Captain Payne to gaol, but he was delivered on *habeas corpus*. On December, 1764, when Walker was at supper, several persons armed and with their faces blacked or covered with crape, broke into his room and made "a violent assault and assassination" on him "leaving him for dead"—his ear was cut off and he received fifty-two contusions.

Several officers and soldiers of the 28th Regiment "were taken into Custody on the strongest presumptions of being Principals in this atrocious Act : certain Officers and Soldiers of Your Majesty's Twenty-Eighth Regiment, then quartered at Montreal, broke open the Jail, and in Defiance of all Law, set the Prisoners at Liberty, publickly threatening Death to all Persons who should make any further Enquiry into that affair."

The London merchants interested in Quebec, complaining that the Governor, Murray, and Lieutenant-Governor, Burton, had not done their full duty, brought the matter to the attention of the Privy Council, April 29, 1765, who, May 15, referred it to the Board of Trade who, through the Privy Council, called for a report from Governor Murray. Murray reported; and another Petition, this time from the British Merchants in Quebec, was lodged and all were referred to the Committee.

It appeared that the accused persons had been again arrested—that a Commission of Oyer and Terminer had been regularly issued for the District of Montreal but recalled, so that they could not be tried in Montreal. Then a Commission of Oyer and Terminer was issued

for the District of Quebec with a jury from the whole Province; and it was proposed to indict them there. The 28th had been removed from Montreal to Quebec; and, as was alleged, "in consequence thereof, not only from the great expense of travelling near two hundred Miles from home, but from the danger apprehended by the said Walker and his Witnesses on the Road of being way laid by the Soldiers of the said Twenty-Eighth Regiment, and in the Town of Quebec, surrounded by that Regiment then removed from Montreal, and Quartered at Quebec, He, the said Walker, and his Witnesses could not venture to attend the Trial of the said supposed Offenders there, whereby their punishment has been eluded."

Then a Special Commission of Oyer and Terminer was issued for a Court to sit at Three Rivers and try the offences alleged to have been committed at Montreal, by a Jury summoned from the whole Province at large.

A True Bill was found against one person for the assault on Walker, and five True Bills for the riot, prison breach and rescue. For want of witnesses, the former was acquitted, as were four of the latter, while one was found guilty of the riot only.

No wonder Their Lordships of the Committee were of "opinion that a new Commission (if it may be legally done) should be issued in such a manner as Your Majesty's Attorney and Solicitor General shall advise, for the Trial of the said supposed Offenders at Montreal; but as this matter is proper for the consideration of Your Majesty's Servants of the Law, the Lords of the Committee have referred it to Your Majesty's Attorney and Solicitor General for their Opinion thereupon."

The Law Officers of the Crown—Charles Yorke, Attorney General, and William de Grey, Solicitor General, "being of opinion that the Governor of Quebec is fully authorized and impowered by His Commission and Instructions to appoint Courts of Oyer and Terminer within all the Districts of that Province, and that no Special Commission can be lawfully issued for a new Trial of those persons who had been indicted, tried

and acquitted at the said Court held at Trois Rivieres : but as there is reason to believe there are several other Principal Offenders, who have not yet been apprehended or brought to tryal, the Committee think it advisable for Your Majesty to require Your Governor or Commander in Chief of the Province of Quebec to exert himself in causing a diligent search to be made after such Persons, bringing them to trial in due course of Law in the Vicinage of the Place, where the Offence was committed, and by a Jury of the said Vicinage." (24)

This was ordered by the Privy Council, November 22, 1765. So far the records of the Privy Council : but the story does not end there. In November, 1766, George Magovock, a discharged soldier from the 28th Foot, gave information that M. St. Luc la Corne, Captain Campbell of the 27th, Captain Disney of the 44th, Lieutenant Evans of the 28th, Joseph Howard, a Merchant, and Captain Fraser, Deputy Paymaster General, had been present at the assault upon Walker. They were arrested in their bed, sent to Quebec, placed in the Common Gaol, bail being denied, then returned to Montreal for trial.

The Grand Jury threw out the first Bill—that against Lieutenant Evans : Walker broke out in open and passionate abuse of the Grand Jury and they declared that they would not proceed with the other Bills with such monstrous charges against them. Francis Maseres, the Attorney General, was willing that they should be discharged, but the Chief Justice, William Hay, refused. Next morning, True Bills were brought in against Captain Disney on two charges, but no Bill was found as to the others, Disney's trial being proceeded with and he, proving an alibi, was acquitted. The Chief Justice thought the alibi abundantly established, and approved of the verdict.

So ended the Walker Scandal. (25)

Let us now turn to more recent events. I do not go into the long line of cases in which the respective powers of Dominion and Provinces were determined—the list is not yet complete, but I shall mention one case of

dispute concerning territory between Dominion and Province.

It has a curious history. The original Province (or "Government") of Quebec formed by the Royal Proclamation of 1763, came as far west only as a line drawn from the southern end of Lake Nipissing to about the present Cornwall. By the Quebec Act of 1774, 14 George III, c. 83 (Imp.) the boundaries of the Province of Quebec went down along the River Ohio from the western boundary of Pennsylvania "to the banks of the Mississippi and Northward to the southern boundary of the Territory granted to the" Hudson Bay Company. In 1791, the enormous Province was divided into two Provinces, Upper Canada and Lower Canada, Upper Canada receiving all the territory west of a certain line.

By the British North America Act, 1867, the Province of Ontario was given the same limits as the former Province of Upper Canada. Not long afterwards, there arose a contention as to the western boundary : what was meant by "Northward" in the Quebec Act ? Did it mean due North or Northerly along the Mississippi? Ontario, through Sir Oliver Mowat, contended for the latter; the Dominion, through Sir John A. Macdonald, for the former, interpretation.

In 1870, by the Dominion Act, 35 Vic., Cap. 3, the Province of Manitoba was formed with its eastern boundary at the meridian of 96 degrees W.L. At once there was a movement in Ontario, the Government of that Province claiming that it went further west than 96 degrees W.L., although this had long been considered in fact about her western limit. Many communications passed between the Governments, but without result. Then, in 1876, an Act was passed (39 Vict., Cap. 21) extending the limits of Manitoba to the "westerly boundary of Ontario." The Dominion and Manitoba claimed that the westerly boundary was about six miles east of Port Arthur. Armed forces of the Provinces of Manitoba and Ontario took possession of Port Arthur, but the scandal was abated by an agreement to arbitrate, December 18th, 1883, by the Dominion and Province. Ontario named

William Buell Richards, Chief Justice of the Province, and when he became Chief Justice of Canada, his successor, Robert A. Harrison; the Dominion, Sir Francis Hincks, and the two Governments jointly, Sir Edward Thornton, the British Ambassador at Washington.

These Arbitrators made, August 3rd, 1878, a unanimous award in favour of the Ontario contention, which by this time was in reality limited to the generally recognized boundary. This was at once accepted by Ontario, but the Dominion refused to ratify the award. At length, in 1883, the two Provinces concerned agreed to submit to the Judicial Committee of the Privy Council three questions : (1) whether the award was binding; (2) if not, what was the true boundary, and (3) what legislation was necessary to make the decision effectual.

The Judicial Committee, August 11th, 1884, decided (1) in the absence of Dominion legislation the award was not binding; (2) the award laid down the boundary correctly, and (3) Imperial legislation was desirable (without saying it was necessary).

The Imperial Act (1889), 52 and 53 Vic., Cap. 28, carried the decision into effect, and ended the controversy.

The case of the Labrador territory has just been decided, and is too fresh to require more than this passing mention; it indicates, however, the great advantage of such a tribunal.

I have been asked to give my view of the advisability of retaining the Appeal to the Judicial Committee : and as it is not a political question I venture to do so. It is to be remembered that the House of Lords is the final Court of Appeal for part of the Empire, that is, the British Isles, England, Scotland and part of Ireland, and the Judicial Committee for the remainder. The logical thing would be to unite these two Appellate Courts in one Imperial Court of Appeal, one Grand Supreme Court of the Empire—and that I have urged upon more than one Lord Chancellor. This course was recommended by the Imperial Conference of 1911, but it was not adopted although the two bodies are largely identical

in composition. I have not been able to discover the objection—perhaps the innate conservatism of the British people has something to do with it. Until such a scheme is adopted I think that the Appeal should be retained. The value of the Judicial Committee in settling our Constitution everyone must admit : its value in determining private rights has not been universally admitted, but it has certainly been very considerable. It has moreover done much to keep the law of the whole Empire uniform. An important feature is the removal of the Judges from the local atmosphere. While the most important thing in any Court is that its decisions shall be right, it is not much less important that the litigants can see and must admit that they have had fair play from Judges without prejudice or prejudgment.

There is little disposition to accuse our Judges of intentional unfairness; but it is not unnatural for an unsuccessful suitor to think that local feeling and prejudice, past political and present social or religious associations, may have given their mind an unconscious bias and so deflected the judgment. I know of at least two cases now in litigation in which I am confident the losing party will not believe that he has had fair play by reason of such unconscious bias.

Is it not an immense advantage that the defeated litigant can have his case determined by Judges of the greatest ability, who have lived all their lives three thousand miles away, who have never known the local feeling and are innocent of any connection or association that could warp the judgment ?

Nor does it argue inferiority in Canadian Judges—an appeal lies from my Court to the Supreme Court of Canada : none of us feels himself branded as inferior on that account.

It is a matter upon which there may be an honest difference of opinion : and Canadians will settle the question as their best interests seem to demand. The question should be discussed on its merits and without heat. I earnestly protest against any view being made

a test of loyalty to British connection—such a test would brand my very dear and honored friend, the late Sir William Meredith, as a traitor.

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(1) Of course Quebec, the ultimate basis of whose civil law is, since 1776, the Civil Law of Rome—her criminal law is based on the English Common Law and has been since 1763.

(2) Those interested may consult Bentwick's *Privy Council Practice*, 1926; Dr. A. F. Pollard's admirable articles in *The English Historical Review*, vol. 37 (July, 1922) "Council, Star Chamber and Privy Council under the Tudors," pp. 337, *sqq*, and (October, 1922), pp. 516, *sqq*; also *The Law Quarterly Review*, vol. 39 (January, 1923) pp. 1, 2; Professor Baldwin's *King's Council, passim*; the two volumes published by the Selden Society edited by I. S. Leadam, *Select Cases ... in ... the Court of Star Chamber*. Introduction; Hallam and Gneist, *Constitutional History of England*, are to be read with caution. The language quoted just below is from the first-named article, p. 342.

(3) This Star Chamber, Camera Stellata, was a room in the Palace at Westminster (why it was so called in uncertain, perhaps from the decorations on the ceiling; we have "Sterred Chambre," "Sterrid Chambre," "Starryd Chamber," "Sterne-chamere," "Sterre Chambre," "Chambre of Starres.")

(4) It must be borne in mind that the titles even in the official *Statutes at Large* are no part of the Old Acts: "Acts of Parliament ... had no titles until the Sixteenth Century, and they have been invented for mediaeval legislation by subsequent editors": *37 Eng. Hist. Review*, p. 339 (n) 1.

(5) See the *Select Cases*, etc., mentioned in Note 1, *Supra*: Hudson: *Treatise of the Court of Star Chamber* (in Hargrave: *Collectanea Juridica*): Leadam: *Select Cases from the Court of Requests* (Selden Society); also the articles mentioned in Note 1, *supra*.

(6) Hallam: *The Constitutional History of England*, 4th edit., London, 1842, vol. 1, p. 53. The history of the Privy Council and Star Chamber has not been adequately written: I have given an outline sketch in my Address before the Missouri State Bar Association, September 17, 18, 1909: 1, *Essays and Addresses*.

(7) The language of sec. 5 of the Act is "of this Kingdom": Scotland was a separate Kingdom at the time and had its own Privy Council. Although England and Scotland were under the same King from the accession of James I in 1603, the Statute of 1 Jac. 1, c. 1, speaking of the "Union or rather ... Reuniting of two mighty famous and ancient Kingdoms ... of England and Scotland under one Imperial Crown"—yet they remained separate Kingdoms until May 1, 1707. In 1701, the Statute, 1 Ann St. 1, c. 14, provided for the appointment of Commissioners to arrange a Union with Scotland: and, in 1706, was passed the Act, 5 Ann. c. 8, which provided that from and after May 1, 1707, "The two Kingdoms of England and Scotland shall ... be united in one Kingdom by the name of Great Britain." Ireland remained a separate Kingdom until January 1, 1801, when the United Kingdon of Great Britain and Ireland came into existence under the British Act, 39, 40, George III, c. 67, and the Irish Act, 40 George III, c. 38. Ireland did not wholly escape the Privy Council till 1877, 40, 41, Vic. c. 37, s. 86 (Imp.) since which Statute the House of Lords has been the only final Court of Appeal for Ireland.

(8) In my *The Canadian Constitution in Form and in Fact*, the Blumenthal Lectures, Columbia University, 1923, I gave (pp. 8-10) eight instances of Constitutional change since 1867: and say, p. 3, "There is ... no difficulty in having an Amendment made if and when desired. An Address to the Sovereign is passed by both Houses of Parliament at Ottawa asking for the Amendment specified. According to the unwritten Constitution, the vote on the Address must be unanimous (or practically unanimous) or it will not be forwarded to London. When the Address is received by the Colonial Secretary in London, the desired Amendment to the B.N.A. Act is passed by the Imperial Parliament as of course and without debate. This is, in substance, simply legal validity to

an amendment agreed upon by the parties to the original contract, which they desire to amend."

(9) Professor C. M. Andrews has given an admirable account of the course of evolution of Committees of the Privy Council in his *British Committees, Commissions and Councils of Trade and Plantations*, Johns Hopkins University Studies, Baltimore, 1908.

(10) *Acts of the Privy Council of England; Colonial Series.* Vol 1, Preface, pp. XIII, XIV. This extraordinarily interesting Series has been edited with great diligence and ability by our own Dr. W. L. Grant (now of Upper Canada College) and Dr. James Munro. I wish to tender my humble tribute of sincere thanks to these editors.

(11) De Ramezay who surrendered Quebec, September 18, 1759, was only "Commandant Les Hautes et Basse Ville de Quebec" and could not surrender anything but Quebec and its surrounding territory : but de Vaudreuil who surrendered Montreal, September 8, 1760, was "Gouverneur et Lieutenant General pour Le Roy en Canada"; and he could and did surrender all Canada. See as to the Articles of Capitulation, Shortt and Doughty : *Documents relating to the Constitutional History of Canada*, 1759-1761, 2nd edition, Ottawa, The King's Printer, 1918, pp. 1, *sqq*: 7, *sqq*: my *Michigan Under British Rule*, Michigan Historical Commission, Lansing, 1926, pp. 9, 10, 386, 387 : Kingsford : *History of Canada*, Vol. IV, pp. 417-433.

(12) By the Treaty of Paris, February 10, 1763, by Article 4, the King of France ceded to "His . . . . Britannic Majesty in full right, Canada with all its dependencies," thereby making Canada British *de jure* as well as *de facto*. Shortt and Doughty, *op. cit.*, pp. 99, 115.

(13) While there was undoubtedly power given to General James Murray as Captain General and Governor-in-Chief of the Province of Quebec by his Commission, November 21, 1763, and his Instructions, December 7, 1763, by and with the Advice and Consent of the Council, "to constitute and appoint Courts of Judicature and Justice," it was thought prudent to await the lapse of the eighteen months allowed by Article 4 of the Treaty of Paris for the subjects of France to remove from the ceded territory, if so inclined. Accordingly the Civil Courts were constituted and appointed for the first time only on September 17, 1764, by an Ordinance "*Given by His Excellency the Honourable James Murray, Esq. . . .In Council*, at Quebec, the 17th of September, Anno Domini, 1764 . . ." See Shortt and Doughty: *op. cit.*, pp. 173, *sqq*: 181, *sqq*. 205, *sqq*.

(13) "Snow": "A small sailing-vessel resembling a brig, carrying a main and foremast and a supplementary trysail mast close behind the main mast : formerly employed as a warship." New English Dictionary, *sub-voc*—the latest instance of the word given is in 1860. The term was for years applied to King's vessels on Lake Ontario : many instances of its use will be found in the official despatches of Simcoe and other Governors. A snow was, *e.g.*, lost on the False Ducks.

(14) "Isle of Beck." Bic or L'Islet au Massacre, off the South shore of the St. Lawrence opposite the present Village of Bic, about 180 miles down the river from Quebec and a few miles above Rimouski. The legend is that some two centuries ago over two hundred Micmacs were there slaughtered by the Iroquois. The island is not large.

(15) Nova Scotia Currency, often called Halifax or Provincial Currency, and later Quebec Currency, was at this time considered worth 9/10 of sterling. The name Halifax Currency persisted in Canada until after the middle of the 19th Century, when the Currency disappeared with the name. In my boyhood it was still well-known and commonly used—the pound being $4, the shilling 20 cents. This must be distinguished from the "York Currency," long in vogue in parts of Canada, in which the pound was $2.50 and the shilling (York Shilling or "Yorker") was 12½ cents—eight to the dollar. For the "Yorker" the English sixpence was the coin.

(16) The Statutes of the Commonwealth were not recognized after the Restoration in 1660(at least in theory); and they are not printed in the *Statutes*

of the Realm. They are to be found in Scobell's Blackletter work, *A Collection of Acts . . . . London, 1658 :* this Act is on pp. 176, 177. See also John Reeves : *A History of the Law of Shipping and Navigation*, London, 1792 (an admirable work in every sense), pp. 44, *sqq*.

(17) Reeves, *op. cit.*, p. 72.

(18) Amendments were made from time to time : in 1670, by 22, 23, Car. 2, c. 26 ; in 1672, by Car. 2, c. 7. In 1696 the Act 7, 8, W. & M., c. 32, by sec. 2, allowed the "built" to be of England or Ireland or of the Colonies or Plantations; but in the latter case the ship must be wholly owned by the people thereof.

(19) Reeves, *op. cit.*, pp. 123, 124. A ship, French built, taken as a prize, but not legally condemned, wholly owned by Englishmen, imported fish and oil from Newfoundland. The question arose whether this was a violation of the Act of 1696, forbidding importation from "any Colony or Plantation" in any but a ship of specified 'built'," which this ship was not. The Law Officers of the Crown gave their opinion on the question, January 24, 1698. Sir Thomas Trevor, the Attorney General (1695 to 1702) afterwards a Manager of the Sacheverell Impeachment said in his written Opinion that he should have thought Newfoundland was neither a Colony nor a Plantation had it not been that the Statute law, 15, Car. 2, c. 7 and 27 Car. c. 7, reckoned Newfoundland among His Majesty's Plantations. Of course, all questions ceased with the Treaty of Utrecht ; but up to that time, the sovereignty over Newfoundland was always in dispute. For a discussion of the meaning of "Colony" and "Plantation" see Tomlinson : *Law Lexicon*. Later the status of Honduras was also in dispute after the Treaty of Paris, 1763, by the 17th Article of which Britain undertook to destroy her fortifications there, but British subjects were to be allowed to cut logwood, etc. Sir William de Grey, Attorney General (1766-1771) afterwards C.J.C.B. and Lord Walsingham, was of opinion, November 19, 1768, that it was not a Colony or Plantation of the King, but a part of the Spanish territories. Reeves, *op. cit.*, pp. 126, 127.

(20) *Acts of the Privy Council of England : Colonial Series*, London, The King's Printer, 1912, Vol. IV., pp. 540-3.

(21) The amount of money to be paid for Bills of Exchange varied with the season. I have in my *Life of William Dummer Powell*, Michigan Historical Commission, Lansing, 1924, thus explained the fact : "The exchange fluctuated very much as there was only one convoy to England every year · this being in October, it is obvious that the Canadian debtor received no benefit from any remittance to his English Creditor sent after October of one year until October of the next year : accordingly the Quebec merchants preferred to receive interest from their debtors rather than keep cash or bills locked up ; the natural result was that bills in England dropped sharply in value immediately after the departure of the October convoy and rose gradually till immediately before the sailing to par or about par, and immediately after anywhere from one to ten per cent. below, gradually rising to par".—See *Acts*, etc., Vol. IV, p. 559.

(22) The Ordinance Establishing Civil Courts, September 17, 1764, will be found in Shortt and Doughty: *Op. cit.*, pp. 205-210 · *Can. Arch.* Q. 62a, pt. 2, p. 500.

(23) Petition to the King's Most Excellent Majesty of "His Majesty's Ancient and New Subjects, Inhabitants of the Province of Quebec," dated at Quebec, November 24, 1784. Shortt and Doughty: *op. cit.*, pp. 742, 745. The 13th Article reads "That appeals from the Courts of Justice in this Province to Council or Court of Appeals composed of the Right Honourable The Lord Chancellor and the Judges of the Courts of Westminster Hall." The short and sharp reply is, *do.*, *do.*, p. 982 of *Can. Arch.*, C.O. Vol. 21, p. 85.

William Dummer Powell's part in this movement is spoken of in my *Life, ut supra*, pp. 43, *sqq* ; 177, *sqq*; Shortt and Doughty : *op. sit.*, p. 742, Note 1.

(24) For the proceedings in the Privy Council and Committee see *Acts, etc.*, Vol. IV., pp. 719-720 : for subsequent acts see Kingsford : *History of Canada*, Vol. 5, pp. 165, *sqq*. It cannot be said that the proceedings in the Walker affair reflect much credit on the Administration. Perhaps in part because of his "unyielding and surly carriage", Walker was *persona non grata* with Governor and officials ; but there were many of his sympathizers in Montreal, and the authorities did not wish the trials to take place in that Town.

The Ordinance of September 17, 1764, had erected a Court of King's Bench presided over by the Chief Justice, an English lawyer, and having authority to try all civil and criminal cases. This Court sat at Quebec : and "in all Tryals in this Court all His Majestys Subjects in this Colony to be admitted on Juries without Distinction." Of course, the accused might legally be sent to Quebec for trial and there properly enough the Jury was summoned from the whole Colony ; but the more usual course would have been to have the trials before a Court of Oyer and Terminer and General Gaol Delivery in Montreal. A sufficient reason for the non-attendance of Walker and his witnesses was the pecuniary one, for it must be remembered that at that time and for long after, Crown witnesses received no pay ; and it would have been a heavy tax on Walker, even if he could persuade his witnesses to go, and dared himself to go to Quebec.

The Ordinance provided that the Chief Justice should hold a "Court of Assize and General Gaol Delivery" once a year at the Towns of Montreal and Trois Rivieres "for the more easy and convenient Distribution of Justice to His Majesty's Subjects in those distant parts of the Province." Obviously, the usual course was to try Montreal cases at Montreal.

But by the Common Law of England a Jury must be summoned from the body of the County ; and, in old Quebec, the District corresponded to the English County. There was no provision in the Ordinance for the locus of the Jury in the Courts at Mntreal and Three Rivers ; and the usual and proper course was to summon the Jury from the particular District only. It was determined by the authorities to avoid trial by a Montreal jury ; and an Ordinance was passed, March 9, 1765, to effect this object. The Ordinance is not in Shortt and Doughty: *op. cit.:* it will, however, be found in *Ordinances made and passed by the Governor and Council of the Province of Quebec, 1763-91*, Ottawa, The King's Printer, 1917, pt. 1, pp. 67, 68. It recites :

"Whereas at a Council held by His Excellency the Governor of this Province at the City of *Montreal*, on the Third Day of *January* last, it was, amongst other Things, Resolved, That it was not necessary to hold a Court of Assize in the City of *Montreal*, as the Court of King's Bench, to be held in the Capital, would be sufficient to answer every purpose. And whereas several Crimes and Offences have lately been committed in the City of *Montreal*, and the Offenders charged therewith, as well as most of the Witnesses to prove the same, are now residing and dwelling in the City of *Quebec* : and whereas several Persons stand bound by Recognizances to appeal and answer, and others to appear and prosecute, and give Evidence against the several Persons so charged at the next Court of Assize and General Gaol Delivery, to be held at the said City of *Montreal :* In Order therefore to avoid the great and unnecessary expense to this Province, which must unavoidably happen, as well as the great Delay of Justice by bringing Jurors from the District of *Montreal* to *Quebec*, for trying the said Offenders, or by removing the several Persons charged with the said Crimes and the Witnesses to prove the same, from the City of *Quebec* to *Montreal* aforesaid, it has been resolved by His Excellency the Governor in Council, That a Commission for a Court of Assize and of Oyer and Terminer and General Gaol Delivery, do forthwith issue, directed to the Honourable *William Gregory*, Chief-Justice of this Province, for the hearing and determining at the City of *Quebec* aforesaid, all Causes of Nisi Prius, Treasons, Felonies, Crimes and Misdemeanours whatsoever, done or committed in this Province as well out of Districts as within, and the Gaols in the same Province, of the Prisoners therein being to deliver; In Order therefore to avoid any Doubt or Objection that may hereafter arise or be made, touching any proper Venue or Vicinage of Juries hereafter to be summoned and returned." Then it proceeds to Ordain and Declare :

"That all Precepts for the summoning and returning of Grand-Juries; and all Writs of Venire Facias, hereafter to be issued out of any Court of Record in this Province, shall, for the future, in all Cases whatsoever, be for the summoning and returning of Juries from the Body of this Province at large, as well out of Districts as within ; and all Juries, so summoned and returned, and who are otherwise by any Ordinance of His Excellency the Governor and Council of this Province declared to be qualified to serve on Juries are hereby declared to be lawfully summoned and returned, and shall serve accordingly, any Law, Usage or Custom to the Contrary notwithstanding."

This accounts for the constitution of the Jury at Three Rivers.

Of course those who were acquitted at Three Rivers could not be again tried : *Nemo bis vexari debet pro eadem causa.*

By the time the soldier gave information in 1766, Murray had left the Province, being succeeded by Sir Guy Carleton. Chief Justice Gregory and Attorney General Suckling had been succeeded by William Hey and Francis Maseres, very different and very superior characters. The prosecutions were now proceeded with with due vigour: but Walker's luck was against him.

(25) Walker's subsequent career can be read in Kingsford: *History of Canada*, Vol. 5, pp. 167, *sqq.*: 196, Vol. 6, pp. 39, 69. He was dismissed from the Commission of the Peace, but was restored: he opposed the Quebec Act of 1774, actively supported the rebel cause, was arrested but released by Montgomery and finally left Canada after his fruitless attempt to win the Canadians over to the Revolutionary side in 1776. Franklin, who was an excellent judge of men, says of Walker and his wife: "I think they both have an excellent talent for making enemies, and I believe, live where they will, they will never be long without them": Franklin, *Works, etc.*, Vol. 8, pp. 182-3.

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AN INSTANCE OF THE HUMANITY OF THE NEGRO

By the Honourable William Renwick Riddell, LL.D., D.C.L., etc., Justice of Appeal, Ontario.

In 1793, there was a fearful outbreak of Yellow Fever in Philadelphia then the Capital of the United States, whch taxed to the utmost the energies of all physicians. The most celebrated physician at the time in Philadelphia—or, indeed, in the United States—was Dr. Benjamin Rush, whose name and fame are by no means forgotten in the annals of the profession.

A letter from him, long unpublished but appearing in the Magazine of American History for January 1891, pays tribute to the humanity of the Negro population of that city—a well-earned tribute which should be better known. The letter reads as follows:—

"Dear Sir,

Accept of my thanks for your friendly note and the interesting paper enclosed in it.

The facts which I have preserved during our late calamity relate only to the origin, history, and cure of the disease.

The only information whch I am capable of giving you relates to the conduct of the Africans of our city. In procuring nurses for the sick, Wm. Grey and Absalom Jones were indefatigable, often sacrificing for that purpose whole nights of sleep without the least compensation. Richard Allen was extremely useful in performing the mournful duties, which were connected with burying the dead. Many of the black nurses, it is true were ignorant, and some of them were negligent, but many of them did their duty to the sick with a degree of patience and tenderness that did them great credit.

During the indisposition and confinement of the greateest part of the Physicians of the City, Richard Allen and Abraham Jones procured copies of the printed directions for curing the fever—went among the poor who were sick—gave them the mercurial purges—bled them freely, and by these means, they this day informed me, they had recovered between two and three hundred people.

I am the more pleased with the above communication as it showed the safety and simplicity of the mode of treating the disease, which you politely said was generally successful,

Benjn. Rush.

October 29th, 1793.

P.S.—The merit of the Blacks in their attendance upon the sick is enhanced by their not being exempted from the disorder. Many of them had it; but, in general, it was much milder and yielded more easily to art than in the white people."

It is surely worth while, in these days of "every man for himself," to be reminded of deeds of simple and unassuming heroism, which must always remain without reward, and generally without recognition.

WILLIAM RENWICK RIDDELL.

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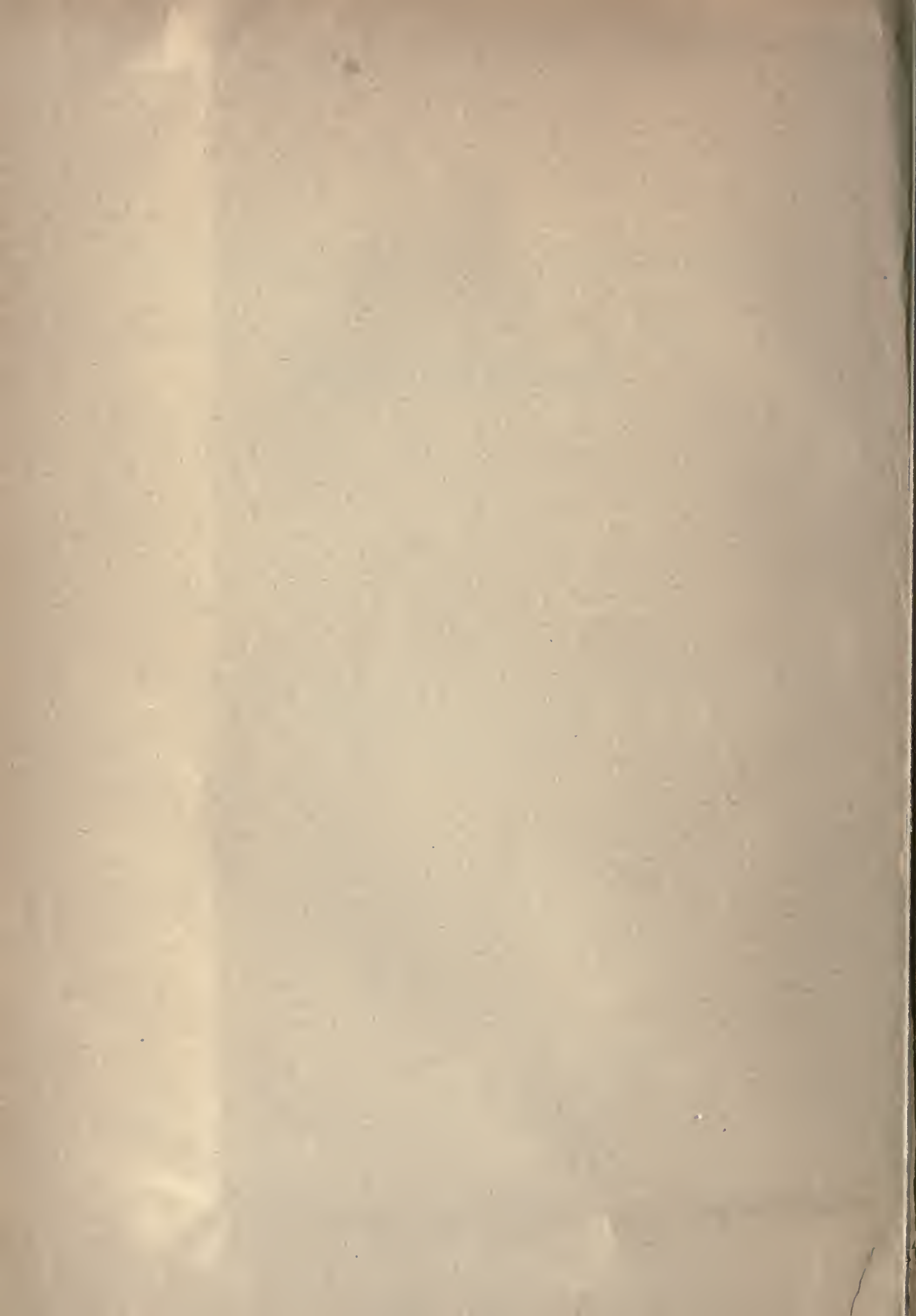
PROFESSOR JOHN ROBISON AND HIS ATTACK ON FREEMASONRY

BY THE

HONOURABLE WILLIAM RENWICK RIDDELL

L.L. D., D. C. L., F. R. H. S., Etc.

(Justice of Appeal, Ontario)



PROFESSOR JOHN ROBISON AND HIS ATTACK ON FREE-MASONRY

By the Honourable William Renwick Riddell, LL.D., D.C.L., F.R.H.S., Etc. (Justice of Appeal, Ontario)

[Address to "The Toronto Society for Masonic Study and Research."]

John Robison, born at Boghall, Stirlingshire, Scotland, in 1739, the son of a Glasgow merchant, and intended from infancy for the Ministry of the Kirk of Scotland, was one of the ablest men that even Scotland ever produced. Educated at Glasgow, at the University in that city and graduating at the age of 17, he, in consequence of certain scruples conscientiously entertained, declined to turn to Divinity; and, like our own Richard Cartwright, Jr., of early Upper Canada, sought a life in other fields. It was not from any doubt as to the cardinal beliefs of his Church that Robison took this step, any more than it was the case with Cartwright—both remained pronounced and reverent Christians, though both declined Holy Orders, for reasons which were wholly valid with them though we are not able to see that they need have had much if any force. Such men are to be honoured, even if they are not quite understood.

A fine mathematician, he was recommended by the celebrated Dr. Adam Smith as Assistant to Dr. Dick, Professor of Natural Philosophy (which we now call Physics); but Dick thought him too young, and he went to London, furnished with fine testimonials, hoping to become Tutor to the Duke of York, son of King George III, who expected to go to sea, as common talk had it. However, the Duke went into the Army instead of going to sea; and became a creditable Officer, especially after he became Commander-in-Chief. It is not without interest for us that it was after him, that Simcoe called this place "York," rejecting the old name of Toronto, which was not returned until 1834. The Duke had had some trifling successes in the Low Countries; and in 1793, Simcoe in his honour named the Harbour "York" in "respect to His Royal Highness." So came the name to Town and County.

Robison, in 1759, the year after he went to London, secured the appointment of Tutor to the son of Admiral Knowles, who had been expected to accompany the Duke of York; and was rated Midshipman on the *Royal William*, on which ship, his pupil was Lieutenant. He continued in the Marine Service for three years, in which time, he had relations with Canada. Joining the expedition of Wolfe, he went with him up the River St. Lawrence to Quebec; he was very useful, being engaged in making surveys in the River and adjoining territory. He was with Wolfe the night before his death, when he visited the Posts on the River; but does not seem to have been present at the Battle on the Plains of Abraham. Continuing in his position for three years and improving himself in Navigation, he returned to England in 1762, then was employed in Jamaica; he returned to Glasgow, where he studied Law and Chemistry, and was somewhat closely connected with James Watt—he, later, was of great assistance to Watt, as it was largely on his evidence that Watt succeeded in his action in 1796 to protect his patent from infringement. In 1766, he succeeded Dr. Black as Professor of Chemistry in Glasgow University and lectured with great ac-

ceptance and to large classes of undergraduates and others.

In 1770, he accompanied Sir Charles Knowles as Secretary to Russia, where in 1772, he was created Inspector-General of Marine Cadets; and was held in high esteem by the governing classes; but he tired of this and accepted the nomination to the Professorship of Natural Philosophy in the Edinburgh University, tendered him by the Magistrates and Town-

THE HONOURABLE WILLIAM RENWICK RIDDELL,
LLD., D.C.L., F.R.H.S.

Council in 1773. He lectured "with great fluency and precision of language . . . . on the sciences of mechanics, hydrodynamics, astronomy and optics, together with electricity and magnetism." One of his pupils at the University was Robert (Fleming) Gourlay, who became, in the second decade of the 19th Century, such a prominent figure in this Province, and who is not yet forgotten. Gourlay speaks of him with great respect, "the profound Mr. Robison."

He continued in active service until his death in 1805. He earned encomiums from many quarters—Sir James Mackintosh calls him: "one of the greatest mathematical philosophers of his age"; James Watt, who knew him if anyone did, says: "He was a man of the clearest head and the most science of anybody I have ever known"; Henry Hallam speaks of him with the greatest respect for removing Bacon from the pedestal of demigod upon which the unwise had set him, and placing him in his rightful position of a useful guide. His biographers, his admirers and his critics all give him credit for absolute honesty and the most sincere desire for the right—a real endeavour, at all times and on all subjects, to do complete justice.

Now, this was the man who, in 1797, published a book, which, it is not too much to say, attracted the attention of the public in an uncommon degree —and worried and puzzled the Masonic world to an unprecedented extent; and this was increased by the fact that the author was himself a Mason in good standing. The title read, "PROOFS of a CONSPIRACY against all the RELIGIONS and GOVERNMENTS of Europe, carried on in the Secret Meetings of FREE MASONS, ILLUMINATI, and READING SOCIETIES. Collected from good authorities, by JOHN ROBISON, A.M., Professor of Natural Philosophy, and Secretary to the Royal Society of Edinburgh. *Nam tua res agitur paries cum proximus ardet . . . .*" The quotation from Horace, Epistolarum, I, 18, 84, "For it is a matter of concern to you when the adjoining wall is blazing," indicates as, indeed, is manifest from his book throughout, that he had not neglected or forgotten his classics— he might have added the verse following: "Et neglecta solent incendia sumere vires."

A second edition appeared at Edinburgh in 1797, a third at Dublin in 1798, a fourth (calling itself the Third) at London in 1798: nor was its vogue confined to the British Isles, as we find an edition published at New York in 1798, and a French translation in Paris, 1798. All these editions are practically the same except the first, to which a long postscript was added in the second and subsequent editions. In this paper, I make use of the London edition of 1798, which has on the title page after the above copied words, the following: "The Third Edition, corrected.—London, Printed for T. CADELL, Jun., and W. DAVIES, Strand; and W. CREECH, Edinburgh, 1798."

The book has been characterized as "a lasting monument of fatuous credulity;" and it well deserves the characterization. One has great difficulty in understanding how a man of the intellect and acumen of Robison could possibly father such a production; one would think him the last man in the world to do so; but the depths of human credulity, as the heights of human faith, have not yet been measured. It is not to be forgotten that even a genius like Sir

Isaac Newton was responsible for considerable which we should characterize as rubbish, if it came from a less eminent hand.

Robison was a Mason when he went to Russia in 1770; he belonged to a Lodge in Edinburgh working the English Rite, or what was practically identical with the English Rite of the Grand Lodge of 1717. A great deal has been said and written, and, no doubt, will be said and written concerning the Scottish Masons and Scottish Masonry; but there will be no controversy over the fact that by the end of the 18th Century, there was little if any distinction between English and Scottish Masonry as actually practised. Robison has no hesitation in saying, as he does more than once, that England was "the birth-place of Masonry;" and when in St. Petersburg, he connected himself with the English Lodge. At home, the Masonic Lodge "was considered merely as a pretext for passing an hour or two in a sort of decent conviviality, not altogether void of some rational occupation," treating with a smile "the story of old Hiram." He was amazed, when visiting the Continent in 1770, to find that Masonry was there taken seriously: "the differences of doctrines or of ceremonies," which at home, were regarded as "mere frivolities," he found "on the Continent . . . matters of serious concern and debate." He was initiated in a very splendid Lodge at Liège, of which the Prince-Bishop and the chief Noblesse were members, and visited French Lodges at Valenciennes, Brussels, Aix-la-Chapelle, Berlin and Konigsberg. Perhaps the most curious event in this Masonic excursion was the "very elegant entertainment" given him at St. Petersburg "in the female *Loge de la Fidelite'*, where every ceremonial was composed in the highest degree of elegance, and everything conducted with the most delicate respect for our fair sisters, and the old song of brotherly love was chanted in the most refined strain of sentiment." This seems to have been a Lodge of women only, not a Lodge in which the odd custom of "Adoption" was in vogue, such as that which I have described in an Article: *Women in Free Masonry a Century and a Half ago.* The Masonic Sun. Vol. XXXI, (July, 1928), pp. 17, *sqq.*, from the book issued in 1810 from the celebrated *Imprimerie de Bonnant* and called "Ce Que C'est La Franche-Maçonnerie." In that book, we are told that the writer was "especially surprised to see that the dear Sisters who were initiated were not at all alarmed at the sacrifices of their modesty required in the ceremonies, inept indeed, but certainly pressed with undue freedom. These ladies—who, morever, did not justify the good taste of the brethren—were, beyond any question, of the kind who find difficulty in blushing." In Germany, apparently, not the same success was met in preserving the modesty of the initiate—at all events, some time afterwards, Robison had information of the initiation at Frankfort of a young lady, who was received under the feigned name of Psycharion (which, by the way, is Plato's name for Dear Little Soul); Robison says that, men initiating, the account of the initiation "shows the most scrupulous attention to the moral feelings of the sex," but, unfortunately, "the confusion and disturbance which followed, which, after all their care, it occasioned among the ladies, shows, that when they thought all

right and delicate, they had been but coarse judges."

And so, he thinks, women are not so blind, after all: he does not seem to have thought out the question whether men, mere men, could under any circumstances and upon any matter, decide so as to receive the approval of the fair sex, "fair" being here used in the physical and not the judicial sense. Nevertheless, he finds the Discourses or Addresses delivered on that occasion "are really ingenious and well-composed, were they not such as would offend my fair countrywomen."

It was not, however, till some years after his return to Scotland that he began to pay serious attention to the Continental Masonry in "which," as he says, "I had learned many doctrines and seen many ceremonies which have no place in the simple system of Free Masonry which obtains in this country."

Before going into the results of his enquiries, it may be of advantage to find what were his principles and his conception of the right religion and government which he was to find conspired against by Freemasonry. There can be no possible doubt of Robison's absolute rectitude and patriotism, of his sincere desire that his country and all other countries should have the best possible government and religion—it is equally certain that he thought that Scotland had the best of Kings in George III. (he undoubtedly did not agree with the allegations of the Declaration of Independence about "the Farmer King"—but then, nobody did at that time, whatever may be the case now) ; he thought that the form of government in Church and State could not be much improved; and, if improvable at all, not in the way the Radicals desired. "All that is, is right," was his creed: he was a High Tory, as Toryism was then understood, and would have despised the lukewarm Conservatism of a later day. Moreover, he took the manifestoes of the new Secret Societies and their founders or leaders at their face value—perhaps his mathematics and physics had made him a literalist, though, as an old Professor of Mathematics myself, I hope that the study of these sciences has not always that result. We Masons believe our Craft is founded on eternal principles of truth; but we know that a certain amount of mysticism is essential in every esoteric society, and always has been, from long before the times of Pythagoras: a certain amount of hyberbole, exaggeration, apparent misstatement even, is inevitable; and must be taken into account; no Mason takes as literal the horrible imprecation—disgusting, if taken literally—as to what should happen if he were false to his pledge. No one, for a moment, thinks that if he had "faith as a grain of mustard-seed," he could physically remove a mountain of actual rock; or that nothing would be impossible for him: in the Church of which Robison was so important a member, and of which he was an ornament, it was not expected even of the Moderator, that he should "hate . . . his father and mother and wife and children and brethren and sisters;" and that the Archbishop of Canterbury, at the other end of Britain, did not sell all that he had and give the proceeds to the poor, I am reasonably certain. Every reasonable man must understand that such statements are not to be taken literally, and must read them accordingly.

So, too. in national affairs, allowance must be made for conventional, traditional and ceremonial expressions—no one, now-a-days imagines

that the King is "King by the Grace of God," but we all know, as he knows, and is proud of the fact, that he is "King by grace of an Act of Parliament."

Moreover, I am sure that Robison did not give sufficient attention to the German character: that as he says, "is the very opposite to frivolity; it tends to seriousness . . . . singularity and wonder . . . are to them irresistible recommendations and incitements; they have always exhibited a strong predilection for everything that is wonderful or solemn or terrible . . . and . . . have been generally in the foremost ranks, the gross absurdities of magic, exorcism, witchcraft, fortune telling, transmutation of metals, and universal medicine have always had their zealous partisans, who have listened with greedy ears to the nonsense and jargon of fanatics and cheats . . . many have been . . . rendered ridiculous by their credulity . . ." But he quite fails to recognize what is very important, that while a German philosopher evolves a camel from his inner consciousness, he never asks anyone to accept it as a real camel of flesh and blood, and his admiring followers know that it is a creature of fancy only. In other words, many a German Thesis is in reality a mental exercise, and is not expected to be taken seriously and in every-day life as a real camel.

Robison's politics, too, are of importance to be considered: he in this regard gives no uncertain sound; as I have said, he is an old-time Tory, a Tory of the time when a Tory was an out-and-out Tory, and would scorn to be called a Conservative; everything was for the best in the British Isles, the best in the best of all possible worlds; they "exhibit the finest specimen of civil government that ever was seen on earth, and a national character and conduct not unworthy of the inestimable blessings that we enjoy:" the nations which "wished to have a constitution . . . an *improvement* on ours," utterly failed: the Parliament might be improved, indeed, by not electing so many merchants, for he thinks "the Gentry are proper objects of our choice for filling the House of Commons:" it is all wrong to object to Ministerial corruption for "Ministerial corruption is the first fruit of Liberty, and freedom dawned for this nation in Queen Elizabeth's time, when her Minister bribed Wentworth. A wise and free Legislature will endeavour to make this as expensive and troublesome as possible, and therefore will neither admit universal suffrage nor a very extensive eligibility." And the Establishment was as admirable in Church as in State; in short, the only improvement anywhere in the Kingdom would be to limit the franchise and the eligibility to be elected a Member of Parliament.

Bearing in mind the kind of man he was, we shall be able to understand, if not to sympathize with, his criticism of the Societies he attacks.

One almost shudders to think what this fine old crusted Tory would have said to the suggestion that a working man should have a vote; and it is quite certain that if he could while dreaming have had a vision of a time when a working man should not only vote but have a seat in the House of Commons and even form a Government and create Lords Chancellors and Peers, he would have waked up with the memory of a ridiculous phantasia—Ramsay MacDonald would be to him as impossible a character as Jack the Giant-Killer.

Let us now see what it was that

caused such deep concern and alarm to this intellectual, learned, experienced, honest and patriotic Scot. A Society had come into existence on the Continent and had a few branches in Britain (as was supposed, although I have not been able to satisfy myself as to this); it was named "The Illuminati." The story of this curious order has been told more than once, and there is no mystery about it. I have carefully examined the works, chiefly German and French, which deal with it; but the account given in Gould's excellent *History of Freemasonry*, can be relied upon as accurate, so far as it goes—see Vol. III, pp. 375, *sqq*.

Adam Weishaupt was a well-meaning dreamer, a sort of a pre-Marx Marxian, with rather more than his share of German mysticism—he could evolve not only a camel, but a whole political, economical, sociological system out of his inner consciousness, and talk about it as though he expected it to materialize. Educated under Jesuit masters, he quarreled with them and, thereafter, he had to meet with their enmity in every way. Born in 1748 at Ingolstadt in Bavaria, he received his education at the University of that City, and in 1772 and 1775, he was appointed to important chairs in his Alma Mater. A dreamer, if ever there was one, he conceived the idea of forming a Society of the young for the best purposes, that is, the advancement of virtue and the extirpation of evil and vice throughout the world. This idea of a secret society revolutionizing the world and bringing in a Millenium when Satan, evil, vice,—call it by what name you will—was to lie and

"Writhe in pain,
And die amid its worshippers,"

was as old as Pythagoras, and much older. It is doubtful if mankind since the Stone Era has ever been without such reformers with such schemes.

Son of a professor and himself a professor, Weishaupt had the faith and confidence of the classic pedagogue in the knowledge derived from books, the proud sufficiency, the doctrinal and pedantic tone, the dictatorial spirit, the radical ignorance of real life. He saw men and society only by way of books and he was convinced that a man who like him could read what had been written from the most remote antiquity, necessarily possessed the real knowledge and could resolve every problem that presented itself to a human being. He always believed that he was in his professor's chair, he never ceased to consider the Order which he created as a great class and its members, students who should humbly and docilely submit to the authority of the master.

Sometimes, care must be taken in reading of the "Illuminati," to distinguish this organization of Weishaupt's from other organizations which took the same name; there were several of them—the *Alombrados* of Spain early in the 16th century destroyed by the Inquisition as heretical; the *Guerines* of France about a century later; another in France after about another century which went to pieces in the Revolution; an association of mystics in Belgium somewhere about 1750-1770, etc. Some so-called Pythagoreans can scarcely, if at all, be distinguished from one or other of these Societies—most of whom, be it said, thought or said they had the most philanthropic objects in view, but some of whom can hardly be considered as pursuing these objects by the wisest or most direct methods.

Weishaupt began his Society with the title *Perfektibilisten,i.e.,* Perfectibilist; but it had nothing in common with the so-called Perfectibilists in religious history. It spread with considerable speed through the whole of Catholic Germany; and numbered among its adherents, men of the highest standing, such as Goethe, Nicolai and Herder. The expressed object of the Society was to combat ignorance, superstition and tyranny, chiefly but not exclusively in the field of religion —to this, Weishaupt seems to have been moved by hatred of and opposition to his old teachers, the Jesuits, whom he never forgave and who never forgave him. He undoubtedly taught and urged as an object of his now Society, opposition to ignorance, superstition and tyranny, chiefly in the field of religion, indeed, for he rejected all national Church-foundations, all formal dogma as declared by the existing Churches, and, in fact, all form whatsoever in public worship. How this would naturally strike the strict Scot with his Established Church and formal worship, need not now be considered.

Had Weishaupt and his confreres been content to fight religious battles alone, it is not unlikely that he would have been left unmolested by the "Secular Arm," whatever might have been done to him by the Church or Churches. He did not so act; with his views and his enthusiasm, it is hard to see how he could restrict himself to religion; at all events, he ventured into the realm of the State and its constitution, and advocated Republican opinions utterly opposed to the passive obedience views then held, but by no means so opposed to the principles of the British Constitution as Robison supposed. Some of his views are commonplace with us. For example, what the Elector of Bavaria most bitterly complained of was that Weishaupt with his doctrines of the rights of humanity was preaching that the people should actually govern themselves leaving to the Sovereign but the name and the privilege of wearing the Crown. That does not shock a British subject; but those were the days on the Continent of Kings by the Grace of God. The list closed the other day with the name of name of William II. of Prussia.

The Order received fresh vigor and vogue by the adherence of the extraordinary character, Baron von Knigg ,and at length received a limited amount of support from the perverted Masonry of Germany and France.

The Reading Societies so fulminated against by Robison seem to have been inaugurated in 1784—one is spoken of at the beginning of July of that year. They met once or twice a month in a private home, and some of the company read aloud from a book selected from among those recommended by the Order. These not being secret but rather public and open, they did not come within the prohibition of the Decree of June 22, 1794, to be spoken of later.

When by this Decree, the Illuminati were prevented from meeting in secret Lodge, they gathered in small groups to form "Reading Societies," "in which the young might continue to regulate and inform themselves according to the directions of the Statutes" of the Order. They are known to have continued until January, 1785.

After capturing or securing the assistance of the Masonic Lodges, the Society became more important: the other brands of so-called Masonry, the

Rosicrucians, the Jesuits, all made war on Weishaupt and his interlocking body of enthusiasts; not only private fulminations, but also vituperation, barely concealed as argument, filling the Press, were employed, the attention of the authorities in the State was drawn to the Radical and revolutionary principles of the Order, and the end became inevitable—on June 22, 1784, an Electoral Edict suppressed the Illuminati in Bavaria, and the Masonry which had allowed itself to be made a tool of by the Illuminati shared their fate, for the Edict purported to suppress Secret Societies altogether in Bavaria. The Illuminati obeyed the decree, protesting innocence of all wrongdoing, and producing their books in evidence of their innocence; all their protestations were in vain; another Edict followed, and then came persecution: Weishaupt fled and took refuge with Ernest II, Duke of Saxe-Gotha, a Freemason, and survived till 1830; others of the leaders also fled, the Order came to an end carrying with it to destruction, Freemasonry in Southern Germany. The Illuminati never reappeared, although an occasional group has used the name from time to time. It is difficult to account for the disquiet, which can almost be called terror and panic, which this small body of men, never at its best having more than 2,000 members, caused in more than one European State (never in Britain, be it said), it may be that the reason is to be found in the enmity, unrelenting and unscrupulous, displayed against Weishaupt by his former teachers, the Jesuits, now turned his bitterest foes—and it must be said that he hated them as much as they him. The old story of the iron pot and the earthen pot colliding was retold, Weishaupt playing the part of that of earth.

The alarm of Robison is even more difficult to account for; all danger had ceased, the Order of Illuminati had been dissolved, never to reappear, the Reading Societies had, finally, gone down with it, the number of Lodges of Illuminati in Britain must have been small, and the members insignificant; true, the Revolutionary doctrines were being spread broadcast throughout Europe, but by much more important and much more manifest agencies than the defunct or dying Order, while he himself absolves British Masonry of the stigma of heretical and revolutionary views or aims. It is still more difficult to understand why he linked Masonry with Illuminism and Reading Societies attached to Illuminism—in his Title-page, joining Masonry, which in Britain, at least, was wholly innocent of the challenged doctrines and propaganda, in common reprobation with the sinning organizations of the Continent.

It is in no small degree owing to this ineptitude, that this amazing work has earned the characterization, already mentioned, of "a lasting monument of fatuous credulity," a characterization fully deserved.

It is time, now, that we should turn to the book itself. He begins by stating that in 1795—*ten years* after the dissolution of the Order, be it noted—his attention was called by perusing a German periodical, to the schisms in Freemasonry; he had been a somewhat active Mason, himself; and he first tells of his experiences on the Continent in Masonry, so different from his own. His curiosity being aroused by what he read, he made enquiries, going into the matter fully and at length, he found that "AN ASSOCIATION HAS BEEN FORM-

ED for the express purpose of ROOTING OUT ALL THE RELIGIOUS ESTABLISHMENTS, AND OVERTURNING ALL THE EXISTING GOVERNMENTS OF EUROPE" (I use his own capitalization). He goes on to say of this feeble and now practically defunct institution: "I have seen this Association exerting itself zealously and systematically, till it has become atmost irresistible." After such a statement, without a shadow of a shade of justification except from Bavarian calumny, almost anything could be believed of Robison's credulity and want of reliability, which I, for one, am wholly unable to account for in a man of his intellect, character and attainments. The only explanation that at all approaches plausibility, is that he read and relied upon some of the productions of the Bavarian Jesuits—and that explanation comes short of being completely satisfactory.

His first chapter on Schisms in Free Masonry is fairly accurate; in it, he details some of the vagaries of so-called Masonry in France and Germany, the *Chevalier Maçon Ecossois,* preceded by the Degrees of *Novice* and *Eleve,* and with them leading up to that of Parfait Maçon, the "Chivalric" Degrees, *Philosophe, Pellerin, Clairvoyant,* etc.; *the Chevalier de Soliel, Chevalier de l'Orient, Chevalier de l'Aigle, Chevalier Bienfaisant, de la Sainte Cité, Amis reunis de la Verite'*—then, passing over into Germany, we have the Lodge *Theodor von der guten Rath, Philalethes, Rosycrucians, Chevalier de l'Epée,* the *Tempelorden* or *Orden des Strikten Observanz,* the nonsense of Baron von Ruth, the lies of the soi-disant Johnson, Baron Knigge's honest, earnest but silly efforts and the results obtained, culminating (as perhaps it will be considered), in the great and glorious (to give credence to the exultant claims of its members) institution of the Eclectic or Syncritic Masonry of the United Lodges of Germany. Then made an insidious invasion into these innocuous if childish systems, the hideous enemy of all that was right, calling itself Illuminism. The origin and progress of Weishaupt's Order is fairly stated, even if we cannot quite believe that all its preceptors and leaders were fiends in human form, determined to destroy all that was worth while in Church and in State. I do not detail the accusations, some apparently honest misunderstanding of the meaning of the language employed, more due to taking *au pied de la lettre,* the highly hyperbolic and mystical expressions and the doctrines expressed in words understood by the initiated only—I wonder what a non-initiate would think of some of our perfectly innocent "mysteries!"

It is quite true that Weishaupt taught the desirability of abolishing Church Establishments connected with or controlled by the State; but so did and do Presbyterians and Baptists in England, and Episcopalians and Baptists in Scotland, and the Independents everywhere: the system had no place in the United States (after a short period in certain States), and in this Province, it was the source of constant trouble and discontent when even partially in vogue, and hardly anyone has thought of it for a century. Nay, in Scotland itself—and this may possibly account for some of Robison's invective—there was more than a little discontent, which showed itself in the formation of Dissenting Churches and culminating in the great Disruption of 1843.

As to religion apart from Church government it is rather difficult to determine quite clearly what Weishaupt really taught—I am not sure that he quite knew himself. Some have called it Deism, I should rather call it Theism, a belief the minimum of what is required of every Mason of our Rite, a belief in the G.A.O.T.U. He did not require more, as our Masonry does not require more; whether he insisted that the belief should go no further, as our Masonry does not, I find myself unable to be certain: I think not, but I may well be in error. In any case, he did not go so far as to advocate anything but persuasion, and he did not go anything like the length the English Deists openly did. Yet, this is called a "conspiracy;" anything more absurd can hardly be conceived by the most vivid imagination.

So, too, as to the State, the views of Weishaupt were the views of the best intellects of the day, the views which have made the New British Empire, the New Commonwealth of Nations; he was more moderate than the contemporary French writers, not to speak of certain visionary Germans, while there is scarcely a word which the new nation of the United States of America, fully recognized in 1783 by Britain as an independent nation, would not accept as sound doctrine. Of course, no one would expect such views to be palatable to one who objected to merchants in the House of Commons, and thought bribery by the Ministry, not only permissible but the mark of liberty, and therefore laudable—at least, so long as it was confined to the landed gentry. The doctrine of human equality was abhorrent to him: it was "not intended . . . that all may be at rest and happy, even though all *were* equal, but to get rid of that coercion, which must be employed in the place of morality, that the innocent rich may be robbed with impunity by the idle and profligate poor." And nowhere do we find in Robison a word of sympathy for the poor or a word of rebuke for the rich. What the Order sought in its actions and teachings was "to overturn the present constitutions of the European States"—that may be conceded, but he goes on "in order to introduce a chimaera which the history of mankind shows to be contrary to the nature of man. Naturam expellas furca, tamen usque recurret." Of course, human nature is always about the same, but that, we moderns do not think a reason why we should go on always in the old paths; the old is not necessarily the best, and changes are not only wholesome, they are inevitable as knowledge grows from more to more. This was an abhorrent doctrine to our old Tory Professor.

If there is one thing more absurd than another in this succession of phillipics, it is the appeal to the authority of Sir Kenelm Digby as more cogent than that of Sir Isaac Newton, himself.

I have no intention to go through this extraordinary book, and discuss all its vagaries; but I cannot resist the temptation to say a few words on one subject. Remembering the admiration which he expressed at the proceedings of a Women's Lodge, the *Loge de la Fidelité,* when on his visit to the Continent, it is at least singular that he devotes page after page assailing Weishaupt for his desire to enlist women in his cause,—the real author of the scheme seems to have been Zwack, one of Weishaupt's best workers. Zwack suggested "a project for a Sisterhood, in subserviency to the designs of the Illuminati." This,

Robison considers shear villainy, without one redeeming feature. "There is nothing in the whole constitution of the Illuminati that strikes me with more horror than the proposals . . . to enlist women in this shocking warfare with all that 'is good and pure and lovely and of good report.'" He urges his countrywomen "by the regard they have for their own dignity, and for their rank in society to join against these enemies of human nature and profligate degraders of their sex . . ." Otherwise they may "fall from that high estate to which they have arisen in Christian Europe, and again sink into that insignificancy or slavery in which the sex is found in all ages and countries out of the hearing of Christianity." Listen to that, ye politician women! "Their *business* is supposed to be the ornamenting themselves . . . Everything is prescribed to them *because it makes them more lovely,*" etc., etc.

The proposition to form Lodges of young women was never carried out or even submitted to the Order. In any case, Zwak might have called to its support the example of the Orders of feminine Chivalry of the time of the Crusades, or the crowds of young girls and even nuns who followed the troops and made use of their nights to make recruits for the future.

That the scheme to divide women into two classes, the chaste allured by the opportunity to procure good reading, and the unchaste allured by the opportunity to gratify their passions, was as rascally as it was absurd, all will agree—and neither the rascality nor the absurdity is diminished by the proposition that the latter class should not only act as spies, but also turn in to the Order the money made by prostituting their bodies.

Probably, enough has been said to indicate the character of this book; and the charges are now too stale to merit investigation.

Nowhere does Robison so much as suggest that the Masonic Lodges in Britain, or Masonry as known in Britain had the villainous designs attributed to Illuminism; and the inclusion of Freemasonry in the list of conspirators on his Title-page is a gratuitous libel, the object of which, I find myself unable to fathom. Freemasonry even of the continental kind did not make use of Illuminism, but Illuminism of Freemasonry; in other words, Illuminism never became a part of Freemasonry but Freemasonry's degrees were made a part of Illuminism.

Whatever the intention and however weak the assault on Masonry, it probably had much to do with the prejudice undoubtedly existing in certain parts of Scotland against Masonry which continued down to well within the last century, and which I am informed still exists in some parts of Scotland, as it is known to exist in some parts and some circles of Canada.

It will suffice to give one instance of record of the operation of this prejudice. In a work intituled *Reports of certain Remarkable Cases in the Court of Session and Trials in the High Court of Judiciary, by William Buchanan, Esq., Advocate;* Edinburgh . . . 1813, is given a Report of a case in 1800. In Maybole, Ayrshire, had existed a Royal Arch Lodge for some years—it will be remembered that at that time in some jurisdictions, the Symbolic and Royal Arch Degrees were worked by the same Lodge—in 1800, for no reason that ever became known, a report was circulated, possibly based upon Robison's accusations, that the members were

making "use of the profession of Free Masonry merely as a cover for principles hostile to the Government and Religion of the country," which, it will be recognized, was precisely the accusation of Robison. No ground was ever shown for the charge; but two members, John Andrew, a shoemaker, and Robert Ramsay, a cartwright, were arrested and kept in prison for a time. Tried at the Circuit Court at Ayr in the autumn of 1800, they were unanimously acquitted. The Lord Justice Clerk (Lord Hope), sarcastically says in a proceeding growing out of this charge: "I suppose this Mason-lodge was magnified into the most dreadful society that ever existed . . . . very heavy and very dreadful charges brought against it."

But, after all, no great harm was done by Robison by his ridiculous attack except to his own reputation—So Mote It Be, even *in aeternum.*

Osgoode Hall,
Toronto,
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REGINA v. STERNAMAN: A UNIQUE CASE IN CRIMINAL PRACTICE.

The Honourable WILLIAM RENWICK RIDDELL, LL.D., D.C.L., &c.,
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The almost casual reference in my recent article on the Sacco-Vanzetti Case,[1] of our Canadian case, *R.* v. *Sternaman (1898) 1 Can. Cr. Ca., 1,* has caused many American lawyers to write me about it and ask for further information concerning it—most of the inquiries being as to our practice in appeals in criminal cases and the power of the Minister of Justice to grant a new trial. In this paper, I shall try to answer these inquiries, at least in part.

At Cayuga in the County of Haldimand and Province of Ontario, a true bill was found against the accused for the murder in August, 1896, of her husband by arsenical poisoning. Her trial took place, November 17, 18 and 19, 1897, before Chief Justice Armour (then Chief Justice of the Queen's Bench, later Chief Justice of Ontario and finally, Justice of the Supreme Court of Canada) and a jury, resulting in her conviction.

The evidence appeared to prove conclusively that the death was due to arsenical poisoning while the accused was living with and attending on her husband. The Crown in order to show that the poisoning was intentional and not accidental put in evidence to prove that her former husband had been taken suddenly ill after eating food prepared by her and that the symptoms and circumstances attending his illness and death were similar to those attending the illness and death of the second husband. This evidence having been objected to, the Chief Justice ''Reserved a Case'' for a Divisional Court: a Divisional Court composed of Boyd (afterwards Sir John Boyd), Chancellor, and Rose and Falconbridge (afterwards Sir Glenholme Falconbridge) JJ., held, January 3, 1898, the evidence properly receivable.

This practice is now to be described.

At the Common Law, there was no New Trial in cases of Felony—*Reg. v. Scaife (1851) 17 A. & E., N.S., 238* stands alone and it has been authoritatively discredited: *Attorney-General, N.S.W. v. Bertrand (1867) L.R. 1 P.C., 520*—I am not, of course, referring

[1] *The Sacco-Vanzetti Case from a Canadian View-point:* "American Bar Association Journal" (December, 1927), pp. 683, *sqq.:* An abstract of this article appears in Current Events (March, 1928), pp. 839, *sqq.*

to the writ of *venire facias de novo juratores,* which, while not an order for a New Trial, had substantially the same effect and was granted where a jury was discharged without verdict, a special verdict was insufficient or there was an imperfect or misunderstood verdict.

It may be worth while to mention one case of the kind, which seems to have been overlooked by the text-writers.

In *19 Howell's State Trials, 680,* mention is made of the Case of Ashley and Simons the Jew. Simons on the trial in 1751 of one Goddard, gave evidence for the prosecution: Goddard being acquitted prosecuted Simons for perjury; the jury found him Guilty, as it was supposed; but they all made affidavit that they did not intend to do more than find that what he swore to was not true but not wilfully untrue and that what they gave as their verdict was misunderstood. A *venire de novo* was awarded and a new trial had, "the first precedent of the kind to any person who had been convicted of a criminal offence": *do., do.,* 692, note.

But the strict limits of the practice are shown in *Rex v. Canning (1754) 19 St. Tr., 283,* where two jurors swore that while they agreed in the verdict of Guilty in a prosecution for perjury, they did not intend to do more than find that the accused had sworn to what was in fact untrue. The Court, however, refused to grant a new trial, as in this case the verdict was correctly taken whereas in the Ashley and Simons case, "The judge took a wrong verdict which was not the meaning of the jury": *do., do.,* 672, 673.

I have elsewhere given an historical account of the statutes concerning New Trials in this Province[2]: in 1897, 8, the practice was governed by the Criminal Code of 1892, 55–56 Vict., c. 29 (Dom.) which by s. 743, after abolishing proceedings in Error, authorized the Trial Judge "to reserve any question of law . . . for the opinion of the court of appeal . . ." At that time in Ontario "The Court of Appeal" for the purposes of the Criminal Code was a Divisional Court of the High Court of Justice and composed of three Judges—we shall see that this has since been changed.

The appeal failing in the Divisional Court, there was no further appeal, as the Judges were unanimous—had there been a dissent, an appeal might have been taken to the Supreme Court of Canada: Code, s. 742.

[2] *New Trial in Present Practice*: 27 "Yale Law Journal" (January, 1918), pp. 353, *sqq.;* and cf. *New Trial at the Common Law:* 26 "Yale Law Journal" (November, 1916), pp. 49, *sqq.*

All that was open to the prisoner was to make "application for the mercy of the Crown", and such an application was made.

Now was brought to light, by what many would regard as an intervention of Providence, a fact which changed the whole situation. The death of the unfortunate man had been attributed to arsenical poisoning chiefly because arsenic had been found in considerable quantities in the body on the postmortem examination. The prisoner insisting on her innocence, her Counsel made diligent search for a possible source of the arsenic and at length discovered that the embalming fluid used in the body before suspicion was aroused contained arsenic. This fact was made to appear to the Minister of Justice, the Hon. David Mills, afterwards a Puisné Justice of the Supreme Court of Canada.

In the Code, s. 748 provides, "If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may direct"—this law is still in force. Of course, "advising Her Majesty" was part of the camouflage with which our Constitution abounds, a method by which we keep the old traditional forms while having revolutionized the spirit, for "the letter killeth and the spirit giveth life,"—Canada is in fact governed by the Cabinet and Her Majesty knew no more about and had no more to do with the matter than the President of the United States. So, too, the acts of the Minister of Justice in the exercise of his official duties, the Cabinet, the Administration, the Ministry, as a whole must accept responsibility for: accordingly, Mr. Mills laid the facts before a Cabinet meeting. The determination of the Cabinet appears in the order of the Minister of Justice, although couched in language indicating the conclusion to be his own,—camouflage again.

The formal order will be found in *1 Can. Cr. Ca., pp. 3, 4.* After reciting the indictment, trial, conviction and application for mercy, it proceeds:

> "I, the . . . Minister of Justice . . . having considered the evidence taken and the proceedings had at the trial, although I entertain no doubt as to the propriety of the said conviction . . . upon the said evidence and proceedings, yet inasmuch as representations have been made upon the said

> application for clemency, and evidence and circumstances called to my attention which were not presented at the trial, or considered by the learned Chief Justice or the Jury, which throw doubt on the propriety of the said conviction, and on account of which, I entertain a doubt whether the 'prisoner' ought to have been convicted, and having made such enquiry as I think proper . . .''

A new trial was ordered before the High Court of Justice for Ontario, May 3rd, 1898.

On that day she appeared before a Jury and, the arsenic being now accounted for, was acquitted.

This is a unique proceeding, the order for a New Trial being without precedent, and none having been since made.

The practice of appeal in criminal cases has since been changed and now there is an appeal as of right without the necessity of the Trial Judge "Reserving a Case": and the Court of Appeal is a Divisional Court of the Appellate Division of the Supreme Court of Ontario composed of five judges with a further appeal to the Supreme Court of Canada if there is any dissent in the Court of Appeal.

WILLIAM RENWICK RIDDELL.

OSGOODE HALL, TORONTO, March 12, 1928.

NOTES AND DOCUMENTS

A Philadelphia Lawyer and Early Lower Canada Law

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NOTES AND DOCUMENTS

A Philadelphia Lawyer and Early Lower Canada Law

IN the year 1810, a very able member of the Philadelphia Bar—the acumen of the "Philadelphia lawyer" is proverbial—visited Lower Canada, and wrote an account of what he saw of interest in that province. This was William Rawle, a descendant of Francis Rawle, who went to Philadelphia from Cornwall in 1686. William Rawle was born in Philadelphia in 1759, and studied law in New York from 1778 to 1781, under J. T. Kempe, the last Loyalist attorney-general of that colony: he then proceeded to England and was in August, 1781, admitted a student-at-law in the Middle Temple. Returning to America he was, in 1783, admitted to the Bar of Philadelphia, and founded the Rawle Law Office which has continued to the present day, the head of it now being his descendant, an equally able and distinguished lawyer, Francis Rawle, one of the two surviving founders of the American Bar Association. Before his tour in Canada, William Rawle had been United States district attorney under Washington, and had prosecuted the criminal cases arising in 1794 out of the "Whiskey Rebellion."

Rawle's account of his tour in 1810—or, at least, of part of it—is contained in a small note book wholly in his clear handwriting, and now the treasured possession of his descendant already named.

He left Schenectady, August 17, 1810, by carriage, proceeded to Buffalo, to Niagara Falls and Newark (Niagara-on-the-Lake), then by a chartered schooner to Kingston, Upper Canada. From Kingston he went by a river boat propelled by oars to Ogdensburgh, and by another to Montreal; thence by steamboat to Quebec, by "calash" back to Montreal, and by carriage to St. John's.

In this paper, we are concerned only with Rawle's observations on the laws, lawyers, and constitution of Lower Canada: these are worthy of consideration as he was not only a lawyer in active practice and a man of great ability, but also he was a gentleman,

and seemingly without the rancour against "England" and everything "English" which characterized and disfigured too many of his generation.

An appreciative description is given of Montreal, the greater part of whose "inhabitants are French, who are rigid catholics." Of the new Court House, "one of the most conspicuous and the finest edifice in the place," Rawle says:

> It is a large structure built of handsome stone. Though in itself there is nothing very superb, yet its modern style is so happy a relief to the gloomy monotony around, that it does not fail to strike the eye in a pleasing manner. A beautiful portico in front deserves, however, for its own sake some attention. This is spacious and lofty & is supported by a number of fine pillars . . .

With regard to the laws of Lower Canada he proceeds:

> The laws respecting real property in Lower Canada are far from being uniform. In consequence of the change of masters which the country has experienced, considerable mutations have taken place in the laws generally. The whole of the old criminal code has been rejected in favor of that of England & such alterations have been introduced in the system regulating landed estates as to produce great confusion and a multiplicity of forms in the proceedings of the Courts.
>
> While this was a French province, tenures were strictly feudal. Upon its conquest by the British it was naturally supposed, that so small a population as it then possessed would readily incorporate their manners laws & customs with those of the more populous & more extensive colonies, with which it was in future to be united. It was, therefore, ordered that the same code, criminal and civil should be observed in this that governed his Majesty's other American provinces. But this innovation was not relished by the Canadians. They complained loudly of the overthrow of institutions to which time & prejudice had attached them & and at length induced the British Parliament in the 14th of the King to pass a bill restoring to them their civil code & granting them a constitution of their own. By this bill, called the Quebec Act, it is enacted, that thenceforward all suits that shall be instituted in his Majesty's courts in this province respecting the property of his Canadian subjects, shall be determined according to the ancient laws & customs of Çanada. But it was also ordered that all lands taken up under grant from the British crown, should be held in free & common soccage, according to the laws of England. Here then are two systems of jurisprudence, existing in full force in the same country; diametrically opposite

> in their nature; and in their modes of pursuing the ends of justice altogether different. Hence has arisen much confusion in the courts. Possessing both a civil & common law jurisdiction, they have been obliged to multiply their forms to such a degree as to require much industry & attention, to understand their proceedings. And this confusion is greatly increased by the necessity of conducting almost all suits in two languages. In trials by jury it rarely happens that all the jurors understand the same tongue. It is therefore necessary that the testimony of witnesses should in every instance be translated; for which purpose, I believe, the clerk of the court is sworn. For this reason the gentlemen of the Bar are obliged to make themselves so perfectly acquainted with both french & english, as to be able to address a jury, with equal facility in either language and sometimes in both. It therefore follows that the trial of a cause under these circumstances must occupy double the time it would otherwise require. But notwithstanding this unavoidable delay, I am well assured that they get through much more business here in the same time, than some of our courts which are not clogged with similar encumbrances.
>
> I was struck, too, with the dignity & distance observed by the Bench & the deference & respect which the Judges received from the Bar & all the officers of the court; so different from our own.
>
> Monk is the Chief Justice of the District of Montreal. In his manners he is haughty & imperious. He is said to be pretty well learned in the law; but from his style of expression in the decision of a question, which I heard, I conceived no very favorable opinion of his general education.

This description fairly and intelligently sets out the state of the law. By the Royal Proclamation of October 7, 1763, after Canada had become by the Treaty of Paris, 1763, *de jure* as it had been for some years *de facto*, British, the King said: "All Persons Inhabiting in or resorting to our Said Colonies [including Quebec] may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England—"[1] This proclamation was construed as introducing the laws of England, civil and criminal, into the province on the principles laid down by Lord Mansfield in Campbell v. Hall, 1774. (1 Cowper K.B.R. 204 at p. 209): "The laws of a conquered country continue in force until they are altered by the conqueror . . . the King without the con-

[1]Adam Shortt and A. G. Doughty, eds., *Documents relating to the Constitutional history of Canada*, 1759-1791 (2'd ed., Ottawa, 1918), I, 165.

currence of parliament has a power to alter the old and to introduce new laws . . ."

When a system of courts came to be established in 1764, the ordinance issued at Quebec, September 17, 1764, erected two courts, the one a superior court called the Court of King's Bench "to hear and determine all criminal and civil Causes agreeable to the Laws of *England* and to the Ordinances of this Province", the other an inferior court called the Court of Common Pleas for civil causes above £10. The extraordinary provisions concerning the law to be applied in this Court of Common Pleas prove the incapacity and unskilfulness of its authors. It was provided that,

> The Judges in this Court are to determine agreeable to Equity, having Regard nevertheless to the Laws of *England* as far as the Circumstances and present Situation of Things will admit, until such Time as proper Ordinances for the Information of the People can be established by the Governor and Council, agreeable to the Laws of *England*.
>
> The French Laws and Customs to be allowed and admitted in all Causes in this Court between the Natives of this Province, where the Cause of Action arose before the first Day of *October*, One Thousand Seven Hundred and Sixty-four.[3]

There was an appeal from the inferior court to the Court of King's Bench in causes of £20 and over. In the Court of King's Bench, the judge was the chief justice of the province, then, and for some time, an English barrister: and in that court in all cases, original or in appeal, the laws of England were applied: in the Court of Common Pleas, the judges were generally laymen—they interpreted the word "Equity" in the Ordinance, not as a lawyer would, *i.e.*, the rule in the Court of Chancery, but according to the principles of natural justice. There was, thus, an extraordinary state of confusion in this court—neither the laws of England nor those of France were regularly applied, but each judge decided according to his own view of "Equity"; it was "the length of the Chancellor's foot" over again. And there was confusion worse confounded when a case was taken up in appeal to the King's Bench with its English law; and still worse if, the cause exceeding £300 sterling, an appeal was taken from the Court of King's Bench to the governor and Council. It is no wonder that a special committee in reporting to the "Lords of the Committee for Plantation Affairs", September 2, 1765, said:

[3]*Ibid.*, 205-7.

> As to the manner in which the said Ordinance appears to have been Drawn up . . . it is in many Parts . . . far from having that Accuracy and Precision that ought to have been particularly attended to in the framing an Ordinance of so great Importance, and upon the Construction of which the Life, Liberty and Property of the Subject depend . . ., [The Special Committee cannot say] Whether these obvious Defects in the manner of framing this Ordinance are to be attributed to the Neglect or the Inability of the Officers in the Law Departments of this Colony, we cannot take upon us to say.[3]

The responsibility for this lamentable piece of legislation should probably be laid on William Gregory, the first chief justice of the province, an English barrister brought, it was said, from a debtor's gaol, and dismissed two years afterwards. Governor Murray gives him the faint praise that, "tho' perhaps" a good lawyer and man of integrity, he was "ignorant of the World, consequently readier to Puzzle and create Difficultys then remove them."[4] At all events, Gregory was the only lawyer on the Council—of the other seven, three became judges but were never lawyers.[5]

Except on the part of a few seigneurs who looked at it as a levelling law, the English criminal law was not objected to, but the French Canadian was wedded to his own civil law. Many and grievous were the complaints until the Quebec Act determined that the province should have English criminal, and French civil, law.

The Constitutional Act of 1791 continued the existing law. It is quite true, however, that there was a divergence in the tenure of land in the Lower Province,—some of the grants being in free and common socage while most of the land was held in the feudal or seigneurial tenure: but this was no more anomalous and these tenures were no more different than was the case in England, where free and common socage and copyhold had existed for centuries, side by side.

I have not seen any other account of the manner of Chief Justice Sir James Monk. In 1787, he made before the Legislative Council very derogatory statements concerning the administration of justice in the Canadian courts, which led to an extensive investigation before Chief Justice William Smith, the minutes of which fill thirteen volumes in the Canadian Archives. On the creation

[3] *Ibid.*, 242.

[4] *Ibid.*, 256, note 2.

[5] See the author's *Pre-Assembly Legislatures in British Canada* (Transactions of the Royal Society of Canada, 1918, Sec. II, p. 118).

in 1793 of two Courts of King's Bench for the province, one at Quebec and the other at Montreal, Monk was made chief justice at Montreal. His life at the Bar was a stormy one, which is, perhaps, partly explained by Rawle's account of his manner. His knowledge of law I do not find questioned by anyone else.

Another matter of interest is the constitutional struggle between the governor, Sir James Craig, and the House, which Rawle thus describes:

> A gentleman, a canadian by birth, who had for some time been a member of the Assembly & who by his opposition to Government had acquired great popularity, was for some cause or other (probably on account of that popularity) suddenly made a judge. Immediately he changed sides: he became the warm partizan of the Executive & openly advocated all its measures with as much zeal as he had formerly taken the part of the people. Incensed at his apostacy, the popular party determined that if they could not deprive him of the patronage of the governor, they would at least exclude him from the house. Accordingly a bill was passed declaring a judge to be incapable of holding a seat, which passed the representatives. As in the Act granting the constitution of Canada, no such exclusion is to be found, it would have been a violation of that Act to make such a law: it was therefore rejected by the Governor; who finding there was no prospect of business being done in a regular way, & that the house had become very clamorous, dissolved the Parliament. To the next Parliament the gentleman was elected & took his seat. The same business was renewed, the same warmth ensued, upon which the Governor thought proper again to dissolve it. This unpleasant dispute was at length happily terminated by the gentleman himself who declined another election leaving the controverted point unsettled. During these heats seditious & inflamatory pieces frequently appeared in the public prints & in the form of pamphlets: these were answered with warmth by the other party but as they were merely ephemeral productions, few of them could be obtained when I was in Quebec.
>
> The Governor issued a proclamation offering a reward for the detection of these anonymous writers & warning the people against their seditious suggestions.

This is not quite a fair account of a striking incident in the history of Lower Canada. The fact is that for some time there had been growing a feeling that judges should not be mixed up in the political concerns of the province: and, in Sir James Henry Craig's first parliament in 1808, a resolution was passed (22 to 2), in the

Assembly that it was expedient to exclude judges from the Assembly: a Bill to that effect passed the House but was rejected in the Legislative Council. This did not, however, cause a dissolution or even a prorogation: the Assembly continued its work, one of its measures being the ejection (21 to 5), of Ezekiel Hart, M.L.A., because of "professing the jewish religion": (and, by the way, his constitutents of Three Rivers, with proper spirit, at once re-elected him). This was in the fourth session of the fourth parliament of Lower Canada: and P. A. De Bonne (the judge referred to by Rawle) was one of the members for the County of Quebec, having been elected in 1804 at the general election of that year.

The fourth parliament being dissolved, at the general election of May, 1808, De Bonne, now a judge, was one of the two members elected for the County of Quebec as before. The House, meeting on April 9, 1809, went into the matter of the election of the Jew and the judges, and, after it had spent about five weeks over this, the governor, becoming tired of what he considered a waste of time, dissolved parliament on May 15.

The general election took place in October, De Bonne being again one of the members for the County of Quebec. The House met on January 29, 1810: in the Speech from the Throne, the governor spoke of the proposal to exclude the judges of the Court of King's Bench from the House, and said that, whatever his own opinion was, he could not give the royal assent to a measure which excluded any class of His Majesty's subjects, but that if such a Bill were presented to him, concurred in by both Houses, he would take His Majesty's pleasure upon it. He said, however, that the right could not be taken away "by any other authority than that of the concurrence of the three branches of the legislature." The House resented this, but passed a loyal address; then later proceeded to pass a resolution (18 to 6), "That P. A. De Bonne being one of the Judges of the Court of King's Bench, cannot sit nor vote in this House." The governor at once, and for the reason that the House had usurped the functions of the other branches of the legislature by this resolution, dissolved parliament.

At the general election for the seventh parliament there were two well defined parties; the one, Canadian, composed of French Canadians, and chiefly rural and agricultural, called by their opponents "Frenchmen", "democrats," "boutefeus," etc.; and the other, the British party, who called themselves the Loyal Party, and were called by their opponents "Anti-Canadiens", "choyens," "Anglais", etc. This was a most turbulent election; treason was

freely charged; the governor issued his Proclamation of Warning—and Mr. Justice De Bonne wisely declined nomination, because, the suspicious say, he expected to be called to the Legislative Council—an expectation which, if it ever existed, was doomed to be disappointed. Such was the state of affairs when Rawle visited the province. The agitation against judges in the Assembly died down with De Bonne's retirement from the political field—there can be no doubt that it was largely because of him that the difficulties originated. At length the Act of 1843, which came in force in May, 1844, made it impossible for any judge to be a member of the House.[6]

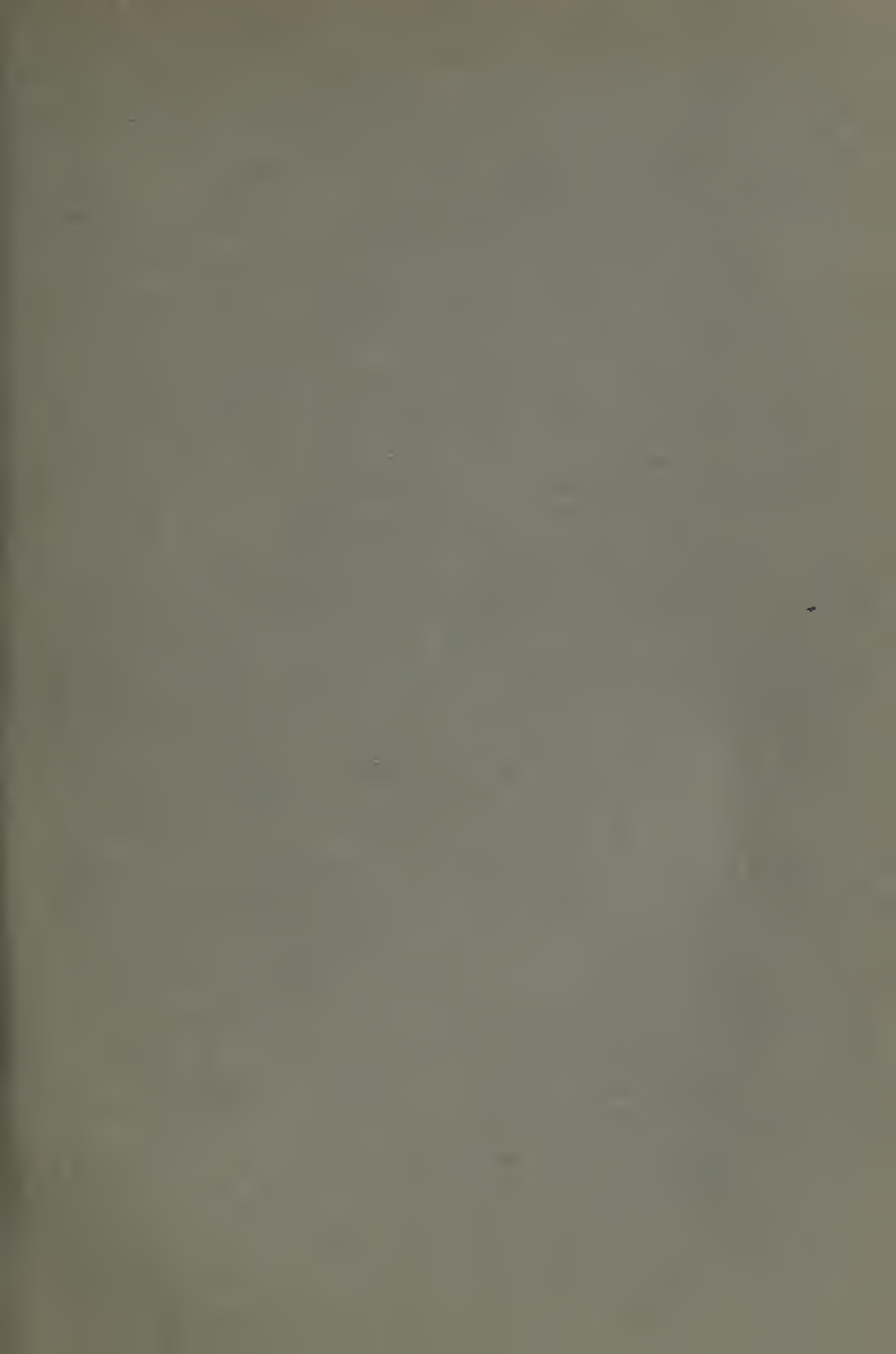
This paper may fitly conclude with the Philadelphian's estimate of the French-Canadian "peasantry":

> I never had a proper idea of peasantry until I saw that of Canada. A more miserable race does not exist. They do not appear to have advanced a step for a century. They are excessively idle; spending half their lives in drinking, smoking & lounging; and provided they can live from day to day seem quite indifferent about securing for the future greater comforts either for themselves or for their children. They suffer lands, which with a little care would produce abundant crops, to lie neglected and get from them scarcely enough to supply their immediate wants. Yet notwithstanding their indolence and inactivity, they have all the politeness & vivacity which so strongly mark their nation.

Then as now the Anglo-Saxon and the Gallic minds could not meet—*joie de vivre* and anxious thought for the morrow had difficulty in being reconciled. It would be interesting to hear a contemporary French Canadian's views of the manner of life in rural or urban Pennsylvania.

WILLIAM RENWICK RIDDELL

[6] 7 Vict., c. 65 (Canada). The story of judges in the parliament of Upper Canada is given in the author's articles in the *Minnesota Law Review,* February and March, 1919.



The Tragedy of Mary Lamb

By THE HONOURABLE WILLIAM RENWICK RIDDELL, F.R.S.C.

The generous gift of Mr. John Gribbel of St. Austell's Hall, Wyncote, Pennsylvania, to the Royal Society of Canada, of a photostatic copy of what he calls "the saddest letter I ever read", recalls the most tragic event in the life of Charles Lamb, who "wrote for antiquity" but is beloved by those who followed.

Charles Lamb, the son of persons of amiable disposition but of no importance, had passed through Christ's Hospital, where he had met Samuel Taylor Coleridge, and where they had both essayed the poetic art and both attained at least the lower stages of the ascent of Mount Parnassus: he had been a clerk in the office of a merchant, "Joseph Paice, of Bread-street-hill", and, after renewing his acquaintance with Coleridge, was safe in the haven of the East India House.

He had passed the dream of love—his idolized Alice, who was known to others by her real name, Ann Simmons, to himself in the Sonnets as Anna, had not responded and had married a pawn-broker. He still cherished her memory, indeed, but she was lost to him forever. Yet, he had a not unhappy life in Little Queen Street, Lincoln's Inn Fields, with his aging father and mother, John Lamb his brother, his "Aunt Hetty" (Sarah Lamb, sister of John Lamb, his father) and one other, dearly loved and deeply loving, who, all unconscious of wrong-doing was to bring into his life, horror and tragedy, as she had already brought care and anxiety.

Mary Lamb, born in 1764, christened Mary Anne, was the third as Charles was the youngest of the seven children who were born to John and Elizabeth Lamb; she was some eleven years older than Charles, and had taken care of him from infancy with the tenderest devotion; and her love was fully reciprocated by him—they two with John were the sole survivors of the seven; and while the older brother John—who was eighteen months older than Mary—had due fraternal and sisterly affection, he did not share the very great love between the sister and the younger brother.

Mary Lamb had no small share of the literary ability of her famous brother; she had not the advantage of so extensive an education—in those days this would have been thought indelicate or, at least, eccentric—but she had native talent and put it ultimately to good use. John Lamb was not a rich man; *res angusta domi* was not a stranger

to the household, and Mary was required to help the family exchequer. She became a mantua-maker, what we new call a dressmaker—or with a concomitant advance in prices of twenty-five per cent, a Couturière —and she was working at that trade by day and attending her ailing and somewhat querulous mother by night. Her loving brother could truthfully as proudly say of her: "Of all the people in the world, she was the most thoroughly devoid of all selfishness". Unfortunately, in common with Charles, she suffered from a diathesis, then by all, now still by many considered a hereditary taint, making her peculiarly liable to the dread affliction of insanity. Charles had in 1795, "spent the six weeks that finished . . ." 1795 "very agreeably in a mad house at Hoxton", as he says in a letter to Coleridge of May 27th., 1796. He is said to have imagined himself to be young Norval of Home's "Douglas", whose father fed his flocks, "a frugal swain, whose only care was to increase his store". Be that as it may, he retained enough of his intellect and sanity to write to and of his sister the beautiful and moving sonnet:

> If from my lips some angry accents fell,
> Peevish complaint, or harsh reproof unkind,
> 'Twas but the error of a sickly mind
> And troubled thoughts, clouding the purer well,
> And waters clear of Reason . . . . .
> . . . .
> . . . . Thou to me didst ever show
> Kindest affection . . . .
> Mary . . . . . my sister and my friend.

In 1794, Mary was attacked by sickness, the precise nature of which does not seem to be known. There are indications that it had, at least, some effect upon her disposition—which is often but another name for state of health, physical and mental. Whether her mind was seriously affected by this illness, we cannot be sure; but the probabilities are that it was. However that may be, she was tired with constant attention to her handicraft and perpetual watchful care over her mother; her apprentice, too, as is the way with apprentices, was a trouble to her; and it is more than likely that the scanty means available for the support of the family were a source of anxiety to the house-mother.

On Monday, September 21st., 1796, into the life of this family, entered grim tragedy with a cloud which was never to be lifted, and which for a time threatened the growing powers of Charles Lamb with complete destruction. It is said by several biographers that Mary

had already had an attack of insanity; whether that is true or not, I have not been able to make sure; no particulars are given. However that may be, she had been showing signs of stress—as was said, "her conduct was peculiar".

At all events, on September 21st., 1796, she showed symptoms which alarmed her household, indicating insanity: the next morning, Charles went for the famous physician, expert in all branches of "Physick", Dr. Pitcairn; but the doctor was out and he did not call in anyone less renowned. At noon of that day, the terrible tragedy occurred: the table was set for dinner, apparently some awkwardness on the part of the apprentice brought on an attack of *furor,* which had been feared and which was far from unlikely to occur to anyone in Mary's physical and mental condition, with the diathesis she undoubtedly had and the prevalence of matters which irritated and annoyed her. She snatched up a "case-knife", which was lying on the table and made an attempt to stab the girl; the frightened apprentice ran round the room in the effort to escape the mad woman, and Mary pursued; the crazed one threw the table-forks at random around and wounded her father, sitting in quiet; she kept up the pursuit of the apprentice, and when her mother protested against what she was doing and tried to quiet her, she stabbed her to the heart, killing her instantly. Charles arrived in the room just at this juncture and wrested the knife from her hand in time to prevent further bloodshed; then he went to the assistance of his father who was bleeding from a wound in the forehead where he had been struck by one of the flying forks; "Aunt Hetty" was lying insensible and apparently dying; and unhappy Mary stood dazed and helpless.

On the following day, an inquest was held and a verdict rendered in accordance with the facts, Mary being found insane and not responsible for her acts. Some of the biographers say that she was put in an Asylum for a time, but the fact seems to be that sufficient interest was brought to bear upon the authorities that this was spared her, and she was given into the custody of her brother. His tender care of her for the remainder of their lives is too well-known to require retelling. From time to time, she had a relapse, necessitating restraint; and the pathetic story is told of sister and brother going hand-in-hand, weeping together, to the Asylum, which was found to be the only place where she could hope to recover her reason.

On September 27th., 1796, Lamb wrote the letter of which I have spoken—it is as follows:—

My dearest friend:

White or some of my friends or the public papers by this time may have informed you of the terrible calamities that have fallen on our family. I will only give you the outlines. My poor dear dearest sister in a fit of insanity has been the death of her own mother. I was at hand only time enough to snatch the knife out of her grasp. She is at present in a mad house, from whence I fear she must be moved to an hospital. God has preserved to me my senses,—I eat & drink & sleep, I have my judgment I believe very sound. my poor father was slightly wounded, & I am left to take care of him & my aunt. Mr. Norris of the Bluecoat school has been very very kind to us & we have no other friend, but thank God I am very calm & composed, & able to do the best that remains to do. Write,—as religious a letter as possible—but no mention of what is gone & done with—with me the former things are passed away & I have something more to do that to feel—

God Almighty have us all in his keeping— C. LAMB.

mention nothing of poetry, I have destroyed every vestige of past vanities of that kind. Do as you please, but if you publish, publish mine (I give free leave) without name or initial & never send me a book I charge you.

Your own judgment will convince you not to take any notice of this yet to your dear wife. You look after your family,—I have my reason & strength left to take care of mine. I charge you don't think of coming to see me. Write. I will not see you if you come. God almighty love you & all of us.

This letter is on a sheet and a leaf of foolscap paper.

On the first page of the sheet the writing ends at the words "I charge you" and the rest of the letter appears on a loose sheet.

On the other leaf of the sheet and on the outside is the address: "Mr. Coleridge, Bristol", and the post mark which is apparently D. 27/96.

NOTE—White named in this letter was James White, a schoolfellow of Lamb's, and a close friend; he is described by Lamb in his *The Praise of Chimney Sweepers.* Lamb stayed with him in 1798 and he frequented Lamb's Thursday evenings; when he died in 1820, Lamb said: "James White is extinct. . . . He carried away with him half the fun of the world when he died—of my world, at least". Of Mr. Norris, Lamb writes to Coleridge shortly after this: "Mr. Norris of Christ Hospital has been a father to me, Mrs. Norris as a mother: tho' we had few claims on them".

Coleridge was living at Bristol, to which place he had gone to reside after marrying Sarah Fricker.

In addition to the *Encyclopaedias* and the *Dictionary of National Biography* I have consulted Mrs. Alex. Gilchrist's *Mary Lamb* in the *Eminent Women Series*: Barry Cornwall's *Charles Lamb*: Alfred Ainger's *Charles Lamb* (both the 1882 and the 1888 editions): and particularly, E. V. Lucas's delightful *The Life of Charles Lamb* in two volumes. Several of these give the letter in whole or in part, none quite accurately: the necessity of quoting with literal precision has not yet been acknowledged in purely literary circles; meticulous accuracy is left to the drudges who write History and the like.

Osgoode Hall, Toronto, WILLIAM RENWICK RIDDELL.
Mayday, 1928.

A Pretty Quarrel Over Rum in Old Michillimackinac

By THE HONOURABLE WILLIAM RENWICK RIDDELL, F.R.S.C.

(Read May Meeting, 1928)

During the French Régime, Michillimackinac (1) was an important trading-post, the French receiving furs in exchange for their wares—practically all accounts agree that a very large proportion of the latter consisted of brandy which was as much and as justly reprobated by the English as the rum of the English trader was by the French.

After the surrender at Montreal by de Vaudreuil, September 8, 1760, Jeffrey Amherst directed Major Robert Rogers to take over the French Posts in the western country: he at once proceeded with his small but efficient body of Rangers westward and, November 29, took over Detroit. He was unsuccessful in his attempt to take Michillimackinac that winter, as the lake froze up; but early in the spring of 1761, a detachment of the Royal Americans took it over (2).

Rogers (or Rodgers—he spells his name both ways as do others (3)) was born in Londonderry, N.H., (or Methuen, Mass.), in 1727, the son of an Irishman, James Rogers, who was shot by a hunter who took him for a bear in the woods. The son is described as a man six feet high, "well proportioned and one of the most athletic men of his time, well known in all the trials of strength and activity among the young men of his vicinity . . . inured to the hardships of the frontier, acquiring that character of decision, self-reliance and boldness which distinguished him in after life" (4).

He first appears in history in 1755 when he was commissioned to command a company of New Hampshire Troops in the successful expedition against Fort St. Frederic (Crown Point) under the command of Major General (afterwards Sir) William Johnson. He took an active part in this campaign. His account, brought concerning the enemy at Ticonderoga, differed from the accounts of others, and the discrepancy led to his veracity being called in question. Sir William Johnson said of him: ". . . Captain Rodgers whose Bravery & Veracity stands very clear in my Opinion & of all who Know him . . . I have mentioned Capt. Rodgers more particularly as I have Understood some Insinuations have been made to his Disadvantage. I believe him to be as brave & as honest a Man as any I have equal Knowledge of . . ." (5). Goldsbrow Bonyar, who seems to have been the originator of the suspicion, at once wrote to Johnson: "if it be from any thing

I have wrote that you conclude doubts are entertained here (*i.e.*, at Albany) of Capt. Rogers's veracity: I meant & still think he was imposed upon himself . . ." (6).

He remained in command of Rangers, some 300 men, and took part in the siege of Montreal in 1760; we have already seen his commission immediately after the Capitulation, and the acquisition by the British of Michillimackinac in the spring of 1761.

Rogers now disappears from the scene for a time: Michillimackinac knows him no more for some years.

Notwithstanding the prohibition against French trading in the far western territory, traders of that nationality—some of the most active having their headquarters at Toronto—continued to flood Michillimackinac and other western points with brandy; and the English traders, not to be behind, did the same with rum, each lot maligning—or, to speak more accurately, telling the truth about—the liquor of the other, bootlegger style. In the Licences to trade with the Indians which every trader was obliged to take out by Sir William Johnson, who had been made "His Majesty's sole Agent and Superintendent of Indian Affairs for the Northern District of North America", February 17, 1756 (7), rum was not forbidden to be sold; and Captain Campbell in command at Detroit lodged a complaint "that the Traders from Niagara which, of course, go from Oswego, Carry nothing with them but Rum" (8). Captain Henry Balfour, at a Conference, September 29, 1761, with the Indians of the Nations living in the "Environs of Michillimackinack", was very plain and outspoken: they complained: "We are so poor that I have great fear our old people, our Women and Children will perish with hunger. We are destitute of every thing, having neither powder, nor lead for hunting . . . We have nothing to cover us as well as our Wives and Children from the Cold . . . Will you not Succour them under the pressing necessitys?"

The fearless Scot answered: "I am not . . . surprised . . . you are so miserable. You had plenty of pelltry last Fall, what is become thereof? . . . you sold your pelltry for Rum without even buying powder, Lead, or any other things. You are continually drunk and then you behave yourselves not as Men but as Beasts . . . I have considered you hitherto as Men, but I believe you merit not that title, because you prefer a little Rum to your old people, your Wives and your Children . . ." But the apparently hard hearted Captain showed human sympathy: though the Indians did not merit it, he would not let them perish in the Winter. "The Commdt will give you tomorrow what we can (*i.e.*, from the Military Stores) and the Traders at my

request are willing to give you credit for what you want . . . The French have given a bad character of you saying that you will not pay. Let them see the contrary . . . learn to behave as Men, and be no longer Children . . ." (9).

Amherst (through Johnson's influence, it would seem) ordered their Rum to be taken from the western traders and placed in the King's Stores "with strict orders not to let an Indian have a Drop."

More than the welfare of the Indians was at stake: Amherst could not credit Major Gladwin's information, soon to have a terrible confirmation in Pontiac's war, that the Indians in Canada had the design of "Revolting against the English", but, basing his belief largely on the report of Daniel Claus, considered "that the whole must have Sprung from some Indians Intoxicated with Liquor". He agreed with Johnson that it would be hard to prevent the traders from the New York "side from carrying Rum, while it is permitted to be taken from Montreal", but he did not think, from his correspondence with General Gage, the Governor at Montreal, "that Rum is Allowed to be Carried by the Traders" (10).

Although Gage asserted that it was forbidden traders to carry rum to give to the Indians, several traders—chiefly from Toronto—asserted that they had his Licence to sell Liquor to the Indians.

There is nothing prohibitive as to liquor in Gage's Proclamation of April 7, 1761, which notified all persons who wished "to trade in the Posts of the Upper Country that they may go there, the trade is free for everybody but . . . the said Traders will be obliged to take passports from us and to give us a statement of the merchandise they are to take . . .": but July 29, 1761, Gage's Proclamation expressly forbade all persons, innkeepers or otherwise to give or sell liquor to Indians. This Proclamation was never revoked, and it is hard to see how the claim of the Toronto traders could be justified by the facts; but vendors of spirituous liquors have never been noted for their candour (11).

At Niagara no less a quantity than 2602 gallons of liquor was seized under this order (12); twelve Indian traders residing at Niagara presented a petition to Johnson, dated April 27(?), 1762, saying that, being "very sensible that the impoverishing an Indian of Cloaths & Ammunition would be the Decay of Trade", they "never thought it Convenient to let them have any more (rum) than what was proportionable to the Dry Goods they bought; otherwise all the Rum we had might be sold"—they thought that by keeping liquor away from the Indians, "they would not Trade and . . . will not come near this Post, that we may look upon ourselves nothing better than ruin'd

Bankrupts . . . drove to Destruction as by a Common Enemy . . . poor endeavouring Men, upon the brink of the greatest Misfortunes"; they asked His Honour "to allow a small trifle to be given to each Indian, even two Gallons to he that comes from afar . . . if your honor does not look on us in this our Extremity we must either leave our Goods here in a perishing Condition or take them back to our Merchants from [whom] we expect a Cool reception . . ." (13).

The Commandant at Niagara, Major William Walters, who had complied with the order, was, nevertheless, known occasionally to relax a little on the earnest solicitation of an Indian. We find him giving to an old friend of Johnson's—who had begged that each of his people might buy "a two Gallon cag of Rum when they came to Trade to carry home by way of a cordial"—"a present of three two gallon Cags of rum to take whome with him . . ." He anticipated great difficulty in the coming Summer to convince "the Indians that the Debaring them from rum is for their good". (14).

However, at a meeting at Johnson Hall in the Mohawk Valley of the Six Nations with Johnson, April 21-28, 1762, the Oneidas said that they felt obliged to the General for stopping the traffic and that they had staved what liquor they had (15).

Commandant Donald Campbell at Detroit by June had already felt "the good effects of the Rum being forbid at Niagara tho the Indians grumbled at first and even threatened . . ." (16).

The traders at Toronto continued their evil practices of bootlegging at Niagara; we find repeated complaints on that score—and their conduct in respect of Michillimackinac and the Indians who came to Toronto to trade was brazenly illegal and scandalous. We find Gage reporting to Amherst and Amherst to Johnson that there were complaints in Michillimackinac that the Indians had "been drawn from those parts by some Traders at Toronto, having Seduced them by the Sale of Rum, that a Belt of Wampum had been sent from Toronto by those Traders for this purpose and that the Indians thereupon, set out with their Skins and Returned with a Quantity of Rum". Amherst was also informed by Major Wilkins, commanding at Niagara, that many Indians are come to his Post, "Naked & Destitute of Everything having sold their Skins at Toronto for Rum . . ." and he had directed Wilkins to send a party to Toronto "to seize every Drop of That pernicious Liquor that is found in the Traders Stores"—Johnson agreed that their conduct was "verry wrong" and he would punish then if he could but had no Lawyer to advise him. These traders are named, all of them Albany People (17).

Amherst had reiterated the orders he had given "for Prohibiting

the least drop of that pernicious Liquor to pass any of the Posts" (18).

We find complaints from Montreal about the Albany traders—"who obtained a pass from the Govr. (Gage) to go to Toronto", and "took unknown to him a large Quantity of rum with them which had near been of bad Consequence to other people Trading there, which had none of that kind with them" (19).

Johnson asked John Tabor Kempe, Attorney General of the Province, to take proceedings against these illicit traders at Toronto, who had grossly abused Gage's pass "by selling them (*i.e.*, the Indians) large Quantities of Rum contrary to his Excellency's positive orders . . .", Johnson himself never permitting any trader "to carry any Liquor", which he considered "productive of many Murthers, Quarrells & other Breaches of the Peace" (20).

The authorities in the east were anxious to prevent the trade: we find General Gage, Governor at Montreal, April 1, 1762, in his Proclamation respecting the trade of the Upper Country, saying, "Wishing . . . to remedy the inconveniences which may arise in the Indian posts where the traders carry on their trade many of whom carry intoxicating liquors: we, therefore, impose an express prohibition and interdiction on all traders and other persons, whoever they may be against taking or carrying any strong drink of any kind whatever and under any pretext for trade with the Indians . . ." (21).

All kinds of irregularities on the part of Indian traders are reported from time to time from around Detroit—and this meant also further north—which engaged the attention of the authorities—liquor continued to be given to Indians almost openly throughout the New York country and further west (22); but the Pontiac Conspiracy (23) made simple self-preservation a pressing need for the conquering Whites, and nothing was or could be done for some time in the way of checking the flow of fire-water to the aborigines from the French. General Amherst officially stated that he had taken every measure he could for "Preventing the Indians from getting Rum or Spirituous Liquors" (24).

Michillimackinac taken by the Indians in Pontiac's operations was reoccupied by British Troops after the failure of the Indians. During the war, Johnson gave instructions to the officers under his control "to see that the Indians (in the British service) are properly supplied . . . as also that they have a Dram each, Morning and Evening . . . no more . . ." (25).

General Gage who succeeded Amherst, thought "that we must at length yield to the immoderate Thirst which the Indians have for Rum, and let them have it. It should, however, be put under some

Restriction—They should not be permitted to have it at the Trading Posts but to carry away Home what Quantity they pleased" (26).

General Ralph Burton who had in October, 1763, succeeded Gage as Governor in Montreal, when Gage went to New York to succeed Amherst, issued a Proclamation, April 13, 1764, stating that he had established a post at Carillon on the Ottawa and another at the Cedars on the St. Lawrence for trade with the Indians but forbade traders passing above these posts without passes from him—and "expressly forbidding all Traders to sell and retail to the Indians or others at those Posts any Gun Powder, fire arms, ammunition or Spirituous Liquors"—this referred to trade with the "Indians in the Upper Country" (27). Indians from Michillimackinac and other western Indians were not allowed to come to Montreal (28).

For a time after the reinstatement of Michillimackinac as a British post, it was proposed to confine the traders in the Upper Country to Oswego, Niagara and Detroit, Michillimackinac being, indeed, a good place for furs but not reestablished so as to "Secure the Traders Lives & Propertys", and, moreover, "the Traders will be more Cautious of committing Frauds under the Eye of a Commanding officer of some Rank . . .", Johnson having in 1761, "settled the Profits . . . at 50 p.c. at Osswego, 70 at Niagra, 100 at Detroit . . ." (29). We find, however, the Chippewas "liveing at & about St. Marys Lake Superior" praying that they "have liberty to trade as formerly & that you will let the Rum run a little as our People will expect on our return to taste yr. Water wh they like above all things (30).

Gage for a while did not place much reliance on these Chippewas: "they belonged to the Chippewas of Michillimakinak" (31).

The Menominees of La Baie (Green Bay) also wanted liberty to trade and hoped that "you'll not . . . suffer us to want the thing you Know we like, wch we have tasted here" (*i.e.*, at Niagara) (32).

The Chippewas from St. Marys satisfied Gage that "they disapproved at the Beginning of the Surprise of Michillimakinak", and he did not find that they "were the Actors in and Contrivers of the Tragedy" (33).

Johnson had a conference at Niagara in August, 1764, with the "Nations . . . from the Westward" including "Chippaweighs" and "Menominy's", at which it happened that "Most of the Western Nations were well recommended by Major Gladwin (Commandant at Detroit) & other officers, they dwell much on their good treatment of the garrisons of La Baye & Michilimacinac ye latter taken by the Enemy Ottawaes & Chippaweighs . . . they . . . promised . . . to procure restitution for the Traders losses . . . and agreed to the reestablishing a Post at Michillimackinac" (34).

Apparently, it was a result of this conference and the evidence adduced of the good conduct of the Indians at and near Michillimackinac, that it was decided to reopen to the trade, the Post at that place when reestablishment of the Post was completed. There was considerable illicit trading there during the Indian occupancy, generally by the French.

Many of the Montreal traders, who had obtained passes and who went westward by the Lakes or the Ottawa, carried the prohibited goods—"some of whom being Frenchmen continued amongst the Indians during all the Subsequent troubles (and) sold their commodities . . ." They remained in the Western Indian country after the reduction of the Pontiac Conspiracy and continued their trade—one La Charme seems to have been the chief offender. Efforts were made and with fair success to put a stop to this (35).

Johnson's scheme for trade he formulated in October, 1764—this included a Trade Commissary for Michillimackinac as well as one for the other Posts including Niagara, Detroit and La Baye—every trader had to take out an annual Licence and had to declare "the full and actual amount of the Goods (he intended) to vend for one Whole year". Rum was not wholly excluded—Johnson calculated that 50,000 gallons would supply the whole Northern Department.

He was very firmly of the opinion that "to guard agst. Abuses at the Revival of this Trade", the "Licences should contain a Claus binding the Traders to follow such Orders & Regulations as are Shortly to be made . . ." (36).

Captain William Howard, with a Detachment of the 17th Regiment, retook possession of Michillimackinac in the Fall of 1764 and very shortly it became a trading as well as a military Post once more—for example, we find the well-known trader, traveller and explorer, Alexander Henry, supplying Howard, June 6, 1765, with 30 lbs. of ball for the Indians and, again, June 18, with a large quantity of Indian goods (37).

The French traders continued to pursue their illicit trade much to the annoyance of Howard—they kept out of the Post and out of the reach of his soldiers (38). But the English Commandant was able to report substantial progress, as he was "better stocked with Goods & Sold on more reasonable Terms than the French". Rum and tobacco formed a considerable part of the stock; and by September, 1765, Gage, Commander-in-Chief at New York, was able to say to Johnson: "I am glad to see by the last (letter of Captain Howard) that Matters go on so well at Missillimakinak"—adding "I have lately sent up Rum & Tobacco with some stroud . . ." (Stroud was a particular kind of blanket, manufactured specially for the Indian trade).

Howard seems to have been somewhat strict with the traders, as we find them expressing great dissatisfaction with him (39)—the strictness seems to have been necessary, as the Indians had not yet settled down in complete amity with the English, and the French from Canada and Louisiana were constantly stirring up strife (40).

Rogers, after the outbreak of the Pontiac Conspiracy, had been sent in 1763 with a body of troops to the relief of the garrison at Detroit, and had taken part in the sortie when Captain Dalzel was killed—he later was engaged in a campaign under General Grant against the Cherokees: then he went to England and published at London, in 1765, *A Concise Account of North America*, 8vo., pp. 264: and also his better known *Journals of Major Robert Rogers*. Returning, he applied for service and apparently had backing in England.

During the winter, word had come to Johnson of the proposed appointment of Rogers as Commandant at Michillimackinac, and he wrote Gage and others letters, disparaging his character and deprecating the appointment (41); but Gage was apparently unable to follow Johnson's advice. He removed, however, some of the objections by appointing him only Commandant of the Garrison and referring him to Johnson for all orders concerning the Indian trade—Gage said: "I . . . think it best that he should not be more called Superintendent of Indians . . . But he will have business to transact with them as Commandant notwithstanding; tho' he may be restricted in that Character than as Superintendent; And if you find he will not do, that Complaints are made, and that the King's Affairs are going into Confusion, thro' Major Rogers bad Management . . . I shall certainly then remove him from Missilimackinak to some other Post where he can do less Mischief." (42). Johnson was not satisfied, but he had to submit: he, however, determined if possible to put in a Trade Commissary; and, in that view, wrote to Gage asking "whether you think Major Rogers's Appointment should prevent the Sending of a Commissary to Michilimackinac or whether you approve of my sending one there".

In the same letter, he spoke in high terms of "Lt. (Benjamin) Roberts of the 46th . . . A man who has laid himself out to study the Inds. & acquire their Esteem", and expressed his inclination to appoint him Trade Commissary at Niagara (43). Gage approved this appointment and, as to Rogers, he expressed a "fear that he will not make an Extraordinary Commissary, and Missilimakinak is the greatest Mart of Trade" (44).

A little later on, Gage wrote Johnson: "Detroit & Missilimakinak seem to require them (*i.e.* Trade Commissaries) the most from the

Great Number of Indians which we are told resort thither for Trade" (45).

Johnson appointed Benjamin Roberts, Commissary at Niagara, where he did good work in checking the illicit Toronto trade—amongst other things he had taken into custody, Isaac Todd, a merchant of great reputation, afterwards to be a close friend and correspondent of Richard Cartwright, one of the first Legislative Councillors of Upper Canada—Todd was dismissed from arrest on promising to return at once to Montreal (46).

Rogers received instructions from Johnson, June 3, 1766, respecting his conduct towards the Indians, directing him *inter alia* to prevent quarrels between them and the soldiers or traders, to hear their complaints and redress them as far as possible "should any traders use them ill or overreach them" (47). Rogers had some interviews with Roberts at Niagara on his way up to his new Post—he was appointed by Gage, June 14, "Commandant of the Garrison of Michilimakinac", and reached his Post, August 8. His "liberality toward the Traders" there received their commendation; but this turned to wrath, when they were disappointed at not receiving exorbitant prices for goods which they advanced to him (48).

Soon after the arrival of Rogers at the Post, Johnson "was informed of his assembling numbers of Indians, of Secret conferences which he held at which he suffered none to be present of the Garrison —of extraordinary titles he gave himself, ect. . . ." To prevent this, he, on the advice—perhaps rather with the permission—of Gage, appointed Benjamin Rogers, Commissary for the management of Indian affairs. Before this, Rogers had already incurred expense to the extent of several thousand pounds—most of this expense, Johnson thought, was incurred "to acquire a name and influence among the Indians" (49).

Roberts went from Niagara to Michillimackinac as Trade Commissary; and he officiated as such from and after July 3, 1767, up to which time Rogers' "Journal of Indian Affairs" was delivered to him by the Commandant (50).

Such an arrangement with men and under circumstances like these was certain to cause trouble—while it was Johnson's "desire & intention that the Commisarys should be on ye best terms with the Commanding Officers", the acknowledged difficulty existed that "the Commanding Officers . . . received Instructions for their conduct at the Posts before the creating the Office of Commissaries from which they cannot recede without orders from the Commander in Chief, and on the other hand ye Comissrys are of no use unless they have the

entire Management of Trade & Indian Affairs where they reside . . ." (46).

So far as open expressions went, both were anxious to keep rum from the Indians, but they could not agree as to the method.

At length, Roberts sent to Captain Lieutenant Spiesmacher of the 60th Regiment Commander of the Troops at that Post, the following extraordinary letter:

"Michilimackinac 20th August 1767

"I impeach Robert Rogers Esqr. Commandant of Michilimakinac for holding Secret Correspondence with the Enimies of Great Brittain, & forming Conspiracies, I desire you in your Allgiance to Seize his person & papers amongst which you will find Sufficient proof

I am Sir
Your humble Servant
B. Roberts Comsy.
of Indn. affairs &c.

Capt. Lieut Spiesmacher
(Com)mandt. of the Troops.
( ) Michilimakinac
I have now discharged my Duty." (51)

The following day he sent a memorial to the commander of the troops, the important parts of which are as follows:

"That) your Memorialist (received information) yesterday of a Quantity of Rum (being hid in) the Woods on the Island opposite this place (that) your Memorialist applied to Captain Rogers (for) assistance to bring into the Fort the Rum that (sho)uld be found, that then Captain Rogers granted a Serjeant & Two Men, which your Memorialist promised to pay for their Trouble—That your Memorialist Deputised his Clerk John R. Hanson to Seize the said Rum & furnished him also with Two Canadians to assist him. That the Rum was actually (seized) & Landed on the Wharf at the Fort Gate. that your Memorialist desired the Rum should be put into the Kings Store appointed by General Orders of which the Commissary keeps one Key & the Traders another. that Capt. Rogers ordered the deputy Commissary of provisions to take Charge of the (sai)d Rum, that your Memorialist desired he might be (per)mitted to keep one Key of the Store as well as the (dep)uty Commissary of Provisions which was Refused (with so)me warmth, that your Memorialist said he (looked) upon himself as Seizing officer and therefore (accountable) for the Rum, therefore would hold the (deputy) Commissary of Provisions Liable for the Rum (Captain Rogers told) your Memorialist he was very (impertinent and said) that your Memorialist (had nothing to say to the affair) your Memorialist replied (he was acting in Office and that no man but the commanding officer dared tell your Memorialist he was very impertinent. Then Capt. Rogers got very warm and gave your Memorialist the lie. Your Memorialist answered that he was a gentleman, and that he would not dare to tell him so out of the limits of his command. Then Capt. Rogers cried out he was challenged as commanding officer, that your Memorialist denied having challenged him; that Capt. Rogers ordered your Memorialist in arrest, which your Memorialist refused; that) Capt. Rogers Called the (guard, ordered your Memorialist's) Stick (which your Memorialist (used to examine the) Bales & Sacks

that no Rum is (hid in them) to be) wrested out of his hands, and that (your Memorialist) was Lifted up and Carried Like a C(riminal through) the Fort Guarded by Soldiers with Fixt bayonets) and Cast into his House."

. . . .

"That after (Your) Memorialist made his information to Cap(t Rogers that) your Memorialist saw Capt. Rogers ta(lking to one of) the parties Concerned in Carring Out R(um. that said) party is Stuart (to whom by my inf(ormation the) Rum seems to belong) were met Cross(ing over to the) Island in a Battoe.

Your Memorialist appr(ehends (that as it is) His Majestys Intentions that (no person having) Command in the Indian (Country should interpose) his Authority in (anything concerning the trade or civil commerce of the Indians, but to give the commissary, or other Civil Magistrate all the assistance in his power) that he has been greatly abused, and has no other resource than your protection, as being Commander of the troops from further insult and for the security of the Traders who labor under many grievances." (52)

A Court of Enquiry sat the following day, August 22, 1767, without much result: but Spiesmacher was soon able to report that both had come to his room, asked pardon of each other, and Roberts "Said what he meant by Tre(ason) was for Sending him li(ke a) Criminal to his Room having nothing else (in mind)" (53).

So passed over this storm; but soon another arose—Rogers again imprisoned Roberts next month. Roberts thus describes the circumstances in a letter to Daniel Claus, Deputy Superintendent of Indian Affairs.

"Sept. 21, 1767

(   ) Claus.

I suppose youll not be so much Surprized to hear I am a prisoner but that I am to be sent immediately in Irons perhaps to Detroit tho he is sure the Indians that way are not in a good humor. & all this because I asked an Order in writing for a Forge. & then was threatd. with Irons wch. were immediately made for me. All the Garrison Civil & Military have done every thing to prevent the usuage except Mutinying but I am forced from Effects & Employ without time to do any thing in the way of Securing my Effects or those of Strangers, all Letters I fear are intercepted adieu think the only Satisfaction I have is Suffering in the Cause of my allegiance to my King & Friendship to my benefactor & friends, if the almighty will assist me equal to my faith in him, I shall arrive Safe at Detroit which is more than my adversary think

Adieu whilst
Your Sincere Friend
B. ROBERTS". (54)

Spiesmacher gives Rogers' reasons thus:—

"I am Sorry to inform You that Majr. Rogers has again Confind Mr. Roberts and is Determen'd to Sent him from this,—The Majrs. Reasons is for Mr. Roberts doing his endeavours from time to time to lessen his Athorety, by telling him on the publike Parade, that he did not look on him as his Commanding officier, nor would obey

(   ) orders of his, with many other expressions which he aledges is Next (to mu)-tiny its Selfs."

He seems well-justified—even if his orthography is eccentric—when he says:—

"I was oblig'd to give (him no) protection, while he had So many Complaints against him, which was Never Know to me before Mr. Roberts Came here, and in My oppiniam that till that time Merchants Traders & Indians Seem'd well Sattisfy'd, but as I have Soom reason to tink by the Many Compleants the lodge against on other, their is a personal pique between them, I Could not dear to take it upon me to interfear further than having done my outmost endevour to Settle it." (55)

As was Jehu Hay justified in saying of Roberts:

"Mr. Roberts has been very unlucky in his appointment both at Niagara & Michilimackinac in short his treatment at the last place has been such that I thought was not possible to be shewn to one Gentleman from another." (56)

Johnson himself had this to say of Rogers:

"I believe the public Opinion (concerning) Major Rogers is not ill founded, I raised him in (1755 from the low)est Station on accot of his Abilities as a (Ranger, for which) duty he seemed well calculated, but how people (at home or anywhere else) could think him fit for any other (purpost must appear surprising) to those acquainted with him. (I believe he never confined himself within) the Disagreable bounds (of truth as you mention, but I wonder much they did not see through him in time)." (57)

The traders at Michillimackinac complained of him, November 24, 1767:

"Memorial of we the Subscribers in Behalf (of ourselves and) others Sheweth

"That Major Robert Rogers Commandant of (Michili)macknac did in the Months of June, July and Au(gust) Last apply to Several Traders at his Post (for differ)ent Kinds of Goods and Merchandize for the Use (of his) Majesty and told them at Same time they Should (have) Drafts on Your Honour for the Amount and as there (was) a great Concourse of Indians then there, and it No being Posible that they Traders Should Know his orders thought it their Duty to Let him Have what he wanted (even) to the Distressing themselves which Was the Case (by) Unsorting there Cargoes and Rendring them Unfitt (for) Trade—

We your Memorialists for the Above Reasons (did on the) Public Faith Take Said Drafts to a (great) Amount, and to our Great Loss & Disapointmt. (your hono)ur will not pay them." (58)

Roberts fell into financial difficulties and Johnson said, November 26, 1767:

"If an unfortunate affair between him & Major Rogers had (not happ)ened. He might Soon have been able to extricate himself (from his) difficulties, & how that will end I as yet know not." (59)

Further this series saith not.

This was, however, far from the whole story—from other documentary sources we are enabled to reconstitute the play (60).

Rogers gave up the Indian business into the hands of the Commissary with very bad grace on Roberts' arrival about July 3. It seems certain that he considered himself badly used, and that he formed a design to better himself. It may be that he contemplated this almost from his arrival at the western post—but it is certain that he was very much aggrieved at Roberts' appointment. He desired to have the country around Michillimackinac made into a separate Province, with himself as Governor in command of a body of Rangers and independent of both the Commander of the Forces and Johnson, the Indian Superintendent. He had, indeed, when in England, in September, 1765, made a formal application to the authorities in England for authorization to make an expedition by land for the discovery of a North-West Passage from North America to China—this application had not been successful, October 2, 1766, as the plan would "be attended with a very considerable expense" (61).

The new scheme was more ambitious still; but it does not seem ever to have been brought formally before the British Government.

He had a correspondent, Hopkins, in the French Service in the West Indies, who advised him to embrace the French interest. There is evidence on oath indicating that he was contemplating to retire among the Indians and French, after getting goods into his hands—he was certainly believed by Roberts and others to be sending liquor among the Indians with the design of making himself a power amongst them—and when we bear in mind the intrigues of the French from Louisiana constantly going on, his conduct was certainly suspicious.

One Potter, an intimate of Rogers, quarreled with him and disclosed some of his designs to Roberts—we find Roberts writing August 20, to Guy Johnson, Sir William's nephew, son-in-law and subordinate: "New Scems of Villany open every Day: last Night a Quantity of Rum was conveyed out of the Fort about Midnight. I find that there is to be a Canoe loaded with Rum to go to La Bay (la Baie, Green Bay) which will pick up all the Skins and perhaps get all the Traders scalp'd" (62).

Potter, later, got to Montreal and, examined before Chief Justice Hey, September 28, he told an amazing tale of intended treason (63).

But in the meantime, the fracas of August 20 had occurred—it appears that Roberts had discovered and seized the rum as illicit—the fracas was reported to Gage and he could "devise no better means to stop his proceedings and put an end to all the mischiefs that he may create than to remove him immediately from his command."

Roberts also came east and was well received. He returned to

Michillimackinac in June, 1768, and found that in his absence of about nine months, the rum was "either stolen or had leaked out of the casks".

Rogers was sent to Montreal, but proceedings against him were delayed: he and Roberts met in May, 1769—Rogers asked if the latter would give him satisfaction for bribing Potter to swear his life away, and was answered that when he was at liberty, Roberts would make him give satisfaction for the ill usage he had received from him up at Michillimackinac—after an animated jangle, pistols, blowing out brains, names of coward, puppy, rascal, &c., &c., the two parted. Roberts went to Albany, New York and England, back again to New York and disappears from our sight.

Rogers escaped prosecution, went to England, made a great noise, demanded to be made a baronet and a major and receive a pension of £650 a year, "or he would not be silent"—he made a claim for and was allowed his salary as Commandant. He got into gaol in Philadelphia for debt in 1775, and was discharged on giving his parole not to fight against the Colonies in their struggle with Great Britain. Afterwards he was authorized by Howe to raise a battalion of Rangers: his command was captured but he escaped, October 21, 1776, at Mamorance: he went to England and died about 1800—he was banished by Statute of New Hampshire, November, 1778, but his estate was not confiscated (64).

As to actual treason on Rogers' part, it is to be remembered that the charge depends on the story of a single person—there can be no certainty one way or the other (65).

William Renwick Riddell.

Osgoode Hall,
Toronto,
October 7, 1927.

Notes

(1) The name of this place has the usual variety of spelling—quoting from official documents, I find Michillimackinac, Missilimakinak, Michilimacki, Michilimackinac, Michilimakinac, Michilimacninac, Michillimahinac, Michellimackinak, Missinilimnac, Michillimakinah, Mishilimakinac, Michilimackinack, Misilimackmack, Eshselemackanac, Eshselemackenac, Mishilimacinac, Michilimack'c, Michil, Michilimacknac.

(2) For an account of this expedition see my *Michigan under British Rule*, Michigan Historical Commission, Lansing, 1926, pp. 11-13, 387, 388. *Journals of Major Robert Rogers*, Albany, 1883, pp. 175-198. Parkman: *The Conspiracy of Pontiac*, Boston, 1898, p. 170 (n) fully accredits Rogers' account: Rogers: *Siege of Detroit*, &c.

(3) In several places in The Sir William Johnson Papers, both he and Sir William spell the name "Rodgers".

(4) *Journals of Major Robert Rogers*, pp. 6, 7.

(5) *The Papers of Sir William Johnson*, Albany, 1922, vol. 2, 190. Letter from Johnson to Sir Charles Hardy from Camp at Lake George, October 13, 1755; cf. *Journals, &c.*, p. 33 (n).

(6) *Do. do.* vol. 2, p. 205, Letter from Goldsbrow Banyar to Johnson from Albany, October 18, 1755.

(7) See the Royal Commission, *The Papers of Sir William Johnson*, vol. 2, pp. 434, 435. His salary was £600 per annum payable out of the Military Chest in North America, p. 434.

(8) *Do. do.* vol. 3, p. 507. Letter from Genl. Jeffrey Amherst to Johnson from Albany, July 11, 1761.

(9) *Do. do.* vol. 3 pp. 543-545. A copy of the proceedings was sent by Amherst to Johnson from New York, March 13, 1767. *do. do.* vol. 3 p. 645. He had directed George Croghan, Jany. 8, 1762 "If the service Requier itt to (go to) Misilimackimack in order to Examine into ye State and behaviour of ye Indians in those parts as allso to Regulate or transactt any busniss with them . . . Requisett for ye Good of the Service . . ." *do. do.*, vol. 3, p. 605. We have not Croghan's Report. Captain Henry Balfour, the "Laird of Dunbog", had been sent in the Fall of 1761 with a detachment of Light Infantry from Detroit to take possession of the Posts of the Bay (*i.e.*, la Baie, Green Bay) and St. Josephs. See dispatch from Captain Donald Campbell to Colonel Henry Bouquet from Detroit, October 12, 1761: *Canadian Archives*, A. 17, p. 238. He returned, Novermber 22, and was sent to Niagara but had to put in at Sandusky: he was then sent to Fort Pitt, and later to the West Indies where he was wounded at Havana in 1762; next year he went to England with his regiment and disappears from our history. See *Can. Arch.*, A. 17, pp. 238, 277, 304; A. 4, p. 71; A. 18, 1, p. 30; 19 *Michigan Pioneer and Historical Collections*, pp. 116, 120, 121, 125, 130, 686, 687.

(10) *Do. do.*, vol. 3, pp. 678, 679, Letter to Johnson from Amherst from New York, April 11, 1762.

(11) See these Montreal Proclamations in the *Report of the Public Archives of Canada for . . . 1918*, Ottawa, 1920, pp. 45, 46. During the Indian War, all trade was forbidden with the Indians in the Upper Country: Gage's Proclamation, Montreal, August 3, 1763; *do. do.*, pp. 74, 75; but this was reestablished by Burton's Proclamation of April 13, 1764, except "Gun powder, firearms, ammunitions and spirituous liquors". And only as far up the Ottawa as the Carillon and up the St. Lawrence as the Cedars—no trade was allowed further up. General Burton at Three Rivers had as early as October 28, 1760, prohibited the sale of brandy to soldiers: May 28, 1762, Haldimand, who had succeeded Burton at Three Rivers, forbade giving the Têtes de Boule Indians, "Any strong liquor before the close of the public market or even to procure for them too great a quantity in return for their peltries . . ."; *do. do.*, pp. 95, 127. Haldimand, May 23, 1763, "as the time will soon arrive for the Northern Indians to come down to trade . . .", made the same order; *do. do.*, p. 156.

(12) *The Papers of Sir William Johnson*, vol. 3, p. 719. Return of the quantity of Rum and Spirituous Liquors taken into store by Order of Major Walters belonging to the Several Indian traders, at this Post, dated at Fort Niagara, April 26, 1762.

(13) *Do. do.*, vol. 3, pp. 720, 721.

(14) *Do. do.*, vol. 3, pp. 721-723: Letter from William Walters to Johnson, from Niagara, April 27, 1762.

(15) *Do. do.*, vol. 3, pp. 690, 700, 708.

(16) *Do. do.*, vol. 3, p. 758: Letter from Donald Campbell to Johnson from Detroit, June 9, 1762.

(17) *Do. do.*, vol. 3, pp. 942, 943, 962: Letter Amherst to Johnson, New York, November 21, 1762, enclosing copy of Gage's letter: Johnson to Amherst December 17, 1762.

(18) *Do. do.*, vol. 3, p. 857: Letter Amherst to Johnson, New York, August 7, 1762.

(19) *Do. do.*, vol. p. 969: Letter from John Lottridge to Johnson from Montreal, 12th December 1762. Lottridge was no bigoted prohibitionist, but he did think "Capt. Ormsbay who Commands at Ticonderoga . . . a very od Kind of a man rathear too intimate with his Bottol . . ."; *do. do.*, vol. 3, p. 970.

(20) *Do. do.*, vol. 3, p. 976: Letter from Johnson to Kempe, December 18, 1762. See his letter to Amherst, December 30, 1762, at p. 985.

(21) *Report of the Public Archives . . . Canada, for . . .* 1918: Ottawa, 1920, p. 53.

(22) Attorney-General Kempe writing to Johnson from New York, February 7, 1763; *do. do.*, vol. 4, p. 41, says "The Irregularities committed by the Indian Traders was somewhere about Detroit", and rightly thought them not punishable in the Province of New York; he, however, brought the matter before the Council: *do. do.*, vol. 4, pp. 45, 46; Indians were being made drunk continually, *do. do.*, vol. 4, pp. 43, 46, 56, 112, 113, &c. As an Indian Chief pathetically said: "Liquor hath always been our Ruin . . .", as he handed over a Bottle with which they had been "beguiled by George Klock", *do. do.*, vol. 4, p. 53.

(23) The extraordinary story of Pontiac's Conspiracy will be found in sufficient detail and with sufficient accuracy in Kingsford: *History of Canada*, vol. v, caps. 1, 2, 3, in greater detail in Parkman: *The Conspiracy of Pontiac;* M. Agnes Burton: *Journal of Pontiac's Conspiracy;* 8 *Michigan Pioneer and Historical Collections*, pp. 266, 339, &c. The following may suffice for our purpose—beginning in early Spring of 1763, he failed to take Detroit by surprise in May, began hostilities, May 9, took Sandusky, May 16, Fort St. Joseph, May 25, Miami, May 27, Outanan, June 1, Michillimackinac June 4—the Ottawas took two officers and eleven men and treated them kindly, so that they soon made their way to Montreal; there was much booty taken. Presqu'isle, fell June 16, Le Boeuf, June 18, Venango and Ligonier a little later—but Fort Pitt and Detroit successfully resisted—peace came—at first imperfectly, indeed, in October, closing a five months' war—formal peace in August, 1765 and July, 1766.

Bradstreet in the Fall of 1764 sent Captain William Howard with a detachment of the 17th to take possession of Michillimackinac.

(24) *Do. do.*, vol. 4, p. 192: Letter to Johnson, New York, August 20, 1763.

(25) *Do. do.*, vol. 5, p. 412, Instructions to Captain Henry Montour, April 28, 1764.

(26) *Do. do.*, vol. 5, pp. 432-434: letter to Johnson from New York, May 28, 1764.

(27) *Report of the Public Archives, Canada for . . . 1918*, Ottawa, 1920, p. 83. In *Papers of Sir William Johnson*, vol. 5, p. 400. A Proclamation of Burton's dated April 17, 1764, forbidding trade with the Indians of the Upper Country, &c., is mentioned in vol. 5 of the *Papers*, p. 400. I presume this is the Proclamation I have abstracted.

(28) In another place, *do. do.*, vol. 5, pp. 426, 428, mention is made of General Burton's Measures to prevent the Michillimackinac and other western Indians from

coming to Montreal."—"to suspend trade with the western Indians and to keep them from Montreal"—I can find no record of a Proclamation to that effect.

(29) *Papers, &c.*, vol. 4, pp. 442, 443, 444. Letter Johnson to Cadwallader Colden from Johnson Hall, June 9, 1764.

(30) Report of a Conference with the Chippewas at Niagara, July 13, 1764—the Speaker said: "We are a poor & foolish People . . . we are peaceably inclined & wish to live long, we have no evil thoughts, they are chiefly taken up thinking of yt. Darling Water made by men . . .", Sir William would not promise anything.

(31) *Do. do.*, vol. 5, pp. 481-483: Letter Gage to Johnson at Niagara from New York, July 15, 1764.

(32) *Do. do.*, vol. 5, pp. 487, 488. Report of a Meeting with the Menominees, Niagara, July 17, 1764—they were "very poor & in great Want of Cloathing" but *did* want a taste of Rum.

(33) *Do. do.*, vol. 5, pp. 508, 510: Letter Gage to Johnson from New York, August 15, 1764.

(34) *Do. do.*, vol. 5, pp. 511, 514: Letter Johnson to Cadwallader Colden, August 23, 1764,—"the largest number of Indians perhaps ever Assembled on any occasion" says Johnson.

(35) *Do. do.*, vol. 5, pp. 516, 557, 559, 623.

(38) Some of the troubles with the French (Canadians) may be gathered from Gage's letter to Johnson from New York, September 8, 1765; *do. do.*, vol. 4, pp. 838, 839—cf. *do. do.*, pp. 833, 834, 837.

(39) *Do. do.*, vol. 4, p. 849.

(40) By the way, we find Johnson in 1765(?) making a 3 gallon Cag of Rum equal to 3 large Bevers or 4 large Bucks; a 10 quart Cag of Rum to 2 large & 1 small Bever or 3 Bucks & a Doe; an 8 quart Cag of do. to 2 large Bevers or 3 Bucks; a 6 quart Cag of do. to 1 large & 1 small Bever or 2 Does & a Buck, and a 4 quart Cag of do. to 1 large Bever or 2 Doe Skins or 5 Racoon—which by ordinary arithmetic makes a large Beaver worth 4 quarts, a small Beaver, 2 quarts, a Buck about 3 quarts, a Doe about half as much and a Raccoon about a quart—2 Raccoons were worth 3 muskrats or 1 mink and 2 yards of Calico, 1 Beaver or 3 Doe skins.

(41) *Do. do.*, vol. 4, p. 559. The price was put at 3 York shillings, 37½ cents. per gallon. *Tempora mutantur.* It may be added that Bradstreet, commanding the force on the Western District, had in July, 1764, at Niagara, given Notice to all Indian Traders on Johnson's representation, of the price of Indian goods—*inter alia:* "A Gallon of Rum . . . 1 Bever".

(42) *Do. do.*, vol. 5, p. 30: Letter from Gage to Johnson, New York, Feby. 3, 1766—Rogers wrote Johnson, Feby. 14, informing him of his appointment as Commandant at Michilimakana—*do. do.*, vol. 5, p. 31: *Journals of Major Robert Rogers*, pp. 220-221. *Do. do.*, vol. 5, p. 80: letter dated March 15, 1766, from Johnson Hall. Johnson says in a letter to the Earl of Shelburne, October 26, 1797: "From very strong suspicions which now appear well grounded, I took care by the advice of General Gage to give him very little powers with regard to Indian management or expenses there, the General and myself well knowing the man, the heavy debts he had incurred and reasonably concluding he ought not to be entrusted with much authority". 7 *New York Colonial History*, p. 988, *Journals, &c.*, pp. 225, 226.

(43) *Do. do.*, vol. 5, pp. 30, *sqq.* See note 39 *supra.*

(44) *Do. do.*, vol. 5, p. 94, Letter from New York, March 23, 1766.

(45) *Do. do.*, vol. 5, pp. 201, 202: Letter from New York, May 5, 1766.

(46) *Do. do.*, vol. 5, pp. 278, 703. Other instances were given of such illicit trading, and a complaint made of the monopoly at La Baie—it would appear that Todd did not carry out his promise but disposed of his wet goods illicitly.

(47) *Do. do.*, vol. 5, pp. 238, 239—he was also told "to conduct yourself so as to acquire the Confidence & Esteem of the Indians and to discover any Plots concerting by them or any other Persons tending to disturb the publick tranquility"—a direction which may perhaps be considered to explain certain suspicious conduct of his to be referred to later in the Text.

(48) *Do. do.*, vol. 5, pp. 331, 338, 380, 468.

(49) *Do. do.*, vol. 5, p. 404; Johnson's letter to Captain John Brown, October 31, 1766. Apparently the Detroit Commandant and Commissary also failed to hit it off; *do. do.*, p. 620. See *Journdls*, &c., pp. 226-229.

(50) *Papers, &c.*, vol. 5, p. 615: Letter from Rogers to Johnson from Michillimackinac, August 14, 1767: he said: "it will afford me great pleasure to give him all the Assistance in my power towards the Executing of his office, and assure you sir that nothing shall be wanting on that Head". But there can be no doubt that Rogers bitterly resented the appointment of a Commissary and the consequent interference with his plans.

(51) *Do. do.*, vol. 5, pp. 629, 630. Captain Spiesmacher (properly Speissmacher), sometimes called Spicemaker and Spismacher, was in command of the garrison at Michillimackinac. He was promoted from Lieutenant to Captain in 1761; *Can. Arch.*, A. 8, p. 314; *19 Michigan Pioneer and Historical Collections*, p. 107; cf. 10 *do. do. do.*, p. 221.

(52) *Do. do.*, vol. 5, pp. 632, 633; the parentheses indicate the lacunae caused by fire—the burnt portions are restored from other sources.

(53) *Do. do.*, vol. 5, p. 652.

(54) *Do. do.*, vol. 5, p. 691.

(55) *Do. do.*, vol. 5, pp. 691, 696.

(56) *Do. do.*, vol. 5, p. 730.

(57) *Do. do.*, vol. 5, p. 788.

(58) *Do. do.*, vol. 5, p. 819.

(59) *Do. do.*, vol. 5, p. 831.

(60) Some misapprehension has arisen concerning Rogers' movements, arising from failure to distinguish Robert Rogers from others of the name of Rogers—even the usually accurate indexer of the *Michigan Pioneer and Historical Collections* has fallen into error: III, 22, 24; VIII, 357, and X, 212 do not relate to Robert Rogers. *E.g.*, the Captain Rogers wounded in the thigh, X, 212, was Captain Jedediah Rogers.

(61) *Acts of the Privy Council of England: Colonial Series*, London, 1911, vol. 4, pp. 739; cf. *do. do.*, vol. 5, p. 194.

(62) Letter from Benjamin Roberts to Guy Johnson from Michillimackinac, August 20, 1767. *Canadian Archives*, Q 4, p. 308; *10 Michigan Pioneer and Historical Collections*, pp. 224, 225.

(63) Johnson writing to General Gage, October 22, 1767, says that "Potter with great difficulty escaped from his clutches and got to Montreal": *Journals, &c.*, p. 225; other accounts indicate that Potter was on his way to England when he was caught at Montreal and examined: *Journals, &c.*, p. 225.

The amazing story is told at length in 10 *Mich. P. & H. Coll.* at pp. 225-228.

(64) The curious story will be found in *Journals, &c.*, pp. 249, 253; 17, 18.

(65) In a very interesting publication by the University of Michigan, Ann Arbor, 1923, intituled *The William L. Clements Library of Americana at the University of*

Michigan, at p. 182, occurs the following passage relating to Major Robert Rogers:— "And here let it be mentioned that in this war (*i.e.*, the Seven Years' War, ended by the Peace of 1763), he performed his last meritorious service to his country and to himself: had Rogers died immediately after this war, he would have died a hero; as it was, he died a scoundrel and a traitor". I am not at all sure what "country" is meant; if the American Colonies in Revolutionary mood, then the charge may be simply the conception still had by some American writers concerning any American, who kept his faith to the Crown and remained loyal to his King, namely, that such an American was, *ipso facto*, a traitor, and, *prima facie*, a scoundrel; if Britain is meant, then it is a little difficult to convict Rogers of treason; and, in any case, he was not so much a traitor as Hancock and Washington. What is a "scoundrel" must depend on one's terminology.

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A Textbook of Pharmacology and Therapeutics. By Hugh Alister McGuigan, Ph.D., M.D., Professor of Pharmacology and Therapeutics, University of Illinois, College of Medicine. Illustrated. Philadelphia and London: The W. B. Saunders Company. Canadian Agents: McAinsh & Co., Limited, Toronto. 1928. Price, $6.00.

This work by the favorably-known author of *Experimental Pharmacology* is a somewhat ambitious attempt to connect physiology, biochemistry and pharmacology with clinics; and, it must be said, with considerable success, whatever may be thought of connecting pharmacology with the two former subjects, in their nature closely allied.

From a pharmacological point of view the work is very valuable; little that can fairly be said to be established has been omitted, and while opinions that are effete are firmly set aside, the wise old Syracusan's dictum of the value of honest doubt has not been overlooked: constantly we find a modest "unsettled," "still in doubt," "not certainly known," "this may be," etc. After a satisfactory discussion of the theories of pharmacology, which generally reduce down to differences of terminology, we have a classification of drugs, and special pharmacology is attacked, the treatment, as has been indicated being admirable. Some outworn theories and practices are mentioned, only to be reprobated, such as the use of turpentine in phosphorus poisoning, of sulphur in syphilis, of chlorine water in cholera and typhoid as an intestinal disinfectant, the practically hopeless attempt to cure cocaine addiction without isolation, etc. It is gratifying to know that after all "modern improvements," there is nothing better after a "tear" than the old-fashioned "Calomel followed by a Seidlitz."

Much more than its title page calls for, this book gives us: hygienically, warning is given of the evils of bad drainage, foul odors, damp homes, etc. And we have the anatomy of the parathyroid, the genetic effect of alcoholism, and much more, all excellent; some will probably think the chapter on purgatives especially valuable.

Well printed on good paper with good ink, well bound, the volume is a pleasure to behold. Fortunately, it does not claim to be a literary work, the orthography, punctuation, capitalization,

A CANADIAN HAMPDEN

By

HON. WILLIAM RENWICK RIDDLE

LL.D., F.R.S.C.

Reprinted from the

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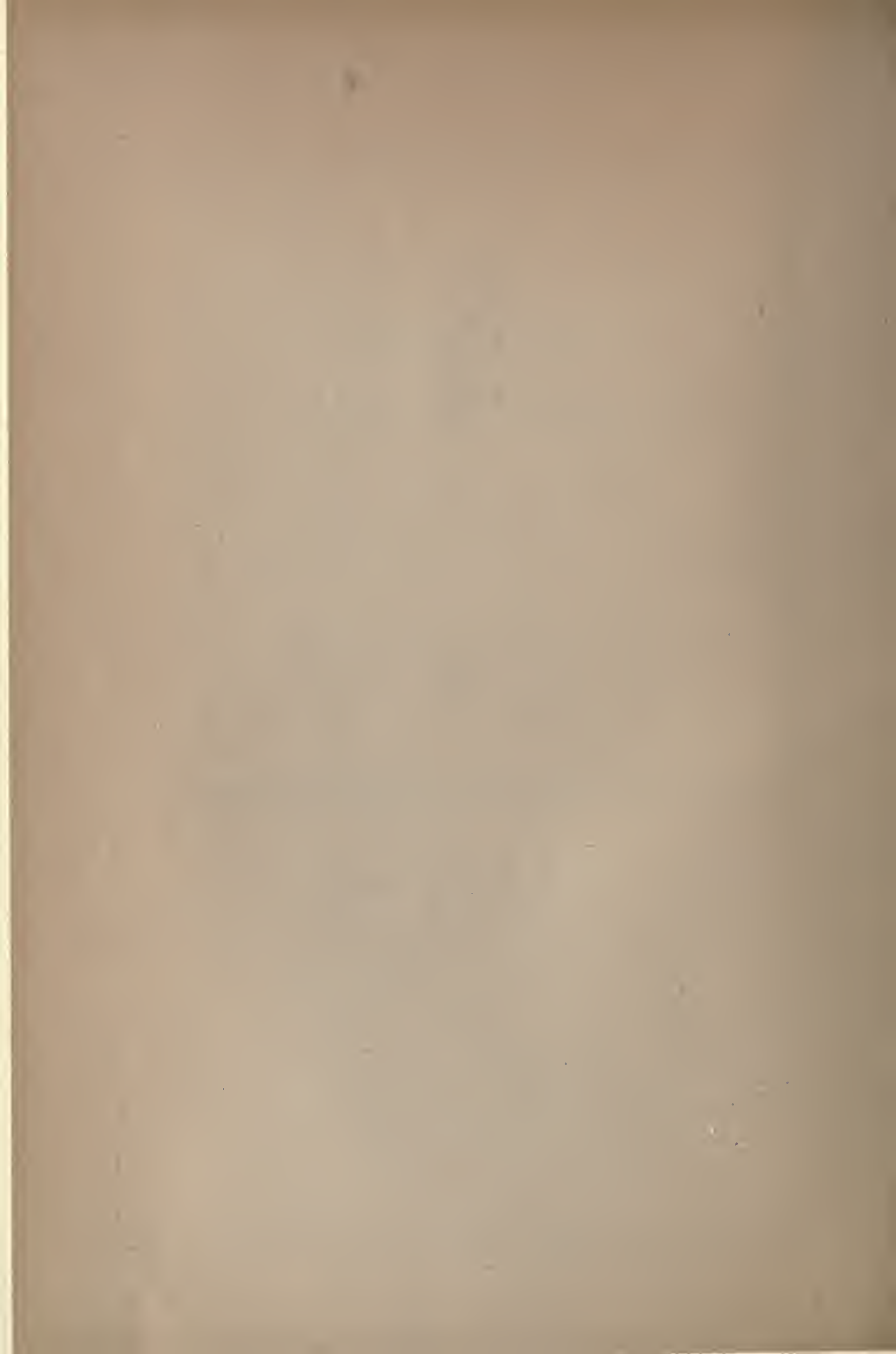

XVIII.

A CANADIAN HAMPDEN

By the Honourable William Renwick Riddell, LL.D., F.R.S.C., F.R.H.S.

If anyone had called Robert Gourlay a "Village Hampden", the appellation would have been resented. Gourlay might have tolerated the comparison with the famous Englishman but never the suggestion of inferiority to him; he would have preferred to have Hampden called an "early Gourlay".

It may be of interest to show why the title "Canadian Hampden" is not inappropriate when applied to Gourlay. To do this, some very common misapprehensions in regard to both of them must be removed, and that does not imply anything derogatory to either. Gray's celebrated lines in referring to withstanding a tyrant, of course, show that what was in the mind of the poet was Hampden's conduct in respect of Ship money, in which he withstood the "tyrant", Charles I.

It is not uncommonly thought that Charles in the Ship money Writs was acting illegally and tyrannically, that he was introducing a new and arbitrary impost and that Hampden asserted the legal rights of a freeborn Englishman in resisting. There can be no doubt that he thought so; and he is entitled to the honour and praise due to "men, high-minded men . . . . . who know their rights, and, knowing, dare maintain".

The fact, however, is different. The Writ of Ship money was not at all a new thing, the invention of Charles I. or of Noy, his Attorney General. It is quite true that, as James Howell said of William Noy at the time: "His head is full of Proclamations and devices how to bring money into the Exchequer"—to use the time-honoured excuse, the King "needed the money", but he did not invent the method; he found precedents in the old Records in the Tower and followed them.

As was his undoubted constitutional right, the King called for the opinion of the Judges as to the legality of the levy, and they returned what purported to be their unanimous opinion that it was lawful. It is true that two Judges, Sir George Crooke and Sir Richard Hutton, said afterwards that they signed only for conformity; but the answer reads, "every man for himself and all of us together", and is signed by all the twelve Judges. Even had the alleged dissent been communicated to the King—and Lord Chief Justice Finch did not admit that there was any dissent—no one could blame the King for taking the opinion of ten Judges as to what was the law of England. Having the opinion of his very able Attorney General and of his Judges, Charles proceeded with the levy.

Hampden disputed the right in law of the King, as was his undoubted privilege. The matter coming before the Court of Exchequer, it was by reason of its very great importance referred as a question of pure law to

the twelve Judges, the Full Bench of the three Superior Courts of England.

It was argued with great learning and consummate ability for twelve days by the ablest lawyers of the day in arguments based, not only on precedent, but also on principle.

In their judgments, ten of the twelve decided that the Writ was valid in general although some thought for technical reasons the particular Writ was invalid. Therefore Hampden was held to be wrong in law. Notwithstanding, the monstrous charges later made against some of the Judges by the House of Commons for political reasons, no one—no lawyer at least—after a careful consideration of the precedents cited in arguments and judgments would say that they were certainly wrong—*me judice,* they were clearly right.

It is quite true that at the time "every stander-by was able to swear" that the "grounds and reasons" adduced by the Judges "was not law"—to use the words of Clarendon;[1] but the opinion of even an intelligent stander-by cannot be relied upon as to what is and what is not law.[2]

Some authors, as for example Kennet, while thinking the Judges wrong in law give them credit for honesty.

And the Commons themselves, notwithstanding the charges[3] of corruption made against some of the Judges, seem to have ultimately come to the conclusion that in the Ship money proceedings they were not blameworthy. We find that in their negotiations with the King at Oxford, Sir John Bramston, who had been dismissed by the King from his Chief-Justiceship of the King's Bench, was to be restored, notwithstanding his impeachment. The Judges who were punished had other sins laid to their charge; and if half what was alleged was true, they acted in a most arrogant and unmannerly way. Indeed, a perusal of the proceedings warrants the suspicion that it was rather their manners than their law that were at fault.

The fact is that the law of England was in a state of evolution, that the Constitution was just emerging and that the law had become unsuited to the new conception of the rights of the people. Had it been the duty of the Judges to make the law and not simply to declare it, they might reasonably be accused of inveterate, perhaps reactionary, conservatism; but theirs being *dicere non dare,* they must be acquitted of wrong doing. Even if we accept the Resolution[4] of the Lords "Die Mercurii, 20 die Jan. 1640-41, that the Ship Writs, the extra-judicial opinions of the Judges therein, both first and last, and the Judgment given in Mr. Hampden's Case . . . . . are all illegal and contrary to the laws and statutes of this realm, contrary to the rights and properties of the subjects of this realm, contrary to former judgments in parliaments and contrary to the Petition of Right"—and I for one

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[1]Quoted in *3 Howell's State Trials*, pp. 844, 1255.

[2]The "Bystander" of Toronto (the late Goldwin Smith), confidently asserted that a certain judgment of mine (Florence v. Cobalt) was not law, but the Court of Appeal and the Judicial Committee of the Privy Council disagreed with him.

[3]These will be found in a very rare volume in the Riddell Canadian Library: *Articles of Accusation exhibited By the Commons House of Parliament now assembled . . . . . 1641*—and in part in *3 Howell's State Trials*, pp. 1283, *sqq.* The Judges impeached were Bramston and Berkley of the King's Bench, Crawley of the Common Pleas and Davenport, Weston and Trevor of the Exchequer. Finch, C. J., C. P., now Lord Keeper, had escaped to Holland.

[4]*3 Howell's State Trials*, pp. 1299, 1360.

do not accept the Resolution as in accordance with the previously existing law—the Judges may be acquitted of everything but mistake.

However that may be, Clarendon[5] is certainly right in saying that the proceedings were impolitic and the consequences were grave and harmful to the cause of the King.

There is a curious parallel in the celebrated case in Upper Canada in 1819 when Robert (Fleming) Gourlay was prosecuted.[6]

There was indeed little resemblance between the Englishman Hampden and the Scot Gourlay; excluding the characteristic *tenax propositi*, perhaps none.

"Mr. Hampden" we are told[6](a) "was a man of much . . . . . cunning and . . . . . of the most discerning spirit and of the greatest address and insinuation to bring anything to pass which he desired . . . . . and who laid the design deepest . . . . . He was not a man of many words and rarely began the discourse or made the first entrance upon any business . . . . . He made so great a show of civility and modesty and humility and always of distrusting his own judgment and esteeming his with whom he conferred . . . . . that he seemed to have no opinions or resolutions but such as he contracted from . . . . . others whom he had a wonderful art of governing and leading into his principles and inclinations whilst they believed that he wholly depended upon their counsel and advice . . . . . He was of that rare affability and temper in debate and of that seeming humility . . . . . as if he brought no opinion of his own but a desire of information . . . . . he pretended to learn . . . . ."

Gourlay was the exact opposite: he "Knew it all" and made everyone understand the fact. So far from allowing anyone to think that he desired information on any subject, he instantly resented any attempt to enlighten him and he would rather any measure would fail than that it should originate from anyone but himself. Hampden was a superb Party Leader and would have made an ideal "Boss". We have—or had—at least one counterpart in Canada. It was not Gourlay, however, who could not lead any Party but who estranged even those who thought with him.

But as Hampden had a strong view that the authorities were wrong in their law and resisted, so Gourlay; and both with dauntless breast withstood the tyrant.

Some current misapprehensions may first be cleared away. Gourlay was not accused of or tried for Treason or anything that can fairly be called a criminal act. He had been ordered to leave the Province and he refused. The very head and front of his offending had this extent—no more. Nor was he prosecuted for advocacy of Responsible Government. Who so scornful as he of the proposition to introduce Responsible Government into Upper Canada?

He had rendered himself offensive to some in authority in the Province

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[5]Quoted in *3 Howell's State Trials*, pp. 845, 1254.

[6]For the facts of this prosecution derived from official documents see my paper: *Robert (Fleming) Gourlay, as shewn by his own Records*: 14 Papers and Records, Ontario Historical Society, Toronto, 1916; also my *Life of William Dummer Powell*, Lansing, Mich., 1924, cap. XV., *passim*.

[6](a)Clarendon cited in *3 Howell's State Trials*, p. 825(n).

and it was determined to eject him from it. For this purpose the Statute of 1804 was to be appealed to.[7]

The opinion of the Judges as in the Ship money case was sought and it proved favorable; prosecution was accordingly proceeded with, although Chief Justice Powell, the only Judge with any influence with the Lieutenant Governor, advised against it.

The Act, premising that "it is necessary to protect his Majesty's subjects of this Province from the insidious attempts or designs of evil-minded and seditious persons . . . . .", enacted that it should be lawful for certain officials including "Members of the Legislative and Executive Councils", "by warrant . . . . . to arrest any person . . . . . not having been an inhabitant . . . . . of this Province for . . . . . six months . . . . . or not having taken the oath of allegiance . . . . . who by words, actions or other behaviour or conduct hath endeavoured . . . . . or given just cause to suspect that he . . . . . is about to endeavour to alienate the minds of his Majesty's subjects . . . . . from his government".

When the person so charged was brought before the tribunal he must satisfy it—must "give . . . . . full and complete satisfaction" as to his innocence, or an order could and indeed, must be made that he leave the Province within a time stated.

Isaac Swayze, a Member of the Legislative Assembly, laid an Information against Gourlay under this Statute;[8] and no one at all conversant with Gourlay's words and actions would say that they had not the intent to alienate the minds of Upper Canadians from their government. A warrant for arrest issued December 19, 1818. December 21, 1818, he was brought before William Dickson and William Claus, two Legislative Councillors, at Niagara. These men he despised, perhaps with justice; and he scorned to give that full and complete satisfaction required by the Act. He contended that the Act did not apply to him, a natural born British subject, and moreover he had been an inhabitant of the Province and had taken the oath of allegiance. Dickson said that he had not taken the oath of allegiance in Upper Canada and Gourlay could say that he had.[9] Gourlay refusing—or at least omitting—to give the satisfaction mentioned in the Act, an order was necessarily made for him to leave the Province[10]. January 1, 1819, was named as the limit.

If the law applied to British subjects and the interpretation placed upon the Act in legal circles at the time was correct, that is, that the Act contemplated an oath of allegiance after arrival in the Province, the order was not only legal, it was obligatory. Gourlay did not consult a lawyer. Like

[7](1804) 44 George III., c. 1. (U.C.)

[8]Swayze swore that he verily believed that Gourlay "having no particular or fixed place of residence in this Province is an evil-minded and seditious person and that the public tranquility thereof may be endangered by his unrestricted Residence and that the said Robert Gourlay by words, writings, actions and other behaviour hath endeavoured and is about endeavouring to alienate the minds of His Majesty's subjects of this Province from his Person and Government and that the said Robert Gourlay has not been an Inhabitant of this Province for the space of six months preceding the date hereof and that . . . . . the said Robert Gourlay has not taken the oath of allegiance to our Sovereign Lord the King."

[9]Gourlay on his own showing was not an inhabitant of the Province. See King v. Mitchell (1809), 10 East's Reports, 511—but this does not seem to have been pressed against him.

[10]The order had the proper recitals and followed precisely the wording of the Statute.

so many self-willed men, he despised lawyers;[11] and, unlike most, he did not consult them even when he got into trouble. He thought that he knew the law; and he, like Hampden, stood on his interpretation. Had he, like Hampden, consulted and retained the ablest lawyers, they would, as Hampden's lawyers could not, have advised him as to a way out. But he defied the order to leave the Province, as Hampden defied the Ship money Writ, with more dire results. Hampden at the worst could suffer only pecuniary loss; Gourlay might lose liberty, and perhaps life itself.

The Act of 1804 provided that if the order to leave the Province were disobeyed a warrant might issue and the offender be committed to gaol, "without bail or main prize", to be tried for the offence of disobeying the order.

Gourlay refused openly and defiantly; and January 4, a warrant was issued for his arrest,[12] and he was incarcerated in Niagara Gaol. An application for bail was necessarily refused—the Statute was express that the commitment was "without bail or main prize"—and back went Gourlay to gaol.

The Assizes came on and Gourlay was indicted[13] for refusing to obey the order. A great deal of rubbish has been written about this trial—packed jury, improper charge to the jury, maniacal laughter of the prisoner, &c., &c.—but the issue was simple and the result a foregone conclusion; on the plain and undisputed facts, Gourlay must needs be convicted once it was found that the order stood not quashed and its applicability to Gourlay was not successfully controverted.

In after times, Gourlay relied almost exclusively on his contention that the Act did not apply to natural-born British subjects. This contention was probably, to some extent, if not wholly, due to the fact that the Act was always known as the "Alien Act". It seems to have been introduced as an "Alien" Act but to have been changed in its passage through Parliament.

It may be well to trace the course of legislation. In the Address from the Throne, February 8, 1804, Lieutenant Governor Peter Hunter said: "Among the first objects I would recommend to your deliberation is the security of this part of His Majesty's Dominions by some wise and salutary

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[11]His writings: *Statistical Account of Upper Canada* and *The Banished Briton and Neptunian* are full of slurs on lawyers; his last kick at them seems to be in the former work, Vol. 2, p. 299(n): "This intelligence I have just now, June 25, 1825, received . . . . . and when I heard last September that *seven lawyers* had gained favour with the simple Canadians I guessed how truly it would be, but improvement must have time."

[12]Now in the Ontario Archives with former warrant and indictment.

[13]I have before me as I write the original Bill of Indictment on three full skins of parchment in the unmistakable handwriting of John Beverley Robinson, endorsed with the names of the witnesses, Dickson and Claus and Sheriff Merritt, and also the documents to be produced, namely the warrant and order. The Indictment recites the appearance before Dickson and Claus, December 21, 1818; copies in full their order to leave the Province, and alleges Gourlay's disobedience. In a second Count it is set out that Gourlay, not having taken the oath of allegiance, was brought before Dickson and Claus and their order is again set out *verbatim*, and Gourlay's disobedience again charged. In a third Count it is set out that Gourlay, not having been an Inhabitant of the Province, was brought, &c., &c. (as before). The fourth and last Count is substantially the same as the second in different language. The Bill is signed "Jno. B. Robinson, Atty. Genl.". The Foreman of the Grand Jury was W. Crooks. Jno. Powell, Marshall of Assize, entered "*Po. Se.*" opposite Gourlay's name, where it first appears, and "W. D. Powell, C. Ct. Assize" entered the verdict, "Guilty". The Crown Counsel took no chances of technical defect in those days of technicality.

law calculated to protect the King's Government against Aliens and to afford His Majesty's subjects in this Province all the internal security which can be derived from timely and well concerted legislative precaution". In the Answer to the Address, February 9, the House said: "Fully convinced of the good effects to be derived from timely precaution against hostile aliens and of the indispensable necessity of assisting by every means in our power to give energy to His Majesty's Government in this Province, we will lose no time in taking these important objects into our consideration, and will cheerfully give aid to make such laws as may best protect the persons and property of its inhabitants".

The Legislative Council did not make any specific reference to the proposed measure in their Answer to the Address; but the Bill was introduced in that Chamber, February 14, by James Baby, seconded by Richard Duncan, as the "Alien Bill". In its passage through the Council, the Bill was radically changed and by February 24, on its Second Reading, it became "A Bill for better securing this Province against all seditious attempts or designs to disturb the tranquility thereof"—and under that name went to the Assembly.

The Bill having passed the Council without opposition, the only amendment suggested in the Assembly was to limit its operation to four years, and that amendment received only two votes against eleven.[14]

Apparently the Bill was originally aimed at immigrants from the United States, but during its passage through Parliament, the danger from United Irishmen, who had made their last venture in Ireland in 1803 under Robert Emmet became manifest, and this was guarded against; at all events, the Bill ceased to be an "Alien Act".[15] It illustrates the tyranny of language that as it continued to be called The "Alien" Act, Gourlay, with others who should know better, including some Magistrates, believed that it did not apply to natural-born British subjects.[16]

Gourlay risked all on this interpretation; he was wrong. His conviction followed, and to save his life he left the Province in 1819, not to return until 1836.

Hampden and Gourlay both fought for what they believed to be the rights of the subject; and, in my view, what they fought against was unconstitutional in the English meaning of the word: that is, contrary to the principles upon which we should be governed, although perfectly legal.

In each case "the man on the street", the "stander-by" could "swear

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[14]For the proceedings in the Assembly, see *Journal of the Legislative Assembly of Upper Canada (1804)*; 6 Ontario Archives Report (1909), pp. 417, 420, 454, 460; in the Council, see *Journal of the Legislative Council of Upper Canada, 1804*, 7 Ontario Archives Report (1910), pp. 208, 209, 214, 216-218, 220.

[15]It may illustrate the long arm of coincidence to note that this Rebellion of 1803 was thwarted by the warning given to the Castle by Mr. (afterwards Sir) Richard Willcocks, brother of Joseph Willcocks, once Sheriff of the Home District, a traitor of the War of 1812-15, spoken of so highly by Gourlay, *Statistical Account of Upper Canada*, Vol. 2, pp. 315, 655-662 (note).

[16]William Lyon MacKenzie was nearer the fact when in addressing the Legislative Assembly, May 21, 1858, on Gourlay's application to be heard, he said that the Act was passed "to keep out the Irish Catholics from this country"—*Mr. Gourlay's Case before the Legislature . . . . . Globe Book and Job Office 1858*, a very rare brochure in the Riddell Canadian Library. But even in 1803, the United Irishmen were far from being all Roman Catholics. Gourlay himself, in his *Statistical Account of Upper Canada*, Vol. 2, cap. 3, says that this Act was intended for "Irish rebels and aliens".

that the grounds and reasons were not law"—and in each case, at least one House of Parliament considered the proceedings illegal.

In 1841 the Legislative Assembly of Upper Canada adopted the Report of a Committee that "the arrest and imprisonment of Gourlay in Niagara in 1819 was illegal . . . . ." The Report was drawn up by Dr. Dunlop, who thanked God that he was not a lawyer—in which gratitude, most lawyers will join.

No one will wonder that the Legislative Council under the guidance of such lawyers as Hon. Robert Baldwin Sullivan (afterwards Mr. Justice Sullivan), refused to characterize the proceedings as illegal, and stated plainly "Mr. Gourlay suffered for direct disobedience of the law as it stood; he could not legally have been acquitted by any jury . . . . ."

In both cases, the law was soon plainly expressed in favour of the defendant—in Upper Canada by the repeal of the obnoxious Statute.[17] In both cases, the decision seriously injured the government—and the reputation of the Judges involved has suffered, as I am confident, quite unjustly. Enough has been said of the English Judges, and I have elsewhere shown that Chief Justice Powell could not have acted otherwise than he did.

None of the English Judges, with the possible exception of Lord Chief Justice (afterwards Lord Keeper) Finch, had any part in advising that the right to Ship money should be exercised; none of the Upper Canadian Judges advised that Gourlay should be proceeded against; and it is a curious illustration of the injustice of history that the one Provincial Judge, who advised against the prosecution, should be the one who alone has been subjected to obloquy on account of it.

Both Hampden and Gourlay should enjoy the glory of defending to the last what they thought the right.

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[17](1829) 10 George IV., C. 5. (U.C.)—in England the Resolution of the House of Lords of January 20 1640, will probably be considered as making law; but in any case the Bill of Rights of 1688 rendered it certain.

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THE LAW QUARTERLY REVIEW

EDITED BY

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or omission by the owner, as, for instance, where the owner suffers it while in his possession to get into an unsafe state so that the whole of it or portions of it are likely to fall upon the land of an adjoining owner and do damage, such owner cannot rid himself of liability for the possible consequences of his breach of duty merely by letting the wall or other structure as a part of the premises let to a tenant, without taking a covenant from the tenant to repair; the liability of the lessor in such a case is independent of the question whether at the time of the letting he had or had not actual knowledge of the state of disrepair. It is enough if he might have known of it if he had exercised all reasonable and proper care, or, in other words, if he ought to have known of it but did not know of it through his own default.' That seems to be a correct statement of the law as the authorities stand. But the result is that we have an instance of *damnum sine injuria* where a landlord demises premises with a latent nuisance upon them. The tenant is not liable, as Scrutton L.J. pointed out; *Job Edwards, Ltd.* v. *Birmingham Navigations* [1924] 1 K. B. 341; nor is the landlord. The injured party has no remedy—a regrettable fact.

When it is added that Scrutton L.J. made some instructive observations on the difference between nuisance and trespass, it will be seen that the city wall of Exeter has provided students with a most fruitful case.

W. T. S. Stallybrass.

THE FIRST LEGAL EXECUTION FOR CRIME IN UPPER CANADA.

THE well-known Quebec Act, 1774 (14 Geo. 3, c. 83), extended the limits of the Province of Quebec as far south as the Ohio, and as far west as the Mississippi; the Treaty of Paris of 1783 gave all the territory to the right of the Great Lakes and connecting waters to the new Republic, but for a time Britain held possession of the border posts, Michillimackinac, Detroit, Niagara, etc., ostensibly, at least, as a pledge for the United States implementing the contract in the Treaty that there should be no impediment to the collection of the debts owed by citizens of the United States to British subjects—a contract notoriously not carried out, nor was the United States able to carry it out.

Accordingly, when by the Canada or Constitutional Act, 1791 (31 Geo. 3, c. 31), the immense Province of Quebec was divided into the two Provinces of Upper Canada and Lower Canada, the former Province *de facto* included what is now Detroit as well as much other territory, now part of the United States. A supposed suggestion that the Detroit people should be considered in any different position from those in what was British territory, *de iure* as well as *de facto*, was received by Lieutenant-Governor Simcoe with the utmost indignation; and, in fact, until the delivery to the United States in 1796, under the provisions of Jay's Treaty, no distinction was made between those in the anomalous position of belonging to two nations and those in admittedly British territory—except that the former had no vote for Members of the Legislature, and were consequently subject to the injustice of which the Colonies had complained, and were subject to 'taxation without representation.'

Detroit was no more free from crime than the rest of the world, and it had the fortune to furnish the victim of the first execution for crime in the new Province of Upper Canada.

The story goes back to Boston and Montreal before Upper Canada was born. On February 18, 1785, 'Elijah Cooper of Williams-town-bay-state, or Boston-State in North America, Farmer and Shoemaker, for and in consideration of the Sum of Thirty-two Pound, ten Shillings of lawful Money of the Province

of Quebec [about $130 of Canadian money] and one gray Horse,' sold to John Turner, a merchant of Montreal, 'a certain Negro-Man, of the age of Twenty-two Years or thereabouts, called Josiah Cutten.' An Imperial Act, 1732 (5 Geo. 2, c. 7), had placed Negroes in the same category as 'Houses, Lands . . . and other Hereditaments,' that is, made them real estate; and consequently in the conveyance, the seller 'granted and confirmed' the Negro, as though he was a farm. The purchaser did not long keep his purchase; we find him on March 29, 1785, selling him to David Rankin of Montreal, merchant, and making a similar deed; the purchase money was fifty pounds of lawful money of Quebec (say, $200).

How he got to Detroit is wholly unknown; but we find, January 13, 1787, the Detroit firm of merchants, William St. Clair & Co., selling him to Thomas Duggan of Detroit for 'the sum of One Hundred and Twenty Pounds, New York Currency [say, $300], payable on or before the first day of May, next, in Indian Corn and Flour.' These transactions are evidenced by extant deeds copied in the recent publication of the Detroit Library Commission: *The John Askin Papers* (1928), pp. 284—287.

Thomas Duggan transferred him to John Askin, a merchant of Detroit, March 28, 1791, for 'a farm at the River Tranch [now the Thames, Ontario] of Nine acres in front more or less,' but there does not appear to be more than a memorandum of the sale extant: *op. cit.* p. 287. In some way that does not appear, one Arthur McCormick, who had been a teacher in Kingston but had come to Detroit, became half owner of the slave.

All this took place before Upper Canada came into existence on December 26, 1791.

The negro, whose name was variously spelled Cutten, Cuttan, Cutan and Cotton, had very hard luck; on October 18, 1791, he was caught stealing rum and some furs from the shop of Joseph Campeau in Detroit, taken before John Askin as J.P., and committed for trial.

The English practice prevailed as it did for long in this Province, that Courts of Oyer and Terminer and General Gaol Delivery were constituted from time to time for the trial of criminal cases; at that time the territory, afterwards Upper Canada, was divided into four Districts, of which the furthest west, the District of Hesse (afterwards the Western District), contained Detroit: this continued after the formation of the new Province. In each District a Court of Oyer and Terminer and General Gaol Delivery sat from time to time; and before the

unhappy Negro could be tried, Upper Canada had come into existence.

On September 3, 1792, 'His Majesty's Court of Oyer and Terminer and General Gaol Delivery . . . in and for the District of Hesse, in the Province of Upper Canada,' sat at L'Assomption, now Sandwich, Ontario: the Court was presided over by William Dummer Powell, first and only judge of the Court of Common Pleas in and for that District, who lived at Detroit, but, on the erection in 1794 of the Court of King's Bench for Upper Canada, was appointed its first Puisné Justice, becoming later Chief Justice of Upper Canada.

The negro had a fair trial; but his case was hopeless, and he was rightly convicted. At that time the punishment was death; and this dread sentence was pronounced by Mr. Justice Powell, who said to the unhappy man: 'This crime [of burglary] is so much more atrocious and alarming to society, as it is committed at night, when the world is at repose, that it cannot be guarded against without the same precautions which are used against the wild beasts of the forest, who, like you, go prowling about at night for their prey. A member so hurtful to the peace of society, no good Laws will permit to continue in it, and the Court in obedience to the Law has the painful duty imposed upon it of pronouncing its sentence, which is that you be taken from hence to the Gaol from whence you came, and from thence to the place of execution, where you are to be hanged by the neck until you are dead. . . .' And it was done, and the young Province paid £2 Halifax currency for the job. The full account of this trial appears in the Records of the Court in the Ontario Archives: I, in my *Michigan under British Rule*, Lansing, Mich., 1926, have given some account of it.

The *John Askin Papers*, already referred to, have a concomitant circumstance which will bear mentioning. While the slave was in prison awaiting his trial, a deal was entered into between his co-owners whereby Arthur McCormick sold his half-interest in him, being 'now in Prison for Felony,' to Askin for £50 [New York currency, say, $125] 'which Negro man should he suffer death . . . I am not Answerable for.' May 16, 1792: *op. cit.* pp. 410, 411. Hanged he was, and McCormick was not answerable for him.

William Renwick Riddell.

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The Seigniorial Régime in Canada. By DOROTHY A. HENEKER. Quebec: Ls.-A. Proulx. 1927. Pp. 446.

THIS, the most interesting and valuable work on Canada under the French *régime* since Professor Munro's *Documents relating to the Seigniorial Tenure in Canada*, we owe to "The Canadian History Competition", instituted by the government of the Province of Quebec. The English-speaking Canadian, as a rule, does not trouble himself with things Canadian before 1759: the English-speaking lawyer, however, will in this work find himself in the atmosphere of the English common law, the English feudal system, the society described by Pollock and Maitland, by Holdsworth, and, more in extension if less in intension, in the second book of Blackstone's *Commentaries*.

The introduction into Canada of the feudal tenures and their continuance after the British conquest should be of interest to the English-speaking lawyer. England had herself put an end to most of them in 1660 by the sweeping statute, 12 Car. II, c. 24. The author is in error in giving the date "as early as 1645" (p. 13)—the Act was not passed until after the Restoration. The full story of the introduction into Canada is not told in this work: it is made to begin in 1664 with the charter to the *Compagnie des Indes Occidentales*, May 28 of that year, which by article xxxiii provided for the application in the colony of "la coûtume de la prévôté et vicomté de *Paris*." But in the previous year, 1663, Louis Quatorze, on accepting the demission of Canada from *La Compagnie de la Nouvelle France*, had, when forming a *conseil souverain* for Quebec, directed it to judge "selon les Lois et Ordonnances de notre Royaume et y proceder autant qu'il se pourra, en la forme et manière qui se practique et se garde dans le ressort de notre Cour de Parlement de Paris." The decree of 1664 simply supplemented this provision.

The author has, however, given a very valuable account of preparation or incubation long before, and beginning in 1540 with what she calls "a definite scheme of government founded on the French model of Seigniorial Tenure", in which the seigniorial system was distinctly foreshadowed. This was followed by the commission in 1598 to Sieur de la Roche and the creation in 1627 of the Company of New France, from both which events, writers have dated this introduction,—the grant in 1626 of the Seigniory of Sault-au-Matelot to Louis Hébert, the grandfather of all Quebec, and also the grant of other seigniorial estates between 1627 and 1663.

A very full and accurate description is given of the various feudal tenures and their incidents, now of little interest to any but the legal historian. There can be no doubt of the immense superiority of the position of the Canadian habitant, "a hardy, enterprising and liberty-

loving settler", over not only that of the common law villein, but also that of the contemporary French peasant. The position of the habitant was much like that of the English copyholder, whose tenure had been preserved by the revolutionary Act of 1660. The habitant, like the copyholder, was an inveterate litigant.

The conflict of interest between the companies and the settlers is excellently described: human nature being much the same everywhere the same phenomena appeared in New France and in Pennsylvania. It is interesting, too, to note that the very able and practical intendant, Talon, had the same scheme of following the old Roman practice of mustering out legions in outlying provinces to settle there, as recommended itself to Simcoe and formed part of his plan for Upper Canada. Talon, from the Carignan-Salières Regiment, added between four and five hundred to the population of his province; Simcoe, checked and hampered at every turn, did little for his with the Queen's Rangers. The author rather criticizes the action of Britain in not continuing the office of intendant: but, useful as he was when he was a Talon, worse than useless when he was a Bigot, I can find no room for him in a British colony.

The story of the abolition of these tenures is well told; that their end was urgently called for is abundantly manifest; and the statesmen who had laboured long and ardently for the relief obtained in 1854 deserved well of their country. Canada stood in 1854 where England had stood some two centuries before.

No complaint can be made as to the diligence in research, appreciation of the effect and significance of facts, skill in arrangement, aptness of terminology, and general ability exhibited by the author—while the collection of official documents printed in the appendix is of very great value. The paper is good, the type clear, and the ink without a fault.

But there praise must end. The book falls into pieces in one's hand, the printed sheets being attached to the paper cover with some adhesive fluid. The proof-reading is discreditable, and, to me, unexplainable. A few of the mistakes may be attributable to French practice, as, for example, the small initial in gentile adjectives, "french", "english", which is still proper in French but has not been proper in English for a century. The use of capitals, italics, accents, punctuation and quotation marks is irregular. We find "coutume" and "Coutume" as often as "coûtume" and "Coûtume"; "Arret", "arret", "Arrêt" and "arrêt"; "Regime" and "regime" as well as "Régime" and "régime"; "Judgment" and "judgment" on the same page and with the same meaning; "Colony" and "colony"; "médicin" and "medicin"; "Seignior" and "seignior"; "Prevoste" without accent. Many would have difficulty

in recognizing "M. Raudot", the intendant, under the name "Mr. Raudot Senior." A date such as "January 15th, 1540" is given sometimes with, sometimes without, the comma,—in six successive instances, alternately. We find on p. 212 "high, middle and low justice (haute moyenne, ou basse)." An occasional solecism occurs: "foot passengers . . . ran many perils in those days"; "there was" several rights; a certain document "never appears" to have been signed; the seignior had "power to publish all such regulations . . . not inconsistent with the laws of the Colony"; "only" is generally misplaced; "majority" is used for "the greater number"; and the "journalese" expression "due to" for "in consequence of" is of common occurrence. It is unfortunate that the long "s" of the old texts is often printed "f"—we have such hideous expressions as "La raifon eft", "fecours dans leurs befoins", "jouiffaient", "poffeffion", etc. An occasional slip is to be expected; one finds no great fault with "one-eight" for "one-eighth"; "righ" for "right"; "heavely" for "heavily"; "n'étaient" for "n'était"; "1925" for "1825"; "Vexin-le-Françios" for "Vexin-le-François."

It seems probable that the text did not receive its final revision at the hands of the author, and it is to be regretted that a work so well-conceived and well-wrought out should be given to the world defaced with such blemishes. However, even with the defects, it deserves a hearty welcome to the library of Canadians.

WILLIAM RENWICK RIDDELL

Essai sur l'industrie au Canada sous le régime français. Par JOSEPH-NOËL FAUTEUX. Two volumes. Québec: Ls.-A. Proulx. 1927. Pp. xx, 1-281; 282-572.

THE publication of these volumes is a landmark in the history of New France and of Canada. Material throwing light on the industries of New France has been gathered from the available primary sources, including official correspondence and records, and the full details have been printed. The subject is divided with reference to mines including the St. Maurice forges, construction, forests including shipbuilding and the production of tar and potash, food, tanning, fisheries, and minor industries, each division being treated chronologically. Since the work is based largely on official sources, certain deficiencies are evident. We find scattered references to the technique of the industries and its improvement. No definite description, for example, is given of the technical operation of sawmills and gristmills. On the other hand, numerous projects which were stillborn or died at an early age are fully described. But these deficiencies are slight compared to the value of the work.

For the first time, we have available the evidence which makes possible an appreciation of the causes of the slow growth of industry. The mercantile policy becomes much less important as a result of this study. Indeed, industry in New France reached its grand climax as a direct result of the mercantile policy. The construction of naval boats and its stimulus to related industries, such as the St. Maurice forges and the manufacture of tar, could be attributed to that policy. The textile industry and, most conspicuously, the hat-making industry suffered as a result of prohibitions from France, but these industries were of relatively slight importance. The evidence suggests that France was more anxious to develop an industrial New France than England was to develop an industrial New England.

Nor were the military burdens of New France the chief difficulty! Indeed, the ranks of the army and the navy were drawn upon on numerous occasions for a supply of skilled workmen. It is pointed out that a serious handicap followed the uncertain support of the colonial administrators and the Home government, but the importance of this is probably over-emphasized since, as suggested, the evidence is based largely on colonial correspondence. The spurts of activity which followed the appointment of aggressive intendants were probably less important than the correspondence would indicate. The author shows clearly that certain other factors were of more importance. In the first place geographic conditions were a serious handicap. Transportation of the finished product to France was limited. In the beginning, boats were not provided with holds for loading masts. Boats were wrecked on the difficult voyage, or they were pillaged by the English with consequent loss of goods and men. The earthquake of 1673 destroyed the tar furnaces at Baie St. Paul. With such handicaps the technical organization grew slowly; trained workmen demanded high wages to leave France. The financial organization was also weak. The heavy capital required for certain industries, especially with a slow turnover incidental to a long voyage and seasonal navigation, was obtained with difficulty. Moreover, capital was supplied by partnerships and largely controlled by families, and the break-up of partnerships as a result of deaths and disagreements was serious. Misguided enthusiasts like Abbé Lepage wasted great sums of capital, even though the final results may have been advantageous. But, in spite of these difficulties, local industries, especially the tanneries and the grist mills, flourished, and important industries such as naval construction eventually succeeded, but because of government support and not in spite of it. It is to be hoped that the breaking of new ground by Professor Fauteux will be followed by studies rounding out the knowledge of technique and of financial organization

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"Amherst's determination to have a first class siege" (p. 168) explains the slowness at Louisbourg under which Wolfe chafed. The author knows thoroughly the geography of both Louisbourg and Quebec, the scenes of Wolfe's efforts in America, and he has himself sketched two clear maps in the volume. A unique feature is the inclusion of caricatures in colour made by Townshend, who had that dangerous gift. There is malice in them. Townshend, secure in his high connections, ventured deliberately to annoy Wolfe by handing round sketches likely to cause a contemptuous laugh:

> When the cartoons were circulated at mess, ostensibly as a joke, it was hard for Wolfe to take any action and a show of annoyance was precisely what Townshend wished to provoke. One night, however, a specially objectionable drawing was passed round the dining-table, and when it reached Wolfe he crumpled it up and threw it down with the words, 'If we live, this shall be enquired into; but we must first beat the enemy' (p. 249).

Professor Waugh mentions more than once the studies relating to Wolfe of the distinguished Canadian physician, Dr. J. Clarence Webster. There is nothing known about Wolfe which Dr. Webster has not examined and he is convinced that Wolfe's life would in any case, have been short, since he suffered from an incurable malady—tuberculosis of the kidneys. Professor Waugh repeats the stories of Wolfe's unheroic personal appearance and lays emphasis on his red hair and his "lanky figure and gawky gait." Undoubtedly, however, this adverse criticism of Wolfe's appearance has been over-done. "No one ever claimed that he was handsome," says Professor Waugh (p. 249). Yet this is precisely what is done by one of the leaders of the time, Lord Shelburne, who became the first Marquis of Lansdowne. Shelburne was a subaltern under Wolfe and wrote: "He was handsome in his person, thin, tall, well-made, with blue eyes, which rather marked life than penetration" (Fitzmaurice, *Life of Shelburne*, I, 71). It is not unlikely that the tradition of Wolfe's gawky appearance is due to Townshend's caricatures. Shelburne was a keen observer and his testimony ought to modify the received view. Professor Waugh gives no list of authorities, and this, too, is becoming a biographical fashion. His book is of high quality and, owing to its thoroughness of method and its balanced judgment, it should rank as a standard biography.

George M. Wrong

The John Askin Papers. Volume I: 1747-1795. Edited by Milo M. Quaife. Detroit: Detroit Library Commission. 1928. Pp. 657; illustrations.

This publication is of great interest to all students of the early history of Upper Canada, and by reason of the editor's notes, it is par-

back with a buckle." A business man had no qualms in buying one, two, or even three, "boles of punch" in a day with a glass or two of brandy or an occasional gill of rum or glass of bitters. But then liquor was much cheaper in Detroit than at present: one could get a "bole of punch" for 1*s*. 6*d*.; a pint of rum was only 2*s*., and a pint of cider half as much.

The paper is excellent, the type clear, the binding first class, and I have not found a typographical error in all the 657 pages. It is all too seldom that this can be said of even a small volume. The succeeding part will be eagerly awaited.

WILLIAM RENWICK RIDDELL

The Papers of Sir William Johnson. Edited by ALEXANDER C. FLICK. Volume VI. Albany: The University of the State of New York. 1928. Pp. xiv, 789; illustrations.

THIS, the sixth printed volume of Sir William Johnson's papers, covers the period from December 13, 1767, to May 31, 1769. Johnson spent his life in the attempt to reconcile the interests of the fur-hunting Indians with those of land-hungry whites. Of special value, therefore, are the papers in this volume relating to the congress and treaty at Fort Stanwix in 1768, "the last of the several efforts of the English government to delay the entire absorption of the Indian lands by the migration of the colonists, and one of the last to appease the resentment of the Indians over the crimes committed against them by the frontiersmen." Other land cessions, such as the Kayaderosseras patent and the grant to the Susquehanna Company, find a large place in Johnson's correspondence at this time. During these years, the British government gave up its plan to control the Indian trade through commissaries stationed at the army posts, such as Niagara, Detroit, and Fort Pitt. Of special interest to students of Canadian history is the correspondence with factors and commandants in the western posts, George Croghan Edward Cole, Daniel Claus, Norman MacLeod, and others.

A large number of the original Johnson papers at Albany, from which this work has been compiled, have been partially or totally destroyed by fire. Many of the gaps have been filled in from other manuscript sources, such as the Library of Congress, the Public Record Office, and the Harvard College Library. Had the Public Archives of Canada been as thoroughly examined, several contemporary copies of papers might have been found which would have been of much service in replacing a still greater number of the burnt originals. The Day calendar of the Johnson papers in Albany, which has been used in preparing the present publication, although it is an admirable piece of

work, does not make any attempt to list related papers in other archives, and, consequently, a mass of material on Indian conferences held by Johnson and his deputies has not found a place either in this, or in the previous volumes. In spite, however, of the omission of a considerable number of available documents which would have thrown much light on Sir William's policy, the historical department of the state of New York has made accessible in these volumes a source of information, whose importance can scarcely be over-estimated. It is hoped that a calendar and index of the whole work will accompany the last volume, and thus greatly enhance its value.

R. O. MACFARLANE

The Life of George Rogers Clark. By JAMES ALTON JAMES. Chicago: The University of Chicago Press. 1928. Pp. xiv, 534; illustrations.

THE fourth book in two years upon a common subject has need to justify itself either by the importance of its matter or by the skill of its treatment. In 1926 appeared *George Rogers Clark: His Life and Public Services*, by Mr. Temple Bodley; and in 1927 there followed Mr. R. F. Lockridge's *George Rogers Clark: Pioneer Hero of the Old Northwest* and Dr. Milo M. Quaife's edition of Clark's and Hamilton's records of *The Capture of Old Vincennes*. Dr. James has devoted several years of research to this aspect of American history, and since 1908 he has been publishing his conclusions in historical journals. His scholarship is unmarred by national prejudice or by excessive admiration for his hero. To Clark is assigned only his just share of credit for the conquest of the Northwest. The book is, in fact, not a biography but a history of the times. There are chapters, and those not merely introductory, where Clark's name does not appear, and others where an incident in his career serves merely as a text for a dissertation upon Western history. It is a narrative of many details told without emphasis; and it fails to translate the vigorous personality of the soldier-statesman who captured Vincennes, subdued the Indian tribes, and himself wrote one of the most interesting of contemporary records. Clark is a difficult subject for a biographer. He was a man of one adventure—the conquest of the Illinois region at the beginning of the War of Independence. During the remaining years of war he advocated an aggressive policy on the frontier—the capture of Detroit and a decisive blow at the centre of Indian conspiracies; but his advice was unheeded or inadequately carried out. By the end of the war he was ruined financially, for he had pledged his own fortune for public services—generous behaviour which received meagre and tardy recognition after his death—and he was out of sympathy with the Federalists, who emerged as the political leaders of the new nation.

In later life he was involved in intrigues for the conquest of New Orleans and Louisiana, going so far as to hold a French military commission for that purpose. Indirectly, perhaps, these later years were fruitful, for he was an adviser of Jefferson, who purchased Louisiana. Although it has defects as a biography, the book contains much that is interesting. It affords glimpses into the lives of frontier families, in peace and in war; it shows how agricultural settlement progressed with incredible rapidity from point to point along the Ohio valley, and how the long-suffering pioneers had to struggle against land speculators and trade restriction. It tells a connected story of the diplomatic contest between France, Spain, England, and the United States for the Mississippi trade.

In chapter IV, on "The Illinois Country," there are a few errors which demand comment. On page 78, where the system of land tenure is described, there occurs a misleading and unnecessary comparison with Canada; and on page 87 the author states, incorrectly, that French law was extended to the Northwest by the Quebec Act, although he notes on page 88 that English criminal law was to be administered. The argument of a paragraph on page 85 is answered by the fact that the Proclamation of 1763 was not issued until October 7. And on pages 82-3 the author again appears to contradict himself in regard to the profits of English trade by the Ohio after the Seven Years' War. This route was, in practice, costlier than the "more circuitous route" by the St. Lawrence and the Great Lakes, and the Pennsylvania traders who attempted it complained frequently of being hard pressed by their northern competitors.

MARJORIE GORDON JACKSON

The Taking of Ticonderoga in 1775: The British Story. By ALLEN FRENCH. Cambridge: Harvard University Press. 1928. Pp. vi, 90.

THE previously unprinted account of the taking of Ticonderoga from the British in 1775, which is here published, was written by Lieutenant Feltham, second in command of the garrison, about a month after the event for the information of General Gage. On the morning of May 10, 1775, the fort with some forty-five sleepy British soldiers was suddenly surprised by Ethan Allen and his Green Mountain boys together with sundry others, among them Benedict Arnold. Later records give a confused picture. There was, it seems, some brandishing of swords, talk (about which tradition has said much), a British officer, unfortunately for his dignity, *sans culotte*—and the fort passed into the hands of the embattled farmers, apparently without loss of life or limb. The real struggle took place later, for each of the conquering principals endeavoured to prove that his had been the leading rôle. Since then

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of the book. A very full index makes up in part for the omission of chapter headings. The volume is copiously illustrated.

The narrative is a description of Bell's life in terms of his interests and activities, and these were remarkably numerous and varied. The steps by which the telephone was brought to perfection are clearly described. Of special interest to Canadian readers are the accounts of the experiments at Brantford in 1876 and of the relations with George Brown. Brown's failure in 1876 to carry out promises with reference to obtaining patents in England had serious consequences which Bell never forgot. A pardonable note of admiration runs through the book, but the author does not hesitate to admit that there was little practical result from many of Bell's later investigations.

GEORGE W. BROWN

Crowland. By LOUIS BLAKE DUFF. (Baskerville Press Quartos No. V.) Welland, Canada: Baskerville Press. 1928. Pp. 60; illustrations.

THIS volume deserves notice here for two reasons. In the first place, it is in some sense a local history of the township of Crowland in the Niagara peninsula, though the greater part of it is taken up with an account of Crowland Abbey in England, from which the township took its name. The local history is sketched in very lightly, but what there is of it is well and accurately done. The second reason why the book deserves notice is because of its format. It is issued in a limited edition of 200 numbered copies, and it is printed, illustrated, and bound in the most admirable taste. Good printing has not been much studied in Canada until recently, and the type used in many Canadian imprints is still barbarous. Mr. Duff, by the books which he has been issuing from his private press, is setting a new standard for Canadian printing, and he deserves a warm recognition of this fact.

W. S. WALLACE

The Autobiography of a Teacher of French, with preliminary chapters from various sources. By JOHN SQUAIR. Toronto: The University of Toronto Press. 1928. Pp. 292.

As a contribution to educational history this book by the late Professor Squair has great value, and it also throws light upon some significant episodes in the history of the University of Toronto. For instance, the claim of the lecturers in Latin, French, German, and Italian and Spanish for admission to the University and College Councils with or without the status of professors, which was pressed in 1890 and finally admitted in 1892, is fully dealt with and reveals some negotiations with the provincial government not hitherto known. But not the least interesting feature

of the book is the frank disclosure it makes of Professor Squair himself. We see him as one who always did his own thinking, a man of independent judgment, but essentially sound and sane, never hasty to move but indomitably persistent when the time to move had come. The following calm summary which he gives of his University career admirably reflects the even temper and quiet modesty of the man, while at the same time showing that he fully realized and expected others to realize the great services he had rendered the University and the study of French. He has noted that from his appointment as fellow it was four years before he was given the title of lecturer, and five more before he became an associate professor, although in sole charge of his department from the first. He continues:

> In these five stages [Fellow, Temporary Lecturer, Lecturer, Associate Professor, Professor] he did not once apply for a position. The Fellowship was offered to him, and he hesitated as to whether he should accept it. In the other four cases the positions came by promotion without application. But they did not come without waiting. Much patience was needed. But as he looks back the writer feels that the long waiting need not be considered remarkable. Looked at as men usually regard things of this kind, why should he have expected rapid promotion? His preparation was not of a distinguished kind. He went to no foreign university to study under any great master. He took what he could find in his own country, within her own institutions. After all, his *alma mater*, whom he sometimes complained of for her stepmotherly ways, turned out to be a pretty good mother, and he is glad he stayed under the old roof. He might have found worse places.

H. H. LANGTON

Mary's Rosedale and Gossip of "Little York." By ALDEN G. MEREDITH. Ottawa: The Graphic Publishers. Pp. 280.

THIS volume is creditable to its publishers: it is well printed on good paper and well bound; the garish lining of its covers might offend some, but the jacket is becoming, and the "blurb" modest. The book is written in a light and pleasant style, wholly appropriate to the avowedly gossipy character of the content: as a piece of literature, it is successful; and no one looks for historical accuracy in a work of that character.

The "Mary" of the book is Mary, the elder daughter of William Dummer Powell, Jr., and the wife of William Botsford Jarvis, sheriff of the Home District. "Rosedale" is the home by the ravine in which she lived. The book is chiefly devoted to the story of her husband and of her and his families. Many letters are printed, from copies (generally) made by an early copying machine; few of these have been made public hitherto, and many of them throw a light not only on the doings of the Jarvises and Powells, but also on public affairs. Such materials are all too scarce; and these will be welcomed by those interested in early Upper Canada.

The story of Stephen Jarvis, of Sheriff Jarvis, of Jeremiah Powell, of the Fancy Dress Ball in 1838, in which the characters of the *Pickwick Papers* (published in 1837) were prominent, and the like, we find along with a first journey in a "Railcar", the Oregon question, the Rideau Canal, Trinity University, the Rebellion of 1837—all presented in an interesting style.

The proof-reading is not beyond reproach: the punctuation is erratic, and the syntax of a singular verb with a double conjunct subject, or of a plural verb with two disjunct singular subjects, is not unknown, while the orthography of proper nouns is unusual—we have "McCauley" for "Macaulay"; "Cavello" for "Cavallo"; "Tolpeddi" for "Tolpuddle" (or "Tolpiddle"); "FitzGibbon" and "Fitzgibbon", "Eston" for "Esten"; while the "Scotch malcontent" is always "MacKenzie." Were this history and not gossip, it might be objected that some mistakes are made, *e.g.*, William Dummer Powell was not chief justice of Upper Canada or a man of power there in 1827, nor did he travel in Spain in 1808 as chief justice of Upper Canada: he did not become chief justice till 1816, and he resigned in 1825, after having lost all his influence. He was not in Canada in 1827: nor did he go "to England after his . . . daughter Anne" in 1815 or at any time; she sailed to meet him when he was in England in 1822, and was drowned. His work was not and could not be carried on by his son John during his absence in Spain; and his early life had nothing of a struggle—he was a rich man's son and educated as such. His son, William Dummer Powell, Jr., did not take part in founding the Law Society at York; he did not live at Stamford, Conn., but at Stamford, Upper Canada, and he did not die after the birth of his second child. Jeremiah Powell was not a prisoner in Spain; the heads of his comrades in Miranda's expedition did not "decorate the Spanish ships"; he did not sail from New York for Curaçao. The engagement between the *Chesapeake* and the *Shannon* did not take place in 1807, but in 1813—but why continue? This is a work of gossip, not of history, and when did gossip care for accuracy?

The work deserves a place in every Canadian library—having been first furnished with a liberal page of *errata*, or a warning not to take its statements for historical fact.

WILLIAM RENWICK RIDDELL

Uren Prehistoric Village Site, Oxford County, Ontario. By W. J. WINTEMBERG. (Department of Mines, National Museum of Canada, Bulletin No. 51, Anthropological Series No. 10.) Ottawa. 1928. Pp. 97; illustrations.

THE historian who seeks to follow the paths of the early explorers in

Canada cannot neglect a study of the Indians; the white pioneers lived with the natives, their freedom to traverse new lands depended upon their dusky companions, successful trade required willingness and ability on the part of the aborigines to provide furs, alliances had to be made and hostile agreements checked; in fact, it may be said that for several hundred years the Indian was the dominant factor in Canadian history. To evaluate this factor, however, it must be remembered that the culture of the tribes in various parts of the country differed so fundamentally that the conditions affecting the work of explorers were never identical. Unfortunately, few of the early writers have left detailed accounts of these conditions, so the historian must supplement written records with those dug from the ground.

This volume is an excellent example of the kind of archæological work that throws light on life in Ontario prior to European discovery, and, accordingly, on the life in which the Jesuit fathers and other French explorers participated. Wintemberg has carefully investigated part of a single village site in Oxford county, and by a detailed analysis of minute fragments has been able to reconstruct many of the activities of the inhabitants. Kernels of corn and sunflower seeds prove horticulture; 3,360 broken bones not only show that animals and birds were important articles of diet, but indicate the relative frequency in which the species were used; bone tools predominate over stone though many chips of the latter show that local manufacture occurred; pipes indicate the smoking of tobacco; while beads, charms, and ornaments show that aesthetic and religious aspects of life were not overlooked. In the twentieth century we are so accustomed to metal that we are apt to forget the craftsmanship required in working stone, bone, or antler; Mr. Wintemberg, by a careful study of the actual specimens, shows that no less than eleven processes were employed. For cultural analysis, potsherds are always valuable, and he has studied some 6,000 fragments both with respect to manufacture and design. Pottery decorations, the deep deposits indicative of semi-sedentary life, the presence of horticultural products, and a few other clues lead the author to believe that this site is that of a proto-Neutral village, perhaps one of the earliest Iroquoian settlements in Ontario.

Anthropologists and historians alike will welcome this volume, both for its own value, and as an indication of the resumption of anthropological publications by the Department of Mines. Prior to 1916, a considerable number of excellent monographs and papers, prepared by members of the Anthropological Division, were printed, and are now widely used as authoritative works on the Indians of Canada. Between that date and the appearance of the present volume, however, only one

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Arms of
Captain William Crispin

SUGGESTED GOVERNMENTAL ASSISTANCE TO FARMERS TWO CENTURIES AGO, IN PENNSYLVANIA.

BY WILLIAM RENWICK RIDDELL, LL.D., D.C.L., &c.

There have been many schemes formulated on this Continent for State assistance to farmers—few of them have been so outright and straightforward as to suggest direct subvention by way of a cash bonus, as did one elaborated in Pennsylvania more than two centuries ago and set out in the first book printed by Benjamin Franklin (according to his own statement) published, "printed and sold by S. Keimer in Philadelphia MDCCXXV."

It was entitled *Ways and Means for the Inhabitants of Delaware to become Rich* . . . by "Delaware" the author meaning the territory on both sides of the Delaware, now the States of Pennsylvania and Delaware, but then under one Proprietary Colonial Government, Pennsylvania and the Lower Counties.

The author was Francis Rawle; born in Cornwall, living in Devon for a time where he was persecuted and imprisoned as a Quaker, he came to Philadelphia with his father of the same name, arriving in June, 1686. He took an active part in public life being, for several years, Member of the Assembly for Philadelphia. He was generally in opposition to the Government and when he was in 1724 appointed to the Provincial Council, he did not qualify or take his seat. This opposition may account for the fact that he did not put his name to his book.

Only one copy of the work is known to exist; it is in the fine Library of the Historical Society of Pennsylvania in Philadelphia, but a few copies of a private Reprint of 1878 are in the hands of favored individuals.

The writer of this book is concerned with Trade "a

noble subject, very copious, so it deserves . . . Genius and Capacity to discourse of . . .": and the question of aid to the farmer is rather incidental.

He thinks no man can reasonably deny that "the true cause of our Poverty and sunk Condition is the low Price of our Country-Produce." Beginning with "that Specie which is the chief Staple of or Trade, *Wheat* . . . , what we . . . raise in vast Quantities and what we are most to depend on," he recommends to the "Legislative Authority of the Provinces on Delaware, that a Bounty of [ ] *per* Bushel be paid for all Wheat which shall be exported to any Parts of the Continent of Europe; as to France, Spain, Portugal and . . . Italy"—"The Bounty to be raised by a Land-Tax or a Duty on Rum." This he takes "to be the only Means to advance the Price of Grain which of late has been so low that the Farmer has been reduc'd to the Brink of Ruin . . . his inevitable Fate without some timely Remedy."

And "if the Planter or Farmer sinks, the Merchant or Trader cannot swim, nor more than ship when a But-head is sprung."

He does not think much of the merits of Barley, of which, by the way, there were three Sorts, 4-rowed, 2-rowed and apparently our old 6-rowed kind, "a Winter *Barley*"—its only use was to make Beer and, unfortunately, "thro' the Depravity and Viciousness of our Palates and the so frequent use of Spirits, there has not been due Care in the Brewing of Beer"—"we are so strongly addicted to Rum and other Spirits . . . that neither Regard to publick Interest or private, Body or Soul will divert the Generality of these Parts of the World from the frequent use thereof. But not to be wholly without Hopes let the Brewer do his Part and the Legislature theirs by laying an Impost on Foreign Liquors, and permit the selling of Beer and Cyder free of all Charges: This will further the frequent use of the latter and Disuse of the former, consequently will

cause a greater Consumption of the Country-Produce . . ." Obviously, Rawle would have considered anyone who should suggest anything so unheard of as Prohibition as not only insane but also unpatriotic.

Of "Oates, . . . we have two or three Sorts . . . distinguish'd by Black and white"—no doubt our Canadian Black Oats, White Oats and Potato Oats. The cheapest of grain, if "manufactured into Grots or Oatmeal," they might "when Freight is low or by throwing them into the Hold among the Cask, answer for export to the Caribbees."

Tobacco commands too low a price to be of advantage.

Hemp, however, is "another artificial Product of this River, the raising whereof ought to be encouraged by a Bounty;" and the writer was "induc'd to urge the Necessity of a Bounty for the Encouragment of that Product here. . . ."

And here inevitably comes in the universal argument of the protectionist and bounty-seeker of all ages and countries, that is "foreign cheap labor." In the "East-lands," afterwards identified with Russia, "the Labourers (are) Vassals who live in miserable Bondage under their Lords. Their apparel is Sheep-Skins Coat and Breeches with the Wool on the Inside in Winter and the same with the Wool Outside in Summer. They subscribe and name themselves Kolophey, that is Villains or Bondslaves . . . Hence, all the Produce of the Land is . . . very cheap. . . ." This is told "to support . . . the necessity of a Bounty for the Encouragement of raising that Commodity . . . Hemp": that growth would "raise the Value of Lands and Labour of our Servants and Slaves in which the Riches of *America* chiefly consist."

For Flax, Paper and Linseed-Oyl, he does not suggest a Bounty: he does urge more active "Distilling . . . another Art or Mystery we are capable of . . . the Chymical Extraction of Spirits from Matter of a low

Value . . . not only for Consumption at home but for Transportation to any of our Neighbour Colonies. . . . We can easily supply our selves with Melasses besides other Matter we have to distill as Cyder, Peach-Drink, decay'd Wines . . . Rye, Barley, &c.''

He recognizes, indeed, that ''tho' the Art of Distilling is a Science very useful to mankind, yet by the great abuse thereof, nothing is more injurious and prejudicial;'' but his ''Design being Traffic not Physick,'' he proposes ''Remedies and Preventives for the Body Politick'' and leaves ''the Natural to Gentlemen of the Faculty.'' He cites the example of England which ''fell in Debt [to France] more than a Million yearly . . . chiefly by the great Imports of Wine and Brandy . . . then by Distilling of Spirits came nearer a Ballance,'' and now France ''has been obliged to part with *Louis d'Ors* to make good the Ballance.''

Rice, Timber, Iron, Ising-glass, all these may and should be diligently exploited and used to promote Trade, and, what is most important and pressing, a suitable and sufficient issue of Paper Money.

All students of the history of the American Colonies will remember the constant vigilance of the Imperial authorities required to prevent the excessive issue of Credit-notes: Rawle advises ''to emit no more Paper-Money than the Trade of these Colonies call for;'' but it was always a matter in dispute between Colony and Mother Country how much, if any, the trade of the Colonies called for, and there never was a time when the Mother Country desired to advance the Foreign Trade or the Shipping of the Colonies.

This work is well written in plain and dignified language, well-argued and logical upon the writer's hypotheses; and it is in every respect creditable to the author.

Osgood Hall
Toronto
May 26, 1928.

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THE CANADIAN BAR REVIEW

TORONTO, SEPTEMBER, 1928.

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THE "STAR-CHAMBER ACT" AND THE IMPERIAL CONFERENCE OF 1926.

It is a far cry from 1641 to 1926 and from the Dominions of King Charles I. to those of King George V.; but the political conceptions of the race have not changed—*semper eadem* in State as in flag.

Early in the reign of the first Stuart King of England, the great case of *The Postnati* fixed the relation of subject to King. The Scottish laddie, the Postnatus, was the natural-born subject of him who was King of England but not the subject of him *quâ* King of England. The man of flesh and blood called James was the King of the boy, not a metaphysical entity, an abstract "King of England."

A modern has difficulty in getting into the atmosphere of those days, whether in Law, Medicine, Philosophy—what not. Matter composed of four elements, earth, air, fire and water; the animal world having the serpent which slew at a distance by its glance and the little fish which checked the course of a ship in full sail. The vegetable kingdom boasted its mandrake-root which shrieked when drawn from the earth—and there were the four "humors" of the body, Blood, Phlegm, Yellow Bile and Black Bile, whose predominance determined the "temperament." Even in Mathematics, Cardan is not always wholly intelligible if Cocker is—although we had to wait for Gauss and Bolyai for real transcendentalism.

It was no wonder then that the relation of subject to King was discussed in language scarcely intelligible to the modern lawyer. But there is no difficulty in understanding the decision: and it may be stated thus—anyone born in Scotland after James (who was and continued to be King of Scotland) became King of England, was a natural-born subject for all purposes of that King but not a subject of the Kingdom of England.

Every student of our or any other British Constitution must read and digest *Calvin's Case: the Case of the Postnati.*[1]

The historical result is the constitution of the British Empire—the Canadian is the subject of him who is the King of Great Britain and Ireland, but in no sense a subject of the United Kingdom or of the people of the United Kingdom and as a corollary thereto, *Civis Britannicus Sum, non Civis Canadensis.*

[1] (1608) 7 *Coke's Reports, 6 b*: 2 *Howell's State Trials*, 607.

When in 1640, the people of England determined to abolish the Court of Star-Chamber established in 1487 by the Act 3 Henry VII., cap. 1—the first "Judicial Committee of the Privy Council"—and also the Common Law appellate jurisdiction of the King-in-Council, the language of the repealing Act was carefully selected. The Court of Star Chamber was "clearly and absolutely dissolved" for all purposes; but not so the jurisdiction of the King and his Privy Council. What was taken away was their authority to determine as to the property "of any of the Subjects of this Kingdom"—that is the Kingdom of England.

This "Star-Chamber Act," (1640), 17 Car. I, c. 10, did not interfere with the existing right outside of England; whence it was that the appellate jurisdiction was exercised in the Channel Islands and later in the American Colonies including Canada. This has sometimes, absurdly enough, been represented as something tyranically imposed on the people of the Colonies, instead of what it really was, a continuance in favour of these people of their Common Law rights as British subjects in a British country.

When Canadian statesmen framed the written Constitution which they desired for the proposed Kingdom of Canada, they purposely omitted to take for Canada the power to change the Constitution. At that time the right to appeal to the Foot of the Throne existed, and the "Fathers of Confederation" did not take power for Canada to take it away. Consequently it has remained.

But there never has been a time, when Canada wished for a change in her Constitution, that the change was not made immediately and without question or discussion; and there never was a time when if Canada wished the right of appeal to the King-in-Council to be abolished that it would not have been abolished immediately and without question or discussion.

At many times, the question of appeals to the Privy Council has been discussed in Canada, especially since she has sloughed off her "Colonial" status and taken her position as a self-governing State, one of the component parts of the New British Empire. No change has been agreed upon; but that it was a Canadian and not an Imperial question has long been obvious. As the English Star-Chamber Act of 1640 forbade appeals from England only without interfering with any other part of his Empire, so it came to be felt that any and every self-governing part of the Empire should decide for itself whether the King should be shorn of his Common Law

power, the subject should be deprived of his Common Law right, in that part of the Empire.

When the Imperial Conference met in 1926, it was thought well to express this in clear terms, and accordingly we find it said:

> "Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."

Whether there ever will be an abolition of the right to appeal to the Privy Council from Canada is doubtful, but the question should be discussed upon its merits—it is to be hoped not in the heat of political controversy or as a test of loyalty.

William Renwick Riddell.

Osgoode Hall, Toronto.

A NOTE ON ONTARIO AND MANITOBA MORTGAGE ACTS.

Section 10 of 39 Victoria, chapter 7, enacts as follows: "The purchaser in good faith of a mortgage may, to the extent of the mortgage, (and except as against the mortgagor, his heirs, executors and administrators,) set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do."

This provision, first enacted in Ontario in 1876, now appears in the statutes of Ontario[1] and of Manitoba.[2] When it was first passed there had been two decisions[3] of Strong, V.C., holding that the purchaser of a legal[4] mortgage could not plead the defence of purchaser for value without notice. The ground of the decisions was that, although such a purchaser took a legal estate, he was also the assignee of the mortgage debt and was therefore within the ordinary rule that the assignee of a *chose in action* takes subject to equities; and this reasoning was supported by some authority.[5]

At all events, the legislature, by the section quoted above, made it clear that the purchaser of a mortgage[6] was to be entitled to the plea of purchase for value without notice, but added that he may set it up "in the same manner as a purchaser of the property mortgaged might do."

It is to these words last quoted that I request attention to be directed. The obvious comment is that, except where the mortgage is only equitable, the "purchaser of the property mortgaged" never could and cannot yet avail himself of that plea,[7] apart from cases where

[1] R.S.O. 1927, c. 140, s. 11.

[2] R.S.M. 1913, c. 130, s. 11.

[3] *Ryckman* v. *The Canada Life Assurance Co.* (1870) 17 Gr. 550, and *Smart* v. *McEwan*, (1871) 18 Gr. 623.

[4] In *Smart* v. *McEwan* (*supra*) it would seem from the report that the mortgage assigned was a second mortgage and therefore only equitable, but this is not mentioned in the judgment of Strong, V.C., who treats the case as being similar to *Ryckman* v. *The Canada Life Assurance Co.* (*supra*) and states that he adheres to his decision in that case.

[5] *Moore* v. *Jervis*, 2 Coll. 60; Lewin on Trusts, (3rd ed., p. 229); *Cockell* v. *Taylor*, 15 Beav. 103; Fisher on Mortgages (2nd ed., p. 696).

[6] It does not appear from the act whether this includes an equitable mortgage.

[7] See Ashburner on Mortgages, 2nd ed., p. 534, where he cites *Phillips* v. *Phillips*, 4 D.F. & J. 208; *Thorpe* v. *Holdsworth*, 7 Eq. 139; *Cave* v. *Cave*, 15 Ch. D., 639. The report of *Colyer* v. *Finch* in 5 H.L.C. 905, also cited by Ashburner, might seem to be to the contrary, but the rule is well established. See further Fisher on Mortgages, 6th ed., pp. 598-599, and the cases cited in *Thorpe* v. *Holdsworth*, *supra*.

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DELEGATION OF POWERS OF PARLIAMENT.

In the CANADIAN BAR REVIEW, Vol. IV, September, 1926, in an Article under the above heading, the statement is made at p. 429 that "every Canadian lawyer understands the power in a British country of a legislative body in matters within its jurisdiction to delegate its authority to a body of its own creation."[1] This was too sanguine a statement: quite recently, in a work intended to be used by the legal profession in Ontario, it was in the original draft said: "Of course, the Dominion Parliament cannot delegate its power": fortunately this was revised by the Consulting Editor.

It may be of interest to mention a little known instance in English history of ratification by Parliament, *ex post facto,* of legislation by another body—*omnis ratificatio retrotrahitur et mandato priori aequiparatur.*

The troubled times of Charles I and the Commonwealth yield to none in constitutional interest.

Legislation was expressed to be "by the King's most Excellent Majestie, the Lords and Commons of this present Parliament assembled" until and including some of that of 17 Car. I (1642, N.S.): part of this year's legislation in the name of" The Lords and Commons now assembled in Parliament," although the King is also mentioned.

In 1653, the legislation reads: "The Lords and Commons assembled in Parliament do . . . ", the King's name no longer appearing; and this was the style until 1649, N.S. Charles being executed in January, 1649, the House, March 19, solemnly declared that it had "been found by too long experience that the House of Lords is useless and dangerous to the people of England," and enacted that it should be abolished. *Anno* 1648, O.S. (1649, N.S.) cap. 17. But before this time and a fortnight before the death of Charles, "the Commons assembled in Parliament" had as early as January 16, passed legislation without either King or Lords—who disappear from the Statute Book for a time.

[1] Of course, this is not true in the United States with its written "Constitutions"—Cooley: *A Treatise on the Constitutional Limitations,* Boston, 1903, p. 163: *Black, Handbook of Constitutional Law,* St. Paul, 1910, p. 374: Riddell, *The Constitution of Canada,* Dodge Lectures, Yale University, 1917, p. 140, *seq.*

The House was the enacting body until 1653 when Cromwell dismissed the Long Parliament. The "Little Parliament" or "Barebones Parliament" followed for a few months; but by the end of the year (December 12), the better part of the Members with the Speaker returned their powers to Cromwell. This might, perhaps, be considered as an express delegation of Parliamentary powers; but as we shall see, it was considered wise to give a retroactive ratification.

Late in 1653, N.S., we find legislation by "Oliver, Lord Protector of the Commonwealth of England, Scotland and Ireland, and the Dominions thereto belonging, having the Exercise of the Chief Magistracy, and the Administration of Government within the said Commonwealth, invested and established in His Highness assisted with a Council who have Power until the Meeting of the next Parliament (which is to be on the third day of *September*, now next ensuing) to make Laws and Ordinances for the Peace and Welfare of these Nations, where it shall be necessary which shall be binding and in force until Order shall be taken in Parliament, concerning the same." *Anno* 1653, O.S., cap. 4, passed December 26, a fortnight after the surrender of powers to Cromwell.

This, by the way, will remind the Canadian lawyer of the provision in the Canada or Constitutional Act of 1791, 31 Geo. III, cap. 31 (Imp.), sec. 50, making it lawful before the First Meeting of the Colonial Parliament "for the Governor or Lieutenant-Governor of such Province . . . with the Consent of the major Part of (the) Executive Council . . . to make temporary Laws and Ordinances . . . ," these to be valid and binding until after six months from such first Meeting.

The last legislation in the name of Protector and Council seems to be September 2, 1654.

When the new Parliament met, September 17, 1656, the legislation was in the names of "His Highness, the Lord Protector and the Parliament," and by Statute, *Anno* 1656, cap. 10, it was recited: "Whereas since the twentieth day of *April*, One thousand, six hundred fifty-three, in the great Exigences and Necessities of these Nations, divers Acts and Ordinances have been made without the consent of the people assembled in Parliament, which is not according to the Fundamental Lawes of the Nations and the Rights of the people [i.e. not "constitutional" in our British sense of the word: does anyone hear an echo in the language of July 4, 1776?] and is not for the future to be drawn into Example": and it proceeds

to declare much legislation since April 20, 1653, to September 3, 1654, valid, effective, and continued along with certain legislation with which we have here no concern.

While it is permissible to look upon this episode not as delegation of legislative power *a priori,* it is an interesting instance of delegation *a posteriori.*

It may perhaps not be without interest to note that in his period of absolute power—for everyone admits that after a few ineffective struggles, his Council obeyed his directions—Cromwell preferred—and said so—that men or at least Englishmen should be free rather than sober by compulsion—thus antedating Archbishop Magee. To the Scottish clergy, he said that "it will be found an unjust and unwise jealousy to deprive a man of his natural liberty upon the supposition that he may abuse it . . . to keep all wine out of the country lest a man should be drunk"—but then the 18th Amendment and Volstead were not yet.[2]

Toronto.

WILLIAM RENWICK RIDDELL.

[2] Of course, the legislation of the Commonwealth was not considered binding on the Restoration in 1660 or later; it will be found in the 4to: *A Collection of Acts and Ordinances* . . . by Henry Scobell, Esq., Clerk of the Parliament, London, 1658.

THE HONOURABLE JOHN E. MARTIN.

The late Honourable John Edward Martin, Acting Chief Justice of the Superior Court of Quebec, came from the Eastern Townships of Quebec, which have given to this country so many distinguished men in all walks of life. He was born in 1859, in the Township of Shefford, where his father owned a farm, and he had to mingle, in his youth, with his father's servants, whether of English or of French descent.

His early education was had in the public school at Waterloo. Then he took a Normal diploma and taught school for some years. As a teacher's salary is not very large, the young man felt obliged, for the first time, to apply to his father for help, in order to continue his studies. The latter grudgingly gave him five hundred dollars, which had to see him through his legal studies. So he had to earn, in his spare moments, the remainder of the sum required.

Another disillusion awaited him at the start. Before taking the final plunge, he sought the advice of Mr. W. H. Kerr, K.C., a leader of the Montreal Bar and a Professor at the McGill Law Faculty. The answer was not comforting: "Study Law in Quebec?" Mr. Kerr said, "Well, in twenty-five years the English-speaking lawyer here will be as extinct as the dodo!"

Nothing daunted, young Martin passed his preliminary examination, entered the McGill Law School, and four years later, in 1883, he left it at the head of his class, with that much coveted distinction, the Elizabeth Torrance Gold Medal.

Called to the Bar the following year, he began his career in the circuit he was born in, at Sweetsburg, as the junior partner of the Honourable George B. Baker, for some time Solicitor-General of Quebec. It was not a brilliant *début*. For many years the junior prepared briefs for the senior's arguments, and had very few chances of appearing before the Appellate Courts.

However, everything comes to him who waits. In 1892, Mr. John S. Archibald, K.C., senior member of the firm of Archibald & Foster, became a Judge of the Superior Court. Mr. (now Senator) Foster thought of reorganizing his firm, and associated with himself Mr. Girouard, K.C., M.P., afterwards a Judge of the Supreme Court of Canada, his son, Désiré H. Girouard, and a comparatively unknown lawyer from the townships, who was to succeed Mr. Archibald as Mr. Foster's partner, and also, thirty years later, as Acting Chief Justice of the Superior Court.

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TORONTO, SEPTEMBER, 1929.

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VIII. BOOK REVIEWS.

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scope for this article. It is enough to say that this great scandal is being cleared up slowly by legislation in England and in the Dominions.

Why does one say that the principles enunciated by the Privy Council appear to be inadequate. A sense of justice, powerful but undefined, and unformulated is the only answer. To follow Professor Hocking, there is a great need for a philosophy of law, if we can find one capable of use. There are many people who think that they have provided such a philosophy. It is for the students of Jurisprudence to decide which one has really accomplished this task or to synthesise those which are offered, as well as they may. For that purpose Pound, Stammler, Kohler, Hocking, Lunstedt, DeMogue and Geny are writers worthy of careful consideration.

It is impossible as yet to offer any one formula to fill the needs outlined above. The writers named at the end of the last paragraph offer stimulating attempts at formulation and definition of guiding principles, but for some time to come each person must use a synthesis of the writers he finds most helpful. That no formula will ever satisfy all demands one can be certain, but that is no good reason for not using the valuable part of each man's writings. The present uninformed situation will only be productive of more injustice and contempt for the law.

Cambridge, Mass.

J. F. DAVISON.

"FI. FA. LANDS" IN UPPER CANADA.

As is well known the Writ of Fieri Facias was not effective as against land in England: Levari Facias was employed to enable the crops to be seized and Elegit gave the judgment creditor the right to the use of half the judgment-debtor's lands until the debt was satisfied.

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Toronto. WILLIAM RENWICK RIDDELL.

LONDON LETTER.

The nomination of Sir Cecil Hurst as one of the British members of the Hague Court of Arbitration is generally understood to mean that he will be elected in September to fill Lord Finlay's place on the Permanent Court of International Justice. Sir Cecil has for many years been one of the best known figures at the council tables of Europe, and he combines a vast practical experience of international affairs with a scholarly and scientific knowledge of the law of nations. To those who are engaged in the teaching of international law in England his departure will come as a real loss, for no man has done more to bridge the gap which still exists in this country, though not on the Continent, between the teaching and the practice of the law. In the Legal Department of the Foreign Office he has established a tradition of close personal contact with the universities which we hope may become permanent. In some quarters the appointment has been criticised on the ground that it should have been given to a retired judge. Criticism of this kind indicates a misconception of the character and functions of the Permanent Court. All the other members are experts of acknowledged authority in international law and practice, and the prestige of Great Britain imperatively demanded that her representative should be one who had already established his reputation as an expert in the law which the Court must administer.

* * The case of the *I'm Alone* has been followed with intense interest by the public in this country. Although there is general sympathy with the gallant captain and with the Canadian Government which has taken up his case, all the responsible organs of the press have commented upon the matter with dignity and restraint. Everyone is pleased that the question should have been so promptly referred to arbitration under the terms of the treaty. Pending the report of the arbitrators the less said the better, but we may note the incident as an excellent example of the successful working of Dominion diplomacy. Whatever the hypothetical difficulties may be, so long as the problems which actually arise are handled in this manner we need have no fear that Dominion representation abroad will imperil the diplomatic unity of the Empire.

"FI FA LANDS" IN UPPER CANADA

BY

THE HON. WILLIAM RENWICK RIDDELL
LL.D., D.C.L., Etc.

Reprinted from THE CANADIAN BAR REVIEW for September, 1929

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TORONTO, OCTOBER, 1929.

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CHIEF BARON POLLOCK.[1]—This work of filial piety was well worth writing, and on the whole it is creditable to the distinguished author.

The first Pollock of the legal profession was the third son of the saddler to George III. and his sons—the father hailed from Berwick-on-Tweed, the *Nutrix Leonum,* which produced the Scotts, Lord Mansfield and Lord Stowell.

Born September 22, 1783, (Jonathan) Frederick, the "handsome Pollock," was educated in a private school in Lambeth, in St. Paul's —which he left after a controversy with the Headmaster who prophesied that he would be hanged, a prophecy which in later years the prophet remembered as foretelling that he "would fill an elevated position"—and at Trinity College, Cambridge, becoming Senior Wrangler. He was at the University just before the Cartesian symbolism and terminology were adopted, Fluxions and Fluents were still in vogue, the Differential Calculus was not, and the "Newtonian dotage" had not given way to the "Cartesian deism."

It is recorded of him that he maintained his early love, and toward the end, devoted his leisure thereto—not unlike our own Chief Justice Thomas Moss, who spent much of the time in his last illness in solving algebraical problems.

He attended lectures on Anatomy, Chemistry, Mechanics—and when he was in active practice, one of his sayings was: "I study medicine but I practise law." *Me judice,* no better foundation can be laid for a career at the Bar than a thorough grounding in Mathematics, pure and applied, Chemistry and Medicine.

His law course included Paley's *Natural Economy* and Beattie's *Truth* as well as Blackstone, Tidd, Selwyn, Littleton, Coke and Cruise.

Called in 1807, he obtained a fine practice in a comparatively short time. A High Tory, he was elected to Parliament at the fateful General Election of 1831: he fought against the Reform Bill of 1832 to the last and when the inevitable occurs, he considers "the

[1] Lord Chief Baron Pollock, A Memoir by his Grandson, Lord Hanworth, Master of the Rolls. London: John Murray, 1929.

Constitution is at an end. The Revolution has begun and practically we are a Republic."

But although he had been Attorney-General (1834-1835) resigning to resume his practice at the Bar, he did not refuse in 1839 to defend the Chartist Frost (9 C. & P., 165—the technical defence is worth considering even in these non-technical days).

After a successful career at the Bar, Frederick Pollock (he early dropped his first name just as our Edward Blake did) became Chief Baron in 1844 and occupied that high office until his resignation in 1866; he died in 1870 aged 87. It may not be without interest to note that he had twenty-four children of whom twenty survived him. It is said that in the later years on the Bench, he at times dozed when hearing argument—in one case, *Attenborough* v. *Thompson*, 2 H. & N. 559, on Counsel arguing that a man's residence is where he eats, drinks and sleeps, he said: "That cannot be, for if so, my residence would be the Court of Exchequer."

The biography as a whole is well-written, and it throws a side-light on some matters of the past.

Pollock's older brothers were attacked with smallpox, the oldest was laid out for dead but afterwards recovered and lived to be "the ugliest man in London." The mother insisted on Frederick being inoculated (Jenner and vaccination were still in the future) against the views of her husband, a strict Presbyterian who believed that such matters should be left to the direction of Providence. A King's Counsel still received wages from the Treasury: duelling was still in vogue and everyone was anxious to find an escape for the duellist who had killed his man: a criminal sentenced to death on Friday was hanged on Monday (the author makes a strange mistake in saying that this "probably indicated unusual haste," a hundred years ago): Dissenters had no place in the Universities, and it was impudence in them to ask it: when an election was imminent "it was the duty of someone to post down to Huntingdon to secure all the public-houses in the Tory interest, whence followed unlimited beer": in the House of Lords, any peer, lay as well as professional, could sit and hear cases (some of us have seen a half-crazed lay Lord, sitting with the Law Lords on the hearing of an appeal, but no one paid any heed to him).

Coming seventy-five was "an age considerable—beyond the common stretch of human existence"—*eheu fugaces labuntur anni!* Campbell, Parke, Russell and their confrères are met in many situations.

In a Review of Lord Hanworth's Life of Lord Chief Baron Pollock in the Law Quarterly Review of October 1929, occurs the following:

There was an incident in the Chief Baron's life which could not well have found a place in Lord Hanworth's memoir, but which it may be permissible to print here. It is supported by the best authority (to whom detection of the textual error mentioned below is also due). When Pollock was appointed Attorney-General he had to acquire armorial bearings, and applied for that purpose to the College of Arms. He thought the fees excessive, and after many colloquies there came a messenger from Garter King-at-Arms with the ultimate terms. The Attorney-General's reply was as follows: 'Tell Garter King-at-Arms with my compliments that he may go to the devil sable in flames gules with a pitchfork argent stuck in his backside proper.' It is not known whether Garter King-at-Arms ever had official knowledge of the words used; he might have rejoined that sable on gules is incorrect. The Attorney-General, true to his Scottish ancestry, procured from Lyon King-at-Arms, presumably for a more moderate fee, the arms which his descendants now bear.

The author gives due credit to Dickens "with his usual accuracy in criminal procedure"—it is extraordinary and to this reviewer unaccountable that the trial of *Bardell* v. *Pickwick* has been generally considered a travesty.

The curious Chancery tradition which inserted a mute aspirate between two vowels to show that they should be sounded separately, e.g., "preheminence," is noticed.

The proof-reading is not impeccable—we find "Lord Coke"—the criminal is "hanged, drawn and quartered" (as though he was hanged and then "drawn" like a chicken, instead of being "drawn" to the place of execution on a hurdle and then hanged): for "Quant a moi," the author is not perhaps responsible and an occasional slip in punctuation may be overlooked.

The work will make no very great impression upon the legal or literary world; but as has been said, it, on the whole, is creditable to the author, and was worth writing.

WILLIAM RENWICK RIDDELL.

Toronto.

NOTES ON RECENT BOOKS.

BY THE EDITOR.

WISE SAWS AND MODERN INSTANCES.—We congratulate Mr. Johnson on producing a book[1] of a kind and quality all too rare in Canada. Many books on the practical side of the two systems of law prevailing in this country have been published, but little has been done in the way of critical enquiry into the origin and development of the doctrines of either system or in making a comparative study of both. Mr. Johnson's book is a happy combination of the practical and what is called, *faute de mieux,* the academic aspects of the law. Predicating that the maxims of the Civil Law which have survived to our own day stand as "the core of codes and textbooks, the rock foundation of legal thought today as they were a thousand years ago," he takes certain of these maxims and, after tracing their history, establishes the reasonableness and utility of the principles they embody by showing how persistently modern legislation and judicial decisions in Quebec are moulded in conformity with them.

The sub-title of the book is "Essays in the Evolution of Law," and the author modestly offers his venture in legal literature "to those who will take the trouble to read it; not without the hope,

[1] *Maxims of the Civil Law.* By Walter S. Johnson, K.C., Montreal: Wilson and Lafleur, 1929.

however, that in the comparative method adopted wherever possible, lawyers of the English provinces may find some windows opened through which they may view the *rationale* of our French Civil Law; and that young students may find some stimulation in the methods of legal reasoning exhibited in the decisions reviewed." The author's hope will be realised if our law-schools throughout Canada do their duty by his book. If there is any country under the sun where the study of comparative jurisprudence should be encouraged, surely it is ours where two great systems of law coexist. Notwithstanding all that has been written to the contrary in the past, that the English Common Law owes somewhat of a debt to the Civil Law cannot be gainsaid. In one of his recent books, that great historian of the former system, Dr. Holdsworth, says: "Whether we look at the law from the point of view of the practitioner, or the teacher, the debt of English law to the civilians is much more considerable than a modern lawyer would suppose . . . . In the sixteenth century it [the Civil Law] helped to make English law sufficient for the needs of a modern State. In the eighteenth century it helped Lord Mansfield to construct our modern Commercial Law . . . . From the purely academic point of view we cannot afford to neglect a branch of legal learning which has so large an historical effect, a branch of learning which is still so necessary to a scientific study of law. From the purely practical point of view we cannot afford to neglect a branch of learning which is necessary to the proper understanding of International Law, and of foreign Codes of Commerce."

Mr. Johnson will pardon the suggestion that any later editions of his book should include an index and a table of cases cited.

* * * *

American Diplomatic History.[1]—This is a book of abounding interest in a field which, as the author declares, is "astonishingly neglected." The position of executive agents in American foreign relations is worthy of study if only because of its peculiarity under the constitutional structure of the United States. European executives, for the most part, are untrammelled in making appointments to their legations, while in the case of the United States appointments involve a dichotomy of power between the President and the Senate. It has been the object of the author, in the studies that have given him material for his work, to discover how far the executive

[1] *Executive Agents in American Foreign Relations.* By Henry Merritt Wriston. Baltimore: The Johns Hopkins Press, 1929. Price $5.00.

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LAW REVIEW

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A TREATISE ON THE

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upon Legislative Power in the Several States of the American Union

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Citations are to the official reports, the Reporter System, U. S. L. edition, and to the several sets of selected cases.

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THE LAW AS A SOCIAL SERVICE PROFESSION

BY DANIEL L. MARSH[A]

Laws should be made by our best and wisest citizens, who act upon human experience in the interest of the public good. Jealousy as we guard personal liberty, experience has shown that social liberty is more important than personal liberty. There can be no liberty without restraint. It is by law that individual conduct is socially controlled. It should be the lawyer's function, therefore, to help preserve the social order. Rightly understood the legal profession is a social service profession. If the nation is to endure, lawyers must become social servants primarily rather than chiefly the personal servants of individuals and corporations. Lawyers, by their speeches and their conduct, should breed respect for law. The community has as good a right to expect a lawyer to obey the laws of the land as to expect a clergyman to live a clean moral life. A lawyer must keep an open mind lest he become the victim of precedents. A lawyer should eat enough of the salt of progress to keep him from becoming hide-bound to the past. Let us discourage from entering the legal profession any man who does not give promise of living up to its ideals. If a man is capable of trickery and dishonesty and the betrayal of a trust, let him keep out of the legal profession. Let us have here men of brains and character; men of unimpeachable integrity and unsullied reputation; men who will not surrender to the commercialized conception of the profession, but who will hold themselves as promoters of the public weal; men who will hold fast to that which is good in the past and who at the same time will consecrate themselves to the working out of the divine idea of progress.

[A]President of Boston University. In addressing the Annual Banquet of the Boston University Law School Association, Tuesday evening, April 10, on "The Lawyer as a Social Servant," he spoke, in part, as above.

THE PROFESSION OF LAW IN ONTARIO

The Honorable William Renwick Riddell, LL.D., D.C.L., &c.

Justice of Appeal, Ontario

When Upper Canada began her separate Provincial career on the day after Christmas, 1791, there was only one practitioner of law, duly licensed, within her boundaries—there was, indeed, one out of the ten judges who had been regularly admitted to the practice of law, so that the nascent Province could boast of two lawyers.

This number was, in 1792, increased by the advent of the Attorney General, an English Barrister; but most of the legal business was done by non-professional persons, who were required to file in court, a formal Power of Attorney, before being allowed to take part in the trial.

In 1794, the experiment was tried of going back to the original English practice—of the Crown, *i. e.,* the Lieutenant-Governor, granting licenses to practice law; but this did not prove satisfactory, and, in 1797, the profession was placed on a new footing, which, in substance, continues until the present day. This has proved so satisfactory in actual practice, that other professions have been put on much the same basis—medicine, apothecaries, dentists, and others.

In 1797 the legislature of Upper Canada passed an act, which authorized those duly licensed and actually practicing law, to form themselves into a society to be called the Law Society of Upper Canada; and to that society was entrusted the regulation of the profession of law, "calling" to the Bar, &c.

This society exists in full vigor today, and to it belongs every barrister and student-at-law in Ontario—the name was not changed, time-honored as it was, when the former Province of Upper Canada, in 1867, became the Province of Ontario. In order to enable land to be acquired and kept for our Palais de Justice, Osgoode Hall, the governing body of the society, the treasurer and benchers, received incorporation in 1822; but the constitution of the society at large remains unchanged.

It would serve no good purpose to go into the various changes in detail, the various experiments tried during the century and more; the society has been in existence; it will suffice to state the present system.

Every fifth year, an election is had for thirty benchers; at this election, every person who is a member of the Bar in good standing and not in arrears for fees to the society, is qualified to vote for these benchers; the voting is done by ballot by mail. The candidates must have been nominated by at least ten electors. In addition to these

thirty benchers, there are certain *ex officio* benchers—present and past Ministers of Justice, Solicitors-General, Attorneys-General, every retired judge of the Supreme Court of Ontario or Canada. There is one provision which, so far as I am aware, is unique: it was found that the prominent members of the profession were elected and re-elected as benchers; and thus the legitimate ambition of the younger barristers had not an opportunity; accordingly, it was provided that every person who should have been elected at four quinquennial elections should be a bencher *ex officio;* it was in the same view that it was provided that every person who should be seven consecutive years, treasurer, should also be an *ex officio* bencher. The benchers at their first meeting after the election, elect one of their number, treasurer, *i. e.,* president—the English practice of the Inns of Court of calling their head, treasurer, being followed from the beginning.

The benchers with their treasurer form the Senate and Board of Governors in all matters relating to the profession; they make rules for the government of the society, lay down the curriculum of studies for the student-at-law, they have established a law school at the expense of the profession, and keep it in a high state of proficiency; they appoint the professors, lecturers; they "Call to the Bar" such persons as they consider duly qualified to be so "Called," according to the provisions of law and the rules of the society: no person can practice at our Bar unless and until he has been "called" by the society. When a young man or woman has been called, he or she is presented to a judge in court by the treasurer or one of the other benchers; and then, and not till then, the person is recognized by the courts as a barrister. In addition to the barrister, we have the solicitor, formerly generally called the attorney. Our system differs from that in England, in that we permit the same person to be both barrister and solicitor, which is contrary to English ideas; and in fact, a very large percentage of our practitioners of law in Ontario have both qualifications. The solicitor is not, as such, a member of the society; but as long ago as 1857, he was put under the society's jurisdiction as to his qualifications; the society lays down the curriculum, furnishes the law school for his education, examines him as to his attainments and if satisfied, furnishes him with a "Certificate of Fitness," armed with which, he attends a judge; and, presenting it, is "Admitted" as a solicitor—without such a certificate, no one can be admitted to practice as solicitor in an Ontario court.

The barrister is subject to the discipline of the society; the solicitor to that of the court; but when a solicitor is struck off the rolls or suspended by the court, notice is given to the society which takes immediate action—no one is fit to be a barrister, who is considered unfit to

practice as a solicitor, and the society acts upon the considered opinion of His Majesty's justice.

The student-at-law going on for "Call," as well as the articled clerk aiming at a solicitor's life, must be five years in barrister's chambers or under articles, before being "Called" or admitted, unless he is a graduate in arts or law, in which case, three years are sufficient. All candidates are required to attend the law school for three years, and pass the regular examinations.

Without asserting that this system would suit every people, I have no hesitation in saying that it has answered its intended purpose in this province of furnishing an honorable and learned profession; and that there does not seem any desire in any quarter to change the system—on the contrary, as I have already said, other professions have been incorporated with much the same powers and on much the same plan. It has been found of public advantage to put the professions upon honor, and the maxim *Noblesse Oblige* has been justified. I had almost forgotten to say that the society publishes the Law Reports and furnishes them to its members without further pay beyond the small yearly fee charged to barristers and solicitors.

"BUTTERED ON BOTH SIDES?"

The Serjeant and the Comedian

By The Honorable William Renwick Riddell

In the spacious days toward the end of the first decade of the reign of George III, all theatre-going London—which was practically identical with all London that had a sixpence to spare—heard, used and laughed over "Buttered on *both* sides?", much as, about a century later, we oldsters all heard, used and laughed over "Wha-at never? Well, har-R-R-rdly ever." Both came from the boards; but, while the "Gallant Captain of the *Pinafore*" and his "well, hardly ever" were the pure product of the imagination of Sir William Gilbert (1878), the Serjeant-at-Law and his "Was the toast buttered on *both* sides?" came to Samuel Foote, "the English Aristophanes," straight from the Old Bailey (1770).

It was a joyous time in Old England—the heart of the people was rejoiced at having at last, after half a century of German Kings, one who could speak English and who called himself a Briton—by the Peace of 1763, came to an end the perilous Seven Years' War, and Canada had been ceded, thereby beginning the end of French dominion on this continent, and, as was clearly foreseen and foretold by Vergennes and others, although indignantly—almost contemptuously—scouted by Franklin, rendering inevitable the separation of the American Colonies from the Mother Country and the downfall of the Old British Empire. England was prosperous and the king beloved—that he was a thoroughly honest man, sincerely pious and anxious to do his duty before God and man, some Americans will find difficulty in believing when they remember the strong language concerning him, of the Declaration of Independence and forget, or, at least, fail to appreciate that that immortal document was a political manifesto, the most important and permanently effective propaganda in all secular history.

The king was one of the many who could not see that there could be any good reason why Parliament should not levy a duty on tea imported into Boston when it insisted upon an import duty on what came into Liverpool—or why the Colonies should not share in bearing the expense of a war waged, in part at least, for their protection and benefiting them equally with England herself. The Colonies knew better; but as yet there was little thought of separation. When in 1770, however, the young king appointed Lord North his prime minister, the

crash of the empire became not only invitable, it became imminent, As yet, the people of England had no thought of a calamity.

> Like ships that have gone down at sea
> When heaven was all tranquility:
> They saw no cause present or prospective to
> . . . . move
> Dissension between hearts that love,
> Hearts that . . . .
> . . . . . sorrow but more closely tied:

and all seemed for the best in the best of all possible worlds.

In this happy time, Samuel Foote shared with David Garrick the homage of theatre-going London. A Cornish man of good birth, he had studied law at the Temple but had dropped that pursuit for the stage: failing to find his talent to lie in tragedy and it proving but a very moderate success in comedy, he, beginning to wonder "where the devil it did lie," found it at length in his extraordinary gift of mimicry, in voice, manner and general appearance. Not finding in existing farces an outlet for the exercise of his talents he took to writing them himself. The favorite actor, the eminent physician, the quack oculist, were all ridiculed—and the members of the Bar did not escape.

Looking around for victims, he found them in one of the most extraordinary of all the extraordinary criminal trials at the Old Bailey—a trial which has been the subject of discussion and the justice of the verdict in which, the subject of dispute for a century and three-quarters—and the end is not yet. Scores of writers have dealt with the facts with utterly different conclusions—but the other day, the well-known writer, Arthur Machen, contributed his quota to the discussion and dispute; and there will be more to come. Nor can this be wondered at—the story is as perplexing as it is singular; and I believe that no writer so far has given the true solution.

Elizabeth Canning, a young girl of nineteen, in the service of Edward Lyon in Aldermanbury, had been visiting her uncle and aunt. Thomas Colley and his wife, at Salt-Petre Bank, after calling at her mother's on New Year's Day, January 1, 1753: after a hearty dinner, tea and supper, she left to go to her master's about nine p. m., her uncle and aunt accompanying her to the end of Houndsditch. Not appearing at her master's, he went to her mother's house to make enquiry, but she had not been seen. The mother, alarmed, "frightened out of her wits," sent her children and apprentice to look for her, but in vain—she had disappeared. She was advertised for in the papers and at the Church and the Presbyterian and Methodist Chapels, a reward was offered, to no avail—an astrologer, a "cunning man," with a black wig over his face, living in the Old Bailey, was consulted, "he only asked . . . two

or three questions and wrote, scribble, scribble, scribble along," advised the anxious mother to advertise again and comforted her with the assurance. "Make yourself easy, she'll come home again." But she came not. Many were the conjectures—she "was murdered in Houndsditch and thrown into some ditch there"—some gay young man had inveigled her—"she was forcibly taken away by some evil-disposed person," "forced away in a coach," &c. Witchcraft was suggested, nor did that seem absurd; it is true that witchcraft had ceased to be a crime by the effect of the Statute of 1736, 9 George II, c. 5, but belief in its existence as a terrible fact was firmly fixed—nay, to disbelieve in it was to write one's self down an infidel, for did not the Scripture—God, Himself—say, "Thou shalt not suffer a witch to live." The fearful effect of even a charge of witchcraft may be read in the case of *Reg. v. Richard Hathaway* (1702) 14 *Howell's State Trials,* 639, from which it appears that a decent married woman against whom there was nothing that could be said but that she had a rather too sharp tongue—a not infrequent phenomenon in all places and in all periods—had her life made a burden, narrowly escaped death and did not escape personal violence at the hands of her neighbors, was forced to change her abode and but just succeeded in avoiding a felon's fate at the hands of the common hangman at Chelmsford; all by reason of a wild and idle charge of witchcraft made by an epileptic and illiterate journeyman.

Some more uncharitable conjectured that she had hidden herself to be treated for syphilis or to get rid of the contents of a gravid uterus—it may be said at once that neither supposition had the slightest foundation in fact. The only known treatment for the disease was then and for generations thereafter mercurial salivation which necessarily left unmistakable traces and nothing of the kind was found by the competent physician who examined her, while she had at her trial, shortly to be mentioned a surgeon and a midwife to prove that she was *virgo intacta*—it was not necessary to call them as the Crown witness established the fact and Crown Counsel said expressly that he could charge nothing against her character.

Four weeks passed away without any information concerning her, and then came the denouement: On January 29th, "the night before King Charles' martyrdom," the distracted mother after preparing for bed, was on her knees praying for her return or her "apparition" and the apprentice, James Lord, was "just going to make fast the door," when "about a quarter aften ten o'clock . . . somebody lifted the latch" and in walked the lost girl. She was "in such a deplorable condition" that she was not at first recognized by the apprentice; when he "had looked her in the face again," he called to his mistress: "It is our Betty"—the mother, then on her knees, "fell into a fit directly and con-

tinued some minutes . . . . far from a sham fit . . . ." The girl was "almost spent, just gone . . . had no cap, nor hat, nor stays . . . dressed up with . . . an old . . . bedgown . . . and an old bit of a handkerchief round her head . . . her ear cut and . . . ableeding . . ."

When she came to herself, she told an extraordinary story of having been attacked by two strong men, one on each side of her, who first robbed her of her money and then took her gown, apron and hat, folded them up and put them in a great-coat pocket; she screamed, and they stuffed her mouth; they tied her hands behind her back and hit her on the temple which stunned her—she had been subject to convulsion fits for four years and this threw her "directly into a fit." This was a little after nine, and she came to herself about four in the morning and found herself still with the two ruffians. They dragged her along for about half an hour to a house, the inmates of which urged her to "go their way" and lead a life of shame. On her refusal, one of them cut the lace of her stays and took them from her. She was then pushed into a room up the stair and kept imprisoned, having but a little dry bread to eat and a little water to drink. This continued for four weeks, when she made her escape out of the window and got home. Afterwards she identified the house as that of Susannah Wells, a house of notorious ill-repute, and the woman who robbed her of her stays, as a gypsy, Mary Squires.

These two women were arrested and tried at the Old Bailey, February 21-26, 1753, Mary Squires for stealing the "stays value 10s" and Susannah Wells as an accessory after the fact. They were on the girl's evidence convicted: the gypsy in pursuance of the gentle English Law whereby "steal a shilling and you are whipped, steal twelve pence ha'penny and you are hanged," was sentenced to death. For does not Blackstone who is never tired of praising the clemency of the criminal laws of England, tell us, *Commentaries on the Laws of England,* Bk. iv, p. 237, that while by the ancient Saxon law, a thief might redeem his life by a pecuniary ransom, yet "in the ninth year of Henry the First this power of redemption was taken away, and all persons guilty of larceny above the value of twelve pence were directed to be hanged; which law continues in force to this day."

And Susannah Wells as an accessory even after the fact, had the same sentence—for "the general rule of the ancient law . . . is that accessories shall suffer the same punishment as their principals"—Blackstone: Commentaries, Bk. iv, p. 39.

That this verdict was wholly justified by the evidence cannot be unquestioned—that it was wrong in respect of Mary Squires and therefore, *ex necessitate,* in respect of Mrs. Wells is, I think reasonably certain: "no crime, no accessory." Fortunate was it for the accused that their

trial was presided over by such an intelligent and public spirited man as Sir Crisp Gascoyne, Lord Mayor London. He laid before the Ministry, a petition setting out facts which did not permit to doubt the innocence of the uphappy convicts; the matter, with all the evidence, was referred to the Attorney General and the Solicitor General. They reported "That the weight of evidence was in the convict's favour;" and a free pardon issued. Followed an abortive prosecution for perjury of certain defence witnesses, against whom at their trial, September 6-10, 1753, appeared only one witness and she declared that "she knew nothing of the matter;" and then came Elizabeth Canning's turn to be tried. Arraigned for perjury at the February session, 1754, on a bill found against her at the preceding June session, she pleaded Not Guilty. Placed on her trial, April 29, she was convicted, May 8, after seven days' trial.

Notwithstanding the jury's recommendation to mercy, she was sentenced to imprisonment in Newgate for one month and then to transportation "to some of His Majesty's Colonies or Plantations in America for the term of seven years" (to be hanged if she should return within that period).

Her friends took charge of her, and she was taken to New England in August, 1754—there she married an opulent Quaker named Treat, and, remaining in America, died at Wethersfield in Connecticut in 1773, consistently asserting her innocence to the last.

The convicting jury after two hours' consideration brought in a verdict "Guilty of perjury but not wilful or corrupt." This was properly a verdict of "Not Guilty," the jury plainly meaning that she had sworn to what was untrue but that she believed it to be true. But the Recorder sent them back with the instruction that "they must either find her guilty of the whole indictment or else acquit her." I cannot conceive of a judge acting in that way at the present time—any careful judge would find out what the jury meant and direct them accordingly. Had this method been pursued, there probably would have been a verdict of acquittal. As it was, two at least of the jury retained their original opinion, but unfortunately allowed themselves to join in a verdict of guilty.

A motion was made for a new trial based upon affidavits of these jurymen—it was rightly refused. There was at the Common Law, no new trial in criminal cases except in certain quasi-civil misdemeanors—*Rex* v. *Inhabitants of Oxford,* 13 East. 410, 514, note: *Rex* v. *Scaife* (1851) 17 A. & E., N. S., 238, is not law, Attorney General of New South Wales (1867) L. R., 1 P. C. 520; and see my article, "New Trial at the Common Law," 26 *Yale Law Journal,* November, 1916, pp. 49-60

and "The Sacco-Vanzetti Case from a Canadian Viewpoint," 13 *American Bar Association Journal,* December, 1927, pp. 683-694 at p. 691.

The case of *Ashley and Simons* (the Jew) relied upon by Counsel for Elizabeth Canning and said to be "the first precedent of the kind to any person who had been convicted of a criminal offence;" 19 *Howell's State Trials,* 692, note: was not properly speaking a new trial, although a *venire facias de novo juratores* was accorded. There the real verdict of the jury had not been received, the language being misunderstood by the court—consequently, there was no concluded trial at all. In the *Canning* case, there was an actual verdict properly understood by the court and taken: and that it did not express the real sentiments of some of the jury could not be considered to render it a nullity, these jurors having agreed to the language employed.

I am firmly of the opinion that the first view of the jury was right—that the girl swore to what was, in fact, untrue but that she believed it to be true; and, consequently, she should not have been found guilty of perjury. I think that writers such as Arthur Machen who accuse her of wilful lying are wholly unjust.

It is, indeed, reasonably clear that she was in error in identifying Mrs. Squires as the thief and robber—the gypsy had a hideously deformed face and it is scarcely humanly possible that all the many witnesses who gave evidence of her being many miles away at the time of the alleged crime could be mistaken; that they were perjured is unthinkable.

But even a cursory reading of the proceedings on the two trials will give a clue to anyone with any knowledge of the vagaries of mental and nervous disease—this seems to have wholly escaped those who have written on this singular case.

It will be remembered that Mrs. Canning fell in a fit when her daughter returned, and there are indications that this was not unprecedented or uncommon: the daughter had "convulsion fits" for four years, and fell into one which lasted some six hours on being struck by the ruffians. I think it quite clear that she suffered from hysteria of an epileptoid type: probably she was more seriously affected than her mother from whom she inherited her neuropathic liability or diathesis, but this is the usual thing. "A hysterical mother has an epileptic child." Church and Peterson: *Nervous and Mental Diseases,* Philadelphia, 1911, p. 18. Neurotic heredity is recognized by all nerve specialists, who invariably seek information regarding the antecedents of the patient.

That other children of the mother had a hysteric taint is certain from the evidence of the mother herself.

The probabilities are that the girl was attacked and robbed much as

she said, that she was seized with the "convulsion fit" rendering her unconscious for a time, taken by the men, who were alarmed at her condition (or as some of the evidence indicates, thinking she was drunk) to a house of ill repute then as now and always looking for young recruits, and there she was stripped and detained in the hope that she would join the tarnished sisterhood.

A semi-unconscious, lethargic, comatose state supervened and continued, showing her want of capacity for the rôle intended for her to play even should she consent and her captors, stopping short of murder, ultimately facilitated her escape. Her physical condition on her return to her home was such as was to be expected from such a course of events. Her description of prolonged enteric paralysis and anuria almost parallels the description of certain hysteria phenomena given in the medical work already referred to. A lethargic condition may last "minutes, hours or months:" "Patients reach such a degree of emaciation that they are practically living skeletons:" "even faecal vomiting occurs in attacks which may last days, weeks and months:" "sometimes there is anuria," &c., &c.

Her inability to give an accurate description of her prison house is not to be wondered at—the dazed and uncertain observation of the hysterical is almost invariably succeeded by an equally vague and uncertain recollection.

I have little doubt that she was kept in the Wells house substantially as she describes—the place where she really was, if not the Wells house, not all the efforts, long continued and carefully directed, of the authorities could ever discover.

Her one mistake was in the erroneous identification of Mrs. Squires—the evidence strongly indicates that the witness, Scarrat, knew of her imprisonment and its locus, had a grudge against Mrs. Wells and intended that she should be identified. It seems probable that he told the girl where the woman who robbed her would be sitting and it was only the accident that Mrs. Squires and Mrs. Wells had changed seats before Elizabeth was led in to see if she could identify the offender, that occasioned the wrong identification. No one can read the evidence with care without coming to the conclusion that Starrat knew much more than he disclosed—in him, certainly lay the key to the whole story.

This discussion is, however, by the way.

The trial of Elizabeth Canning was conducted with great skill on both sides. For the Crown were Messrs. Gascoyne, Davy (afterwards, Serjeant) and Willes—of these only the last calls for attention.

Edward Willes, the second son of Sir John Willes, Chief Justice of the Common Pleas (who presided at the trial), was a man of high standing in his profession: he became Solicitor General in 1766 and

was elevated to the bench as Puisné Justice of the Court of King's Bench in 1768. With all his ability, he had a peculiar manner and a thin and stridulous voice.

For the defence were Messrs. Morton (afterwards Chief Justice of Chester), Nares and Williams. Of these, only Nares comes into our story. In the defence, Thomas Colley, the uncle of the accused, was called to give an account of the girl's movements on the day of her disappearance. Willes with his high-pitched voice cross-examined him at considerable length and with considerable minuteness as to what she had eaten that afternoon—cold shoulder of mutton and potatoes with "ten shilling" beer, tea, roast sirloin of beef, toast and butter. This was perfectly proper to show the very great "improbability of the girl's story of four weeks' peristaltic paralysis: it was, no doubt, seen to be having its effect by counsel for the defence, and to minimize the effect, Morton in his re-examination tried to bring it into ridicule by his first question: "Was the toast buttered on *both* sides, do you think?" Of course the court was convulsed, and the town soon heard the story.

Parenthetically, I would say that it has long been a matter of astonishment to me, how the people at large (not excluding lawyers) look upon Dickens' description of the trial of *Bardell* v. *Pickwick* as a farce or travesty and Buzfuz as a caricature. Of course, a breach of promise suit is a huge joke for everybody except the litigants: but everything that is told of that trial is exactly what would take place and does take place in such trials every day in our courts. Had Serjeant Bosanquet or Serjeant Bompas been retained for the plaintiff, he would have done much as Serjeant Buzfuz did, Mr. Justice Gazelee would have ruled and charged as Mr. Justice Stareleigh did: "What the soldier said is not evidence;" and if any leading counsel for the defence has never been embarrassed and dismayed by the indiscretion of junior counsel as Serjeant Snubbin was by that of Mr. Phunky, he has had better luck than I. (See my article, *Plaintiff's Attorneys, Bardell* v. *Pickwick*: 8 *American Bar Association Journal* (April, 1922), pp. 203 sqq: Dalhousie Review, 1922, pp. 200 sqq.).

The lawyer has no excuse; but the member of the general public may be pardoned if he looks on some examinations of witnesses in court as either cunning chicanery or simple absurdity—he does not appreciate the value and purpose of questions seemingly only ridiculous—and, of course, he laughs and derides.

Here was a tit-bit too precious to throw away, an opportunity such as rarely was offered for a "gag" in the playhouse, certain of popular appreciation and applause.

And the best farce writer England has ever produced was on hand and did not let the opportunity slip.

Samuel Foote, the English Aristophanes, had spent his third fortune and was playwriter as well as actor and joint manager.

A reader of the present day cannot find much to amuse him in Foote's voluminous writings, but the same may be said of all comedians, not excluding Aristophanes himself—*autres temps autres moeurs*—but they are still worth reading. A very complete collection and one which is readily available is Rivington's 1788 edition in four volumes, 8 Vo., entitled *The Dramatic Works of Samuel Foote, Esq. . . .*

In the following, I give the date of the original production. Essentially a popular writer, Foote uses popular language and appeals to popular ideas and prejudices. Some of our common sayings were already old: "Coming, yes, so is Christmas." Champagne produces real pain—marriage is fishing for a single eel among a barrel of snakes. *The Maid of Bath,* 1791, I 1. *The Nabob,* 1772, II, I—the poor natives "caught Tartars," and "a good horse can't be a bad color."

Of course, the economical Scot does not escape—Lady Catharine Coldstream, knowing that "marriage will set all matters right . . ." generously offers the marriage dinner as her "wedow's mite," "Cock-a-leeky soup, sheep's head singed and haggis" *The Maid of Bath* III, 1, 1771. Luke Lapelle (in A Trip to Calais, forbidden by the censor, 1776, I, 1), the "Knight of the Needle from Bond Street . . . *tojours* gay, as the French say," who objects to being called a tailor, pays his bills on the road in France, like a lord but assures his friend that "it shall go hard . . . if I don't make the real lords refund when I send in their bills," and "this with a good cargo of lace . . . and some rich suits that I know how to smuggle safely to Dover will, I should think, carry me scot-free to Bond Street."

In the same play, II, 1, poor "Mr. Mac-Rappum . . . one of the best-natured craturs alive . . . got the jail-distemper by attending his own trial at the Old Bailey . . . so the judge advised him for seven years to try the air of America."

I express no opinion as to the justice of the characterization of Jenny Miniken, as a "little American" who "would be an heroine . . . on the other side of the Atlantic"—she had no objection to obey the commands of her parents when they happened to contain the very things that she wished—after having produced and at their own expense trained and sustained her, she would still suffer them to support and protect her, "as in duty they are bound," and they might direct her, provided she governed them in every respect. Is this satire and has it some reference to another event of 1776?

It is just possible that some may think that there is still some modicum of truth in the "Observation" of Kit Codling in the same play,

III, 1, that "the French who rob and cheat the British subjects in Paris are all of them English."

The doctors do not escape ridicule. M. D. is "murderous dog," the "pillmonger," a "blood-letting, tooth-drawing, corn-cutting, worm-killing, blistering, glistering . . . pill-gilding puppy." The Mayor of Garratt, 1763, I, 1.

In The Devil upon two Sticks, 1768, Foote adds to well-deserved ridicule of "pill, bolus, potion, lotion, &c., &c.," of contemporary medical treatment, what seemed to him equally just ridicule of the conclusion drawn from the microscope—now known to be true substantially—that "the source or primary cause of all distempers incidental to the human machine" was to be found in "certain animalculae or piscatory entities, that insinuate themselves thro' the pores into the blood and in that fluid, sport, toss and tumble about like mackerel or codfish in the great deep . . . and undoubtedly cause the disease. . . ."

But while others felt the sting of Foote's wit, the lawyer was his favorite butt—no doubt from his experience at the Temple. There, as a biographer says with some truth and a little gentle malice, "he learned to know something of lawyers if not of law, and was afterwards able to jest at the jargon and to mimic the mannerisms of the bar and to satirize the Latitats of the other branch of the profession with particular success:" A. W. Ward in the *Encyclopaedia Britannica,* vol. X, p. 625.

In The Englishman returned from Paris, 1756, I, 1, we have Mr. Latitat of Staple's Inn, an attorney "with a bag" who prattles of "quae minus" (of course "quo minus") "in the Exchequer," "banco regis," "sci. fa.," "assumpsit," "trover," "clausum fregit" and the like; and to his bewildered client, insists that it is English.

In the Prologue to The Lyar, 1726, we find

> "Thus, if I hum or ha or name Report,
> 'Tis Serjeant Splitcause from the Inns of Court."

And in the Epilogue, Miss Grantham says:

> " . . . . 'tis the fix'd, determined rule of courts,
> Vyner will tell you, nay, ev'n Coke's Reports,
> All pleaders may, when difficulties rise,
> To gain one truth, expend a hundred lies."

Old Wilding agrees and adds:

> "To curb this practice, I am somewhat loath:
> A lawyer has no credit but an oath."

In The Devil upon two Sticks, 1768, I, 1, the Devil, Lucifer, Beelzebub, "is the imp of chicane, and protects the rotten part of the law . . . he is the parent of quibbles, the guardian of pettifoggers . . . the source of sham pleas, the maker and finder of flaws . . ." and if he cannot

"save his friend from the shame of a conviction," he can "evade or at least defer the time of his punishment . . . by finding a flaw" (which has a somewhat familiar ring at this time, in certain countries).

One need not wonder that the Quaker, Broadbrim, considers an attorney, "a sinful man in the flesh," and describes a Serjeant as "a man with a red rag at his back, a small cap on his pate and a bushel of hair on his breast:" *do, do,* III.

In 1770, Foote produced at the Haymarket his The Lame Lover, in which Serjeant Circuit was a principal character. This character which was instantly recognized as drawn from George Nares, who had been one of Elizabeth Canning's Counsel, was worthy of more success than was achieved.

In the Prologue, the author states his intention to take "satiric aim" at certain "insects."

> " . . . . our English law
> Like a fair spreading oak, the Muse shall draw,
> By providence design'd and wisdom made
> For honesty to thrive beneath its shade;
> Yet from its boughs some insects shelter find,
> Dead to each nobler feeling of the mind
> Who thrive, alas! too well, and never cease
> To prey on justice, property and peace."

Serjeant Circuit is full of legal terminology, quotes (in French) from Plowden (in English) from Coke, uses Law Latin on all occasions, instead of saying that Sir Luke Limp owns certain lands, he says that he "may sell, give, bestow, bequeath, devise, demise, lease or to farm lett ditto lands to any person whomsoever;" gives the law as laid down by Chief Baron Bind'em in *Cully* v. *Flip-flap,* and scarcely resents his wife's characterization of him as a "paltry, pettifogging puppy . . . with dirty distinctions and jargon." He is represented as engaged in the case so often mentioned of one highwayman against another for an accounting in a partnership of the profits made "by bartering lead and gunpowder against money, watches and rings on Epping-forest, Hounslow-heath and other parts of the kingdom." He speaks approvingly of a motion in arrest of judgment made by Counsellor Puzzle in the case of John A. Nokes convicted of stealing a cow "because the field from whence the cow was conveyed was laid in the indictment as round, but turn'd out upon proof to be square." (Now, where have I recently seen such a reason advanced in an apparent seriousness)? Finally, he presides over the argument of the case of *Hobson* v. *Nobson,* an action in trespass to determine the ownership of land and which afforded as much amusement to that generation as *Bardell* v. *Pickwick* did to those of its day.

But the comedian had an instant and a brilliant success when he imitated Willes—we are told that he "exercised his talent of mimicry by a very successful exhibition of Mr. Willes' peculiarities of voice and manner"—that he rendered Willes' cross-examination "still more ridiculous by imitating the thin and stridulous voice . . . 'Pray now, let me ask you was—the—bread buttered on *both* sides?' " and this was received "with much satisfaction and applause;" 19 *Howell's State Trials,* 475,

And so "Was the bread buttered on *both* sides?" became as current in those days as "Lamb chops and tomato sauce" in Dickens', or "Hardly ever" in ours.

I cannot leave these counsels without giving the substance of a curious story told of his own experience by Nares when opening the defence of Elizabeth Canning—Nares, by the way, became a Puisné Judge of the Common Pleas in 1771.

A man on trial for robbery defended by Nares, produced five witnesses of undoubted good character who swore to his being at a place many miles away at the time of the alleged crime—the identification by the prosecution witnesses was weak and the judge suggested an abandonment of the charge: the jury convicted. After this, another person in custody on another charge confessed that he and not the convicted man had committed the crime. Nevertheless, he was executed; and, after his death it was made so plain that he was guilty, that "no person in the country doubted his guilt:" *do do,* 453, 454.

Make your own application, if any.

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The Catholic Historical Review

NEW SERIES, VOLUME VIII OCTOBER, 1928 NUMBER 3

STATUS OF ROMAN CATHOLICISM IN CANADA

Nouvelle France, the original Canada, was almost wholly Roman Catholic, the few Huguenots and other Protestants in the Province being practically negligible, numerically and otherwise.

When, in September, 1759, Quebec capitulated to the British commanders, M. de Ramesay, "Lieutenant Pour Le Roy, commandant Les hautes et Basse Ville de Quebec" demanded, Article 6, "Que L'Exercice de La relligion Catholique apostolique & romaine sera conservé, que L'on Donnera des sauve gardes aux maisons des Ecclesiastiques, relligieux & relligieuses particulierement à Mgr. L' Evêque de Quebec qui rempli de zele pour La relligion Et de Charité pour le peuple de son Diocese desire y rester Constamment, Exercer Librément & avec La Decense que son Etat et les sacrés mysteres de la relligion Catholique Apostolique & Romaine, Exigent, son Authorité Episcopale dans La ville de Quebec Lorsqu'il Jugera à propos Jusqu'à ce que la possession Du Canada ait Eté decidée par vn traité Entre S. M. T. C. & S. M. B." *Documents relating to the Constitutional History of Canada, 1759-1791*. Edited by Drs. Adam Shortt and Arthur G. Doughty, Ottawa, The King's Printer, 1918. Second and revised edition, p. 3. (This admirable publication of the Canadian archives will be constantly quoted from with a reference to the page only.)

There was apparently no English version—at all events, none is extant. But the contemporary translation is sufficiently accurate.

"That the exercise of the Catholic, Apostolic and Roman religion shall be maintained; and that safeguards shall be granted to the houses of the clergy, and to the monasteries, particularly to his Lordship the Bishop of Quebec, who, animated with zeal for religion, and charity for the people of his diocese, desires to re-

side in it constantly, to exercise, freely and with that decency which his character and the sacred offices of the Roman religion require, his episcopal authority in the town of Quebec, whenever he shall think proper, until the possession of Canada shall be decided between their Britannic and most Christian Majesties." p. 6.

The demand of the French Commandant indicates the deep reverence of the French-Canadian for his Church, his affection for her and desire for her continuance in his Province, all undiminished by the course of time and as strong today as a century and a half ago.

De Ramesay's demand might well be read and not improbably it was intended, as looking to the maintenance of the Church of Rome as the State Church of Canada. This, Admiral Saunders and General Townshend, who had succeeded to the command of the British troops on the death of Wolfe, could not possibly grant; and their reply was carefully and unambiguously worded.

"libre Exercice de la Religion Romaine, sauves gardes accordées a toutes personnes Religieuses ainsi qua Mr. Leveque qui pourra venir Exercer Librement et avec Deçence Les fonctions de son Etat lorsqu'il le Jugera a propos jusqu'a ce que la possession du Canada ayt été Decidée entre Sa Majesté B. et S. M. T. C." p. 3. "The free exercise of the Roman religion is granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise, freely and with decency, the functions of his office, whenever he shall think proper, until the possession of Canada shall have been decided between their Britannic and most Christian Majesties." p. 6.

It will be observed that nothing appears in the way of continuance of Roman Catholicism as a State Church in the Province, but only tolerance and protection.

But de Ramesay had but limited authority as "Lieutenant Pour Le Roy, Commandant Les hautes et Basse Ville de Quebec," and he could not and did not surrender Canada, but only Quebec and the comparatively small territory in its vicinity and dependent on it. The rest of Canada, Montreal, Detroit, Michillimackinac, remained in French possession for about a year.

When in September, 1760, de Vaudreüil, "Gouverneur et Lieutenant Général pour Le Roy en Canada," was compelled to sur-

render Montreal to Sir Jeffrey Amherst, he exercised great vigilance in the interest of the Roman Catholic Religion and Church. In the very elaborate Articles of Capitulation drawn up in Montreal to submit to Amherst, Article 27 read:

"Le Libre Exercice de la Religion Catholique, Apostolique et Romaine Subsistera En Son Entier; En Sorte que tous Les Estats et les peuples des Villes et des Campagnes, Lieux et postes Eloignés pouront Continuer de S'assembler dans les Eglises, et de frequenter les Sacremens, Comme Cy devant, Sans Estre Inquietés, En Aucune Maniere directement, ni Indirectement.

Ces peuples seront Obligés par le Gouvernement Anglois à payer aux prestres qui en prendront Soin, Les Dixmes, et tous les droits qu'ils avoient Coutume de payér sous le Gouvernement de Sa Mté tres Chrestienne." pp. 15, 16.

As at Quebec, so at Montreal, there seems to have been no English version of the Articles of Capitulation; at all events, none is extant, and I follow the sufficiently accurate contemporary translation.

"The free exercise of the Catholic, Apostolic, and Roman Religion, shall subsist entire, in such manner that all the states and the people of the Towns and countries, places and distant posts, shall continue to assemble in the churches, and to frequent the sacraments as heretofore, without being molested in any manner, directly or indirectly. These people shall be obliged, by the English Government, to pay their Priests the tithes, and all the taxes they were used to pay under the Government of his most Christian Majesty." p. 30. ("Estats," the modern "êtats," should of course, be translated "Estates," i.e., "conditions in life" and not "states.")

It will be seen that the sting of this demand lay in the tail: Vaudreüil expressed what de Ramesay only suggested, that the status of the Church of Rome as the State Church of the Province should continue, and tithes and other Church Rates should continue to be enforceable by law.

Amherst, of course, could not consent to such a proposal—his reply reads:

"Accordé, pour le Libre Exercise de leur Religion. L'Obligation de payer la Dixme aux Prêtres, dependera de la Volonté du Roy." p. 15.

"Granted, as to the free exercise of their religion, the obligation of paying the tithes to the Priests will depend on the King's pleasure." p. 30.

By article 28, the Chapter, Priests, Gurates and Missionaries were secured "with an entire liberty, their exercise and functions of cures in the parishes of towns and countries." pp. 16, 31: while Article 29 secured the Grand Vicar the free exercise of his functions. pp. 16, 31. Article 32 protected all communities of Nuns and prevented the billeting of soldiers on them; and Article 34 protected the estates of Priests and their Communities. pp. 17, 32.

But other demands were not acceded to—that of Article 30 that the King of France should "name the Bishop of the colony who shall always be of the Roman communion"—even "if by the treaty of peace, Canada shall remain in the power of his Britannic Majesty"—met a peremptory refusal. pp. 16, 31. Similarly, Article 31, which empowered the Bishop to establish new parishes, &c., was rejected: and Article 33 had the same fate "till the King's pleasure be known." It reads (in English translation): "The preceding article (securing the Nuns) shall likewise be executed, with regard to the communities of Jesuits and Recollects and of the houses of the priests of St. Sulpice at Montreal; these last, and the Jesuits, shall have the right to nominate to certain curacies and missions as heretofore." pp. 17, 31, 32.

Article 35 allowed "Canons, Priests, Missionaries, the Priests of the Seminary of Foreign Missions, and of St. Sulpice, as well as the Jesuits and the Recollects" if they should "chuse to go to France," to be "masters to dispose of their estates and to send the produce thereof, as well as their persons, and all that belongs to them to France." pp. 18, 32. (The word translated "estates" is "biens," rather "personal property," "moveables").

This Capitulation covered all of Canada, including the Upper Country, what is now Ontario, Detroit, Michillimackinac, &c.

It will be seen that Establishment was absolutely refused, the right of appointing a Bishop was not placed in alien hands, and Jesuits and other such communities were not guaranteed their lands (and, in fact, the confiscation of the lands of the Jesuits was a thorn in the side of Canadian and Quebec Governments until late in the 19th century, when the Government of the Prov-

ince of Quebec made a compromise with the Order. Incidentally, the refusal of the Government at Ottawa to disallow the Provincial act carrying the compromise into effect led to the formation of a third party, the "Equal Rights Party," with much the same platform, the same earnestness, the same ineffectiveness, the same ephemeral course as the A. P. A.)

The whole intention was to allow the conquered people to worship God in their own way without molestation, but nothing more. The right for the Bishop to form new parishes was refused—the existing parishes were not interfered with but matters in that regard were to remain *in statu quo*. The same plan appears in Article 40 whereby the Indians Allies of the French were to "have, as well as the French, liberty of religion and . . . Keep their Missionaries": but the demand: "Il sera permis aux Vicaires généraux Actuels Et à L'Eveque lors Le Siege Episcopal Sera rempli, de leur Envoyer de Nouveaux Missionaires Lorsqu'ils Le Jugeront Necessaire"—"The actual Vicars General, and the Bishop, when the Episcopal see shall be filled, shall have leave to send to them new Missionaries when they shall think it necessary," was refused. pp. 20, 33. And when it was asked, Article 42, that the Canadians should continue to be governed by their established laws and customs, the curt answer was made: "They become subjects of the King." pp. 20, 34.

No complaint has ever been made that these Articles of Capitulation were violated in letter or spirit. The sternest discipline was exercised in the Army of Occupation and the death penalty was always held *in terrorem* over the British soldiers, and sometimes inflicted.

After the Capitulation, Canada was under military law for some time—the Régime Militaire or Règne Militaire as the period is generally called.

Comparatively few French-Canadians left for France: those who did were chiefly of the official class whose occupation was gone.

A very full and carefully prepared account of the Church Government in Quebec was sent by Governor Murray to the Home Government in June, 1762. pp. 66-72: "The Canadians are . . . extremely tenacious of their Religion . . . ; the Jesuits are neither loved nor esteemed in general . . . ; the Recollets is an

Order of mendicants . . . careful not to give offence . .·. ; the Seminary educates the Youth and fits them for Orders . . . ; the Communities of Women . . Nuns . . are much esteemed . . . and . . there are some few French Protestants . . " p. 71. Marriage between Protestant and Catholic had been forbidden. p. 75. "The Huron Indians settled at a little village called Jeune Lorette, about 3 leagues from Quebec . . . are called Roman Catholics . . . a Missionary resides among them, they have a neat Chapel where divine service is constantly performed at which all the Savages attend with a punctuality and decorum worthy of imitation by more enlightened people." p. 73.

The War came to an end and a Treaty of Peace was signed at Paris, February 10, 1763.

For some time there had been an animated not to say acrimonious discussion in England as to the detention of Canada, many favoring the detention of Guadeloupe and the return to France of Canada. The determination finally arrived at was largely due to Benjamin Franklin's exceedingly able and persuasive "Canada Pamphlet" of which it is not too much to say that it caused the destruction of the old British Empire, made possible the birth of the United States of America and revolutionized the English-speaking and consequently the whole world. (See my Article *Benjamin Franklin and Canada,* Pennsylvania Historical Magazine, 1924.)

In Article IV of the Treaty of Paris, the King of France cedes "Canada with all its dependencies . . to the King and . . . Crown of Great Britain," and the King of Great Britain, "His Britannic Majesty . . . agrees to grant the liberty of the Catholick religion to the inhabitants of Canada . . . (and) to give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit." p. 115: the last clause runs in French "pour que ses nouveaux sujets Catholiques Romains puissent professer le Culte de leur Religion selon le Rit de l'Eglise Romaine, en tant que le permettent les Loix de la Grande Bretagne." p. 100.

Ireland being still a separate Kingdom, had nothing to do with Canada—the cession was "au Roylet à la Couronne de la Grande Bretagne."

The sting was again in the tail: the tolerance was only "as far as the laws of Great Britain permit": and in practice "laws of Great Britain" was always interpreted as including the legislation of the Kingdom of England before the Union of England and Scotland in the time of Queen Anne—and consequently the legislation under Queen Elizabeth against Catholics was considered as included. The French ministers did their best to have the words *comme ci-devant,* "as heretofore" inserted so as to continue Roman Catholicism as the State Religion: but this was absolutely and definitely refused, and they were specifically informed that Great Britain could grant only the "Toleration of the Exercise of that Religion." p. 169.

According to our conception of International Law, when territory is ceded to the King, he is the sole master to rule it, lay down laws for it, and generally to dispose of it, unless and until by giving his Assent to an Act of Parliament assuming to deal with it, he parts with his control. Of course, this mastery he does not regulate and exercise in person: that is left to his Privy Council.

Accordingly, we find anxious thought being given to the management of Canada by the Privy Council and especially by a Standing Committee charged with the administration of Colonial affairs, generally called "The Lords of Trade." The Lords of Trade at his request made an elaborate Report, dated June 8, 1763, to the Earl of Egremont, Secretary of State for the Southern Department, who at this time had charge of the American Colonies. They recommended, *inter alia,* that the Upper Country, now the greater part of Ontario and much of Michigan, &c., should be kept as "an Indian Country, open to Trade but not to Grants or Settlements," while the Lower Country, now the Province of Quebec and a portion of eastern Ontario, should be made a new "Government" for "all Your Majesty's new French subjects under such Government as Your Majesty shall think proper to continue to them in regard to the Rights & Usages already secured or that may be granted to them." pp. 127-147: *esp.* 141, 142. This scheme was approved: and the Royal Proclamation

of October 7, 1763, fixed the Western Boundary of the new "Government of Quebec" at a line drawn from the South end of Lake Nipissing to the point at which the Line of 45°, N. L., crosses the St. Lawrence, i. e., about the present Cornwall, Ontario; and forbade grants and settlement further west. There is nothing in the Proclamation expressly relating to religion, but the assurance given "that all Persons Inhabiting in or resorting to our said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England," was, in view of the limitation already mentioned in the Treaty of Paris, at least, disquieting, introducing as it did, the Laws of England as a whole into the new Province or "Government." pp. 163-168; *esp.* 165.

Egremont writing to General Murray, August 13, 1763, on his appointment as "Captain General and Governor-in-Chief of the Province of Quebec," warned him "to watch the Priests very narrowly, and to remove, as soon as possible, any of them who shall attempt to go out of their sphere and . . . busy themselves in any civil matters"—intelligence had been received which gave "reason to suspect, that the French may be disposed to avail themselves of the Liberty of the Catholick Religion granted to the Inhabitants of Canada . . . to keep up their Connection with France and by means of the Priests to preserve such an Influence over the Canadians as may induce them to join, whenever opportunity should offer, in any attempts to recover that Country." p. 169.

In Murray's Commission, November 21, 1763, the only reference to Popery is in the direction that he should make and subscribe the Declaration required by the Statute 25 Charles II, "An Act for preventing Damages which may happen from Popish Recusants." p. 174.

In his Instructions, December 7, 1763, the Lieutenant Governors and Members of the Council were also required to do the same: pp. 182, 183: He was instructed that he should "in all things regarding" the new Roman Catholic subjects "conform with great Exactness to the Stipulations of the . . . Treaty . . . " The Roman Catholics were to "deliver in upon oath an exact account of all arms and ammunition of every sort in their actual possession, and so, from time to time, of what they shall receive

into their possession": p. 191. He was "not to admit of any Ecclesiastical Jurisdiction of the See of Rome or any other foreign Ecclesiastical Jurisdiction . . . ": and the intention was declared to establish "the Church of England . . . both in Principles and practice"; and Murray was "not to prefer any Protestant minister to any Ecclesiastical Benefice in the Province . . . without a certificate from the . . . Bishop of London. . . ." pp. 191, 192. It was intended to make a reservation of public land "for a Glebe and Maintenance of a Protestant Minister" in Townships, &c. p. 192.

Pausing here in the narrative, it may be said that there never was an Established Church of the British Empire or even of the Kingdom of Great Britain. At the time of the Union, England and Scotland each had its Established Church, the Church of England being Episcopal, the Church of Scotland, Presbyterian: there was, indeed, as there still is, an Episcopal Church of Scotland, as there was and is a Presbyterian Church of England, but they are both Dissenting, Non-conformist Churches. It was only the Church of England which it was intended to establish in Quebec: but, when some decades later, a dispute arose as to the meaning of "Protestant Minister" for whom land was to be reserved, the Law officers of the Crown at Westminster, differing from the Law officers of the Colony gave an opinion that the ministers of the Church of Scotland had the same rights as those of the Church of England.

It was in these Royal Instructions declared to be the intention that the Canadians should "by degrees be induced to embrace the Protestant Religion and their Children be brought up in the principles of it." p. 191: and there can be no question that the authorities in England hoped and believed that Quebec would before long be English-speaking and Protestant.

To induce the immigration of English-speaking Protestants from the Colonies to the South as well as—to a less extent—from the British Isles, the laws promised were the laws of England, provision was made for the support of Protestant pastors and schoolmasters; p. 194: and a grant of "one hundred acres of land" was offered "to every person being master or mistress of a family, for himself or herself, and fifty acres for every white

or black man, woman or child, of which such person's family shall consist, at the actual time of making the grant": p. 196.

The hope and expectation that by a considerable English-speaking Protestant immigration and intermingling of the races, the French population would be diluted, and by inter-marriage and otherwise gradually become anglicised and Protestant, were wholly disappointed: the French-Canadian people were tenacious of language and religion and any intermingling there was had rather the contrary effect. This tenacity and the prolific Candienne were too much for the newcomer. It was expected that a very considerable proportion of the French Canadians would decline to change their allegiance—an expectation common to British and French—and, consequently, when the Treaty of Paris was made, it was expressly provided, Article IV, that "the French inhabitants, or others who had been subjects of the most Christian King in Canada may retire with all safety and freedom wherever they shall think proper, and may sell their estates, provided it be to the subjects of his Britannic Majesty, and bring away their effects as well as their persons, without being restrained in their emigration, under any pretext whatsoever, except that of debts or of criminal prosecutions": pp. 115, 117. The term limited for this emigration was eighteen months, ending August 10, 1764. This was but implementing and supplementing the Articles of Capitulation of Montreal, Article 36 providing that "if by the treaty of peace, Canada remains to his Britannic Majesty, all the French, Canadians, Acadians, merchants and other persons who chuse to retire to France, shall have leave to do so from the British General, who shall procure them a passage; and nevertheless, if, from this time to that decision, any French, or Canadian merchants or other persons, shall desire to go to France; they shall likewise have leave from the British General. Both the one and the other shall take with them their families, servants, and baggage": pp. 18, 32.

This expectation was wholly falsified by the result: outside of the official class, civil and criminal, a few professional men and a few Seigneurs, practically all French-Canadians remained in Canada, and became Subjects of King George—his "New Subjects" as they were generally called.

But notwithstanding that Canada became British *de jure* in February, 1763, as it had been *de facto* since September, 1760, it was not thought wise to change the administration, Courts, &c., until the lapse of the eighteen months allowed for those who wished to do so, to leave the Province.

That time having expired in August, 1764, an ordinance was passed at Quebec by the Governor in Council, September 17, 1764, erecting Civil Courts and thus ending Le Régime Militaire: pp. 205-210.

It was, curiously enough, one of the consequences of this legislation, apparently wholly undesigned and unforeseen, that the legal status of the Roman Catholic in Quebec came to be defined.

There were two Courts of Judicature erected: the Superior Court of Judicature or Court of King's Bench in which causes were to be decided "agreeable to the Laws of England," trial to be by jury, and the Inferior Court of Judicature or Court of Common Pleas in which causes were to be decided "agreeable to Equity, having Regard nevertheless to the Laws of *England,* as far as the circumstances and present situation of things will admit": trial to be by jury if either party desired it. In this Court, "*Canadian* Advocates, Proctors, &c.," were allowed to practise: pp. 205-207. The reason of this privilege was not as might be supposed, because the law in this Court was "Equity" in the lawyers' sense of the word, i. e., the principles of the Court of Chancery, and consequently somewhat similar to the French law both being largely based upon the Civil Law: in this Ordinance "Equity" means "natural justice" ("the length of the chancellor's foot") not "Chancery Law." The reason is given by Governor Murray in his Despatch to the Home Government *(Canadian Archives,* Q. 62 A, at p. 504). "We thought it reasonable and necessary to allow Canadian advocates and Proctors to practice in this Court of Common Pleas only (for they are not admitted in the other Courts) because we have not yet got one English Barrister or Attorney who understands the French language." There was also the provision that in all trials in the King's Bench all His Majesty's subjects in Canada should be admitted in juries without distinction.

The Canadians, "to a man, Soldiers," had already recommended themselves to Governor Murray—he thought them "per-

haps the bravest and the best race upon the globe": he believed that the introduction of English law into the Province meant the introduction of the disabilities under which Catholics suffered in England: and this he thought unjust as well as inexpedient.

It is exceedingly interesting to see the change in the view taken of the French-Canadian by the authorities: his religion was, indeed, disapproved of and his priests would stand watching, but he had proved himself a quiet, peaceful subject, not given to plotting or insistent upon renewing his political allegiance to France. His love for France continued deep and heartfelt until dismayed and bewildered, if not wholly destroyed, by the excesses of the Revolution. But loving France as he did, the French-Canadian formed no plots to shake off the British yoke.

The immigrants almost all English-speaking and Protestant and chiefly from the American Colonies had proved a disappointment: it had been hoped that the newcomers, the Old Subjects, as they were called, would mingle peacefully with the New Subjects and form a leaven whereby the whole population would gradually become English-speaking and Protestant. This hope was wholly belied: coming from communities in which Roman Catholicism was held in horror—we shall say more of this later on in the Text—communities which had lived for years in constant dread of raids from French-Canada and in which the popular preacher thought he could give his congregation the best idea of Satan and his Angels in Hell by comparing them to the French-Canadians, the immigrant, who also had the contempt felt by the English-speaking for those using another tongue, refused all intercourse except such as was unavoidable or advanced his own pecuniary interest, with the inferior, jabbering, Papist.

Between the British commercial class and, Murray, there came into existence very strained relations, even personal bitterness and antagonism: in his Despatch of October 29, 1764, he says: "Nothing will satisfy the Licentious Fanaticks trading here, but the expulsion of the Canadians." p. 231; *Canadian Archives*, Q. 2, p. 233.

The views of the Old Subjects are to be seen in the Presentment of the Grand Jury at Quebec, October 16, 1764: this body

was composed of seventeen English and seven French-speaking. The former agreed upon a Presentment in which they persuaded the latter to join: these, later, say that the obnoxious articles they did not understand "if they were interpreted"; and that claim seems highly probable.

Leaving aside other representations as not germane to the subject of this paper, complaint is made "That, among the many grievances which require redress, this seems not to be the least, that persons professing the Religion of the Church of Rome (who) do acknowledge the supremacy and jurisdiction of the Pope, and admit Bulls, Briefs, absolutions, &ca. from that see, as Acts binding on their consciences, have been impannelled, en Grand and petty Jurys even where Two protestants were partys, and whereas the Grand Inquest of a County, City or Borough of the Realm of Great Britain, are obliged by their Oath to present to a Court of Quarter Sessions or assises, whatever appears an open violation of the Laws and Statutes of the Realm, any nusance to the subjects or Danger to His Majesty's Crown and dignity and Security of his Dominions. We therefore believe nothing can be more dangerous to the latter than admitting such persons to be sworn on Jurys, who by the Laws are disabled from holding any Office Trust or Power, more especially in a Judicial Capacity, with respect to which above all other, the Security of his majesty, as to the possession of his Dominions and of the subject as to his Liberty, property and Conscience is most eminently concerned": p. 214: *Canadian Archives, Dartmouth Papers*, Vol. 1, 14, 29, *sqq*.

Remembering the suspicion under which the French priests continued to be, there is some show of reason in the objection to Roman Catholics been admitted on a Grand Jury, one of whose duties was to "present all Treasons, Misprisions of Treason, &c." But this objection could not possibly hold in the case of the Petit Jury, at least in civil trials.

Murray in his Official Despatch had explained the provision which allowed "all His Majesty's Subjects in this Colony to be admitted on Juries without distinction"—a privilege not allowed to Roman Catholics in the Mother Country. "As there are but Two Hundred Protestant Subjects in this Province, the greatest part of which are disbanded Soldiers of little Property and mean

Capacity, it is thought unjust to exclude the new Roman Catholic Subjects to sit upon Juries, as such exclusion would constitute the said Two hundred Protestants perpetual Judges of the Lives and Property of not only Eighty Thousand of the new Subjects, but also of all the Military in the Province; besides, in the Canadians are not to be admitted on juries many will Emigrate: p. 206, (n): *Canadian Archives,* Q 62 A, pt. 2, p. 500. Murray writing to the Earl of Shelburne (afterwards first Marquis of Lansdowne) from Quebec, August 30, 1766, says that there were only 19 Protestant Families in the Parishes, the "other Protestants, a few half-pay officers excepted, are Traders, Mechanics and Publicans in Quebec and Montreal . . . the most miserable collection of men, I ever knew": *Canadian Archives. Shelburne Correspondence,* Vol. 64, p. 101.

The emigration of Canadians he had come to think inexpedient. In a Dispatch to the Lords of Trade, October 29, 1764, he urged that the Canadians should be "indulged with a few privileges wch. the Laws of England deny to Roman Catholicks at home," being convinced that if that were done they would soon get the better of every National antipathy to their Conquerors and become the most faithful and most useful set of Men in this American Empire: p. 231: *Canadian Archives,* Q 2, p. 233. In the same Dispatch, he said: "certain I am, unless the Canadians are admitted on Jurys, and are allowed Judges and Lawyers who understand their Language his Majesty will lose the greatest part of this Valuable people"—but his courage did not go far enough to cause him to admit Canadian Lawyers to practise except in the Inferior Court, the Court of Common Pleas—of course, Roman Catholics were not allowed to practise Law in England. Nor did he venture to appoint a Roman Catholic Judge, equally unknown in England. The old Statute of (1605) 3 James I, c. 5, s. 8, provided that no Papist should practise "the Common Law as a Councellor, Clerk, Attorney, or Solicitor nor shall practise the Civil Law, as advocate or proctor, nor practise physick, nor be an apothecary, nor shall be a judge"; and these patriotic Grand Jurors expressed the opinion that "the admitting persons of the Roman Religion, who own the authority, supremacy and jurisdiction of the Church of Rome as Jurors, is an open Violation of our most sacred Laws and Libertys, and

tending to the utter subversion of the protestant Religion and his Majesty's power, authority, right, and possession of the province to which we belong": and "an unwarrantable incroachment on the establish'd maxims of a British Government": p. 215.

The same objection was implied against a Roman Catholic "holding any office or filling any public employment": p. 216.

The French Grand Jurors insist on the justice of the Ordinance; "that Canadian Lawyers, New Subjects of H. M. might practise (in the Court of Common Pleas) . . . appears to us the more equitable, in that it is only right that the new Canadian Subjects should employ Persons whom they understand, and by whom They are understood, all the more because there is not one English Lawyer who knows the French Language, and with whom it would not be necessary to employ an Interpreter . . . ": p. 221.

They protest against the Presentment of their confrères, "the Ancient Subjects, Grand Jurors . . . with the intention of excluding us from the privilege of serving ourselves and Our associates (les Notres, "ours"), our Country and our King, pretending that they conscientiously believe us to be incapable of holding any office or even of repulsing and fighting the Enemies of H. Mty. . . . " They protest that "It would be shameful to believe that the Canadians, New Subjects, cannot serve their King either as Serjeant or Officers. . . . For more than six Months, we have had Catholic Canadian Officers in the Upper Country, and a Number of Volunteers aiding to repulse the Enemies of the Nation." (The reference is to the Pontiac Conspiracy, in which, however, the "Enemies of the Nation" were Indians and not French.) They express "enough Confidence in the King's Goodness" to believe that he will see to it that "they and their Children might lead their Lives sheltered from Injustice. This they could never do here were they deprived of all Officers, or positions as Jurors": p. 222. These representations were duly transmitted to the Home Government by Murray who strongly commended the French position: p. 231.

The "British Merchants and Traders" in Quebec sent over a Petition to the King complaining of the Government, *inter alia,* because of "The Enacting Ordinances Vexatious, Oppressive,

unconstitutional,* injurious to civil Liberty and the Protestant Cause": p. 233; *Canadian Archives,* B. 8, p. 6. This had reference to the Judicature Ordinance now under consideration.

Transmitted to their London correspondent, it was supplemented by a petition of His "Majesty's most dutiful Subjects, the Merchants and others now residing in London Interested in and trading unto the Province of Canada in North America": p. 235; *Canadian Archives,* B. 8, p. 10. This prayed that the Government of Canada "may be at least put upon the same footing with the rest of Your Majesty's American Colonies or upon any other footing that may be thought Essential for the preservation of the Lives, Liberties and Properties of all Your Majesty's most faithful Subjects"—*alias* English-speaking Protestants.

The French were not idle: the "principal inhabitants of Canada" sent an address to the King early in 1765, "relative to the

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*Americans should remember the different meaning and connotation of the words, "constitution," "constitutional" and "unconstitutional" at the present time in the United States and at the present time in the British Empire—the latter having been also universal in the American Colonies and until the last century in the United States. The latter being a new nation it was thought necessary to draw up a document setting out the form of government and the principles and rules upon which it was to be carried on. This document was called the "Constitution," quite properly and regularly; and it was not long after 1787 that it practically monopolised the word in the United States ousting the former meaning and connotation. In the American Colonies, as in the rest of the British world, "constitution" had meant and in the British word has continued to mean the totality of the principles, more or less vaguely and generally stated, upon which the people should be governed. That is not at all what is meant by an American when he speaks of a Constitution which with him is a written document containing so many letters, words and sentences, which authoritatively and without appeal dictates what shall and what shall not be done. "Constitutional" and "unconstitutional" in the American sense mean "in accordance with" or "not in accordance with a certain document"; in the historical and British sense, "in accordance with" or "not in accordance with the proper principles of government"—in the American sense, any "unconstitutional" is illegal and invalid, in the British sense, is legal but inadvisible and wrong. The redress in the United States is an appeal to the courts, in the British Empire to the people at the polls—in the British Empire to express the meaning of the American "unconstitutional" we say *ultra vires.*

When the American Colonies insisted that taxation without representation was unconstitutional they did not mean that such taxation was illegal but only that it was wrong; so in this complaint the British merchants and traders did not mean that the Ordinance of September 17, 1764, was invalid but only that it was wrong.

See my judgment in *Bell* v. *Town of Burlington* (1915), 34 Ontario Law Reports, 619 at p. 622. *The Constitution of Canada in its History and Practical Working* (Dodge Lectures, Yale University, 1917), p. 52; *The Canadian Constitution in Form and in Fact* (Blumenthal Lectures, Columbia University, 1923), pp. 1, 2, 7.

See also Notes † and ‡, *post.*

Establishment of Courts of Justice and the Presentment of the Grand Jury." "With deep bitterness in our hearts (toute l'amertume de nos Coeurs) we have seen . . . these . . . fifteen Jurors, with the assistance of the Lawyers have proscribed us as unfit, from differences of Religion, for any office in our Country; even Surgeons and Apothecaries (whose professions are free in all countries) being among the number. Who are those who wish to have us proscribed? About thirty English merchants, of whom fifteen at the most, are settled here." (In fact, the Quebec Merchants' Petition had 21 signatures and that of the London Merchants, 25.)

"Who are the Proscribed? Ten thousand Heads of Families who feel nothing but submission to the orders of Your Majesty and of those who represent you . . . "

They ask: "What would become of the general prosperity of the Colony, if those who form the principal section thereof, become incapable members of it through difference of Religion? How would Justice be administered if those who understand neither our Language nor our Customs should become our Judges, through the Medium of Interpreters? . . . Instead of the favoured subjects of your Majesty, we should become veritable slaves; a Score of Persons whom we do not know would become the masters of our Property and of our Interests: We should have no further Redress from those equitable men (properly translated, 'no relief by means of those reliable men') to whom we have been accustomed to apply for the settlement of our Family Affairs and who if they abandoned us, would cause us to prefer the most barren country to the fertile land we now possess": p. 228: French original, pp. 224, 225; *Canadian Archives*, B. 8, p. 121.

It is to be remembered that as yet the Colony was wholly under the unrestrained power of the King, he not having, by giving his assent to an Act of Parliament, given it into the control of Parliament; and, consequently, it was for the Privy Council with its Standing Committee the Lords of Trade, or "Lords of the Committee for Plantation Affairs" and not for Parliament, to deal with the situation. See the celebrated judgment of Chief Justice Lord Mansfield in *Campbell* v. *Hall*, 1774: it is reported in *Lofft*, in *Cowper* and in 20 *Howell's State Trial* also in *Shortt*

v. *Doughty, op. cit.*, p. 522. It may be said that while this doctrine has been uniformly followed in the courts it was strongly disputed by lawyers of high standing in England and Canada.

The matter being referred by the Privy Council to this Standing Committee, it was considered advisable to take the opinion of the Law Officers of the Crown on the legal question involved. While the King had full power of administration, including lawmaking, of the Colony, he could not legally do anything contrary to an Act of Parliament—the alleged power of nullifying Parliamentary legislation asserted, to his own undoing, by the last Stuart King, no subsequent monarch attempted. If then the statute of (1605) 3 James I, c. 5, applied to the Colony, the Ordinance giving Roman Catholics the right to practise law (even in a single Court) or to sit on Juries was *ultra vires*† and without effect.

The Attorney General Sir Fletcher Norton, and Solicitor General Sir William De Grey (afterwards C. J., C. B.) gave their joint opinion to "The Right Honourable the Lords Commissioners for Trade and Plantations," June 10, 1765, "that His Majesty's Roman Catholick Subjects residing in the Countries, ceded to His Majesty in America . . . are not subject in those Colonies, to the Incapacities, disabilities, and Penalties, to which Roman Catholicks in this Kingdom are subject by the Laws thereof": p. 236: *Canadian Archives; Dartmouth Papers,* M. 383, p. 69.

With this opinion, the Lords of Trade thoroughly agreed nor could they "conceive what foundation there is for the Doctrine, that a Roman Catholick, provided he be not a Recusant convict is incapable of being admitted to practice in those Courts as a Proctor, Advocate or attorney": pp. 241, 242: *Canadian Archives,* Q. 56, p. 83; Q. 18 A, p. 131.

The Lords of Trade recommended that "in all Courts . . . Canadian Subjects shall be admitted to practice as Barristers, Advocates, Attornies and Proctors under such Regulations as shall be prescribed by the Court for Persons in general under those descriptions": Moreover, they recommended that "not only the chief justice but also the puisne judges should understand the French Language": p. 246. All legal objection based upon the old English Statute was thus disposed of. This, by the

†See Note *, *ante.*

way, is quite similar to what occurred in respect of appeals to the King-in-Council: the right so to appeal was in England, a Common Law right, but, leading to excesses, it was abolished in the reign of Charles I by the Star-Chamber Act of 1640—only, however, in the Kingdom of England. Consequently, it continued throughout the rest of the King's Dominions: and, indeed, continues today in all the Empire except the British Isles.

So, while the Statute of James like the statute of Charles was law in Canada, it did not affect rights in Canada.

The Lords of Trade closed their Report—dated September 2, 1765—by condemning "the extraordinary Proceedings of the Grand Jury of the District of Quebec" and their "irregular Presentment," as "indecent, unprecedented and unconstitutional";‡ and by advising that the "minds of the new Canadian Subjects" should be "relieved from that anxiety and uneasiness" excited thereby: p. 246. Murray had gone to England; but, July 1, 1766, effect was given to the recommendation by the President and Acting-Governor Lieutenant-General Paulus Aemilius Irving and Council passing an Ordinance expressly giving all Subjects the right to sit on Juries without distinction; and "Canadian Subjects" the right to practise in all Courts: pp. 249, 250: *Canadian Archives*, Q. 62 A, p. 515.

This measure, Irving had the satisfaction of reporting to the Lords of Trade, "contributed very much to quiet their minds": the English were made more dissatisfied and their feelings and conduct towards the Government continued to be hostile through the whole somewhat long administration of (Sir) Guy Carleton (afterwards Lord Dorchester).

The appointment of a French-Canadian Catholic Judge in the Court of Common Pleas also had like effects.

The position of the French-Canadian then was that his religion was tolerated but not established, and he had the same civil rights as the English-speaking Protestant.

For some years the disputes continued; the Home Administration, and Lords of Trade took extraordinary pains in the investigation of the best course to pursue: the English wanted a House of Assembly as promised in the Royal Proclamation of 1763, "so soon as the state and circumstances of the . . . Colony

‡See Note *, *ante*.

will admit thereof," "in such Manner and Form as is used and directed" in the Royal "Colonies and Provinces in America"; but as in not one of these could a Roman Catholic sit, an Assembly was a desideratum with the Protestant only and would necessarily be a detriment to the Canadian, making him subject to the Protestant.

On the other hand, the French-Canadian desired the promise in the Proclamation to be disregarded, that "all Persons Inhabiting in or resorting to "the Colony should have the "benefit of the Laws of England"—they wanted their own law at least in civil matters—with the Criminal Law of England they were not dissatisfied with the exception of a few Seigneurs who never could tolerate or even understand a law which treated all alike, Seigneur and Habitant, Noblesse and Commonalty, Gentleman and Boor. The ordinary Canadian was content with the English Criminal Law; cruel as it was, it was less so than the French with its rack, its judicial question, its arbitrary imprisonment, its breaking on the wheel.

For years the conflict continued, Petition and Counter-petition, representation and counter-representation, argument amounting almost to threat in some instances—for we find some of the Old Subjects going so far as to express the determination to remain English even if that meant to cease to be British.

At length, the conclusion was reached to accede to the desires of the French-Canadian although that meant breaking the Royal word and falsifying the Royal promise.

And the Quebec Act of 1774, 14 George III, c. 83, was the result.

This extended the Province to the Ohio and the Mississippi—and thereby excited the wrath of the Continental Congress which on Thursday, October 20, 1774, after avowing their allegiance to the King, assailed the "Act for extending the Province of Quebec so as to border on the Western Frontiers of the Colonies, establishing an arbitrary government therein and discouraging the settlement of British subjects in that wide extended country; thus by the influence of civil principles and ancient prejudices to dispose the inhabitants to act with hostility against the free Protestant Colonies, whenever a wicked

Ministry choose so to direct them." Peter Force's *American Archives,* Series IV, Vol. 1, p. 914.

Then it was enacted at Westminster "for the more perfect Security and Ease of the Mind of the Inhabitants of the . . . Province" that all Roman Catholic subjects should "have, hold and enjoy the free Exercise of the Religion of the Church of *Rome* subject to the King's Supremacy declared . . . by an Act, made in the First Year of the Reign of Queen *Elizabeth* . . .," i. e., in 1558. This was simply carrying out the agreement in the Articles of Capitulation, 1760, and the Treaty of Paris, 1763: and it was not in itself a subject of animadversion by the Continental Congress.

True it is that in the American Colonies, "everywhere, except in Pennsylvania, to be a Catholic was to cease to possess full civil rights and privileges": Guilday's *Life and Times of John Carroll,* New York, 1922, pp. 70, 71: and in many parts "a Protestant family ran a fearful risk in harboring a Romanist": Shea's *History of the Catholic Church in the United States,* New York, 1890, p. 498; while for some time after the Declaration of Independence the New England Primer had for the school children, cuts of the "Man of Sin," of course, the Pope. But it was not a matter affecting the other Colonies that Frenchmen in their own country were allowed to indulge in their own form of what was looked upon as simple idolatry.

A further provision relieved Roman Catholics from the oath required by the Statute of 1558 and all other oaths substituted for it by subsequent legislation against the Papal pretensions and prescribed instead a simple Oath of Allegiance, which could be taken by any Catholic as by any Protestant who could take an oath at all: pp. 572-3. This was a complete removal of all disabilities upon the Roman Catholic of Quebec—and from that time forward there has been no legal distinction as to civil right, no difference before the law between Catholic and Protestant in any part of Canada—the Jew had to wait a few decades for full enfranchisement. We have had in the Dominion of Canada as Prime Minister not only the Sovereign of the Orange Order, ultra Protestants, but also two Roman Catholics, one a French-Canadian, born a Catholic and the other an Irish-Canadian a "Vert" from Methodism to Catholicism. In the Province of

Quebec, every Prime Minister but one has been a Roman Catholic and in the Province of Ontario we have had one Roman Catholic Prime Minister and two Orangemen.

But this provision was simply carrying out the Capitulation and Treaty in the light of the opinion of the Law officers of the Crown, given in 1765: p. 236: and while very unpalatable to most of the English in the Province could do no harm to the American Colonies in view of the fact that the scheme set out in the Royal Proclamation of 1763 to have a House of Assembly in Quebec was now abandoned.

The legislation went much further than any promise or agreement—it provided that "the Clergy of the" Roman Catholic "Church may hold, receive and enjoy their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion": p. 572.

This meant that, *quoad* Catholics, the Church of Rome was re-instated in the right to receive Tithes from its own people—this as we have seen had been demanded by de Vaudreüil on the Capitulation of Montreal in 1760, and Amherst had refused to grant it, while the Treaty of Paris is silent on the matter.

It is quite certain that nothing was further from the minds of the Imperial Administration for years than the partial establishment in Quebec of the Church of Rome: and it speaks volumes for the desire of the Government to meet the wishes of the French-Canadians expressed through their spokesmen—self-appointed as they were—that this was granted.

While such an Establishment *sub modo* of this Church might have been considered a domestic matter affecting Quebec alone, the Continental Congress did not think so. In the Address to the People of Great Britain, adopted October 21, 1774, the Congress complained that by this "Act, the Dominion of Canada is to be extended, modelled and governed as that by being disunited from us detached from our interests by civil and religious prejudices that by their numbers daily swelling with Catholic Emigrants from Europe and by their devotion to Administration so friendly to their Religion, they may become formidable to us and on occasion be fit instruments in the hands of power to reduce the ancient free Protestant Colonies to the same state of slavery with themselves." The Congress considered or affected to consider

the Act as aimed at the Colonies, a view for which there appears to have been but little if any foundation in fact.

But the Congress went on: "Nor can we suppress our astonishment, that a British Parliament should ever consent to establish in that country (Canada) a Religion that has deluged your Island in blood and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world." *American Archives,* Series IV, Vol. 1, p. 920. The Congress also said: "We think the Legislature is not authorized by constitution to establish a religion fraught with sanguinary and impious tenets . . . ." *do. do.*

"Rebellion" sounds oddly coming from this body less than two years before July 4, 1776, and already rebellious; while "bigotry" might almost be thought ironical.

In one other matter, the French-Canadian was successful: the English wished a House of Assembly, being accustomed in Homeland or Colony to Representative Legislation: the French-Canadian was accustomed to be governed and legislated for by Governor and nominated Council. The Home Administration decided to continue this form of government: and no House of Assembly was elected in Canada for nearly twenty years, open the Canada or Constitutional Act of 1791, 31 George III, c. 31, had so provided for each of the new Provinces, Upper Canada and Lower Canada, into which the former Province of Quebec was divided in that year.

The reintroduction by the Quebec Act of 1774 of the former French-Canadian law in civil matters also met the condemnation of the Congress as "abolishing the equitable system of English Law . . . " *American Archives,* Series IV, Vol. 1, p. 910. But this is no part of the present enquiry and it is not pursued.

The consideration for the wishes of Canadians shown by the Home Government and its officers had a great if not a decisive effect in preventing Canada joining the revolting Colonies in 1776.

It may, I think, be fairly concluded that if the British King and his Government paid nearly as much attention to the wishes of the Old Subjects in the Protestant Colonies as they did to those of the New Subjects in the Catholic Colony, there would have been no American Revolution, no Declaration of Independence:

and, on the other hand, had they paid as little attention to the wishes of the New Subjects as they did to those of the Old Subjects, Canada would not have continued British, and the United States of America would have stretched from the Gulf of Mexico to the Arctic Ocean. *Dîs aliter visum.*

The difference in the political concepts of the two peoples should, however, be borne in mind. The Revolution in the last analysis was due to the determination of the American Colonists to govern themselves for good or ill, while the King and his Government were obstinately determined to treat these new countries as inferior and subordinate, a mere "possession" of Britain —from this faulty attitude practically all the other mistakes followed, terrible blunders as many of them were.

The French-Canadian now the most ardent parliamentarian and active politician, was then accustomed to a government by officers appointed by the Head of the State, and so long as his own rights and interests were protected, he had no concern as to the governors and legislators. When by the Act of 1791, he was granted an elective Assembly, he rapidly adapted himself to the new situation and forgot the old: but in 1776, he was content with the earlier system under which he and his forefathers had lived.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto,
October 9, 1928.

Status of Roman Catholicism in Canada

Nouvelle France, the original Canada, was almost wholly Roman Catholic, the few Huguenots and other Protestants in the Province being practically negligible, numerically and otherwise.

When, in September, 1759, Quebec capitulated to the British commanders, M. de Ramesay, "Lieutenant Pour Le Roy, commandant Les hautes et Basse Ville de Quebec" demanded, Article 6, "Que L'Exercice de La relligion Catholique apostolique & romaine sera conservé, que L'on Donnera des sauve gardes aux maisons des Ecclesiastiques, relligieux & relligieuses particulierement à Mgr. L' Evêque de Quebec qui rempli de zele pour La relligion Et de Charité pour le peuple de son Diocese desire y rester Constamment, Exercer Librément & avec La Decense que son Etat et les sacrés mysteres de la relligion Catholique Apostolique & Romaine, Exigent, son Authorité Episcopale dans La ville de Quebec Lorsqu'il Jugera à propos Jusqu'à ce que la possession Du Canada ait Eté decidée par vn traité Entre S. M. T. C. & S. M. B." *Documents relating to the Constitutional History of Canada, 1759-1791.* Edited by Drs. Adam Shortt and Arthur G. Doughty, Ottawa, The King's Printer, 1918. Second and revised edition, p. 3. (This admirable publication of the Canadian archives will be constantly quoted from with a reference to the page only.)

There was apparently no English version—at all events, none is extant. But the contemporary translation is sufficiently accurate.

"That the exercise of the Catholic, Apostolic and Roman religion shall be maintained; and that safeguards shall be granted to the houses of the clergy, and to the monasteries, particularly to his Lordship the Bishop of Quebec, who, animated with zeal for religion, and charity for the people of his diocese, desires to re-

side in it constantly, to exercise, freely and with that decency which his character and the sacred offices of the Roman religion require, his episcopal authority in the town of Quebec, whenever he shall think proper, until the possession of Canada shall be decided between their Britannic and most Christian Majesties." p. 6.

The demand of the French Commandant indicates the deep reverence of the French-Canadian for his Church, his affection for her and desire for her continuance in his Province, all undiminished by the course of time and as strong today as a century and a half ago.

De Ramesay's demand might well be read and not improbably it was intended, as looking to the maintenance of the Church of Rome as the State Church of Canada. This, Admiral Saunders and General Townshend, who had succeeded to the command of the British troops on the death of Wolfe, could not possibly grant; and their reply was carefully and unambiguously worded.

"libre Exercice de la Religion Romaine, sauves gardes accordées a toutes personnes Religieuses ainsi qua Mr. Leveque qui pourra venir Exercer Librement et avec Deçence Les fonctions de son Etat lorsqu'il le Jugera a propos jusqu'a ce que la possession du Canada ayt été Decidée entre Sa Majesté B. et S. M. T. C." p. 3. "The free exercise of the Roman religion is granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise, freely and with decency, the functions of his office, whenever he shall think proper, until the possession of Canada shall have been decided between their Britannic and most Christian Majesties." p. 6.

It will be observed that nothing appears in the way of continuance of Roman Catholicism as a State Church in the Province, but only tolerance and protection.

But de Ramesay had but limited authority as "Lieutenant Pour Le Roy, Commandant Les hautes et Basse Ville de Quebec," and he could not and did not surrender Canada, but only Quebec and the comparatively small territory in its vicinity and dependent on it. The rest of Canada, Montreal, Detroit, Michillimackinac, remained in French possession for about a year.

When in September, 1760, de Vaudreüil, "Gouverneur et Lieutenant Général pour Le Roy en Canada," was compelled to sur-

render Montreal to Sir Jeffrey Amherst, he exercised great vigilance in the interest of the Roman Catholic Religion and Church. In the very elaborate Articles of Capitulation drawn up in Montreal to submit to Amherst, Article 27 read:

"Le Libre Exercice de la Religion Catholique, Apostolique et Romaine Subsistera En Son Entier; En Sorte que tous Les Estats et les peuples des Villes et des Campagnes, Lieux et postes Eloignés pouront Continuer de S'assembler dans les Eglises, et de frequenter les Sacremens, Comme Cy devant, Sans Estre Inquietés, En Aucune Maniere directement, ni Indirectement.

Ces peuples seront Obligés par le Gouvernement Anglois à payer aux prestres qui en prendront Soin, Les Dixmes, et tous les droits qu'ils avoient Coutume de payér sous le Gouvernement de Sa Mté tres Chrestienne." pp. 15, 16.

As at Quebec, so at Montreal, there seems to have been no English version of the Articles of Capitulation; at all events, none is extant, and I follow the sufficiently accurate contemporary translation.

"The free exercise of the Catholic, Apostolic, and Roman Religion, shall subsist entire, in such manner that all the states and the people of the Towns and countries, places and distant posts, shall continue to assemble in the churches, and to frequent the sacraments as heretofore, without being molested in any manner, directly or indirectly. These people shall be obliged, by the English Government, to pay their Priests the tithes, and all the taxes they were used to pay under the Government of his most Christian Majesty." p. 30. ("Estats," the modern "êtats," should of course, be translated "Estates," i.e., "conditions in life" and not "states.")

It will be seen that the sting of this demand lay in the tail: Vaudreüil expressed what de Ramesay only suggested, that the status of the Church of Rome as the State Church of the Province should continue, and tithes and other Church Rates should continue to be enforceable by law.

Amherst, of course, could not consent to such a proposal—his reply reads:

"Accordé, pour le Libre Exercise de leur Religion. L'Obligation de payer la Dixme aux Prêtres, dependera de la Volonté du Roy." p. 15.

"Granted, as to the free exercise of their religion, the obligation of paying the tithes to the Priests will depend on the King's pleasure." p. 30.

By article 28, the Chapter, Priests, Gurates and Missionaries were secured "with an entire liberty, their exercise and functions of cures in the parishes of towns and countries." pp. 16, 31: while Article 29 secured the Grand Vicar the free exercise of his functions. pp. 16, 31. Article 32 protected all communities of Nuns and prevented the billeting of soldiers on them; and Article 34 protected the estates of Priests and their Communities. pp. 17, 32.

But other demands were not acceded to—that of Article 30 that the King of France should "name the Bishop of the colony who shall always be of the Roman communion"—even "if by the treaty of peace, Canada shall remain in the power of his Britannic Majesty"—met a peremptory refusal. pp. 16, 31. Similarly, Article 31, which empowered the Bishop to establish new parishes, &c., was rejected: and Article 33 had the same fate "till the King's pleasure be known." It reads (in English translation): "The preceding article (securing the Nuns) shall likewise be executed, with regard to the communities of Jesuits and Recollects and of the houses of the priests of St. Sulpice at Montreal; these last, and the Jesuits, shall have the right to nominate to certain curacies and missions as heretofore." pp. 17, 31, 32.

Article 35 allowed "Canons, Priests, Missionaries, the Priests of the Seminary of Foreign Missions, and of St. Sulpice, as well as the Jesuits and the Recollects" if they should "chuse to go to France," to be "masters to dispose of their estates and to send the produce thereof, as well as their persons, and all that belongs to them to France." pp. 18, 32. (The word translated "estates" is "biens," rather "personal property," "moveables").

This Capitulation covered all of Canada, including the Upper Country, what is now Ontario, Detroit, Michillimackinac, &c.

It will be seen that Establishment was absolutely refused, the right of appointing a Bishop was not placed in alien hands, and Jesuits and other such communities were not guaranteed their lands (and, in fact, the confiscation of the lands of the Jesuits was a thorn in the side of Canadian and Quebec Governments until late in the 19th century, when the Government of the Prov-

ince of Quebec made a compromise with the Order. Incidentally, the refusal of the Government at Ottawa to disallow the Provincial act carrying the compromise into effect led to the formation of a third party, the "Equal Rights Party," with much the same platform, the same earnestness, the same ineffectiveness, the same ephemeral course as the A. P. A.)

The whole intention was to allow the conquered people to worship God in their own way without molestation, but nothing more. The right for the Bishop to form new parishes was refused—the existing parishes were not interfered with but matters in that regard were to remain *in statu quo.* The same plan appears in Article 40 whereby the Indians Allies of the French were to "have, as well as the French, liberty of religion and . . . Keep their Missionaries": but the demand: "Il sera permis aux Vicaires généraux Actuels Et à L'Eveque lors Le Siege Episcopal Sera rempli, de leur Envoyer de Nouveaux Missionaires Lorsqu'ils Le Jugeront Necessaire"—"The actual Vicars General, and the Bishop, when the Episcopal see shall be filled, shall have leave to send to them new Missionaries when they shall think it necessary," was refused. pp. 20, 33. And when it was asked, Article 42, that the Canadians should continue to be governed by their established laws and customs, the curt answer was made: "They become subjects of the King." pp. 20, 34.

No complaint has ever been made that these Articles of Capitulation were violated in letter or spirit. The sternest discipline was exercised in the Army of Occupation and the death penalty was always held *in terrorem* over the British soldiers, and sometimes inflicted.

After the Capitulation, Canada was under military law for some time—the Régime Militaire or Règne Militaire as the period is generally called.

Comparatively few French-Canadians left for France: those who did were chiefly of the official class whose occupation was gone.

A very full and carefully prepared account of the Church Government in Quebec was sent by Governor Murray to the Home Government in June, 1762. pp. 66-72: "The Canadians are . . . extremely tenacious of their Religion . . . ; the Jesuits are neither loved nor esteemed in general . . . ; the Recollets is an

Order of mendicants . . . careful not to give offence . . . ; the Seminary educates the Youth and fits them for Orders . . . ; the Communities of Women . . Nuns . . are much esteemed . . . and . . there are some few French Protestants . . " p. 71. Marriage between Protestant and Catholic had been forbidden. p. 75. "The Huron Indians settled at a little village called Jeune Lorette, about 3 leagues from Quebec . . . are called Roman Catholics . . . a Missionary resides among them, they have a neat Chapel where divine service is constantly performed at which all the Savages attend with a punctuality and decorum worthy of imitation by more enlightened people." p. 73.

The War came to an end and a Treaty of Peace was signed at Paris, February 10, 1763.

For some time there had been an animated not to say acrimonious discussion in England as to the detention of Canada, many favoring the detention of Guadeloupe and the return to France of Canada. The determination finally arrived at was largely due to Benjamin Franklin's exceedingly able and persuasive "Canada Pamphlet" of which it is not too much to say that it caused the destruction of the old British Empire, made possible the birth of the United States of America and revolutionized the English-speaking and consequently the whole world. (See my Article *Benjamin Franklin and Canada*, Pennsylvania Historical Magazine, 1924.)

In Article IV of the Treaty of Paris, the King of France cedes "Canada with all its dependencies . . to the King and . . . Crown of Great Britain," and the King of Great Britain, "His Britannic Majesty . . . agrees to grant the liberty of the Catholick religion to the inhabitants of Canada . . . (and) to give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit." p. 115: the last clause runs in French "pour que ses nouveaux sujets Catholiques Romains puissent professer le Culte de leur Religion selon le Rit de l'Eglise Romaine, en tant que le permettent les Loix de la Grande Bretagne." p. 100.

Ireland being still a separate Kingdom, had nothing to do with Canada—the cession was "au Roylet à la Couronne de la Grande Bretagne."

The sting was again in the tail: the tolerance was only "as far as the laws of Great Britain permit": and in practice "laws of Great Britain" was always interpreted as including the legislation of the Kingdom of England before the Union of England and Scotland in the time of Queen Anne—and consequently the legislation under Queen Elizabeth against Catholics was considered as included. The French ministers did their best to have the words *comme ci-devant,* "as heretofore" inserted so as to continue Roman Catholicism as the State Religion: but this was absolutely and definitely refused, and they were specifically informed that Great Britain could grant only the "Toleration of the Exercise of that Religion." p. 169.

According to our conception of International Law, when territory is ceded to the King, he is the sole master to rule it, lay down laws for it, and generally to dispose of it, unless and until by giving his Assent to an Act of Parliament assuming to deal with it, he parts with his control. Of course, this mastery he does not regulate and exercise in person: that is left to his Privy Council.

Accordingly, we find anxious thought being given to the management of Canada by the Privy Council and especially by a Standing Committee charged with the administration of Colonial affairs, generally called "The Lords of Trade." The Lords of Trade at his request made an elaborate Report, dated June 8, 1763, to the Earl of Egremont, Secretary of State for the Southern Department, who at this time had charge of the American Colonies. They recommended, *inter alia,* that the Upper Country, now the greater part of Ontario and much of Michigan, &c., should be kept as "an Indian Country, open to Trade but not to Grants or Settlements," while the Lower Country, now the Province of Quebec and a portion of eastern Ontario, should be made a new "Government" for "all Your Majesty's new French subjects under such Government as Your Majesty shall think proper to continue to them in regard to the Rights & Usages already secured or that may be granted to them." pp. 127-147: *esp.* 141, 142. This scheme was approved: and the Royal Proclamation

ernment of Quebec" at a line drawn from the South end of Lake Nipissing to the point at which the Line of 45°, N. L., crosses the St. Lawrence, i. e., about the present Cornwall, Ontario; and forbade grants and settlement further west. There is nothing in the Proclamation expressly relating to religion, but the assurance given "that all Persons Inhabiting in or resorting to our said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England," was, in view of the limitation already mentioned in the Treaty of Paris, at least, disquieting, introducing as it did, the Laws of England as a whole into the new Province or "Government." pp. 163-168; *esp.* 165.

Egremont writing to General Murray, August 13, 1763, on his appointment as "Captain General and Governor-in-Chief of the Province of Quebec," warned him "to watch the Priests very narrowly, and to remove, as soon as possible, any of them who shall attempt to go out of their sphere and . . . busy themselves in any civil matters"—intelligence had been received which gave "reason to suspect, that the French may be disposed to avail themselves of the Liberty of the Catholick Religion granted to the Inhabitants of Canada . . . to keep up their Connection with France and by means of the Priests to preserve such an Influence over the Canadians as may induce them to join, whenever opportunity should offer, in any attempts to recover that Country." p. 169.

In Murray's Commission, November 21, 1763, the only reference to Popery is in the direction that he should make and subscribe the Declaration required by the Statute 25 Charles II, "An Act for preventing Damages which may happen from Popish Recusants." p. 174.

In his Instructions, December 7, 1763, the Lieutenant Governors and Members of the Council were also required to do the same: pp. 182, 183: He was instructed that he should "in all things regarding" the new Roman Catholic subjects "conform with great Exactness to the Stipulations of the . . . Treaty . . . " The Roman Catholics were to "deliver in upon oath an exact account of all arms and ammunition of every sort in their actual possession, and so, from time to time, of what they shall receive

into their possession": p. 191. He was "not to admit of any Ecclesiastical Jurisdiction of the See of Rome or any other foreign Ecclesiastical Jurisdiction . . . ": and the intention was declared to establish "the Church of England . . . both in Principles and practice"; and Murray was "not to prefer any Protestant minister to any Ecclesiastical Benefice in the Province . . . without a certificate from the . . . Bishop of London. . . ." pp. 191, 192. It was intended to make a reservation of public land "for a Glebe and Maintenance of a Protestant Minister" in Townships, &c. p. 192.

Pausing here in the narrative, it may be said that there never was an Established Church of the British Empire or even of the Kingdom of Great Britain. At the time of the Union, England and Scotland each had its Established Church, the Church of England being Episcopal, the Church of Scotland, Presbyterian: there was, indeed, as there still is, an Episcopal Church of Scotland, as there was and is a Presbyterian Church of England, but they are both Dissenting, Non-conformist Churches. It was only the Church of England which it was intended to establish in Quebec: but, when some decades later, a dispute arose as to the meaning of "Protestant Minister" for whom land was to be reserved, the Law officers of the Crown at Westminster, differing from the Law officers of the Colony gave an opinion that the ministers of the Church of Scotland had the same rights as those of the Church of England.

It was in these Royal Instructions declared to be the intention that the Canadians should "by degrees be induced to embrace the Protestant Religion and their Children be brought up in the principles of it." p. 191: and there can be no question that the authorities in England hoped and believed that Quebec would before long be English-speaking and Protestant.

To induce the immigration of English-speaking Protestants from the Colonies to the South as well as—to a less extent—from the British Isles, the laws promised were the laws of England, provision was made for the support of Protestant pastors and schoolmasters; p. 194: and a grant of "one hundred acres of land" was offered "to every person being master or mistress of a family, for himself or herself, and fifty acres for every white

or black man, woman or child, of which such person's family shall consist, at the actual time of making the grant": p. 196.

The hope and expectation that by a considerable English-speaking Protestant immigration and intermingling of the races, the French population would be diluted, and by inter-marriage and otherwise gradually become anglicised and Protestant, were wholly disappointed: the French-Canadian people were tenacious of language and religion and any intermingling there was had rather the contrary effect. This tenacity and the prolific Candienne were too much for the newcomer. It was expected that a very considerable proportion of the French Canadians would decline to change their allegiance—an expectation common to British and French—and, consequently, when the Treaty of Paris was made, it was expressly provided, Article IV, that "the French inhabitants, or others who had been subjects of the most Christian King in Canada may retire with all safety and freedom wherever they shall think proper, and may sell their estates, provided it be to the subjects of his Britannic Majesty, and bring away their effects as well as their persons, without being restrained in their emigration, under any pretext whatsoever, except that of debts or of criminal prosecutions": pp. 115, 117. The term limited for this emigration was eighteen months, ending August 10, 1764. This was but implementing and supplementing the Articles of Capitulation of Montreal, Article 36 providing that "if by the treaty of peace, Canada remains to his Britannic Majesty, all the French, Canadians, Acadians, merchants and other persons who chuse to retire to France, shall have leave to do so from the British General, who shall procure them a passage; and nevertheless, if, from this time to that decision, any French, or Canadian merchants or other persons, shall desire to go to France; they shall likewise have leave from the British General. Both the one and the other shall take with them their families, servants, and baggage": pp. 18, 32.

This expectation was wholly falsified by the result: outside of the official class, civil and criminal, a few professional men and a few Seigneurs, practically all French-Canadians remained in Canada, and became Subjects of King George—his "New Subjects" as they were generally called.

But notwithstanding that Canada became British *de jure* in February, 1763, as it had been *de facto* since September, 1760, it was not thought wise to change the administration, Courts, &c., until the lapse of the eighteen months allowed for those who wished to do so, to leave the Province.

That time having expired in August, 1764, an ordinance was passed at Quebec by the Governor in Council, September 17, 1764, erecting Civil Courts and thus ending Le Régime Militaire: pp. 205-210.

It was, curiously enough, one of the consequences of this legislation, apparently wholly undesigned and unforeseen, that the legal status of the Roman Catholic in Quebec came to be defined.

There were two Courts of Judicature erected: the Superior Court of Judicature or Court of King's Bench in which causes were to be decided "agreeable to the Laws of England," trial to be by jury, and the Inferior Court of Judicature or Court of Common Pleas in which causes were to be decided "agreeable to Equity, having Regard nevertheless to the Laws of *England*, as far as the circumstances and present situation of things will admit": trial to be by jury if either party desired it. In this Court, "*Canadian* Advocates, Proctors, &c.," were allowed to practise: pp. 205-207. The reason of this privilege was not as might be supposed, because the law in this Court was "Equity" in the lawyers' sense of the word, i. e., the principles of the Court of Chancery, and consequently somewhat similar to the French law both being largely based upon the Civil Law: in this Ordinance "Equity" means "natural justice" ("the length of the chancellor's foot") not "Chancery Law." The reason is given by Governor Murray in his Despatch to the Home Government *(Canadian Archives*, Q. 62 A, at p. 504). "We thought it reasonable and necessary to allow Canadian advocates and Proctors to practice in this Court of Common Pleas only (for they are not admitted in the other Courts) because we have not yet got one English Barrister or Attorney who understands the French language." There was also the provision that in all trials in the King's Bench all His Majesty's subjects in Canada should be admitted in juries without distinction.

The Canadians, "to a man, Soldiers," had already recommended themselves to Governor Murray—he thought them "per-

haps the bravest and the best race upon the globe": he believed that the introduction of English law into the Province meant the introduction of the disabilities under which Catholics suffered in England: and this he thought unjust as well as inexpedient.

It is exceedingly interesting to see the change in the view taken of the French-Canadian by the authorities: his religion was, indeed, disapproved of and his priests would stand watching, but he had proved himself a quiet, peaceful subject, not given to plotting or insistent upon renewing his political allegiance to France. His love for France continued deep and heartfelt until dismayed and bewildered, if not wholly destroyed, by the excesses of the Revolution. But loving France as he did, the French-Canadian formed no plots to shake off the British yoke.

The immigrants almost all English-speaking and Protestant and chiefly from the American Colonies had proved a disappointment: it had been hoped that the newcomers, the Old Subjects, as they were called, would mingle peacefully with the New Subjects and form a leaven whereby the whole population would gradually become English-speaking and Protestant. This hope was wholly belied: coming from communities in which Roman Catholicism was held in horror—we shall say more of this later on in the Text—communities which had lived for years in constant dread of raids from French-Canada and in which the popular preacher thought he could give his congregation the best idea of Satan and his Angels in Hell by comparing them to the French-Canadians, the immigrant, who also had the contempt felt by the English-speaking for those using another tongue, refused all intercourse except such as was unavoidable or advanced his own pecuniary interest, with the inferior, jabbering, Papist.

Between the British commercial class and, Murray, there came into existence very strained relations, even personal bitterness and antagonism: in his Despatch of October 29, 1764, he says: "Nothing will satisfy the Licentious Fanaticks trading here, but the expulsion of the Canadians." p. 231; *Canadian Archives,* Q. 2, p. 233.

The views of the Old Subjects are to be seen in the Presentment of the Grand Jury at Quebec, October 16, 1764: this body

was composed of seventeen English and seven French-speaking. The former agreed upon a Presentment in which they persuaded the latter to join: these, later, say that the obnoxious articles they did not understand "if they were interpreted"; and that claim seems highly probable.

Leaving aside other representations as not germane to the subject of this paper, complaint is made "That, among the many grievances which require redress, this seems not to be the least, that persons professing the Religion of the Church of Rome (who) do acknowledge the supremacy and jurisdiction of the Pope, and admit Bulls, Briefs, absolutions, &ca. from that see, as Acts binding on their consciences, have been impannelled, en Grand and petty Jurys even where Two protestants were partys, and whereas the Grand Inquest of a County, City or Borough of the Realm of Great Britain, are obliged by their Oath to present to a Court of Quarter Sessions or assises, whatever appears an open violation of the Laws and Statutes of the Realm, any nusance to the subjects or Danger to His Majesty's Crown and dignity and Security of his Dominions. We therefore believe nothing can be more dangerous to the latter than admitting such persons to be sworn on Jurys, who by the Laws are disabled from holding any Office Trust or Power, more especially in a Judicial Capacity, with respect to which above all other, the Security of his majesty, as to the possession of his Dominions and of the subject as to his Liberty, property and Conscience is most eminently concerned": p. 214: *Canadian Archives, Dartmouth Papers,* Vol. 1, 14, 29, *sqq.*

Remembering the suspicion under which the French priests continued to be, there is some show of reason in the objection to Roman Catholics been admitted on a Grand Jury, one of whose duties was to "present all Treasons, Misprisions of Treason, &c." But this objection could not possibly hold in the case of the Petit Jury, at least in civil trials.

Murray in his Official Despatch had explained the provision which allowed "all His Majesty's Subjects in this Colony to be admitted on Juries without distinction"—a privilege not allowed to Roman Catholics in the Mother Country. "As there are but Two Hundred Protestant Subjects in this Province, the greatest part of which are disbanded Soldiers of little Property and mean

Capacity, it is thought unjust to exclude the new Roman Catholic Subjects to sit upon Juries, as such exclusion would constitute the said Two hundred Protestants perpetual Judges of the Lives and Property of not only Eighty Thousand of the new Subjects, but also of all the Military in the Province; besides, in the Canadians are not to be admitted on juries many will Emigrate: p. 206, (n): *Canadian Archives,* Q 62 A, pt. 2, p. 500. Murray writing to the Earl of Shelburne (afterwards first Marquis of Lansdowne) from Quebec, August 30, 1766, says that there were only 19 Protestant Families in the Parishes, the "other Protestants, a few half-pay officers excepted, are Traders, Mechanics and Publicans in Quebec and Montreal . . . the most miserable collection of men, I ever knew": *Canadian Archives. Shelburne Correspondence,* Vol. 64, p. 101.

The emigration of Canadians he had come to think inexpedient. In a Dispatch to the Lords of Trade, October 29, 1764, he urged that the Canadians should be "indulged with a few privileges wch. the Laws of England deny to Roman Catholicks at home," being convinced that if that were done they would soon get the better of every National antipathy to their Conquerors and become the most faithful and most useful set of Men in this American Empire: p. 231: *Canadian Archives,* Q 2, p. 233. In the same Dispatch, he said: "certain I am, unless the Canadians are admitted on Jurys, and are allowed Judges and Lawyers who understand their Language his Majesty will lose the greatest part of this Valuable people"—but his courage did not go far enough to cause him to admit Canadian Lawyers to practise except in the Inferior Court, the Court of Common Pleas—of course, Roman Catholics were not allowed to practise Law in England. Nor did he venture to appoint a Roman Catholic Judge, equally unknown in England. The old Statute of (1605) 3 James I, c. 5, s. 8, provided that no Papist should practise "the Common Law as a Councellor, Clerk, Attorney, or Solicitor nor shall practise the Civil Law, as advocate or proctor, nor practise physick, nor be an apothecary, nor shall be a judge"; and these patriotic Grand Jurors expressed the opinion that "the admitting persons of the Roman Religion, who own the authority, supremacy and jurisdiction of the Church of Rome as Jurors, is an open Violation of our most sacred Laws and Libertys, and

tending to the utter subversion of the protestant Religion and his Majesty's power, authority, right, and possession of the province to which we belong": and "an unwarrantable incroachment on the establish'd maxims of a British Government": p. 215.

The same objection was implied against a Roman Catholic "holding any office or filling any public employment": p. 216.

The French Grand Jurors insist on the justice of the Ordinance; "that Canadian Lawyers, New Subjects of H. M. might practise (in the Court of Common Pleas) . . . appears to us the more equitable, in that it is only right that the new Canadian Subjects should employ Persons whom they understand, and by whom They are understood, all the more because there is not one English Lawyer who knows the French Language, and with whom it would not be necessary to employ an Interpreter . . . ": p. 221.

They protest against the Presentment of their confrères, "the Ancient Subjects, Grand Jurors . . . with the intention of excluding us from the privilege of serving ourselves and Our associates (les Notres, "ours"), our Country and our King, pretending that they conscientiously believe us to be incapable of holding any office or even of repulsing and fighting the Enemies of H. Mty. . . . " They protest that "It would be shameful to believe that the Canadians, New Subjects, cannot serve their King either as Serjeant or Officers. . . . For more than six Months, we have had Catholic Canadian Officers in the Upper Country, and a Number of Volunteers aiding to repulse the Enemies of the Nation." (The reference is to the Pontiac Conspiracy, in which, however, the "Enemies of the Nation" were Indians and not French.) They express "enough Confidence in the King's Goodness" to believe that he will see to it that "they and their Children might lead their Lives sheltered from Injustice. This they could never do here were they deprived of all Officers, or positions as Jurors": p. 222. These representations were duly transmitted to the Home Government by Murray who strongly commended the French position: p. 231.

The "British Merchants and Traders" in Quebec sent over a Petition to the King complaining of the Government, *inter alia,* because of "The Enacting Ordinances Vexatious, Oppressive,

unconstitutional,* injurious to civil Liberty and the Protestant Cause": p. 233; *Canadian Archives,* B. 8, p. 6. This had reference to the Judicature Ordinance now under consideration.

Transmitted to their London correspondent, it was supplemented by a petition of His "Majesty's most dutiful Subjects, the Merchants and others now residing in London Interested in and trading unto the Province of Canada in North America": p. 235; *Canadian Archives,* B. 8, p. 10. This prayed that the Government of Canada "may be at least put upon the same footing with the rest of Your Majesty's American Colonies or upon any other footing that may be thought Essential for the preservation of the Lives, Liberties and Properties of all Your Majesty's most faithful Subjects"—*alias* English-speaking Protestants.

The French were not idle: the "principal inhabitants of Canada" sent an address to the King early in 1765, "relative to the

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*Americans should remember the different meaning and connotation of the words, "constitution," "constitutional" and "unconstitutional" at the present time in the United States and at the present time in the British Empire—the latter having been also universal in the American Colonies and until the last century in the United States. The latter being a new nation it was thought necessary to draw up a document setting out the form of government and the principles and rules upon which it was to be carried on. This document was called the "Constitution," quite properly and regularly; and it was not long after 1787 that it practically monopolised the word in the United States ousting the former meaning and connotation. In the American Colonies, as in the rest of the British world, "constitution" had meant and in the British word has continued to mean the totality of the principles, more or less vaguely and generally stated, upon which the people should be governed. That is not at all what is meant by an American when he speaks of a Constitution which with him is a written document containing so many letters, words and sentences, which authoritatively and without appeal dictates what shall and what shall not be done. "Constitutional" and "unconstitutional" in the American sense mean "in accordance with" or "not in accordance with a certain document"; in the historical and British sense, "in accordance with" or "not in accordance with the proper principles of government"—in the American sense, any "unconstitutional" is illegal and invalid, in the British sense, is legal but inadvisible and wrong. The redress in the United States is an appeal to the courts, in the British Empire to the people at the polls—in the British Empire to express the meaning of the American "unconstitutional" we say *ultra vires.*

When the American Colonies insisted that taxation without representation was unconstitutional they did not mean that such taxation was illegal but only that it was wrong; so in this complaint the British merchants and traders did not mean that the Ordinance of September 17, 1764, was invalid but only that it was wrong.

See my judgment in *Bell* v. *Town of Burlington* (1915), 34 Ontario Law Reports, 619 at p. 622. *The Constitution of Canada in its History and Practical Working* (Dodge Lectures, Yale University, 1917), p. 52; *The Canadian Constitution in Form and in Fact* (Blumenthal Lectures, Columbia University, 1923), pp. 1, 2, 7.

See also Notes † and ‡, *post.*

Establishment of Courts of Justice and the Presentment of the Grand Jury." "With deep bitterness in our hearts (toute l'amertume de nos Coeurs) we have seen . . . these . . . fifteen Jurors, with the assistance of the Lawyers have proscribed us as unfit, from differences of Religion, for any office in our Country; even Surgeons and Apothecaries (whose professions are free in all countries) being among the number. Who are those who wish to have us proscribed? About thirty English merchants, of whom fifteen at the most, are settled here." (In fact, the Quebec Merchants' Petition had 21 signatures and that of the London Merchants, 25.)

"Who are the Proscribed? Ten thousand Heads of Families who feel nothing but submission to the orders of Your Majesty and of those who represent you . . . "

They ask: "What would become of the general prosperity of the Colony, if those who form the principal section thereof, become incapable members of it through difference of Religion? How would Justice be administered if those who understand neither our Language nor our Customs should become our Judges, through the Medium of Interpreters? . . . Instead of the favoured subjects of your Majesty, we should become veritable slaves; a Score of Persons whom we do not know would become the masters of our Property and of our Interests: We should have no further Redress from those equitable men (properly translated, 'no relief by means of those reliable men') to whom we have been accustomed to apply for the settlement of our Family Affairs and who if they abandoned us, would cause us to prefer the most barren country to the fertile land we now possess": p. 228: French original, pp. 224, 225; *Canadian Archives*, B. 8, p. 121.

It is to be remembered that as yet the Colony was wholly under the unrestrained power of the King, he not having, by giving his assent to an Act of Parliament, given it into the control of Parliament; and, consequently, it was for the Privy Council with its Standing Committee the Lords of Trade, or "Lords of the Committee for Plantation Affairs" and not for Parliament, to deal with the situation. See the celebrated judgment of Chief Justice Lord Mansfield in *Campbell* v. *Hall,* 1774: it is reported in *Lofft,* in *Cowper* and in 20 *Howell's State Trial* also in *Shortt*

v. *Doughty, op. cit.*, p. 522. It may be said that while this doctrine has been uniformly followed in the courts it was strongly disputed by lawyers of high standing in England and Canada.

The matter being referred by the Privy Council to this Standing Committee, it was considered advisable to take the opinion of the Law Officers of the Crown on the legal question involved. While the King had full power of administration, including lawmaking, of the Colony, he could not legally do anything contrary to an Act of Parliament—the alleged power of nullifying Parliamentary legislation asserted, to his own undoing, by the last Stuart King, no subsequent monarch attempted. If then the statute of (1605) 3 James I, c. 5, applied to the Colony, the Ordinance giving Roman Catholics the right to practise law (even in a single Court) or to sit on Juries was *ultra vires*† and without effect.

The Attorney General Sir Fletcher Norton, and Solicitor General Sir William De Grey (afterwards C. J., C. B.) gave their joint opinion to "The Right Honourable the Lords Commissioners for Trade and Plantations," June 10, 1765, "that His Majesty's Roman Catholick Subjects residing in the Countries, ceded to His Majesty in America . . . are not subject in those Colonies, to the Incapacities, disabilities, and Penalties, to which Roman Catholicks in this Kingdom are subject by the Laws thereof": p. 236: *Canadian Archives; Dartmouth Papers*, M. 383, p. 69.

With this opinion, the Lords of Trade thoroughly agreed nor could they "conceive what foundation there is for the Doctrine, that a Roman Catholick, provided he be not a Recusant convict is incapable of being admitted to practice in those Courts as a Proctor, Advocate or attorney": pp. 241, 242: *Canadian Archives*, Q. 56, p. 83; Q. 18 A, p. 131.

The Lords of Trade recommended that "in all Courts . . . Canadian Subjects shall be admitted to practice as Barristers, Advocates, Attornies and Proctors under such Regulations as shall be prescribed by the Court for Persons in general under those descriptions": Moreover, they recommended that "not only the chief justice but also the puisne judges should understand the French Language": p. 246. All legal objection based upon the old English Statute was thus disposed of. This, by the

†See Note *, *ante*.

way, is quite similar to what occurred in respect of appeals to the King-in-Council: the right so to appeal was in England, a Common Law right, but, leading to excesses, it was abolished in the reign of Charles I by the Star-Chamber Act of 1640—only, however, in the Kingdom of England. Consequently, it continued throughout the rest of the King's Dominions: and, indeed, continues today in all the Empire except the British Isles.

So, while the Statute of James like the statute of Charles was law in Canada, it did not affect rights in Canada.

The Lords of Trade closed their Report—dated September 2, 1765—by condemning "the extraordinary Proceedings of the Grand Jury of the District of Quebec" and their "irregular Presentment," as "indecent, unprecedented and unconstitutional";‡ and by advising that the "minds of the new Canadian Subjects" should be "relieved from that anxiety and uneasiness" excited thereby: p. 246. Murray had gone to England; but, July 1, 1766, effect was given to the recommendation by the President and Acting-Governor Lieutenant-General Paulus Aemilius Irving and Council passing an Ordinance expressly giving all Subjects the right to sit on Juries without distinction; and "Canadian Subjects" the right to practise in all Courts: pp. 249, 250: *Canadian Archives*, Q. 62 A, p. 515.

This measure, Irving had the satisfaction of reporting to the Lords of Trade, "contributed very much to quiet their minds": the English were made more dissatisfied and their feelings and conduct towards the Government continued to be hostile through the whole somewhat long administration of (Sir) Guy Carleton (afterwards Lord Dorchester).

The appointment of a French-Canadian Catholic Judge in the Court of Common Pleas also had like effects.

The position of the French-Canadian then was that his religion was tolerated but not established, and he had the same civil rights as the English-speaking Protestant.

For some years the disputes continued; the Home Administration, and Lords of Trade took extraordinary pains in the investigation of the best course to pursue: the English wanted a House of Assembly as promised in the Royal Proclamation of 1763, "so soon as the state and circumstances of the . . . Colony

‡See Note *, *ante*.

will admit thereof," "in such Manner and Form as is used and directed" in the Royal "Colonies and Provinces in America"; but as in not one of these could a Roman Catholic sit, an Assembly was a desideratum with the Protestant only and would necessarily be a detriment to the Canadian, making him subject to the Protestant.

On the other hand, the French-Canadian desired the promise in the Proclamation to be disregarded, that "all Persons Inhabiting in or resorting to "the Colony should have the "benefit of the Laws of England"—they wanted their own law at least in civil matters—with the Criminal Law of England they were not dissatisfied with the exception of a few Seigneurs who never could tolerate or even understand a law which treated all alike, Seigneur and Habitant, Noblesse and Commonalty, Gentleman and Boor. The ordinary Canadian was content with the English Criminal Law; cruel as it was, it was less so than the French with its rack, its judicial question, its arbitrary imprisonment, its breaking on the wheel.

For years the conflict continued, Petition and Counter-petition, representation and counter-representation, argument amounting almost to threat in some instances—for we find some of the Old Subjects going so far as to express the determination to remain English even if that meant to cease to be British.

At length, the conclusion was reached to accede to the desires of the French-Canadian although that meant breaking the Royal word and falsifying the Royal promise.

And the Quebec Act of 1774, 14 George III, c. 83, was the result.

This extended the Province to the Ohio and the Mississippi—and thereby excited the wrath of the Continental Congress which on Thursday, October 20, 1774, after avowing their allegiance to the King, assailed the "Act for extending the Province of Quebec so as to border on the Western Frontiers of the Colonies, establishing an arbitrary government therein and discouraging the settlement of British subjects in that wide extended country; thus by the influence of civil principles and ancient prejudices to dispose the inhabitants to act with hostility against the free Protestant Colonies, whenever a wicked

Ministry choose so to direct them." Peter Force's *American Archives*, Series IV, Vol. 1, p. 914.

Then it was enacted at Westminster "for the more perfect Security and Ease of the Mind of the Inhabitants of the . . . Province" that all Roman Catholic subjects should "have, hold and enjoy the free Exercise of the Religion of the Church of *Rome* subject to the King's Supremacy declared . . . by an Act, made in the First Year of the Reign of Queen *Elizabeth* . . .," i. e., in 1558. This was simply carrying out the agreement in the Articles of Capitulation, 1760, and the Treaty of Paris, 1763: and it was not in itself a subject of animadversion by the Continental Congress.

True it is that in the American Colonies, "everywhere, except in Pennsylvania, to be a Catholic was to cease to possess full civil rights and privileges": Guilday's *Life and Times of John Carroll*, New York, 1922, pp. 70, 71: and in many parts "a Protestant family ran a fearful risk in harboring a Romanist": Shea's *History of the Catholic Church in the United States*, New York, 1890, p. 498; while for some time after the Declaration of Independence the New England Primer had for the school children, cuts of the "Man of Sin," of course, the Pope. But it was not a matter affecting the other Colonies that Frenchmen in their own country were allowed to indulge in their own form of what was looked upon as simple idolatry.

A further provision relieved Roman Catholics from the oath required by the Statute of 1558 and all other oaths substituted for it by subsequent legislation against the Papal pretensions and prescribed instead a simple Oath of Allegiance, which could be taken by any Catholic as by any Protestant who could take an oath at all: pp. 572-3. This was a complete removal of all disabilities upon the Roman Catholic of Quebec—and from that time forward there has been no legal distinction as to civil right, no difference before the law between Catholic and Protestant in any part of Canada—the Jew had to wait a few decades for full enfranchisement. We have had in the Dominion of Canada as Prime Minister not only the Sovereign of the Orange Order, ultra Protestants, but also two Roman Catholics, one a French-Canadian, born a Catholic and the other an Irish-Canadian a "Vert" from Methodism to Catholicism. In the Province of

Quebec, every Prime Minister but one has been a Roman Catholic and in the Province of Ontario we have had one Roman Catholic Prime Minister and two Orangemen.

But this provision was simply carrying out the Capitulation and Treaty in the light of the opinion of the Law officers of the Crown, given in 1765: p. 236: and while very unpalatable to most of the English in the Province could do no harm to the American Colonies in view of the fact that the scheme set out in the Royal Proclamation of 1763 to have a House of Assembly in Quebec was now abandoned.

The legislation went much further than any promise or agreement—it provided that "the Clergy of the" Roman Catholic "Church may hold, receive and enjoy their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion": p. 572.

This meant that, *quoad* Catholics, the Church of Rome was re-instated in the right to receive Tithes from its own people—this as we have seen had been demanded by de Vaudreüil on the Capitulation of Montreal in 1760, and Amherst had refused to grant it, while the Treaty of Paris is silent on the matter.

It is quite certain that nothing was further from the minds of the Imperial Administration for years than the partial establishment in Quebec of the Church of Rome: and it speaks volumes for the desire of the Government to meet the wishes of the French-Canadians expressed through their spokesmen—self-appointed as they were—that this was granted.

While such an Establishment *sub modo* of this Church might have been considered a domestic matter affecting Quebec alone, the Continental Congress did not think so. In the Address to the People of Great Britain, adopted October 21, 1774, the Congress complained that by this "Act, the Dominion of Canada is to be extended, modelled and governed as that by being disunited from us detached from our interests by civil and religious prejudices that by their numbers daily swelling with Catholic Emigrants from Europe and by their devotion to Administration so friendly to their Religion, they may become formidable to us and on occasion be fit instruments in the hands of power to reduce the ancient free Protestant Colonies to the same state of slavery with themselves." The Congress considered or affected to consider

the Act as aimed at the Colonies, a view for which there appears to have been but little if any foundation in fact.

But the Congress went on: "Nor can we suppress our astonishment, that a British Parliament should ever consent to establish in that country (Canada) a Religion that has deluged your Island in blood and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world." *American Archives,* Series IV, Vol. 1, p. 920. The Congress also said: "We think the Legislature is not authorized by constitution to establish a religion fraught with sanguinary and impious tenets . . . ." *do. do.*

"Rebellion" sounds oddly coming from this body less than two years before July 4, 1776, and already rebellious; while "bigotry" might almost be thought ironical.

In one other matter, the French-Canadian was successful: the English wished a House of Assembly, being accustomed in Homeland or Colony to Representative Legislation: the French-Canadian was accustomed to be governed and legislated for by Governor and nominated Council. The Home Administration decided to continue this form of government: and no House of Assembly was elected in Canada for nearly twenty years, open the Canada or Constitutional Act of 1791, 31 George III, c. 31, had so provided for each of the new Provinces, Upper Canada and Lower Canada, into which the former Province of Quebec was divided in that year.

The reintroduction by the Quebec Act of 1774 of the former French-Canadian law in civil matters also met the condemnation of the Congress as "abolishing the equitable system of English Law . . . " *American Archives,* Series IV, Vol. 1, p. 910. But this is no part of the present enquiry and it is not pursued.

The consideration for the wishes of Canadians shown by the Home Government and its officers had a great if not a decisive effect in preventing Canada joining the revolting Colonies in 1776.

It may, I think, be fairly concluded that if the British King and his Government paid nearly as much attention to the wishes of the Old Subjects in the Protestant Colonies as they did to those of the New Subjects in the Catholic Colony, there would have been no American Revolution, no Declaration of Independence:

and, on the other hand, had they paid as little attention to the wishes of the New Subjects as they did to those of the Old Subjects, Canada would not have continued British, and the United States of America would have stretched from the Gulf of Mexico to the Arctic Ocean. *Dîs aliter visum.*

The difference in the political concepts of the two peoples should, however, be borne in mind. The Revolution in the last analysis was due to the determination of the American Colonists to govern themselves for good or ill, while the King and his Government were obstinately determined to treat these new countries as inferior and subordinate, a mere "possession" of Britain —from this faulty attitude practically all the other mistakes followed, terrible blunders as many of them were.

The French-Canadian now the most ardent parliamentarian and active politician, was then accustomed to a government by officers appointed by the Head of the State, and so long as his own rights and interests were protected, he had no concern as to the governors and legislators. When by the Act of 1791, he was granted an elective Assembly, he rapidly adapted himself to the new situation and forgot the old: but in 1776, he was content with the earlier system under which he and his forefathers had lived.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto,
October 9, 1928.

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become at once the dominant factors in the communal and official and court life and "boss the procedures." All this, indeed, might go along in a well regulated way, if the better newspapers could control the worse and see that their own established ethics were lived up to, while if judges could assent themselves and bar associations were able to make all attorneys live up to their "attorney's oath" or even to subscribe to new and more severe credos such as that suggested by Justice Joseph M. Proskauer of the Appellate Division of the Supreme Court of New York, much might be accomplished in the way of speedy and honest justice with American procedure remaining very much as it is.

But in view of all the preliminary pronouncements of those who are now looking into the situation as to "existing evils" it would seem that one of the most salutary recommendations that they could make would be for a proper control in the interest of the community at large of the tabloid efforts to make criminal cases a "show" in the interest of circulation features. They should also find a way of putting a check on officials of jails, penitentiaries and courts and lawyers for the defense acting as actual employees of the tabloid and as aiders and abbettors in developing demoralizing sob-sister and lying narratives. And, finally, there should be some way of clearing up in the public mind what are the real rights of judges in any court and some way of disabusing the public of the idea that a general abhorrence of crime and criminals and an aversion toward those who are attacking the safety of the state on the part of judicial officials, who, after all, are fellow citizens, is a "prejudice" which calls for interminable delays in procedure in the interest of the lowest anti-social elements of the community.

THE DEATH OF KING JAMES I

A Medico-legal Study

William Renwick Riddell,[1] LL. D., D. C. L., Etc.

James Stuart, King James I of England and VI of Scotland, was a very complex character: well-read, even learned as learning went on those days, he was superstitious to a degree, firmly believing in witchcraft and sorcery; physically an abject coward, trembling like a leaf at the sight of a drawn sword, a characteristic supposed to have been due to pre-natal influences, as the indignant Scottish Lords, in her presence, slew with their daggers a few months before his birth the Italian favorite of his mother, Mary, Queen of Scots, then carrying him under her heart, he was, nevertheless, brave to a fault in having his way in the administration of public affairs, thereby laying the foundation for the tragedy of Whitehall in 1649; stubbornly supporting his friends and favorites in many of their worst measures, he deserted them without a qualm without any real cause and while apparently treating them with the old affection; a master of King-craft, he was most easily deceived by the simplest trick;" the Scottish Solomon" was the "wisest Fool in Christendom," a living paradox, a puzzle to his own age and to those which were to follow.

The purpose of this paper is to say something concerning what was once a burning question and might have caused the destruction of a man of great prominence, had not the assassin's stroke intervened to prevent by one tragedy, the possibility of another, when in 1628, John Felton's knife struck down the Duke of Buckingham at Portsmouth and thus averted the headman's axe.

King James lay at Theobald's suffering with a "tertian ague"—our malaria, the "fever'n'ager" or "Country fever" so well known to a former generation of Canadians, now known to be due to the bite of a mosquito but then supposed to come from swamp air, malarious air or, indeed, even night air. Ague was one of, or rather a generic name applied to all, the non-pestilential fevers; these were in the extraordinary and perverse science of the olden days not caused by the putrefaction in the heart or its contents like pestilential fevers, but by certain putrid vapors carried to the heart and inflaming heart and contents but not putrefying either—for which, all may consult

[1]Justice of Appeal of Ontario.

the *De Morbis Contagiosis et eorum curatione* of old Hieronymus Fracastorius, Lib. II, Cap. III.

To the King, lying sick, George Villiers, Duke of Buckingham brought a posset which the King drank and a plaster which was applied to his body; the King shortly afterwards died.

When, in 1626, after the succession to the throne of Charles I, the Commons came to impeach Buckingham, one of the Articles of Impeachment, No. XIII, was based upon this conduct of the accused. It is all very well to laugh at such a charge now, but it was different in those days when any charge however trivial might be laid hold of to destroy a political opponent—nous avons changé tout cela, of course.

The facts of the administering of these remedies are not clear; Mr. Wandesford who had been deputed to speak for the prosecution, opened on the enormity of the unskillful presuming to exercise and practice physic even on common persons, branding them as "improbos, ambitiosos, temerarios, et audaces homines"—we still have some of that kind. But to dare to practise on the King was much worse; the Royal Physicians themselves were sometimes afraid to try an unusual or, indeed, any medicine on the sacred body—he mentioned for an example that when in 1453, 32 Henry VI, the King was sick, "John Arundel and others, the king's physicians, and chirurgeons thought it not safe for them to administer anything to the king's person without the assent of the Privy Council first obtained an express license under the Great Seal of England." Nor can it be said that Arundel was not wise in this precaution; he was, of course, the Bishop of Chichester, who was domestic chaplain and confessor to Henry VI, and was one of the four physicians entrusted with the king's health: we are told that there was violent suspicion that the king died of foul play, and that his body was exposed at St. Paul's "that every man might see him." It could hardly be charged against Arundel that he desired his master's death, as at the time Henry was pressing with the utmost vigor, Arundel's claims to the See of Durham; but no one could be sure in those days what an opponent in church or state might say.

Wandesford alleged that that suspicious plaster had "a strange smell and an infective quality striking the malignity of the disease inward, which nature otherwise might have expelled outward" (we have not yet got over bringing the measles out and keeping them from going inwards). He also said that the king after taking two drinks of the posset, refused a third, and that the king himself on a relapse

setting in said it was not from cold taken or some other ordinary cause but "it is that which I had from Buckingham."

The charge was made that these medicines had been obtained by Buckingham's mother who was notoriously given to irregular practices in medicine, and administered by Buckingham to effect the king's death. Buckingham, himself, told a plain story and one which bears the imprint of truth: he says that although the Royal Physicians had expressly forbidden any drink to be given to the king except what they prescribed themselves, the king knowing that Buckingham had recovered from a similar ague a short time before, asked him how he had recovered and what did him most good. Buckingham told him that one who had been the Earl of Warwick's physician had administered a plaster and posset-drink to him, and he wished that the king had taken the same at the beginning of his sickness; thereupon the king was very desirous to have the posset-drink and the plaster; Buckingham delayed sending for them, and the king, himself, sent J. Baker, Buckingham's servant for them; Buckingham "besought his majesty not to make use of it but by the advice of his own physicians, nor until it should be tried by James Palmer of his bed-chamber, who was then sick of an ague and upon two children of the town, and this the king said he would do . . . ." (This is, of course, the old medical rule with untried medicines: *Fiat experientum in corpore viti,* try it on an inferior.) The Duke left for London, and in his absence, the "plaster and posset-drink were brought and applied by his late majesty's own command."

He said further that when he afterwards visited the king and told him that there was "a rumour as if his physic had done the king hurt and that the duke had administered that physic to him without advice . . . ," the king "with much discontent answered thus: They are worse than devils that say it." This might all be true and yet the king know that he had taken harm from the unauthorized medicine; James was such a liar and hypocrite that he would be not unlikely to mislead even Buckingham who knew him so well. One old writer says: "Nor must I forget to let you know how perfect the king was in the art of dissimulation, or, to use his own phrase, king-craft": and tells of the last interview he had with the unfortunate and criminal Somerset. The king hung "about his neck, slabbering his cheeks . . . lolled about his neck" and sending a kiss to the equally guilty Countess, when he had already determined on their ruin; when the unhappy man left the room, he said: "I shall never see his face more."

The Commons were certainly informed that the king had blamed his relapse to Buckingham's medicaments; and full enquiry was made as to them. It turned out that they had been obtained—or at least some medicaments of the kind had been obtained—from a Dr. Remington of Dunmow in Essex, who had effected wonderful cures of "agues and such distempers with the same." One of the physicians who made a great to-do about the irregular medicines was obliged to flee the country on account of his allegations of poisoning by these medicines, Dr. Eglisham, left a book in which he says that "Sir Matthew Lister and he being the week after the king's death at the Earl of Warwick's house in Essex, they sent for Dr. Remington . . . who . . . said That one Baker, a servant of the Duke's, came to him in his master's name and desired him if he had any certain specific against an ague, to send it him, and accordingly he sent him mithridate spread upon leather." "But," the account continues, "Sir Matthew and I showing him a piece of the Plaster we had kept after if was taken off, he seemed greatly surprised and offered to take his corporal oath that it was none of what he had given Baker, nor did he know what kind of a mixture it was." Of these doctors, Eglisham and Lister are known to the biographers. Eglisham was a Scottish medical man of some repute, apparently of Leyden training, who was appointed Royal Physician to King James in 1616 and remained such till the king's death: after the death of the king, he had no hesitation in accusing Buckingham of poisoning him: he had to flee the country but he continued his accusations, and at length in 1626, he published his "Prodromus Vindictae," containing the charge; this is the work from which I have quoted. It is generally thought that professional jealousy had something to do with the charge, and his testimony has not received much credit; but to say that the charge was absurd is to ignore the nature of Buckingham. Sir Matthew Lister was an Oriel man, an M. D. of Basle, and physician to Queen Anne, wife of King James and later to King Charles I. I do not find that he corroborated Dr. Eglisham although he lived until 1656, thirty years after the publication of the Prodromus Vindictae. The mithridate which was supposed to have been spread on leather as a plaster for the king, was a well-known medicament, originally discovered and used by Mithridates, King of Pontus and Bithynia and much favored as an alexipharmic: it has long gone out of vogue.

It seems reasonably clear that none of the usual poisons was used, at all events; they were well-known: we find that Franklin, who was applied to by Mrs. Turner, who would now be called a

"Beauty-specialist," but in her own day was rather a witch, for the strongest poisons wherewith to poison Sir Thomas Overbury and get him out of the way of Somerset and his equally villainous Countess, saying that he "bought seven, viz., aquafortis, white arsenic, mercury, powder of diamonds, lapis costitus, great spiders and cantharides." Aqueforti, is, of course, impure nitric acid (HNO3): white arsenic, our ordinary arsenic: mercury is mercury sublimate, mercury bichloride: lapis costitus is a layman's misprint for lapis causticus, potassa cum calce, potassa fusa, potassa caustica of the Pharmacopoeias: spiders were once supposed to be poisonous, although old Dioscorides who knew everything said that softened and made into a plaster, and applied to the forehead and temples, they prevented ague—and I am prepared to prove that they were as efficacious, so applied, as nine-tenths of the medicines recommended by Dioscorides or any other writer before the 19th century.

Whatever the fact may have been, it is certain that within a very short time of the king's death, as appears by contemporary letters—"some Scotch doctors mutter at a plaister the Countess of Buckingham applied at the outside of his stomach."

The Duke made his defence which was brought down to the Commons, June 10: King Charles dismissed Parliament, June 15, most abruptly, and the Impeachment came to an end: a sham Information was preferred by the king's command in the Star Chamber, charging the same alleged offenses; the Duke put in his Answer and some witnesses were examined, "But the Cause came not to a judicial hearing in the Court."

A new Parliament was called for March, 1628: the Commons took up Buckingham's case at once; on June 12th, they presented a Remonstrance to the King, and on June 26th, Parliament was prorogued: on August 23rd, Felton removed the Duke beyond any further prosecution by the Commons and sent him before the final Judge.

What was the truth of the matter? It is notorious that many did not hesitate to charge King Charles with being at least an accessory after the fact to his father's removal, and to say that the favor in which the Duke was held by the new king was due to the fact that he had made him king: our modern thought of fair play revolts from the proposition. but not only "Scotch doctors," but many others could not be persuaded out of the horrible idea. It may have had its part in bringing about the tragedy of 1649; but in the result we must say "Not Proven."

There was certainly a strong current of feeling against the Duke after the king's death; several pamphlets still extant were widely circulated with the charges made bluntly. It may suffice to refer to one of these, preserved in the Harleian Miscellany, vol. v., pp. 211, sq.—intituled: *"Strange Apparitions, or The Ghost of King James,"* 4 to., London, 1642. This purports to be a dialogue by the ghost of Buckingham with the ghost of King James, which brought with it the ghost of Dr. George Eglisham: and later the ghost of Marquis Hamilton appears. The latter charges him with "two eminent murders, namely, of the King's Majesty and of me, the Lord Marquis of Hamilton"; and Eglisham says: "As I did once accuse thee unto the King and parliament, and the whole world, so I affirm again, that thou didst poison King James and the Marquis of Hamilton; and first I will prove the murder of the Marquis of Hamilton, who died first." He does not stop at these murders but goes on to say: "And, lastly, for fear that I, George Eglisham, should discover you as I have now done, to be the poisoner, I was sought to be murdered, but I fled to Holland; and there, by your appointment, I was stabbed and Killed." Buckingham is stricken and goes to "weep for grief"—in numbers, be it said, as everyone seems to have done in those days, from Shakespeare down or up.

> "Murder will out, and just revenge, though slow,
> Doth overtake the murderer, this I know
> * * * * * *
> For before Felton did my life conclude,
> I added murder to ingratitude
> * * * * * *
> But I was most ungrateful to my king,
> And Marquis Hamilton, whom I bring
> Both to untimely deaths; forgive my sin.
> Great king, great marquis, doctor Eglisham,
> All murder'd by the Duke of Buckingham."

After that one need not be astonished to learn that

> "This being said, the duke's ghost shrunk away."

It may be added that the biographers have not been able to learn the time, place or manner of the Doctor's death; but, of course, they did not consult Buckingham's ghost—it is rather suggested that he made his living in his latter years by counterfeiting the coin of the Realm, but that may be another of the slanders with which his age teemed; *quien sabe?*

CRIMINAL STATISTICS AND IDENTIFICATION OF CRIMINALS[1]

Foreword

The administration of criminal justice is admittedly not what it should be. Unquestionably this is in part due to our woeful lack of criminal statistics. We do not know how much crime there is in the United States or how many criminals are apprehended, tried, convicted, reformed or developed into confirmed recidivists. Manifestly it is impossible under these circumstances greatly to increase efficiency through tinkering with laws relating to crimes and criminal procedure. A proper system of accounting must first be installed. Only then will it be possible to hold the various parts of the machinery of justice responsible for the work which they are supposed to do.

Another matter of great importance at the present moment is the identification of criminals. Such figures as our committee has been able to gather from individual cities indicate conclusively that the ratio of arrests to crimes known to the police is far smaller than it is in England. While the Bureau of Identification in the Federal Department of Justice is of material assistance to the police forces of many cities, there is great need of further development.

We believe that both of these matters, criminal statistics and the identification of criminals, should be most carefully considered by the various state crime commissions. We are therefore submitting this report prepared by the secretary of the committee, Dr. Louis N. Robinson, in the hope that it will aid in arousing public sentiment to the need of developing these two constructive measures of reform.

Frank O. Lowden.

Criminal Statistics and Identification of Criminals

In our effort to understand and appraise that part of the machinery of criminal justice which takes hold of the criminal at the time of his conviction, we have found it necessary to make some study of the work of the other parts of the machinery, that is, of

[1]A report submitted to the National Crime Commission by the sub-committee on pardons, parole, probation, penal laws and institutional correction. The personnel of the Committee is as follows: Frank O. Lowden, Chairman; Louis N. Robinson, Secretary; Arnold Bennett Hall, Mrs. Jessie D. Hodder, Hon. Clark Howell, Sam A. Lewisohn, Hon. Sumner T. McKnight, Hon. George L. Radcliffe, Hon. Charles S. Whitman.

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A CURIOUS "WITCHCRAFT" CASE

William Renwick Riddell[1]

A charge of Witchcraft would now be met with a smile of derision in most of the civilized world, even by the illiterate. I have personally known only one woman reputed to be a witch; and she was only a "white witch," consulted as to the whereabouts of strayed cattle, stolen goods, etc. Probably Satan would not acknowledge her; but she did make—or was reputed to have made—astonishingly accurate discoveries or guesses for the advantage of those consulting her. Poor woman, she passed to her reward, whatever it was, more than half-a-century ago; and I have not heard of a Canadian witch, since—except, indeed one endued with a metaphorical witchery.

Two hundred years ago, such a charge was not so innocuous: true, there were already a few daring spirits who ventured to question the existence of diabolical powers given by the Prince of Darkness to deluded votaries, and while not actually directly challenging the divine command not to permit a witch to live, either interpreted it as applying to pretenders to supernatural powers or limited it to the Hebrews among whom such Satanic beings as witches might still be found. But the reality of witchcraft was believed in by practically all of every degree from king to hind, learned lawyer, physician, priest and philosopher to ignorant and illiterate peasant and boor, "tinker, tailor, soldier, sailor, rich man, poor man, beggar-man, thief."

That splendid collection of true stories, the *State Trials*, gives a good example of the estimate of the common people of England concerning witchcraft and of the consequences following a reputation for it, late in the 17th and early in the 18th century.

The story comes out in two trials: *Reg.* v. *Hathaway* and *Reg.* v. *Hathaway* et al. (1702), *14 Howell's State Trials*, 639, *sqq.*: 690, *sqq.*

Richard Hathaway became a servant of one Thomas Welling, a blacksmith in Southwark, Surrey, about 1697-8: he seems to have been neurotic to a degree, whether insane depends upon the definition of insanity but undoubtedly abnormal. After serving faithfully some two years, he was seized with fits, plainly epileptic "Jacksonian" fits

[1]Justice of Appeal, Ontario, Canada.

and not simply *petit mal;* and was sent to a hospital after "his master had spent a great deal of money with doctors and apothecaries and could get no cure for him."

Being put to bed in the hospital he took a fit, turning up the whites of his eyes, etc.; he seems also to have been semi-delirious if he was not malingering.

He remained in the hospital under treatment for some five months: he suffered from chronic constipation which did not yield even to liquid quicksilver, and he was weak and unable to walk firmly. After five months, he was discharged somewhat improved in health, but with the verdict that he was incurable. He had a relapse and was again admitted into the hospital: his symptoms were now more alarming although wholly consistent with epilepsy—he lay seven or eight days at a time without food or drink, his constipation continued in an even aggravated form, quicksilver administered did not operate and "the doctor wondered it should lie so long in his body," "his eyes were set in his head"—we are not told of his kidney condition. The constipation of epileptics as well as their sluggishness, fixity of the eyes, somnolent and stuporous condition lasting, perhaps, several days, all medical authorities agree on if all are not agreed as to the cause. See, e. g., Drs. Church and Peterson's convenient and useful handbook: *Nervous and Mental Diseases,* Philadelphia, 1911, pp. 641, 844, 845.

But it must be remembered that with the Romans, Greeks and practically every people in an early stage of civilization, as, for example, our Indians, epilepsy was the *morbus sacer,* the sacred disease, produced by no mortal cause, but supernatural in its origin and significance.

Counsel for Hathaway on his separate trial said that the "tenders," i. e., the attendants, at the hospital told him "that he must lie under some evil tongue," and in that way the first thought was raised in his mind that he was bewitched. It is but fair to Hathaway to say that his hospital nurse swears that he never in the hospital pretended to have been bewitched.

Being again discharged as incurable, he went to his master's: he now had, however acquired or suggested, the real or pretended belief that he was bewitched. Notwithstanding his conviction in 1702 as a cheat and imposter, I think he actually believed that he was bewitched.

That his master, Welling, the blacksmith, so believed, there can

be no doubt; and it is equally certain that many of the neighbors later shared the belief.

Mr. and Mrs. Welling being told by Hathaway that he was bewitched, began to "consider what person it should be that should have any evil designs against him: and at last they recollected that" Welling "had taken a room over the head of . . . Sarah Morduck, and she had gone in to the shop often and had given them very ill words, and she should be even with him one time or other; and, then [mark the logic!] they concluded this woman was the person."

Sarah Morduck (Murdoch), née Hearne, was the wife of Edward Morduck of Southwark, a waterman; she was a fruit-dealer and, except that she had a nasty temper and a sharp tongue, there does not seem to have been anything against her; moreover, no reason is given or suggested why even a "Saga, *Anglicé,* a witch," should torture a servant for his master's sin; but popular logic is past finding out.

A curious superstition took possession of Hathaway—he conceived the idea that by scratching Sarah Morduck and drawing blood from her, he would be freed from the bewitching. On September 25th, 1700, he went to her house and coming behind her as she was opening a window, attacked her from behind, scratched her face in several places till blood came, knocked out one of her teeth and tore her clothes. He said that he found great relief from this; and, no doubt, he did. The news was spread around the neighborhood that Sarah had bewitched Hathaway and that he had obtained relief by scratching her till the blood came: and when he had another attack in the same month, Elizabeth Willoughby, wife of Walter Willoughby, went with several other neighbors, and, leaving Hathaway at an adjoining street-corner, entered Sarah's house to take her out for him to scratch. She refused, Mrs. Willoughby struck her with her fist, and succeeded in dragging her out of the house, but Mrs. Sarah Hall came to her assistance and with difficulty got her back into the house again. The gang beset the house and threatened to pull it down unless the witch should be delivered to them; but Mrs. Hall called her husband who was in bed—it was about 8 o'clock in the morning— and Hall frightened them away.

Mrs. Willoughby, by the way, swore at Hathaway's trial that she believed that Hathaway was bewitched—she had been bewitched herself when she was a child and "a woman was taken on suspicion for it": and she added: "I flew over them all. . . . One held

me by one arm, another by the other, and another behind and I flew sheer over their heads." She could not tell Lord Chief Justice Holt what had become of the woman who made her fly: "I have been well ever since I was married."

An attempt was made to check the Hathaway scandal but with little success. On February 9, 1702 (1701, O. S.) the witch went to the Parish Church: the people threatened her and she took refuge in the Vestry where she was found by the Rev. Dr. Martin, the Rector. He made inquiries and determined to make an experiment to test the good faith of Hathaway. Visiting him, he found him affecting to be unable to speak or to see, but able to hear and express assent by holding up his hand. Dr. Martin told him that he had been informed that Sarah Morduck had bewitched him and that he obtained relief by scratching her, that he wished to see the experiment himself, and had brought her for the purpose. Hathaway assented: Sarah came to the bedside and spoke to him, and Hathaway was told to scratch her. The clergyman, however, had been told by Mrs. Welling that scratching another woman had no effect and had determined to see for himself. He had offered Mrs. Willoughby who was "a very big woman and very much unlike Sarah Morduck . . . . a shilling if she would let this man scratch her: She flew off, and said she would not suffer it for all the world," perhaps misunderstanding what was proposed or perhaps remembering her girlhood experience.

But a poor woman by the name of Johnson agreed to be scratched: and when the sufferer made to scratch Sarah's arm, Dr. Martin substituted Mrs. Johnson's: Hathaway thought to make sure that he had the right woman by feeling the arm two or three times from wrist to elbow and then razed the skin. The parson said: "You have drawn blood, and you may be satisfied"; Hathaway turned over on his back. Dr. Martin sent Mrs. Johnson away at once and stood by the bed with Mrs. Morduck. Hathaway opened his eyes took hold of Mrs. Morduck's apron and was able to see and speak. Dr. Martin told him of his mistake, Mrs. Johnson came in with her arm bleeding and "the fellow at this seemed very much cast down." Dr. Martin gave him some good advice, told Welling of the deceit and went away satisfied that the fraud had been thoroughly exposed.

But on returning in the afternoon about 5 o'clock he was assailed by Mr. and Mrs. Welling: he had ruined them, the man was worse than before and the clergyman had given it out as a cheat: did he get

any money by it?: two doctors were with Hathaway and they would swear that he was bewitched, etc., etc. And that was not all: the ungrateful Sarah had spread it abroad that Mrs. Johnson had been proved to be the witch and Johnson would have nothing more to do with her. She met Dr. Martin and covered him with reproaches for getting her into this trouble; and he had to placate the angry husband as best he could, by assuring his wife was not a witch.

Southwark was not convinced but rather confirmed in the opinion that Sarah was the guilty witch.

Shortly after this unsuccessful attempt at undeception, other and successful efforts were made to procure the unfortunate Sarah to be scratched by Hathaway: on February 11, 1702 (1701, O. S.) a gang of six men all disguised forced her out of her house to Welling's, and there Hathaway by the encouragement of the company "scratched her barbarously. . . . Welling's wife scratched her and tore her hair and face and pulled off her head-cloaths; then Welling kicked her two or three times . . . threw her on the ground, . . . stamped on her and bruised her so much that she had to keep her bed for a fortnight"—she was then thrown out on the street where she was picked up with "her face much torn in a most barbarous manner, and her legs, arms and body cruelly bruised and black."

Sarah did not take kindly to this treatment and declined to offer herself again to be scratched when requested to do so. Hathaway had long before developed alarming symptoms, fasting for a long time, vomiting bent pins and passing them *per alvum*, etc. The vomiting of the epileptic is a well recognized phenomenon: Church & Peterson, *op cit.*, pp. 635, 640: the pins were certainly a fraud consciously contrived to convince others of the bewitchment—and the deceit was ultimately detected.

The witch fled to London for shelter and Welling had her haled before the Alderman, Sir Thomas Lane, to compel her to allow Hathaway to scratch her: Sir Thomas said that to scratch her without her consent would be illegal: she agreed that she might be scratched if that would put an end to them troubling her, and she was scratched accordingly—whereupon Hathaway, who had been unable to eat or drink, partook of food and drink with avidity. This Sir Thomas Lane had previously refused her protection, as had another J. P., both apparently believing her a witch. Lane also insisted that she should be stripped and examined by women in his own house for teats sucked by Satan or other signs and tokens of witchhood; and

wound up by committing her to Wood-Street-compter. She was tried for Witchcraft at the Guildford Assizes and acquitted: while Hathaway was committed for a Cheat and Imposter.

He was sent for observation to the house of a Mr. Kensey, a surgeon: he refused to eat for two days; but Kensey and his maid, pretending to quarrel, framed a scheme on him, and he ate and drank heartily when he thought he was not observed. In like manner, his pretense of the cessation of natural excretions was fully exposed—and while hundreds of pins were found in his pockets, he could not vomit a single one if his hands were kept from his mouth or pass one *per alvum* if closely watched.

There can be no doubt of his "faking" evidence of his being bewitched; but I do not believe nor will any medical man believe that he did not actually think himself bewitched by Sarah Morduck.

He was tried as a Cheat and Imposter at the Surrey Assizes, 1 Anne, A. D. 1702, and was admirably defended by Serjeant Jenner: Lord Chief Justice Holt left the case most fairly to the jury, saying: "If you do believe upon the whole matter that this man has imposed upon the magistrate or upon the world, or endeavoured by counterfeiting these infirmities, to persuade people to believe that this woman was a witch and had bewitched him, then there is all the reason that can be to find him guilty. But if you believe he did not counterfeit, or that he was *non compos mentis,* or under any kind of delusions, you must acquit him." The Jury convicted without leaving the Box.

I think a modern physician would have said: *"Non compos mentis."*

At the same Assize, Welling, his wife and Mrs. Willoughby were convicted of a Riot and Assault.

We find it difficult to understand a state of society in which an innocent if ill-tongued woman could be so persecuted and tortured through an accusation by a half-crazy epileptic.

Nous avons changé tout cela.

an elderly lady with brain slightly weakened from vascular disease who, in order to disgrace her daughter-in-law, went in for shop-lifting. Here, too, obviously no single formula is of much value. It is not possible here to take up in any detail the great variety of sexually delinquent acts and to emphasize the rôle in such cases of a typical endowment, environmental influences in early life, the rôle of intercurrent diseases and of various types of brain disease.

As to punishment, the psychopathologist feels probably less at home than in relation to crime. As a physician he is usually asked to treat the patient whom he examines or at least to outline the treatment, and he is allowed to use his own language in formulating the diagnosis. In regard to the criminal he is not the authority to whom responsibility for dealing with the case is given and he may be asked to give his opinion in language which cramps his thought and distorts his meaning. As treatment should be fitting for the disease, so he feels that it would be well to make the punishment fit the crime. What it is that determines a fit is no easy problem. If the question were merely one of treatment the psychopathologist would have something to say.

As to the effect of punishment, opinions differ and the psychopathologist has no special contribution to make. The psychopathologist may emphasize the variability in the reaction of individuals to the same tests. Corporal punishment may do one child good, another child harm. Leniency and severity are not equally useful in children of different makeup. A punishment which, if brief, may be wholesome may, if protracted too long, be detrimental. Everyone recognizes that from the deterring standpoint the certainty and promptness of punishment are more important than the severity.

As to the vengeance wreaked by an outraged society on the criminal, that takes one into the field of ethics and anthropology.

WITCHCRAFT IN OLD NEW YORK

William Renwick Riddell[1]

In a publication by the State of New York: *Minutes of the Executive Council of the Province of New York . . . 1668, 1673,* Albany, 1910, appears a case of alleged Witchcraft.

In the "Towne of West Chester" in 1670 lived a woman, Katharine Harrison, widow of John Harrison of Wethersfield, Connecticut, whose daughter, Rebeckah, had married Josiah Hunt, son of Thomas Hunt, Sr., a man of some importance in the Town: Mrs. Harrison lived with this daughter and son-in-law.

She had had an unfortunate history: born in England, she came to America about 1651 and settled in Wethersfield, where she married in 1653. On complaint made, she was arrested for Witchcraft in 1669 and after being in prison some twelve months she was placed on her trial for that offense at Hartford, Connecticut. She was found Guilty by the Jury; the Court did not agree with this finding; and, May 20, 1670, the following Order was made:

"Cort. of Assistants Harford, May 20th, 1670.

"This Cort. having considered ye Verdict of ye Jury respecting Katharine Harrison cannot concurre with them soe as to Sentence her to Death or to a longer Continuance in Restraint, but doe dismisse her from her Imprisonmt., Shee paying her just ffees to ye Goaler; Willing her to minde ye performance of her Promise of removing from Weathersfield wch. is that, as will tend most to her own Safety and ye Contentmt. of the People who are her Neighbours.

"Daniell Garrad is allowed for Keeping Goodwife Harryson five pounds."[2]

She came to Westchester and lived with Josiah Hunt and his young, 16-year-old, wife, Rebeckah with whom she became involved in litigation over some property which the young woman claimed had been left her by her deceased father. It may be that this litigation had something to do with the charge made against her the same year.

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[1]Justice of Appeal, Ontario, Canada; Associate Editor of this Journal.

[2]About $12.50. The order is "Extracted out of y^e^ Records of y^e^ Court" by "John Allen, Secr.," op. cit., vol. 1, p. 54. See also *"Records of Court of Assistants,"* vol. 1, pp. 1-17; Taylor, *"Witchcraft Delusion in Connecticut, 1647-1697,"* New York, 1908, pp. 47-61, 153.

However that may be, we find at "Ye Fort . . . Before the Governor," Colonel Francis Lovelace, a complaint made by "Thomas Hunt Senr. and Edward Waters on behalf of ye Towne of West Chester against a woman suspected for a Witch who they desire may not live in their Towne" came on for hearing. Mrs. Harrison appeared "with Capt. Ponton[3] to justify her selfe."

The Petition of Hunt and Waters was read "as also another from Jamaica against her settling there."

The story of her life and of her trial at Hartford was told[4] and an Order made by Lovelace:

"Whereas Complaint hath beene made unto me by ye Inhabitants of West Chester agt. Katherine Harrison, late of Weathersfeild in his Maties. Colony of Conecticott, widow. That countrary to ye consent & good liking of ye Towne she would settle amongst them, & she being reputed to be a person lyeing undr. ye Suspiccon of Witchcraft hath given some cause of apprehension to ye Inhabitants there, To ye end their Jealousyes & feares as to this perticuler may be removed, I have thought fitt to ordr. & appoint that ye Constable & Overzeers of ye Towne of West Chestr. do give warning to ye said Katherine Harrison to remove out of their prcincts. in some short tyme after notice given, & they are likewise to admonish her to retorne to ye place of her former abode, that they nor their neighbours may receive no furthr. disturbance by her, Given undr. my hand at ffort James in New Yorke this 7th day of July, 1670.

Francis Lovelace."[5]

Being duly notified, the widow refused to obey the order; and the Inhabitants of Westchester making complaint to the Governor, an order was made, August 20, 1670, for her and Captain Ponton to appear before Lovelace at "ffort James in New Yorke" on Wednesday, August 24, when "those of ye Towne that have ought to object agt. them doe likewise attend, where I shall endeavor a Composure of this difference betweene them."

On August 25, the Governor gave his decision in the form of an Order: he recited that several addresses had been made by "Inhabitants of West Chestr. on behalfe of ye rest desiring that" she should be ordered to remove "and not permitted to stay wthin. their jurisdiction upon an apprehension they have of her grounded upon some

[3]Captain Richard Ponton or Panton of Westchester with whom she had gone to reside, op. cit., vol. 1, p. 53, note 1; vol. 2, p. 391.

[4]Op. cit., pp. 52-54.

[5]Op. cit., vol. 2, pp. 390, 391.

troubles she hath layne undr. at Wethersfeild upon suspition of Witchcraft."

From this it would appear that the widow had not been practising anything in the way of Witchcraft in New York: and it was only the bad repute she had brought from "Conecticott" that excited the apprehensions of the Westchesterians.

Lovelace goes on to say that the reasons for these apprehensions did not so clearly appear to him, "Yett notwthstanding to give as much satisfaction as may be to ye Complets. who prtend their feares to be of a publique Concerne, I have not thought fitt absolutely to determyne ye mattr. at prsent, but do suspend it untill ye next Genrll. Cort. of Assizes, when there will be a full meeting of ye Councell & Justices of ye peace to debate & conclude ye same, In ye meane tyme ye saide Katharine Harrison wth. her Children[6] may remaine in the Towne of West Chestr. . . . . wthout disturbance or molestation, she having given sufficient security for her Civill carriage & good behaviour."[7]

While Lovelace was thus prudent in determining to leave the decision to a Court, he was equally prudent in looking after the interests of his master—if Mrs. Harrison should be found guilty of Witchcraft, that being a Felony, her goods would be forfeited to the Proprietor, the Duke of York, whose representative the Governor was and who owned the Colony. While the rule was that a felon might, *bonâ fide,* sell his chattels for the sustenance of himself and his family before conviction—in that respect differing from the rule as to real estate, the forfeiture of which on attainder had relation to the time of the act committed—still they were sometimes collusively and *malâ fide* parted with, in which case the law would reach them.[8]

It was then a wise precaution to have an inventory taken of her chattels: accordingly the Governor the same day gave an Order to "ye prsent Constable of West Chester . . . to take an Account of such Goods as have lately beene brought from out of his Maties. Colony of Conecticott unto Katharine Harrison & having taken a Note of ye Pticulers that you retorne ye Same unto me. . . ."[9]

[6]"John and Katharine Harrison were married on May 4, 1653, and had three daughters of whom Rebekah, born February 10, 1654, was the eldest": op. cit., vol. 1, p. 53, note 2. The children here referred to are the two younger daughters.

[7]Op. cit., vol. 2, pp. 392, 393.

[8]For the whole delightful doctrine of Forfeiture for Crime, see Blackstone's *"Commentaries on the Laws of England,"* lib. iv, pp. 381-389: on the law in such a case as this, especially at pp. 387, 388.

[9]Op. cit., vol. 2, pp. 391, 392.

The widow was bound over to appear before the General Court of Assizes held in the city of New York: she did so, and the Court, October 7, 1670, released her from her recognizances and gave her liberty "to remaine in the Towne of West Chester where shee now resides or any where else in the Governmt. dureing her pleasure," there being no other charge against her.

But her troubles were not over: ffrancis (or Robert) Yates[10] had possession of some of her papers entrusted to his care by her and refused to give them up, claiming to have a lien on them: she applied to the Governor, who, April 7, 1671, gave an Order to the Constable and Overseers to cause the delivery to her or her order of "all Papers or Writeings left by her in Trust with him or that hee Hath otherwise contrived of hers into his Custody. . . . If ye said Robert Yates hath any prtences of Debt, Accot. or Damage against ye said Katherine Harryson ye due Course of ye Law ought to be prosecuted & noe person allowed to be Judge in his own Cause."[11]

Worse was to follow: her daughter's husband and his father, Hunt, had brought an action against her for the daughter's marriage portion: she wished to remove her goods from the inhospitable Town, but at the instance of the plaintiffs, the Constable of the Town "layd an Attachmt. upon her Goods as shee was about to remove them from yor. Towne as also upon ye Boate of Theophilus Ellsworth who was hired to Transport them; ye wch. is contrary to Law for any Constable without a Justices Warrant to Attach upon ye Accots. of Debt above ye value of ffive pounds. . . ." She applied to the Governor, denied that she had made "any Engagement to pay any Summe of Money to her Daughter in Marriage with her Husband," tendered "Security to make Answer to ye Suite of ye said Thomas Hunt and his Son": and the Governor made an Order, May 19, 1671, to the Constable to release goods and boat "takeing Mr. ffrench his Engagement that ye said Widdow Harryson by her selfe or Attorney shall make Answer to their Complaint at ye next Court of Sessions to be held at Jamaica for ye North-Rideing. . . ."[12]

Two months afterwards, July 17, 1671, she obtained an Order from the Governor addressed "To any of ye Constables or other

[10]He is in the Governor's Order called both "Francis" and "Robert."

[11]Op. cit., vol. 2, p. 393.

[12]Op. cit., vol. 2, pp. 393, 394. This seems to have been a different suit from that already referred to as brought by daughter and son-in-law for property said to have been left to the daughter by the deceased John Harrison: op. cit., vol. 1, p. 53, note 1; see *ante* in the Text.

Officrs. upon Long Island or other parts within this Governmt." as follows:

"These are to require you to aid & Assist Katharine Harryson Widdow or whom shee shall employ in makeing Enquiry after & findeing out such Goods as belong to her; ye wch. (if found) you are to cause to be delivered into ye possession of or to whom shee shall appoint. . . .

ffras: Lovelace."[13]

No further documents are forthcoming in this case: the terrible effects of even a suspicion of Witchcraft appear here most clearly—every one seems to have thought that they might take her goods with impunity and that she was a mere outlaw, a *caput lupinum.*

There was a previous case of alleged Witchcraft: at the Assizes held October 2, 1665, Ralph Hall and his wife Mary, both of Brookhaven, were charged with causing by Witchcraft the death of George Wood and of an infant child of Ann Rogers, his widow.

The man was bound over "Body and Goods" in a recognizance for his wife's appearance "at the next Sessions and so on from Sessions to Sessions, as long as they stay wthin. this Government."[14] Apparently this was *in terrorem* and as a strong inducement to emigrate.

Somewhat later, an Indian is suspected of having been bewitched.

The Earl of Bellomont, reporting to the Lords of Trade (the Committee of the Privy Council dealing, *inter alia,* with Colonial matters), July 26, 1700, says:

"Aquendero, the Chief Sachem of the Onondage Nation, who was Prolocutor for all the Five Nations at the Conference I had two years ago at Albany, has been forc'd to fly from thence, and come and live on Coll. Schuyler's Land near Albany: Aquendero's son is poyson'd and languishes, and there is a sore broke out on one of his sides, out of which there comes handfulls of hair so that they reckon he has been bewitch'd as well as poyson'd."[15]

[13]Op. cit., vol. 2, pp. 394, 395.

[14]Op. cit., vol. 1, p. 53, note 1; *"Court of Assize,"* vol. 2, pp. 38-42.

[15]"*Documents Relative to the Colonial History of the State of New York . . .,*" Albany, 1854, vol. iv, p. 689. He follows with a lurid story of Decannissore, an Onondaga Sachem who married a "praying Indian in Canada . . ." who had been "instructed by the Jesuits, . . . taught to poison as well as to pray. The Jesuits had furnish'd her with so subtill a poison and taught her a legerdemain in using it; so that whoever she had a mind to poison, she would drink to 'em a cup of water, and let drop the poison from under her nail (which are always very long, for the Indians never pare 'em) into the cup." She poisoned a multitude of the Five Nations well affected to the English. She came

With such symptoms verified, no one could quarrel with the diagnosis—and the prognosis was necessarily very dark.

The belief in Witchcraft persisted amongst the Indians of New York until well into the Nineteenth Century, if even it can be said to be quite extinct at the present time—it certainly is found widely prevalent among the Pagan Indians of the Grand River, Ontario.

Mary Jemison, the "White Woman of the Genessee," who was captured in 1758 at the age of 15, by the Senecas, and adopted into the tribe, successively married two Indians and remained one of the Senecas until her death in 1833, tells us:

"It was believed for a long time, by some of our people, that I was a great witch, but they were unable to prove my guilt, and consequently I escaped the certain doom of those who are convicted of that crime which, by the Indians, is considered as heinous as murder": *A Narrative of the Life of Mary Jemicson* . . . 22nd (and best) edition, New York, 1925, p. 143.

In the Appendix to this work by Dr. Seaver, published in 1824, he says of the Senecas: "In no instance is their credulity so conspicuous, as in their unalterable belief in witches. They believe there are many of these, and, that next to the author of evil, they are the greatest scourge to their people . . . to whom the evil deity has delegated power to inflict diseases, cause death, blast corn, bring bad weather and in short to cause almost every calamity. . . . Mrs. Jemison informed us that many who had been charged with being witches, had been executed in almost every year since she has lived in the Genesee." An Indian reported that he saw a squaw have fire in her mouth, and she was killed immediately. "Mrs. Jemison . . . was present at the execution. She also saw one other killed and thrown into the river. Col. Jeremiah Smith . . . saw an Indian killed by his five brothers . . . with their tomahawks: he was . . . fortunate enough when on a hunting party to kill a number of deer while his comrades failed of taking any," and so was a witch. "Col. Smith also saw a squaw who had been convicted of being a witch, killed by having small green whips burnt till they were red hot but not quite coaled, and thrust down her throat. From

---

from Canada on a visit to New York Colony and poisoned many, among them a young "Protestant Mohack." A near relation of his seeing her in Albany, "cries out with great horror that there was that beastly woman that had poison'd so many of their friends and 'twas not fit she should live any longer in the world to do more mischief; and so made up to her and with a clubb beat out her brains."

And surely no one could say that it did not "serve her right."

. . . trifling causes thousands have lost their lives . . . the pagans will not suffer 'a witch to live' ": pp. 173-175.

In February, 1824, a celebrated Pagan chief Corn Planter died, and a Christian Indian, Prompit, a Tuscarora, was accused by some of the old-fashioned Indians of killing him by witchcraft—but he successfully defied them: p. 179.

About 1820, Soongiso or Tommy Jemmy put to death a squaw accused of witchcraft: he was arrested and put in gaol in Buffalo; the next morning an angry band of warriors gathered in the streets to release him but were persuaded to return to their homes and remain quiet until the appeal to the justice of the White Man should be found ineffectual. Tommy Jemmy was acquitted, which was considered a triumph for the Seneca Nation, of the unwritten decree of whose Council he had been the executioner: pp. 247, 248.

The delectable story is told of Buckinjehillish, a very old Indian warrior, who angered the Council by saying that only the ignorant made war but the wise men and the warriors did the fighting. He was accused of witchcraft for living so long, and "because he could not show some reason why he had not died before, he was sentenced to be tomahawked by a boy on the spot—which was accordingly done": p. 177.

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A SUPERIOR COURT JUDGE, A CONVICTED CRIMINAL LIBELLER

William Renwick Riddell[1]

Today we read of a Superior Court judge who is trying a murder case in a certain state, having, himself, been the other day acquitted of murder—he said that he "simply had to shoot." So, too, we know of a gentleman who became the chief justice of Newfoundland, who having been acquitted of being an accessary to murder—he had been the second in a fatal duel, in which in old Toronto a prominent barrister had slain an equally prominent law student—and when the principal had been acquitted, of course, he as a supposed accessary, had to be acquitted also—"no crime, no accessory" is good law. After this acquittal, I say, he was indicted for murder, of which he was undoubtedly guilty in law; but the jury did not convict. This did not prevent him becoming a judge *pro tem.* in Upper Canada, and a chief justice in Newfoundland.

But I have never heard on this Continent, where we do so many queer things, of a Superior Court judge being convicted of criminal libel; and we have to go to old England for such a thing.

I am not referring, either, to the evil times—for erring judges, at least—of the Plantagenets or of Charles I; but within the Nineteenth Century, when the Parliamentary title to the Crown was well recognized, and the Hanoverian Line was firmly seated on the Throne.

The offender was not an English judge, but hailed from that most distressful country across the Channel; and his name was Robert Johnson, his position, Justice of the Court of Common Pleas in Ireland.

Johnson was a man of prominence before the Union, of which he heartily approved; he had been a member of the last Parliament of Ireland before the Union; and had supported Castlereagh in the measure for which he has been heartily cursed by generations of Irishmen, who look upon his suicide as a just retribution for his treason to his country. Almost immediately after the Union, Johnson was made a judge of the Court of Common Pleas at Dublin; his conduct in that position has never been adversely criticized, it was creditable in every respect. The only expression of opinion by which

[1]Justice of Appeal, Toronto, Ont.; Assoc. Editor of this Journal.

he is now remembered is really not to be credited to him but to Chief Justice Fletcher of the Court of Common Pleas of Ireland on the trial of one Fenton for the murder of Major Hillas whom he had slain in a duel: "Gentlemen, it is my duty to lay down the law to you, and I will. The law says the killing of a man in a duel is murder, and I am bound to tell you it is murder; therefore in the discharge of my duty, I tell you so; but at the same time, a fairer duel than this I never heard of in the whole *coorse* of my life." This is not wholly unlike the charge of the Chief Justice of Upper Canada, (Sir) John Beverley Robinson, on the trial at Brockville, Upper Canada, in 1833 of the young law student, John Wilson, afterwards to become a judge of the Court of Common Pleas in Upper Canada, for the slaying of another young law student in a duel: "Juries have not been known to convict when all was fair."[2]

For some reason, Mr. Justice Johnson became dissatisfied with the administration in Dublin, and in an evil moment be committed to paper, language that was offensively derogatory to the Earl of Hardwicke (the Lord Lieutenant) to Lord Redesdale, the Lord Chancellor, and to Mr. Justice Osborne, puisné justice of the Court of King's Bench, as well as to certain inferior officials. This would have done no harm if he had kept it to himself; but with what could only have been an intention to make trouble for the government at Westminster as well as at Dublin, he sent it anonymously to William Cobbett in London, who was then (as generally) annoying the government by attacks in his famous *political Register.* Cobbett promptly published the contribution; and was in 1804 convicted of libel for doing so. Nor was this all; he was sued by Plunkett, the Solicitor-General of Ireland, in the Court of King's Bench at Westminster, and a verdict of £500 was given against him by a jury after only twenty minutes' retirement.

Then the authorities determined to proceed against the author, who, of course, was the person really responsible. It was not thought advisable to prosecute in Ireland—Irishmen were then as often largely "agin" the gover'ment"; and advantage was taken of a statute passed with quite a different object, that of (1804) 44 George III, cap. 92, being an "Act to render more easy the apprehending and bringing to trial offenders escaping from one part of the United Kingdom to the other . . ." A warrant was issued signed by the Chief Justice, Lord Ellenborough at Westminster, given to an officer who took it to

[2]See my article, *"The Duel in Early Upper Canada,"* Journal of the American Institute of Criminal Law and Criminology, Vol. 6 (July. 1915), pp. 165 sqq.

Dublin, where it was endorsed by J. Bell, J. P., of the County of Dublin—this was the first time the Act mentioned was put in force.

The officers of the law went to the residence of Mr. Justice Johnson, about two miles from Dublin, and informed him that he was under arrest. The justice was seriously ill, having suffered what appears to have been a paralytic stroke. He was able, however, to take refuge in the house of the Chief Justice of the Court of King's Bench in Dublin and claim his protection. Lord Chief Justice Downes directed the issue of a writ of habeas corpus, returnable *instanter,* and called to his assistance all the judges (except Osborne, of course, as he was personally interested). Three of the judges thought that the statute did not apply and that Johnson should be discharged; three thought that it did apply and that he should be remanded into custody, while two declined to give any opinion. The Chief Justice thereupon referred the matter to the Court of King's Bench; and after long and learned—not to say impassioned—argument, the Chief Justice and Mr. Justice Daly agreed that the warrant was valid, while Mr. Justice Day was of the contrary opinion. Counsel for Johnson, among them the celebrated Curran, were not content, and took out another writ of habeas corpus returnable in the Court of Exchequer. In that Court, Lord Yelverton, Lord Chief Baron, and Maclelland and George, BB., were of opinion adverse to Johnson while Smith, B., held the contrary.

Brought to England, the justice was placed on his trial at the bar of the Court of King's Bench at Westminster in June, 1805; a demurrer was filed and overruled; and the actual trial began November, 1805. Splendidly defended as he was, and before a scrupulously fair court, Ellenborough, C. J., Grose, Lawrence and Le Blanc, JJ., he was convicted; and there can be no doubt of the justice of the verdict.

But the dictates of humanity were listened to by the government; it was recognized that the unfortunate article owed its origin to the justice's ill-health; and in Trinity Term, 1806, a *nolle prosequi* was entered by the Attorney-General, Sir Arthur Pigott; and, to the credit of the administration, be it said, Mr. Justice Johnson was allowed to retire on a pension.

Should any lawyer wish to know more of this interesting case, let him consult the thrilling pages of 29 *Howell's State Trials,* coll. 81, *sqq.*, or Volume 6 of the Osgoode Hall Collection of Trials in pamphlet form.

FACTORS FOR PREDICTING PAROLE SUCCESS

Howard G. Borden[1]

(Tables of original data from which the following article is drawn are available at the author's office for those who may be interested in them. They are too voluminous to be published here.)

Inspired by the article by Professor Sam Warner[2] on the results of parole from the Massachusetts Reformatory and by the critique by Hornell Hart,[3] the writer decided to essay the subject. With the assistance of R. M. Beechley, the writer has compiled a considerable weight of statistics on factors which might be considered as possible determinants of parole success. This was a study made with data at hand on two hundred and sixty-three consecutive paroles, ages seventeen to thirty-five, from a reformatory for young men. These boys were paroled between July 1, 1923, and June 30, 1924. This data was collected August 1925, from both the institution and from the parole folders of the boys. Needless to say, a very large percentage of the information in the folders could not be handled statistically, as it was in descriptive form. The amount of information in each individual case was considerable. No attempt was made to devise special instruments, as a part of the study was really aimed to find the value of the present statistics. The study was attempted not so much with the idea that a complete solution would be had as with the feeling that any tangible presentation was better than none at all.

Appendix A is the table of original data showing the factors used, which are as follows:

1. Age at parole.
2. Nativity; N. (Native White), F. P. (Foreign Parents), F. B. (Foreign Born), C (Colored).
3. Mental Age at parole.
4. Diagnosis of intelligence; F. (Feeble-minded), I. (Inferior), A. (Average), S. (Superior).
5. Number of days lost in the institution for infractions of discipline.
6. Nature of offenses committed in the institution; P. (Perfect), M. (Minor), O. (Occasional serious), C. (Chronic).

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[1]Director of Statistics, Department of Institutions and Agencies, Trenton, N. J.

[2]Journal of Criminal Law and Criminology, XV, 2, Aug., 1924.

[3]Journal of Criminal Law and Criminology, XV, 2, Aug., 1924.

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organizations and as individuals in public health, in social hygiene, in churches, in clubs and in other groups but it finally came to rest upon the laps of the progressive and public spirited women of the community, for many years waiting their emancipation from lack of sympathy with the handicapped of their own sex, from their reluctance to appear publicly in their behalf, from their inexperience in cooperative effort and from their lack of influence in the body politic.

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THE "KINDLY SCOT" AND HIS "AIN LA' "

William Renwick Riddell

"Dang thae Englishers, onyway," I heard burst out of the mouth of Sandy MacIntosh, *Consule Planco,* and more than six decades ago. Sandy was a Scotsman—not a Scotchman, who was a creature wholly unknown to him—who sometimes condescended to help us in our harvest. He looked up from the Edinburgh "Scotsman," and glared in my direction. I humbly asked the reason of his heart-felt utterance and he vouchsafed the reply, "They hae ruint Scotland, hae made it no fit for a kindly Scot tae leeve in, spiled oor coorts, spiled oor la' an we micht as weel be English an' dune wi' it."

I recall the sentiments of my old friend, Sandy, when the other day, there came to me from the Scottish History Society, their latest publication, *The Sheriff Court Book of Fife, 1515-1522,* by William Croft Dickinson, M. A., Ph. D., Edinburgh, 1928. I read the volume with great interest; and soon learned something about the "la'," the pestilent Englishers had "spiled," I found how "kindly" these ancesters of Sandy and myself had been, before the corrupting influences from the south had made themselves felt.

The book contains a transcript of the proceedings of the Court mentioned for some seven or eight years.

As in England (see Blackstone's *Commentaries on the Laws of* England, Vol. I, pp. 339, sqq.), so in Scotland, the Sheriff was the official, entrusted with all the King's business in his County, financial, administrative, military, and not least, judicial. While in England, from various causes, the judicial part of his duties dwindled so that in time it became almost negligible, in Scotland his Court maintained its importance. The jurisdiction was both civil and criminal; in this paper I concern myself with the criminal jurisdiction only. This is one of the parts of "auld Scots la' " in which the malign influence of the Southron is believed to have been exercised. The Sheriff was precluded from cognizance of the major offences, the four Pleas of the Crown, Murder, Rape, Robbery and Fire-raising being reserved to the Justiciar: but he dealt with murder when the offender was taken "red-hand," and theft when the thief was taken "with the fang" (which is a little more graphic than the English "taken with the mainour"), also manslaughter and general breaches of the peace.

The jury was always of an uneven number, generally from the vicinage, but chosen not by the Crown but by the accused in conjunction with the officers of the court. Sometimes jurors were found objecting to serve, and this was considered an indication of sympathy with the accused—I see the Commentator says that those accused were generally "arrant rogues." There was no great delay: there were no pleadings, a simple arraignment on an indictment beginning with the words "You are indited and accused . . . ," the accused pleading, making his statement denying the charge (somewhat as in the Georgia practice to-day), putting himself upon "God and the Country" just as he would in England, the "Assize," i. e., the jury hearing what was alleged, retiring from court and bringing in a verdict, not necessarily unanimous, acquitting (rarely) or condemning. If the latter, doom was pronounced and execution carried out at once. These were not the days and Scotland not the place for delays, appeals, etc.; hanging was not so bad in those days—it is of record that a Scottish mother urged her son to "gang awa' an' be hangit tae please the Laird." As the editor of this work says, "Such was the procedure, concluded in one sitting, and if the accused was found guilty, sentence was often carried out immediately on the same day."

I find six criminal cases reported in this volume and it may be worth while to state them as showing the tender mercies of the "kindly Scot" in the first quarter of the 16th century.

On July 7, 1540, Walter Hird was "Inditid & folowit be toung be" several persons of stealing "fra thame . . . ten scheipe . . . tane (taken) with the said Walter . . . : The quhilk thift the said walter denyit & tuke hyme to gode & the knawlaige of the . . . assise . . . ." The assise "riply & weil avisyt deliuerly enterit & be the mouth of Thomas ball ingall, delieurit that the said walter had stolen the said scheipe . . . & thane the Juge geif dome of courte tharupone that the said walter suld be had to the gallous for the said thift & hangyt quhill he war ded quhilk wes done in continent but (i. e., without) dilay."

On January 11, 1517, Walterus robertsone was found guilty of the theft of two sheep 'et condemnatus fuit ad mortem et per judicium Curie suspensus," as the formal record has it, i. e., "and was condemned to death and hanged by judgment of the court."

On October 2, 1520, "patrik Reid" was "accusyt for the thyftwys (larcenous) steling of ane ox," found guilty, and "dome gevine up—one him that he sould be hangyt on ane gallus quhill he wer deyd."

And we may be quite certain that these kindly Scots would see to it that he was good and "deyd," before he was "lifted doon."

On July 23, 1521, one "Robert lyddale" was found guilty of "thyftwys steling . . . twa scheip" and several other articles: the assise "coucht noucht qwyt" him and "It wes decernit decretit & gevine sentens that the said Robert lyddale sould be haid to the gallos & tharon hangyt quhill he wer deyd & tharupone dome gevine."

So much for simple theft; for "slauchtir" the punishment was different. Ninian Forster "strak . . . Johne low . . . witht ane . . . staf upone his heyd . . . his harnys (brains) come furtht . . . and . . . than . . . he straik him witht ane knyf" and killed him. Found guilty of "slachter," May 7, 1521, he was condemned "to be haid to the heyding hyll & thar his heyd to be strikine fra his body."

So, too, on June 22, 1522, "williame andersone" was found guilty of "the cruell slauchtir of . . . James Quharfor" and the "dempstar, murdow hob" was directed by the Sheriff "to give dome tharupone that the said williame andersone sould be hed to the heyding hyll & thar to stryk of his heyd fra his body for the committing of th said slauchtir."

I find some "Scots cousins" of my own in the assises at these courts; but none of them seems to have been so fortunate as to take part in any of these kindly acts—no doubt, to their great regret, for these Scots of the olden time were a dour folk, ill to "meddle wi'," and not a little blood thirsty.

These were the days of real courts, respected by all, and not troubled with the pragmatic interference of appellate courts, and royal clemency. The sinner was hanged before any steps could be taken to save him from a well-merited fate, and technicalities had no place in that jurisprudence. Alas, even the Scot must say Nous avons changé tout cela.

The number in the jury in these Scottish courts reminds me of a circumstance in early Upper Canada: before the courts were fully manned with lawyers, a member of the Executive Council received a commission as judge *ad hoc;* he had been educated as a medical practitioner, and not being familiar with the practice of the courts, he expressed his astonishment that the number on the jury was even, and asked how it was certain that a verdict should be obtained, as the jury might divide evenly—His contempt when informed that the jury must be unanimous was profound; and he expressed it in language comparable with that of the immortal Bumble, who had no hesitation in saying that "the law is a ass."

THE KING'S EVIL AND HIGH TREASON

William Renwick Riddell*

What was known in England as the King's Evil[1] was also called Scrofula or Struma: it manifested itself generally by swellings or sores on the neck. We now recognize it as a form of tuberculosis: Formerly, it was supposed to be cured, or, at least, much benefited by the afflicted person being touched by the hand of the King. It is not quite certain when this superstition obtained a firm footing in England, but thousands were "touched" during Tudor and Stuart times.[2]

The same sanative power was claimed for the Kings of France, the enthusiasts of either country claiming that their own King had the only true healing touch and the other's alleged virtue was apocryphal and an impudent pretence.

The practice continued through the reign of Queen Anne, the celebrated Dr. Samuel Johnson being one of the last to receive the Royal touch.

The belief was prevalent that only the rightful monarch, the King "by the Grace of God," possessed this gift: and the success of Charles II when in exile in healing by his touch those afflicted with this disease, was hailed by his adherents as a proof of his divine right to the throne—just as, after the Revolution, a similar alleged success on the part of the "Pretenders" brought comfort and joy to the hearts of loyal Jacobites.

It may be that it was because the Hanoverian monarchs knew that they were not Kings "by the Grace of God," but Kings "by grace of an Act of Parliament," that none of them has ever ventured on this superstitious nonsense—and for a couple of centuries, it has been laughed at.

From what has been said, it will be manifest that in the reign of Charles II it was a dangerous thing to express disbelief in the Royal magic which evidenced the King's right to the throne. In the

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[1]For a full account, descriptive and historical, of the "King's Evil," see my article, *"Touching for the King's Evil,"* New York Medical Journal and Record, (December 19, 1923).

[2]Some writers hint—to put it mildly—that the custom of a coin of some value being paid to every one touched, out of the Royal Treasury, had something to do with the crowds of applicants.

common belief, if Charles could not heal the King's Evil by his touch, he was not a rightful King—and to contend that was Treason.

And this found in 1684, Thomas Rosewell, Clericus, a Presbyterian Minister, who had some ten years before come up from Wiltshire to London and was there preaching in "Conventicles"—he "had the reputation of a very honest man, a good scholar and a pious man," but this did not save him from trouble. On Sunday, September 14, 1684, Rosewell preached at a Conventicle held at the house of Captain Daniel in Rotherhithe. One Mrs. Elizabeth Smith (*nomen notabile*) who was in the habit of attending such Conventicles—"unlawful assemblies," by the way—was, according to her own story, one of his hearers and was so horrified at what he said that when she went home she put the words down in black and white and shortly thereafter went to the Recorder of London and "discovered it."

The result was that at the following Session of Oyer and Terminer held at Kingston in the County of Surrey, a True Bill for High Treason based upon the words it was alleged he had used, was found against him.

Brought up on Habeas Corpus to the Bar of the Court of King's Bench, he was arraigned Saturday, October 25, 1684, before a court composed of Chief Justice Jeffreys, and Justices Walcot and Holloway.

Jeffreys, a Puck with the callous cruelty of a fiend, was one of the most noted men of the day—a student-at-law in the troubled times between the execution of Charles I in 1649 and the Restoration in 1660, there was doubt of his having been regularly called to the Bar although undoubtedly "admitted" in the Inner Temple, May 19, 1663 (Lord Campbell says he was Called, November 22, 1668); but after being Common Serjeant of London 1671, he, in 1683, was afterwards Recorder of London, and in 1678, became Lord Chief Justice, and, later, in 1685, Lord Chancellor and a Peer of the Realm. He was at all times a slave to the King obeying his slightest intimation, but he had a fair knowledge of law though many did not hesitate to say that he was "most ignorant but most daring," "he had neither learning, law nor good manners" while his master, Charles II, said that he "had more impudence than ten carted women of the streets." Undoubtedly, he would get drunk, but that was then an amiable failing. He was considered "scandalous, vicious and was drunk every day besides a drunkenness in his fury that liked enthusiasm: He did not consider the decencies of his post" as Chief Justice. Rosewell could not possibly have had a more unfavorable Judge—he considered Conventicles, hot-beds of treason, "base sinks of rebellion," and those who preached at them, "black-coat dissenters to the Church of England" as

they were, did so not only against the law of the land but against the laws of Almighty God, while those who frequented them, he characterized as "factious, pragmatical, sneaking, whining, canting, sniveling, prick-eared, crop-eared . . . fellows, rascals and scoundrels"—"base profligate villains." The ultimate fate of Jeffreys is well known. On the landing of William of Orange, he was taken in Wapping, disguised as a sailor, and taken before the Lord Mayor of London; committed to the Tower, he died largely of fright—as did a Canadian condemned to death by me, some years ago. In my judgment, Lord Campbell in his *Lives of the Lords Chancellors,* utterly fails to appreciate the ability and scholarship of Lord Jeffreys. The contemporary jingle is not quite forgotten:

> "Jeffreys was prepared for sailing
> In his long tarpaulin gown
> Where is now his furious railing
> And his blood congealing frown?"

The Puisnés were respectable characters but, with Jeffreys on the Bench, negligible.

The accused asked to be allowed Counsel, and was, of course, refused. The absurd rule that prisoners charged with Treason should not be allowed Counsel, deriving from the Civil Law principle that a prisoner cannot be convicted except upon conclusive evidence, and, therefore, Counsel could not be of any use to him, continued to disfigure the English Criminal Law for some ten years longer, while the ordinary felon had to wait nearly two centuries for the privilege.[3]

He then asked for a copy of the Indictment: that had also to be denied him, under the existing law and practice, without the consent of the Attorney General, Sir Robert Sawyer; and he would not consent. As the Chief Justice said at a later stage, "the practice has been always to deny a copy of the Indictment . . . the law is so because the practice has been so and we cannot alter the practice of the law without an Act of Parliament . . . ."[4]

[3]See the whole disgraceful story in Blackstone, *"Commentaries on the Laws of England,* Vol. iv, pp. 355, 356, and notes.

It was not till 1836 that the right to be defended by Counsel was given in England to all persons charged with felony: 6 & 7 Will. 4, ch. 114 (Imp.); those charged with treason obtained the right in 1694: 7 Will. 3, ch. 3 (Imp.).

[4]By the Act of 1694, 7 Will. 3, ch. 3 (Imp.), persons accused of High Treason were to have a copy of the Indictment, five days before trial. See Blackstone, *"Commentaries,* etc.," vol. IV, pp. 351, 352, and notes. Jeffreys says: "I think it is a hard case that a man should have counsel to defend himself in a tuppenny trespass and his witnesses examined upon oath; but if he steal, commit murder or felony, nay, high treason, where life, estate, honour and all are concerned he shall neither have Counsel, nor his witnesses examined on oath: But the . . . law is so . . ." 10 *"Howell's State Trials"* 267.

The Indictment which was in Latin was read to the accused in English and at his request, in Latin, then again in English, and Rosewell pleaded "Not Guilty, my Lord; and I bless my God for it"—he asked to be tried "By God and my country," and Sir Samuel Astry, Clerk of the Crown, uttered the time-honoured and conventional, "God send thee a good deliverance."

The charge was the prisoner, "a false traitor," "asseruit et declaravit quod populus condunationem fecere dicto Domino Regi nunc sub praetexta sanandi morbum regni (Anglicé, the King's evil) quod ipse non facere non potest; sed nos sumus illi ad quos illi debent accedere quia nos sumus sacerdotes et prophetae, qui precibus dolores ipsorum sanaremus . . . ."[5] Other treasonable language was also alleged: but the above is all we are at present concerned with. In English, it reads: "Asserted and declared that the people made a flocking to our said Lord, the present King under the pretext of healing morbus regni (in English, the King's evil) which he cannot do; but we are they to whom they should come, for we are priests and prophets who by prayer shall heal their afflictions . . . ."

The prisoner objected that "morbus regni" is "in English properly the disease of the Kingdom" not "the King's evil"; the Chief Justice agreed but said that the innuendo healed the defect—which, I venture to think, is more than doubtful.

Eighteen jurors were peremptorily challenged out of the thirty-five allowed by law—to challenge peremptorily more than thirty-five meant to be sent forthwith to be pressed to death by *peine forte et dure.*[6] He was caught napping as to several, not challenging them until they had been sworn, and the rule then as now being that the jurors must be challenged "as they come to the book to be sworn, before they are sworn."

The trial went on in the usual way for the times—the witnesses for the Crown were helped over the hard places and excuses made for them—the witnesses for the defence (of course, not allowed to be sworn)[7] were insulted, badgered, offensively cross-examined by

[5]I have omitted all the many innuendoes except one: the old Latin Indictments bristled with them to reduce them to meticulous certainty, and avoid all ambiguity. The smallest defect might furnish a ground in those technical days for a successful motion in Arrest of Judgment.

[6]See as to challenges, Blackstone, "*Commentaries*, etc.," vol. IV, pp. 352-354.

[7]The Common Law, on the Civil Law principle already mentioned, originally refused to allow an accused to adduce witnesses—they were unnecessary if the conclusive proof were wanting, and could not displace conclusive proof if it was adduced. The practice grew up of allowing defence witnesses, but not under oath; and at length the right of every accused person to have his witnesses give evidence under oath was given by statute: 7 Will. 3, ch. 3, 1 Annae, Sess. 2, e. g. (Imp.). See Blackstone, "*Commentaries*, etc.," vol. IV, pp. 359, 360.

the Bench—the prisoner protesting his obedience to law is told by Jeffreys, "a man . . . that every day doth notoriously transgress the laws of the land (by preaching at Conventicles) need not be so fond of giving himself commendations for his obedience to the government and the laws"—he was told "It was the devil led you to talk treason" and "I do not desire any of your expositions or preachments," &c., &c. The Lord Chief Justice says to defence witnesses, "You use to go to Conventicles, all of you, I warrant you": and on it being stated that the prisoner prays for the King, says "So there was praying in this Hall (i. e., Westminster Hall) I remember for his late Majesty (i. e., King Charles I, on his trial in Westminster Hall); for the doing of him justice; we all know what that meant and where it ended." To a witness who had become confused the Chief Justice says sneeringly "You had best go out, and recollect yourself; you have forgot your cue . . ."; and in respect to a witness, "It's so hard and difficult to get out the truth from this sort of people: they do so turn and wind," and to another "It is a strange thing, truth will not come out without this wire-drawing."

It was of no avail that the accused and his witnesses insisted that when the Crown witnesses thought he was speaking of Scrofula he was, in fact, speaking of the paralysis of the arm of King Jeroboam, I Kings, xiii, vv. 6, 7, which, on the prophet praying for him, was healed. "The Prophet came to reprove him, and Jeroboam stretched out his hand against him and it dried up; and then he desired the prophet to pray for him, which he did, and his hand was healed."

The defence witnesses said they understood the preacher to refer to this evil of a particular King: the Crown witnesses said that they understood it as of the well known "King's evil"; and I, for one, cannot blame them.

The charge to the Jury (Counsel for the Crown waiving his right to address them) was grossly unfair as was to be expected in a State Trial in those days: everything was left by Crown Counsel to the presiding Judge's charge and he certainly addressed the jury in terms which now-a-days would be considered improper by Crown Counsel and a valid ground of appeal.

The Chief Justice's charge was outrageous: that "blessed martyre King, King Charles I" was pressed into service, for "lack-a-day, perhaps, there were as many rebels against the late King raised by the beating of the cushion in the pulpit as by the beating of the drum"—the "wethers of the faction . . . under pretence of religion came . . . particularly as instruments to bring that blessed martyr, King Charles the first to the block," and the like.

The result was inevitable: a verdict was returned of Guilty and the prisoner was remanded for sentence.

And now occurred what would be impossible in our day, when the King reigns but does not rule, leaving the ruling to the people to whom it rightly belongs. The King was told by many of his friends that the trial was a disgrace—as, indeed, it was—although the jury were perfectly justified in the verdict—he instructed his Attorney-General, Sir Robert Sawyer, to agree to an Arrest of Judgment. On Monday, November 24, Rosewell, being put to the Bar for sentence, while protesting his detestation of the language imputed to him, claimed that the language did not amount to High Treason: the Attorney-General, on instructions from the King agreed that Counsel should be assigned to the accused, and Mr. Wallop, Mr. Pollexfen and Mr. Thomas Bampfield were, on Rosewell's request, assigned his Counsel. The last-named is unknown to fame—than the first two, none could be more competent.

The argument came on, Die Mercurii, 26 Novembris, 1684, Wednesday, November 26, 1684—the Chief Justice, who had also received an intimation from the King, said "It is so loose a hung-together Indictment as truly I have scarce seen," and "that there might have been a good indictment framed on such words as these . . . is no question with me at all": but judgment was reserved and Rosewell remanded to the King's Bench prison. No judgment was actually given but matters were becoming awkward for the Stewarts, England never believed that they were not Roman Catholic at heart, Charles began to recognize that he must—or might—require to rely upon Presbyterians and other non-Anglicans—and he gave a free pardon to Thomas Rosewell—the prisoner presented it at the Bar of the Court of King's Bench and was discharged.

Those who desire to know more of Thomas Rosewell and his case may consult the pages of 10 *Howell's State Trials,* 147-308—reading between the lines. There is to be read the Puckish-malicious glee of Jeffreys at the difficulty the Attorney-General found himself in, in endeavoring to support a conviction which the Chief Justice had helped to obtain—or rather had obtained for him. It is certain that had the King not deemed it wise not to enforce the conviction, the motion would have been overruled and Rosewell hanged—and it is not unlikely the cup of the Stuarts would have been full. Already, however, the Crown was bidding for the support of the Dissenters which was to prove a broken reed in 1688. The reports of the case in 3 *Modern Reports,* 52 and 2 *Shower,* 411, are very defective.

But in every report of those times we should *read between the lines.*

SOME OLD SCOTTISH CRIMINAL LAW

WILLIAM RENWICK RIDDELL

The ponderous Folios of *The Acts of the Parliaments of Scotland,* printed by Royal Command in 1844 are a perfect mine of information concerning Scotland in early times, whether to the philologist seeking information as to the Scottish language, the economist, as to the condition economically, the theologian, as to the course of religious thought—not least so, the student of the history of law.

The purpose of this paper is to gather some idea of the provisions of the early Statutes—or what corresponded to Statutes—in early Scotland in respect of certain criminal offences; and I shall not quote from any but the first volume, before the Parliament at Perth of James I, in 1424 (contemporary with Henry VI of England).

First, it is to be noted that great care was had that when a man was sentenced to be hanged, he was hanged—there was no Court of Appeal, and the executioner was held to his duty.

We find in the first Titule of the "lawes of the Kyng David" (1124-1153) "Of hym yat eschapis ye wallowys. Gif ony mysdoer thruch dome be hingit and eftirwart he eschapis of ye gallowys he sal be quyt as of yat deid fra yin furth And yai yat hingit him sal mak fine wyth ye Kyng saũfeud yaim lyf and memberis and disherisone for quhi yat trespas is mekil and oure mesur." (I, following the usual practice, employ "y" for the old letter indicating our "th".)

Translating—"If any misdoer through judgment be hanged, and afterwards he escapes off the gallows, he shall be quit as of that deed from thence forth And they that hanged him shall make fine with the king, saving life and members, and disherison, because that trespass is great and beyond measure."

The Scot did not believe in "half-hanging," which we read of in English and Irish Criminal "Ana": and one is reminded of the story of Sir Henry Maule, who when a Bishop claimed greater power than he had, "because," said the Prelate, "you say 'You be hanged,' while I can say 'You be damned'," replied "Yes, but when I say 'You be hanged,' you *are* hanged."

The gallows was a very favorite punishment in those days; but it was not in all cases inevitable—for example, in Tit. XIII of the Assise of King William, it is provided (I translate) "Concerning 'Berthynsak,' that is to say, the theft of a calf or of a ram or as much as one can

carry on his back, no one is to be held to judgment; but he upon whose land the thief is caught is to have the sheep or calf forfeited and the thief is to be beaten or have his ear cut off. . . . No one ought (aw) to be hanged for "less price than two sheep each of the value of 16 pence."

In a law of King William, dated 1575, it is provided that if anyone be accused of theft or receiving, the accusation being made under oath by the "greyff" (the prepositus or chief civil officer of the town) and three other "lele" (lawful) men inhabitants of the town, he shall be taken and undergo the Trial by Water. But if the accuser can bring three other witnesses against him in addition to the witnesses already mentioned, then through no battle shall he pass nor water nor yet to iron but speedily shall he be hanged ("thruch na batal sal he pas na to wattir na zit to yrn bot hastily sal he be hangyt"). Also, it shall not be lawful to take redemption of anyone after judgment given of battle or water.

Moreover, the thief caught by Hue and Cry and found in possession of the stolen article, is to be treated as a convicted thief, even if he has dropped the stolen chattel and it has been picked up by the people following. (Tit. VII.) The same appears in the Regiam Maiestatem, Lib. IV, Tit. VII.

In the Quoniam Attachiamenta, Tit. VIII, it is provided that if anyone is charged with theft, he may defend, and he may if he wishes go to an Assise; or he may defend himself by Battel on finding sufficient sureties to recompense the accuser if he (the accused) should fall in the duel. If he succeeds, he goes free; if he fails, his sureties pay for the articles stolen and his Lord takes all his goods, &c.—the humane provision, however, is made that "Vxor vero illius dampnati non dampnabitur pro furti viri sui cum sit sub virga sua." The thief caught red-handed, "rubea manu," however, can be favored with no essoign.

Thieves and other malefactors were pursued with sleuth-hounds; and we find in the Acta Parliamentorum Roberti I, Tit. VII, a provision that "no one shall interfere with a sleuth-hound (canis traciens, sometimes written "tras sens," see Du Cange *sub voc.,* "canis"; it is the same word as "tracing") or with men going with it to follow thieves or to capture malefactors nor even to interfere with men without a sleuth-hound following thieves with their plunder. And whoever does so on being convicted is to be sentenced as a receiver."

In the Assise Regis David, Tit. XVI, it is provided "yat na man sell a theyff of thyft pruffyt for na mone na for na frendschip

na for na manner of meyd," i. e., "that no man sell a thief of theft proved, for no money, nor for no friendship nor for no manner of advantage."

In the Regiam Maiestatem, Lib. II, Tit. XLVI is a somewhat curious provision *De vsurariis et eorum bonis,* i. e., concerning usurers and their goods. "All the goods of usurers dying testate or intestate belong to the King. . . . It is, however, to be known that if any one have formerly been a usurer, publicly famed as such, yet if afterwards and before his death, he repents and does penance, he will not be considered a usurer after his death": and a direction was given that usurers should not be molested during their lifetime. This may, possibly, be looked on as a measure of prudence to allow the usurer to make as much money as possible so to enrich the Treasury—which was in a chronic state of impecuniosity; but perhaps it was to *allow a locus penitentiae* even to the man *in tali crimine.*

Of course, "heretici debent comburi," heretics are to be burnt, Regiam Maiestatem, Lib. IV, Tit. LIII. Counterfeiters were to have their hand cut off; the man who used violence in the King's Court had the same punishment, most others had a severe enough punishment to show the Scotsman's dislike for crime.

Oddly enough, there is a provision whereby a freeman may relinquish his freedom, or as the Scots title runs: "How fredome may be tynt foroutyn recover," i. e., "How freedom may be lost without hope of recovery." And this is the way—"Ilk fre man may leff his fredome gif him likis in ye kyngis court (or in ony oyir court) but yat fredome nevir mar in his lyf may he recover"—i. e., "Every free man may rid himself of his freedom if he likes in the king's court (or in any other court) without that he may recover that freedom ever in his life again." Assise Regis David, Tit. IX.

Clergymen are held in hand—in the Assise Regis Willelmi, Tit. XXXVIII, "Of ye life and honeste of clerkis," we read—"Item it is statut yat kirkmen live honestly of ye fructis rentis and profittis of yair kirkis and sall nocht be husbandmen scheipherdis nor merchandis," i. e., "Also, it is enacted that churchmen live honestly of the fruits, rents and profits of their churches and shall not be husbandmen, shepherds or merchants."

Perhaps I cannot better close this paper than by quoting in full a delightful Titule from the Fragmenta gathered by the accomplished editors, Tit. 21 "Of differens betwix Goddis law and manis law." It reads—"All laws outher ar manis law or goddis law Be ye law of Gode a heid for a heid a hand for a hand ane e for ane e a fut for

a fut Be ye low of man for ye lyf of a man IX XIX. ky for a fut a merk for a hand als mekill for an e half a merk for ane er als mekill for a tuth XII. penijs for ilk inch of lynth of ye wound XII. penijs for a strak vnder ye er XVI, penijs XVI. penijs for a strak with a staf. VIII penijs and gif he sal with ye strak .XVI. penijs for a wound in ye face he sal gif ane ymage of golde And be manis law for brekin of banis. V. oras, for a wound vnder ye claithis. XIJ. penijs for a wound befor ya sleif .XVI. penijs and for ilk seable wound outane ye face. XV. penijs for a manis lyf .XII. mark for a wound abone ye aynd .V (J) Sand vnder ye aynd .LX. penijs for a fut strak .LX. penijs for blude drawyne .XXV. S and beyonde ye see .VI. ky" Which, being interpreted means; "All laws are either man's law or God's law. By the law of God, a head for a head, a hand for a hand, one eye for one eye, a foot for a foot. By the law of man, for the life of a man, nine score cows, for a foot a merk, for a hand as much, for an eye half-a-merk, for one eye as much, for a tooth 12 pence, for each inch of the length of the wound 12 pence, for a blow under the ear 16 pence, for a blow with a staff 8 pence, and if he gives a wound with the staff 16 pence, for a wound in the face he shall give an image of gold and by man's law, for breaking of bones 5 oras, for a wound under the clothes 12 pence, for a wound before the sleeve (manica) 12 pence and for every visible wound not on the face 15 pence, for a man's life 12 marks, for a wound above the hand 6 shillings, and under the hand 60 pence, for a foot-stroke (i. e., a kick) 60 pence, for blood drawing 25 shillings and beyond the sea 6 cows."

The above is just a sample of the interesting information to be had from the perusal of these volumes.

MEDEN AGAN

William Renwick Riddell

The old Greeks had an apothegm "Meden Agan," literally "in nothing too much," which may be rendered in American and Canadian: "Don't bite off more than you can chaw."

An examination of the Secret Service accounts of King Charles II in a publication of the Camden Society, 1851; *Moneys received and paid for Secret Services of Charles II and James II . . . 1679 to . . . 1688* shows that it would have paid Titus Oates and his confrères to keep the maxim in mind and act upon it.

The "Popish Plot" of the reign of Charles II seems to have originated in the half-crazed brain of Dr. Israel (or Ezerel) Tonge (or Tong), the Anglican Rector of St. Michael's in Wood Street, London: he supplied the notorious Titus Oates with money wherewith to go to the College of St. Omer for evidence that the Pope and Catholics generally were plotting against Protestantism in general, and against King Charles in particular. Of course, the accomplished perjurer succeeded. A reasonably full and accurate account of this episode is given in a recent publication by John Lane, London, The King's Journalis, by J. G. Muddiman, M. A., chapter xi.

Titus Oates, of course, denied Tonge's initiative and assistance, but no one can believe him.

Coming to England, he was favored by circumstances; and with a strong public sentiment with him, he was forced upon the incredulous King: and we find that as early as the beginning of June, 1679, he was on the King's Secret Service List as receiving £10 per week "for dyet" and £2 more "for expenses," £12 per week in all (with at least as much as $300 at the present time). Very shortly after this and as early as November, 1679, he was also furnished with free quarters at Whitehall which cost the King £5 a month. He also got a bonus now and then ranging from £10 to £50 (£110 in all) for discovering a Papist, and very considerable sums (£ 125 8s 10d in all) for expenses in getting witnesses, besides a Royal Bounty of £50 in June, 1679, and one of £30 in June, 1680.

Dr. Tonge was also fortunate: he started off in June, 1679, with a Royal Bounty of £50 and another of the same amount in September, £50 the next month "for his subsistence," in January, 1679-80, he received £50 "towards enabling him to provide for and settle him-

self and family in such accommodations as may be most suitable to his condition during his attenlance in his Ma'ties service, and to pay for log'gs which he had in Whitehall" and a like sum the following month—he did not get a regular allowance but was paid for bringing a witness over into England and on his death, January, 1680-81, his funeral was paid for by the King, £50.

In November, 1679, a corroborating witness turned up as earnest if not quite as accomplished a liar as Oates himself, William Bedloe (or Bedlow) by name. He, however, had got on the King's list as early as the end of May, 1679, with an allowance of "£10 p. week for his dyet."

Bedloe got an allowance of £150 "to maintain witnesses in town about the plot," £17 "which he expended about causing Harcourt the Jesuit, lately executed to be seized" (about the trial of Harcourt see 7 *Howell's State Trials,* 311, sqq.), £20 for "bringing up witnesses to the tryal of the priests and jesuits"; he also received free lodging at Sir Paull Neale's at Whitehall for eleven weeks.

After the pair, Oates and Bedloe, had been galloping through the court swearing away the lives of better men, they went too far and attacked Sir George Wakeman, the Queen's physician, whom they accused of being bribed to poison the King; and not obscurely it was intimated that the Roman Catholic Queen was mixed up in the plot. This was too much even for Charles, who esteemed if he did not love his childless wife: he intimated to his Chief Justice, the notorious Scroggs, what he wanted; Scroggs discredited the witnesses much to their amazement and the doctor was acquitted, (1679) 7 *Howell's State Trials,* 591, sqq. Bedloe complained "my Lord, my evidence is not right summed up": but in vain, the tide had turned. Bedloe who had started off with £10 a week, got his last payment to carry him on to the end of August, 1780: but Oates got his pay until September 2, 1781.

The next entry we have of either of these workers is when in 1685, £800 was paid to depay the expenses of prosecuting Oates for perjury.

Quantum mutatus.

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is, and its direction, which depends upon the ultimate and unquestioned values of the group, are both beyond the control of the individual. Nor does choice introduce anything new or uncaused, for choices,—choices, for example, of the goals of effort—are implicit in the culture pattern.

Neither determinism nor libertarianism, in the opinion of the present writer, can ever have more than a pragmatic justification. Nor will the last word ever be said on the subject, for probably there will always be those who emphasize the uniqueness of the individual's inner experience, and these tough-minded and extroverted persons who fasten their attention upon the regularities of human conduct. The present paper is therefore simply an attempt to show the relative superiority of determinism for (1) the understanding of the facts of human experience, even those brought forward as proofs of libertarianism, and (2) the control of human behavior.

SOME OLD-TIME BOOTLEGGERS

William Renwick Riddell[1]

The more we read of the older literature of our law, as of everything else, the more we are assured of the truth of the apothegm of the Wise King: "There is no new thing under the sun," of which the modern version reads: "There is a good deal of human nature in man."

The lover of the Common Law turns with delight to the perusal of the works, edited by such scholars as Maitland, Pollock, Holdsworth: and it is with interest that he sees the early doings corresponding not too remotely to those he sees or hears of in our own time.

The Bootlegger, now!

As is well known, it was the law in ancient time that each organization, corresponding to what we call a "municipality," was required to have from time to time an Assise of Bread, and an Assise of Ale-Assisa Panis, Assisa Cerevisiae—and that if they omitted, a fine might, and most probably would, be imposed by the Justices in Eyre on their next visit to the County. We here are concerned with drink, not meat. At the Assisa Cerevisiae was fixed the strength of the Beer to be sold and its price: and it was unlawful to sell drink —for sometimes wine was included—of weaker strength or at a higher price. At more than one time, indeed, Parliament found it necessary to interfere; e. g., in 1266, the Act 51 Hen. III, St. 1, directed the Brewers in Cities to sell two Gallons of Ale or Beer for a penny, and, out of the City, three or four.[2] This seems to have been the first general provision; previously, each part of the country could suit itself as to price, &c.

The regulations were not always satisfactory (when was the case different?). We read, for example, that at the Eyre of 1221, the Vill of Gloucester complained of the new Regulations: "formerly

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[1]Justice of Appeal, Toronto; Associate Editor of this Journal.

[2]See an article: *"The Food and Drink of an Englishman—by Statute,"* 18 Journal of Criminal Law and Criminology (Feb., 1928), pp. 527 sqq.

. . . the Castellans used to take throughout the Vill on the first day of brewing . . . 28 gallons of beer from a single brewing for two pence, and either pay the two pence down or give tallies, and so long as the woman (brewer) had a tally they could not have any more beer. But Thomas (de Rochfort, the new man) made them take two pence when he did not take beer and moreover took beer to the last day of selling just as on the first day when the beer was light-colored.[3]

Little, if any complaint seems to have been made as to any want of strength in the beer brewed by the Englishwomen—men did not brew in rural England, as a rule. It is of record that Pope Innocent, on an Englishman arguing before him and saying: "Holy Father, we teach in our Schools and it is the opinion of our Magistrates that prescription does not run against *jura episcopalia,*" broke out: "Assuredly, you and your Magistrates had drunk too much of English beer, when you taught that."[4] I know of no more interesting records of the olden times than are to be found in a work all too little known: *Pleas of the Crown for the County of Gloucester, before the . . . Justices Itinerant . . . 1221,* edited by F. W. Maitland, London, 1884.

The official records here copied make it quite clear that the Holy Father was not unjust in his view of the potency of English beer: we read, over and over again of unfortunates being drowned falling from a boat into the Severn—such entries as the following are very

[3]This is taken from the work, *"Pleas of the Crown,"* etc., mentioned in the Text, infra, p. 108, No. 459.

[4]Op. cit., p. xii, note 1: the authority is Bracton himself.

NOTE

Old John Selden (1584-1654) of the Temple, a man of great and varied learning, or, as Lord Clarendon enthusiastically puts it, "of stupendous learning in all kinds and in all languages," knew all about Beer as about most other things, including Tythes and Syrian Goddesses: in his *"Table Talk,"* of which the Society named after him have published a satisfactory edition, he tells us: "Dissentions in parliamt. may att length come to a good end, tho' first there bee a great deale of doe [this does *not* mean 'dough,' but 'ado'] & a great deale of noyce, wch madd folkes make: just as in Brewing of beer, there is a great deale of business in grinding the Malt, & that spoiles any man's clothes that comes neer it; then it must be mash'd, then comes a fellow in, & drinks of the Wort, & hee is drunke, then they keepe a huge quarter [in other words and in modern terminology 'they kick up an awful row'] when they carry it into the Cellar, & a Twelve month after tis delicate fine beer."

common: "Duo homines de Munstrewurthe submersi fuerunt de quodam batello; nullus malecreditur; Judicium-infortunium; precium batelli 8d. unde vicecomes respondeat" i. e., two men of Munsterworth were drowned off a certain boat; no one is suspected; Judgment-misfortune; price of boat eight pence, for which the Sheriff is to account (of course, as a Deodand). Sometimes the drowned man is found "in quodam stagno molendini," i. e., in a certain mill-pond: sometimes in a swamp, sometimes in other places. Then, too, there is an amazing number of falls from a horse—a mare, generally, be it said—and that not in racing for some in the highest positions even now occasionally fall from their steed when racing without suspicion of having indulged in too much beer. We have no few entries like this: "Willelmus de Aumundusbiria cecidit de quadam equa sua et pependit per stiveram ita quod obiit, Nullus inde male creditur. Judicium-infortunium: precium eque 5s unde Englehard de Ciconny respondeat" —i. e., William of Almondsbury fell from his mare and hung by the stirrup so that he died. No one is suspected: Judgment-misfortune: price of mare five shillings for which let Engelard (the former Sheriff) account. In another case, Matthew, son of Walter, "cecidit de equa sua in aquam et submersus est," and no one was suspected.

In addition to the shocking number of murders in which the offender was undiscovered we have many, in which both the criminal and the moving cause are known. The "cervisia," that is the ale-feast, was very common, and a very common occasion of violence. A "mesleta" or "litigatio," or "discordia," a quarrel or dispute would arise "ad cerevisiam," blows be exchanged and often death ensue: or "in reditu de cervisia," on the return from an ale, the drinkers would fall out; and some of them be killed—not always men, for not only did "meretrices" or "nebulatrices" become victims, but sometimes appears a pitiful story like this: "Johannes Gigant et Thomas filius Roberti fabri et Oxethrote fuerunt ad quandam cerevisiam apud Esselewurth, et in reditu suo de cervisia illa quedam femina scilicet Basilia filia Godfridi occisa et Johannes Gigant fugit pro morte illa," i. e., John the Giant and Thomas, son of Robert the smith and Oxthroat were at a certain ale at Elsworth, and on the way home from that ale, a certain woman was killed, namely, Basilia, daughter of Godfrey, and John the Giant fled for that death.

And hardly a Vill comes up to give an account of what rascality is going on in it but it has to report the sale "contra assisam" by one or more of beer or what they call "vinum," but which is almost certainly beer masquerading as the nobler liquor. Even the Clergy seem not to have been exempt from this "bootlegging" the Villate of Campedene has to report: "Henricus de Grete et Robertus clericus vendiderunt vina contra assisam . . ." Perhaps the particular Villate was more than usually law-breaking, as we find: "Assisa de latitudine pannorum non est servata . . ."

But the climax is reached when the Villate of Winchcombe comes before the Justices in Eyre: "Andreas Vinitarius et David Dunninge et omnes de Glou cestria vendiderunt vina contra assisam . . .," i. e., Andrew the wineman and David Dunning and everybody of Gloucester have sold wine contrary to the assise. Which is distinctly worse than anything that has so far been said of Windsor, Ontario!

Of course, for every violation of the assise, a fine had to be paid to the King.

The most interesting "bootlegging" case, however, that I have run across in the old Records is not to be found in this book, but in a publication of the Selden Society: *Year Books of Edward II . . . 6 Edward II, A. D. 1313 . . .*, London, 1927, pp. 19-22; *Smythe* v. *The Abbot of Preaux*. In an action of Replevin, the plaintiff claimed that the defendant had wrongfully taken his bullock: the Abbot justified the taking on the ground that it had been presented at the Leet of Toft Monks that the plaintiff "auoit brace ceruoyse et vendu en countre Lassise, par quei fust am—ercye a xij deners . . .," i. e., had brewed and sold beer contrary to the assise, for which, he had been amerced twelve pence: and that on non-payment the beast was seized to be sold to pay the fine. The plaintiff replied that he was not bound by the assise, because, while he lived within the Vill of Toft, he was not within the jurisdiction of the Abbot, and the Assise before the Abbot did not bind him: he was as indignant, no doubt, as were the Windsor bootleggers, the other day, when they were fired on in Canadian territory by Detroit Customs Officers. A prolonged course of litigation followed; the plaintiff craved and was awarded the aid of his alleged landlady, Joan, who had been the wife of William Roscelyn; and as she claimed under Robert of Mauley

and Hawise (Avice) his wife, they, too, were brought in; and the Abbot made default—and what happened in the long run is not made to appear. The "law's delays" were very real in the 14th Century in England. Nous avons changé tout cela, i. e., some of "nous."

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nalism. And of course the ethical code of the journalist must be positive in its exhortations, not negative, as are codes of criminal law. The latter are for the most part bare statements of what penalties will be applied to those who do certain acts. They are not only not statements of what one should do but they are only by implication statements of what one should not do. Of the abuses listed in Section V and illustrated in Section VI, nearly every one of them might be made the subject of legislation. A statute forbidding the discussion by newspapers of crimes and trials in any manner other than by a bare statement of the fact that such and such an offense has been committed and that so and so had been taken into custody and further forbidding any discussion (or pictures) of the trial other than a bare statement of the accusation, the persons involved and the outcome of the trial, would in great part remedy the situation. A similar statute governing the practices of the newspapers in regard to divorce cases and annulment and separation action would be desirable.

Of course the constitutionality of such statutes would soon be called in question. Whether sustained or not the remedies would lie in great part in the hands of the newswriters themselves. Such statutes would not provide remedies for all the abuses and could not force the press to be constructive. No statute could. The constructive remedy lies in legislation that gives support to the ethical organizations of journalists who have from time to time adopted codes attempting to guide the conduct of the members of the profession. Such legislation should provide for the licensing of all editors and newswriters and make provision for the revocation of such licenses in a manner similar to that resorted to in the case of lawyers and physicians who violate the codes established by their professional associations.

Such a procedure does not contemplate in any sense a censorship of the press which should be repugnant to all who believe in a government of laws rather than of men. Further, such a plan should be welcome to journalists for thereby they may conserve their own interests and have in their own hands a means of controlling those who are bringing opprobrium upon the craft.

On the other hand if the journalists prefer to disavow their constructive duty to society and deny that their activities are of public concern as are those of the physician and lawyer, and like the shopkeeper, be guided only by their cupidity, at the same time hypocritically proclaiming the necessity of the "freedom of the press" they must submit to regulation as does he who engages in any other business which affects the public welfare.

ADMINISTRATION OF CRIMINAL LAW IN THE FAR NORTH OF CANADA

William Renwick Riddell*

When in 1869, the Dominion of Canada acquired at the cost of £300,000 Sterling, the enormous territory known as Rupert's Land from the Hudson Bay Company, she was not blind to the very great responsibilities, she was assuming. While there was a magnificent stretch of land in the southern part, fitted for the highest kind of agriculture, and certain to attract the highest form of immigrant of the White Race, there was also known to be toward the North, an expanse of territory, apparently fit for nothing but the trapper and such forms of humanity and grades of civilization as were represented by the Esquimaux and the wandering Indian tribes. These had little conception of government by law, and seldom considered themselves to be bound by anything but their own desires. Amongst them, too, were degenerate members of the higher race, generally playing on their savage appetites and making profit of their vices.

We Canadians are a law-abiding people, we have no use for Lynch law or the rule of the gunman or Regulator: and it was recognized that some means must be taken to combat lawlessness in the new territory, a means not quite the same as such as were effective in the settled country. Accordingly, in 1873 was organized the Mounted Police Force with the specific purpose of establishing and maintaining law and order in that territory, theretofore controlled by the ancient trading Company from which Canada had bought, and which dated back to the times of the Second King Charles. For over thirty years, the jurisdiction of this force was limited to the Northwest Territories as the tremendous waste was called: and under the name of the Royal Northwest Mounted Police, its fame became world-wide.

By reason of new Provinces coming into existence, its functions were in course of time somewhat modified, but its general work continued, that is, to combat crime and vice among the Indians, the Esquimaux and also among the white immigrants who had come in in large numbers.

*Justice of Appeal, Toronto, Can.; Associate Editor of this Journal.

I have, in another place, given some account of the activities of this force up to the year 1919[1] and I have thought that it might be of interest to tell some of their doings in later years.

In November, 1919, their name was changed from the Royal Northwest Mounted Police to the Royal Canadian Mounted Police; in February, 1920, the Headquarters were transferred from Regina to Ottawa, and their functions somewhat enlarged: they have jurisdiction all over the Dominion, exercising the duties of a State Police —with that part of their duty, we have here no concern, very interesting and important as it is—I propose to speak only of their duties in the bleak North which have continued, notwithstanding change of name and extended jurisdiction.[2] One or two stories will suffice to indicate their devotion to duty and the difficulties in the way, while they will at the same time help to show how we Canadians insist upon our law being obeyed by all within our borders.

The Murder of Robert S. Janes

In the northern part of Baffin's Island at Ponds Inlet, the Hudson Bay Company had a Post: in 1921, it was decided to station there a detachment of the R. C. M. P., as minerals were being discovered and immigration was to be expected—*Auri sacra famos* is as potent in the North as in the South, in Prince Rupert's Land as it ever was in old Rome. News had come that in the previous Spring, one Robert S. Janes, a Newfoundlander, had been murdered by an Esquimaux at Cape Crawford on Lancaster Sound, 400 miles within the Arctic Circle: and when Staff-Sergeant Joy, an experienced northern traveller, was sent in on the Hudson Bay Company's Steamer, *Baychimo,* to establish the Post, he received instructions to investigate the murder alleged: he received a Commission of Justice of the Peace so as to be able to hold a Preliminary Enquiry, a Commission as Coroner to hold an Inquest, as well as Commissions as Customs Officer and Postmaster for the performance of civil functions.

Sailing from Montreal, July 16, he reached Ponds Inlet, August 22, after the usual trouble with the ice. The alleged murderers were, however, at Cape Crawford at the extreme north of Baffin's Island, and had to be sought there. Joy, leaving a detachment at Ponds Inlet, set out, December 7, for Cape Crawford; arriving there December 21, he found the body of the white man five days thereafter: con-

[1]The Policeman's News (N. Y., Jan., Feb. and Aug.. 1919).

[2]Everything contained in this paper is to be found in the official reports, which I owe to the courtesy of the Commissioner of the R. C. M. P.

ducting an autopsy, he found two bullet wounds and conclusive evidence of a violent death. He removed the body to Ponds Inlet, and, as Coroner, held an Inquest, finding a jury of three among the traders and swearing in another as Special Constable: the Inquisition, found February 11, declared a murder by Noo-kud-lah, alias Ki-wat-soo, with abettors, Oo-roo-re-ung-nak and Ah-tee-tah, all Esquimaux. Joy issued Warrants for the arrest of the accused but Noo-kud-lah was five hundred miles away. The rest of the winter and the spring were spent in the arrest of the three men and in collecting the witnesses: they were scattered all over the north part of Baffin's Island, an area of some 300 miles long and 200 miles wide—moreover, the task was made the more heavy and slow by the scarcity of dogs. Oo-roo-re-ung-nak was arrested, May, 1922, Ah-tee-tah, June 12 and the main offender, July 10. He had come in voluntarily but Joy with that meticulous regard for the rights of the accused which characterizes our administration of Criminal Justice, he delayed a week to arrest him until he could secure the services of an interpreter who, he was satisfied, could explain clearly to the accused the warning to be given before he was interrogated.

Noo-kud-lah being arrested, Joy as Justice of the Peace, opened the Court of Preliminary Enquiry, July 10: it was continued till July 20, eight witnesses being examined, one white man and seven Esquimaux; Statutory Declarations (having the force of Affidavits) were read of eight other Esquimaux at distant places; and the three men made statements. It appeared that Janes was claiming from the natives payment for goods supplied and had more than once threatened violence, to shoot the dogs—which is equivalent to causing starvation—and even to shoot some of the men: at length, the three Esquimaux formed a plot and the trader was shot. The men were, of course, committed for trial.

The Judicial party to hold the trial left Quebec, July 7, 1923, on the S. S. *Arctic,* being composed of His Honor Judge L. A. Rivet of Montreal, Mr. A. Falardeau of Quebec, Crown Prosecutor, Mr. Leopold Tellier of Montreal, provided as Counsel for the Prisoners and F. X. Biron of Montreal as Clerk of the Court. The party arrived at Ponds Inlet, August 21, a forty-five day trip: Court was opened, August 25: Ah-tee-tah was acquitted, Noo-kud-lah found Guilty of Manslaughter and sentenced to ten years' imprisonment at Stony Mountain Penitentiary, while Oo-roo-re-ung-nak, found Guilty of Manslaughter was sentenced to two years at the Barracks of the R. C. M. P.

Guardroom at Ponds Inlet. The trial was conducted with all the formality and decorum of a Supreme Court in the civilized parts of Canada, the Judge, Counsel and Clerk were robed as they would have been in Montreal or Toronto; two fully uniformed men were detailed as prisoners' escorts and one as the Judge's Usher. The defense was conducted with great skill, and Crown Counsel said that while in a more civilized part, he would ask for a verdict of murder as justified by the evidence, yet, taking into consideration the ignorance of the prisoners, he would be content with a verdict of Manslaughter. Noo-kud-lah was led away at once and entered the Penitentiary October 8.

The Case of Ou-ang-wak

In the winter of 1919-1920, Sergeant W. O. Douglas was in charge of the detachment of the R. C. M. P. at Fullerton over 400 miles north of Churchill and 100 miles up the coast from Chesterfield Inlet: going down to the Hudson Bay Company Post at Chesterfield Inlet in December, 1919, he found awaiting him a letter from the Manager of the Hudson Bay Company's Post at Baker Lake, 150 miles inland up Chesterfield Inlet informing him that two of his hunters were murdered by another native who was at large to the great terror of the native population. Douglas, of course, determined to go up to Baker Lake at once, and arrived there, January 8—he found that Ou-ang-wak, was accused of shooting two brothers of the same tribe, Angalook-you-ak and Ale-summick, all living some 150 miles south: the murdered had also appropriated the wife of the former. The natives were so afraid of the murderer that it was with very great difficulty that the Officer was able to get anyone to make the trip with him to arrest the accused. But at length he succeeded and, January 27, he left Baker Lake with a party of four Esquimaux and the wife of one of them. Having arrived, February 7, at a native camp, about half-way to that of Ou-ang-wak, Douglas persuaded Edjogajuch, the Headman, to go and try to bring in the murderer. The Headman was much frightened, as he undoubtedly believed that the Sergeant intended to shoot the offender as soon as he saw him. But being assured that nothing of the kind was meant, he left on his quest, February 8, and late in the afternoon of February 9, he returned with the quarry.

Through the interpreter, the usual warning was given the accused, and he was arrested and told that he must go with the Officer to the

White Man's land as the Big Chief there wanted to see him: he at first refused, fearing speedy death, but by showing the natives that unless they obeyed the White Man's laws, they would not be allowed to trade at the White Man's stores, and promising him fair treatment, consent was obtained and the prisoner taken to Baker Lake, arriving, February 18, after experiencing very bad weather: then the trip was made to Chesterfield which, owing to an exceptionally heavy storm, took fifteen days instead of ten usually taken. As indicating the perils of that country, it may be said that on this trip, at a place called Igloo, the Sergeant found the natives suffering from starvation, once child dead and two adults too weak to stand: Douglas left with them as much food as he could spare and on arriving at Chesterfield, March 8, he sent a relief party. Then to Churchill, arriving, April 13, to Fort Nelson, April 23 and The Pas, Manitoba. At The Pas, a Preliminary Enquiry was held before a Justice of the Peace, and the prisoner committed for trial, after a statement had been made by him. From this statement, it appears that he was "old enough to have a wife," that the wife who had been given him was "only a child . . . and still living with her own people," that he wanted a wife and killed Ang-alook-you-ak for his, and Ale-cummick for fear of vengeance.

Of course, the accused was entitled to be tried in the regular way, and in the jurisdiction where the crime was committed: accordingly he was taken back to Baker Lake, to await the arrival, on the opening of navigation, of a Coroner, a Justice of the Peace (the proceedings at The Pas, Manitoba being quashed) and a Court with a Commission of Oyer and Terminer, Counsel for the Crown and the Prisoner, and Clerk. These officials were to leave Montreal on the Hudson Bay Company's S. S. *Nascopic;* and it was expected that a jury could be furnished from the crew. July 25, 1920, Inspector A. E. O. Reames with a Commission as Coroner and also one as Justice of the Peace left Montreal and arrived at Chesterfield Inlet, September 17: difficulties in obtaining an interpreter, dog-feed, etc., detained him, so that he could not leave for Baker Lake until early in January, 1921: he there held an Inquest, but the arrangements for the trial became nugatory, as the prisoner got frightened and escaped, only to perish in a supervening blizzard. It may be worth mentioning that the offender had been subjected to the tribal penalties for murder, the religious or magical discipline directed by the Angekok

of his tribe—he was not to handle rocks; he could eat only "straight" meat; when he ate, he must be under cover from the sun, etc.

The Case of Uluksak

In a former article, I gave an account of the shocking murder in 1915, of two Missionary Priests by two natives, Uluksak and Sinnisiak:[3] the former, Uluksak (or Ulukschack—he was not particular as to the orthography, and there is no reason why we should be more particular) "boasted much of his Shamanistic powers such as living under water two or three days at a time, bringing dead men to life, turning men and women into wolves and musk-oxen, seeing white men with mouths on their chests and dogs with four tails, etc., etc.": but these magic powers did not save him from being convicted at Calgary in the White Man's Court, August 24, 1917. The sentence of death, however, was commuted to imprisonment for life: the same was the fate of his comrade, Sinnisiak. They were released after a short term of imprisonment and came back to the Tree River district, down the Mackenzie. Uluksak had not been benefited by his punishment, he boasted that he was not afraid of the Police and that he would not mind killing a White man, as he would only be taken outside and given a good time, to be returned to his own country again after a little while. He had three wives and sold one of them together with their six year old boy to Sinnisiak for a 22-calibre rifle. This was "an Injin trade"; Uluksak rued it and took back the boy: Sinnisiak and the woman appealed to the Police and the boy was returned, only to be seized again in the spring of 1924: Sinnisiak went to Tree River to complain, and on Uluksak being looked for, it was found that he had gone to a distant part of the Arctic regions. But at this very time, a report came that Uluksak had been murdered by one Ikayena on the Parry River, east of the Kent Peninsula and Bathurst Inlet; and two Mounted Police with two natives set off to arrest Ikayena. The party was held up three days by a blizzard, the supply of coal oil ran out, four of the dogs died through the excessive cold; but Ikayena was found and arrested. From the account given by him and others, it appeared that he and Uluksak had not been on good terms, Uluksak was inclined to bully him, he shot one of Uluksak's dogs, a highly unfriendly act in that region, and replacing it with one of his own did not atone for the wrong thus done Uluksak: Uluksak continued to threaten, and Ikayena formed a plot with his

[3]The Policeman's News (Jan., 1919).

tentmate, Punewyuk, to kill him—at all events, this seems the more likely story, although Ikayena insisted that he shot Uluksak in self-defense. The accused was brought to Aklavik, Yukon Territory and after a Preliminary Hearing before Inspector T. B. Caulkin, acting as J. P., he was committed for trial.

The Yukon Territory is an organized country with its own Supreme Court: the Court sat at Aklavik in June, 1926, Mr. Justice Dubuc presiding. Ikayena came on for trial, June 24: under the circumstances of the case, the Crown Counsel reduced the charge to Manslaughter; but the Jury, after a deliberation of fifteen minutes, found the prisoner Not Guilty, and he went free.

The Case of Tekak, Toongnalik or Toongnaak

In 1925, Sergeant Barnes at Tree River Post received news of a murder said to have been committed on Adelaide Peninsula: and, April 1, he set off with a Patrol to investigate: he travelled to various places in King William's Island and Adelaide Peninsula, and at length found that the culprit one Tekak had gone up to the Back River: not having time to pursue him there, the Sergeant returned to Tree River, leaving word that he would return the following year: he arrived at Tree River, June 3, after 64 days' absence and traveling 1,357 miles. The information that the Policeman was to return to the Peninsula the following year was brought to the accused: these promises, the natives have found, are always kept, and Tekak came with the witnesses to Tree River, voluntarily, in a trading schooner and there surrendered. During the winter, they were sent to Herschel Island over the ice and later to Aklavik, Yukon Territory, where Tekak was tried at the same Court in June, 1926, as the fortunate Ikayena: the charge was reduced to Manslaughter, the prisoner pleaded Guilty, and was sentenced to one year's imprisonment at Herschel Island.

This crime was of a kind all too common among the Esquimaux —and, perhaps, among some races who believe themselves to be higher in the scale of humanity. Puwyatuck had two wives, and Tekak had none; Tekak lived with the polygamist and became enamored of one of his wives—it does not appear whether it was Cardlakeetow, the elder, or Goongnow, the younger, called in one of the official Reports, "the spare wife." About New Years of 1921, the two men and the "spare wife" were sitting in the snowhouse engaged in various do-

mestic duties, when Tekak suddenly shot the other man through the head and killed him on the spot. It was supposed that he had been urged to commit this crime by another native who wanted—and, after the murder, got the "spare wife," this, however, Tekak denied. His story is interesting: he says: "At a dance the night before . . . Puwyatuck watched me and I did not like the way he looked. He looked like he wanted to kill me, and did not smile. We had never quarrelled before, but he watched me for a long time before that. I went to my igloo and loaded my .44 rifle. Next morning I was sitting in the snowhouse with Goongnow and Puwyatuck: Cardlakeetow came in and went out again: Puwyatuck was fixing a snow shovel, and Goongnow was fixing sinew. I picked up my rifle and shot Puwyatuck through the head: then I went outside, followed by Goongnow. After awhile, I went back into the house and saw that Puwyatuck was dead. I took Cardlakeetow for my wife then." The view of the Police was that the murder was from jealously probably fomented by the wife who was fonder of the killer than of her husband.

When the trial was about to come off, it looked as though the accused would be called before a Higher Court than that of the Yukon: about ten days before the Sittings, the prisoner was taken ill with double pneumonia and it seemed likely to be fatal: but he recovered and was tried as has been told.

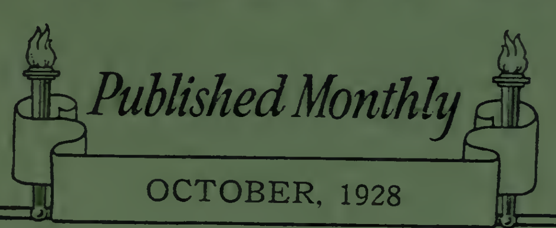
These are but a sample of the tragedies occurring in our North and of the work, admirable in every way, of the Splendid Corps of which the world hears but little. Perhaps, these stories will indicate the reverence we Canadians have for law and the due administration of Justice.

Some of the crimes arise from tribal customs: for example, in some parts, as the Coast east of Tree River district and particularly in the neighborhood of the Kent Peninsula, the natives hold human life very cheaply: in such cases as we have an account of, the usual cause is in regard of women. Women are few in number owing to the custom of infanticide of female children the boy is brought up because he will soon be of use in support of the family, but the girl dies because she will be of no use, at least, for a long time—on the trail, especially in winter, a child born of either sex is made away with as interfering with the march. In the scarcity of women, it is usual for a woman to have more husbands than one not unusually three. This custom does not seem to be as successful as the corres-

ponding polyandry of Tibet and some parts of Arabia; and murder for a wife or for the exclusive use of a wife is not at all uncommon.

In some parts, it would appear that falling in love with the wife of another is considered an infallible symptom of insanity, justifying the putting to death of the lover; while in some parts, looking at anyone without smiling is a certain sign of deadly enmity.

NEW YORK LAW REVIEW



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LAWYERS AND LEGAL EVENTS

Expert Opinion Upon An Age Limit for Judges

The voluminous symposium of letters from members of the bar, published during past months by the Review, discussing from many angles the question of the compulsory retirement of judges for age, indicated an interest in the subject so widespread as to justify its consideration from another, and perhaps the only remaining viewpoint. To this end the Review sought the opinion of some of the most eminent medical authorities in the country. The question put to them was whether, due to the scientific advances of the past few decades, and the recent and present extraordinary examples of judicial officers of advanced years performing highly valuable public service, as well as of New York judges retired at seventy years, full of bodily vigor and with mental strength unimpaired, reasons did not exist for an extension of the age of permissible judicial service. The replies agreed on one idea, but differed in other respects. All concurred as to the scientific incongruity of a law fixing arbitrarily an imaginary date line, by virtue of which our judges who are retired for age pass in a single instant of time from the possession of complete qualifications for the judicial function, to the complete lack of such qualifications. "Old age," so-called for lack of a better name, is a disease, declares one eminent authority, with which the mere number of years, has comparatively little to do. Several of our consultants point out that in spite of the advances in hygiene and theories of health promotion, the amazing decrease in infant mortality, the surprising increase in life expectancy at certain other ages, the life expectancy of a person seventy years old has not appreciably increased in the past half century. This, of course, is based upon statistics drawn from all classes and occupations, and is not limited to any favored class, who, by reason of superior intelligence or freedom from certain phases of responsibility or worry, may be expected to seek and apply such methods and theories of diet, exercise, ventilation and tonic stimulation as the most advanced modern research and discovery may render available. Some suggest that the increased wear and tear and intensity of present day existence has about offset, in the average of those of three score years and ten, the benefits of the health producing and preserving methods which science has developed. No one asserted that a group of men of the average age of the New York Supreme Court Justice when first elected to the Bench, say, at random, fifty years, and of the high average of intelligence which such a group would possess, determined to give the most earnest consideration to the promotion and preservation of

health, would not be able today to prolong the period of official activity and public usefulness beyond that which would have been possible half a century ago. After all, that is the real question.

Dr. Frederick Tilney, of 870 Madison Avenue, New York City, the eminent neurologist and diagnostician, writes:

"I am in entire accord with the idea that a judge or any other man may be young at 70, or even more advanced years. It seems a great pity that the public is to be deprived by some old constitutional provision of the ripe wisdom and experience of men in positions which require pre-eminently such qualities, just because their years happen to number up to a certain arbitrary figure. * * * As far as the brain is concerned, old age is a disease, rather than the result of years. Statistics clearly define the issues—a brain kept fit by wise living and good prophylaxis may render its best service long after the age of 70.

There is no need of giving specific examples. The principle seems perfectly clear."

From Dr. Matthias Nicoll, Jr., the State of New York's distinguished Health Commissioner, the REVIEW has received a very interesting and suggestive letter. Writes Dr. Nicoll:

"I am strongly in favor of the theory that a public servant should not be forced to retire at an age when he is still mentally and physically equipped to perform his duty satisfactorily. On the other hand, I am inclined to doubt whether very many men who have attained the age of 70 years are fit to continue their work with powers unimpaired, although I am perfectly well aware of the fact that there are many brilliant exceptions.

Would it not be possible to extend the age of retirement beyond 70 years, subject to a physical examination as to fitness? This plan, as you know, is in force under the New York State Employees' Retirement System. I can readily foresee the difficulties of applying it to judges, especially in the elective class. On the other hand, it would seem possible in the case of judges subject to appointment."

Dr. Eugene L. Fisk, Medical Director of the Life Extension Institute, 23 West 43rd Street, New York City, has been kind enough to give the subject suggested by the REVIEW somewhat extended consideration. His letter is so interesting and enlightening that it is published in full:

"The question as to whether or not the age of retirement of judges should be advanced to 75 instead of 70 years, taking into account the advances in science and the improvements in longevity that are currently reported to have taken place, is a very interesting one. However, I think it should be approached from a different angle.

There are good grounds for urging this step as a matter of reform, but not because any material extension has been attained in the extreme span of life. It is true that the death rate has been reduced materially and that in the past thirty years, thirteen years have been added to the average duration of human life. This takes into account the mortality at all ages of life. When we investigate the change in mortality at the various age periods, we find that most of this increased life span is to be credited to reductions in the death rate in the earlier age periods, especially under age 5. There has been a certain amount of improvement up to middle life, but beyond age 52

ALBERT OTTINGER

OF THE NEW YORK BAR

ATTORNEY GENERAL OF THE STATE OF NEW YORK

WHO, AFTER TWO TERMS OF EXCEPTIONAL SERVICE AS ATTORNEY GENERAL, IS NOW THE REPUBLICAN CANDIDATE FOR GOVERNOR OF NEW YORK

MR. JUSTICE JEREMIAH TITUS MAHONEY

OF THE NEW YORK SUPREME COURT, NEW YORK COUNTY

ABLE, ENERGETIC, COURAGEOUS, WHO, IT IS SAID, IS SOON TO RESIGN FROM THE BENCH OF THE SUPREME COURT TO RESUME THE PRACTICE OF THE LAW IN THE CITY OF NEW YORK

this is inconsiderable and at the advanced ages there are actual losses. While it cannot be stated that there has been any actual gain in mortality at these advanced ages in recent years, it is indubitably true that knowledge of personal hygiene and of the means of detecting in their earliest stages the chronic diseases that so frequently handicap and impair men at these ages has greatly increased and if brought into action could, without doubt, prolong the years of usefulness of men beyond 60 in this or any other field of human activity.

The fallacy in fixing age 70 as the necessary age of retirement lies in the fact that time is considered to be an element in affecting the physical state and efficiency of men in any walk of life. Time, of course, has nothing whatever to do with the physical state of an individual. Age is not a function of time but of physical condition. It is true that on the average we find certain physical conditions prevailing at certain times of life, but this is not due to the fact that a certain number of years have passed over the heads of these people. It is due partly to their hereditary endowment and partly to the things that have happened to them in the course of these years.

The average lifetime varies widely in different communities and among different peoples. There are certain occupations in which the death rate is only about one-third that of the average. The mortality rate of judges is comparatively low—5 to 15 per cent below the average. They are looked upon by life insurance companies as preferred risks. We may be justified, therefore, in assuming that in a selected group in this profession the terminal age of efficiency would be well in advance of that of the average professional or business worker.

A more rational procedure than fixing this age limit would be to have a system of physical and psychological examinations beginning, say, at age 60 and repeated quinquennially. This may seem to be a suggestion not altogether in keeping with the dignity of the body under discussion, but it is made quite as much with the idea of protecting these eminent men from physical disaster through the assumption of burdens beyond their strength, as in the public interest. The nature of the work is peculiar; it calls for the exercise of the higher faculties in men whose minds are so trained that this type of work is cleared with less reserve expenditure than in most other types of work. It seems to me that a system taking these fundamental principles into effect would be preferable to a hard and fast automatic system seeking to thrust men into a Procrustean bed regardless of their individual capacities."

Darwin P. Kingsley, the widely known President of the New York Life Insurance Company, expresses a viewpoint of extreme originality. It is that the judges of our courts should be retired at an earlier, rather than a later age than at present, because at 65, say, a judge, if of "real quality," could resume the practice of the law and "go on" with his work "effectively," whereas at a later age this would not be so easy. Mr. Kingsley surmises that this may not be in accord with the opinion of the REVIEW, and suggests that if this is so we need not print his letter. The former is true, as we shall shortly explain; but Mr. Kingsley's letter is, nevertheless, a genuine and valued contribution to the intelligent consideration of a subject of real public concern. Mr. Kingsley writes:

"What the best age is calling for compulsory retirement of judges of the

courts of New York state must, of course, always be a matter on which opinions will differ. It is perfectly true that we not infrequently have men who are better equipped at seventy-five to go on with the work of judge than many other men are at sixty. Fixing any age is, of course, a simple and direct way of protecting society against the work of men who have become incompetent or slack, and the problem is one of gain or loss. When any thoroughly equipped man of seventy or seventy-five has to retire there is a distinct loss to society. When a man or a group of men go on beyond the age of greatest efficiency and are still within the retirement limit there is a distinct loss.

My offhand feeling is that perhaps the age of compulsory retirement ought to be made earlier rather than later. The lawyer at sixty-five, for example, is in a condition that differs strongly from the business man at the same age. Most judges, if they retire at sixty-five, could go on with their work, effectively, if they were men of real quality, while the business man could hardly hope to take up the lines of life at that age with any prospect of success.

This is the personal view, but it seems to me that it is a view that applies to the welfare of society with equal directness. The good judge retiring at age sixty-five can still serve society; the poor judge is eliminated.

I am speaking without that direct knowledge which others may have, based on observation of a group of men who have served as judges. I have no personal knowledge of instances where extremely useful men have been retired, and I have no personal knowledge of cases where indifferent judges have continued to hold office. Consequently, the line of diminishing returns is really unknown to me, and I am only discussing the question academically.

From the tone of your letter I should say that my convictions, if they can be called convictions, are out of harmony with your own, and I presume, therefore, you will not want to use this letter. This will be quite agreeable to me."

The Review agrees with Mr. Kingsley that many judges at 65 are at the height of their efficiency. But this is rather a reason for keeping such a judge on the Bench, than for displacing him, to build up a law practice anew. This is not easy, even for much younger members of the bar. When a judge goes on the Bench it does not take long for his law practice to find a new office. Time, tide and legal clients wait for no man.

Additional letters from distinguished experts will be published next month, as the result of which, and that which has foregone, it is hoped that some program may be submitted to the New York legislature at its next session.

Contempt of Court: But of Which Court?

L'Honorable Juge Vallières de St. Real was a gentleman of rank and ability in the old Province of Lower Canada. Descended from an ancient Seigneurial Family, which had cast in its lot with the conqueror after the formal

Cession of Canada to the British Crown by the Treaty of Paris, 1763, and had not exercised the option given by that Treaty to return to France. The judge had studied law, the profession of a gentleman, and had been admitted to the Bar of Quebec. It was conceded on all hands, and even by those who detested him and his political principles, that he was a sound lawyer and of very considerable abilities. In the troublous times before the Rebellion, when most of the French-Canadians were struggling—along constitutional lines as a rule—for the liberties which we now look upon as a matter of course, de St. Real took the side of the Government in most cases. Before the time of which I am about to speak, one of his recorded activities was to oppose the Election Petition filed against the Election at the General Election of 1827 of his fellow-member for Quebec, Upper Town, which was attacked on the ground that the vote of a widow had been rejected by the Returning Officer, although (as was alleged) women qualified as to property had been accustomed to vote at Parliamentary Elections. We read that de St. Real gave his opinion founded on the authorities in the law of England, that women could not legally vote. No express prohibition was made until 1834; but no one can doubt the soundness of this view.

He was made a judge of the Superior Court at Three Rivers and made his home at that city; he was not a favorite with the people and we find complaints that he "*fait le tyran aux Trois-Rivières.*"

He was accused, whether justly we cannot at this time say, of permitting a public nuisance to continue on his premises; and at the Sessions in July, 1834, of the Court of General Sessions of the Peace for the District, a Bill of Indictment was laid against him before the Grand Jury, which did not delay to find a "True Bill." The judge appeared and undertook his own defense. The old adage runs, "he who takes his own case in court has a fool for a client," but it is understood that that saying was the invention of a lawyer. However that may be, the judge allowed his indignation to get the better of him, lost his sense of the respect to be paid to a court, even—or, perhaps especially—to an inferior court, spoke disparagingly of the Bench, and was committed for contempt of court. The sheriff took him into custody and held him imprisoned for an hour in the common gaol of Three Rivers. He did not take this insult, as he considered it, "lying down"—no French-Canadian ever does; he complained to the Governor, Lord Aylmer, and "demanded the interference of the Executive to vacate the sentence and further to vindicate the dignity of the judicial character thereby injuriously affected in his person."

The Governor wisely took the opinion of the Attorney-General and Solicitor-General, and on their advice, informed the judge that "the tribunals of the Province being open to Mr. Justice Vallières, he might there seek the redress of any injury sustained by him by any undue exercise of the

powers of the Court of Quarter Sessions; and that having laid aside his quality of judge in order to conduct his own cause before the Court of Quarter Sessions, he could not with any regard to consistency, expect that the magistrates composing the court should be visited with the displeasure of the Crown for any want of respect shown to him in his judicial character." Not yet satisfied, the offended judge insisted on the matter being laid before His Majesty; and Lord Aylmer sent the whole batch of papers to the Government at Westminster, who gave no comfort to the complainant. All this can be read in the Canadian Archives, Q 217, 2, pp. 402, *seq.*, and next after the *State Trials*, the Canadian Archives has in its volumes the most interesting material for the lawyer, especially the Canadian lawyer, who desires to be fully informed in his science. Neither will help to win a case, however.

Now for the question—why could not the Superior Court judge have vindicated his own dignity? It has been considered and said that a Superior Court judge is always an object for contempt—that, of course, is not the same thing as a contemptible object. Why could he not exercise his authority as a Superior Court judge, and send the offending justices of the peace to gaol for their contempt of him? It has, indeed, been said that when the act considered contempt is done to the judge when he is not exercising his judicial functions it is not punishable, strictly, as a contempt, but as an ordinary assault; and the story is told of Vice-Chancellor Malins, when an egg was thrown at him when he was leaving the Bench, that after remarking that the egg must have been meant for his Brother Bacon, he left the thrower of the egg to the police. The opinon of Chief Justice Wilmot in *Rex* v. *Almon* [1765] Wilmot's Opinions, 243, at p. 265), "for striking a judge when he is walking along the streets would not be a contempt of court" is not a judicial determination. It never was delivered.

As food for further thought we may speculate: What would the sheriff have to do if the Superior Court judge in his indignation, were to treat the usage to which he was subjected as a contempt of court, and commit the offending justices of the peace to the common gaol? And assuming Chief Justice Wilmot's opinion to be good law, what success was Vallières de St. Real to expect, if he laid an information for assault against the sheriff and/or the justices?

W. R. R.

Legal Fees for Thinking in Bed

It is well known that where courts have to decide upon the justice and reasonableness of attorneys' claims for services, the following elements are given consideration: (1) the time spent, (2) the amount involved, (3)

Vol. XVII, No. 1 November, 1928

GEORGETOWN LAW JOURNAL

Georgetown University School of Law
Washington, D. C., U. S. A.

THE "POSTNATI" AGAIN
Justice WILLIAM R. RIDDELL, of Supreme Court of Ontario, Canada.

RIGHTS OF MINORITY RAILWAY SECURITY HOLDERS
RICHARD S. HARVEY, Professor of Law, Georgetown Law School.

VOIR DIRE EXAMINATION OF JURORS: II The Federal Practice
ROGER D. MOORE, of Commercial Laws Division of U. S. Dept. of Commerce.

THE AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION OVER INTRASTATE RATES
PHILIP S. PEYSER, Examiner of the Interstate Commerce Commission.

and

NOTES RECENT DECISIONS BOOK REVIEWS

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Georgetown Law Journal

Volume XVII NOVEMBER, 1928 Number 1

THE "POSTNATI" AGAIN

By WILLIAM RENWICK RIDDELL

THE little Scottish boy born in the first decade of the 17th century and on whose behalf both an action at law and a suit in equity were brought in the early years in England of the Scottish Solomon, King James I and VI, gave his name to a case famous in legal and constitutional history. And, while *Calvin's Case*[1] is seldom cited, the logical results from it are daily manifest to a Canadian; had it been fully understood and its principles fully applied, it may well be that the whole course of history would have been different.

The latest illustration of the principle established by it is the visit of the Prime Minister of Canada to Paris to sign for His Majesty on behalf of Canada the Kellogg Treaty—this but carries out the practice already followed more than once in recent years.

In the number for July-December, 1927, of the comprehensive *Revue de Droit Maritime Comparé,* published at Paris by Leopold Dor, I find the very important International Sanitary Convention of June 21, 1926, which provided safeguards for the nations against transmissible disease such as the Plague, Cholera, Yellow Fever, Typhus, Small Pox, etc. The Convention purports to be made by and between a number of Potentates separately named, amongst them *"Sa Majesté, le Roi du Royaume-Uni de Grande-Bretagne et d'Irlande et des Territoires britannique au delà des mers, Empereur des Indes", i. e.,* "His Majesty, the King of the United Kingdom of Great Britain and Ire-

[1] 7 Coke Rep. 1 (1608); 2 HOWELL'S STATE TRIALS 559; 2 Eng. Rul. Cas. 575.

land and of the British Dominions beyond the Seas, Emperor of India"—which, it will be remembered, is the Royal Title as given to King Edward VII in 1901, and now worn by King George V. (It may be said, perhaps, that with its present connotation, "Dominions" is not happily rendered by "*Territoires*"). This for the first time recognized the kingship of His Majesty over any territory other than the United Kingdom of Great Britain and Ireland; it was consequently implied that the vast Empire (outside of India) was part of or a possession of the United Kingdom.

Lord Balfour has recently said, and with much truth, that the American Revolution was caused by the attitude of Englishmen in looking upon the American Colonies as a "possession" of England and Americans as inferior to Englishmen. This meant that the Colonists were considered subjects of Englishmen—a fundamental error and opposed to decided law.

It will be remembered that after James became king of England in 1603, young Robert Calvin was born in Scotland, and the English Courts decided that the *Postnatus* was, even *quoad* England, a natural-born subject of James, not as King of England, not as a metaphysical entity, but as an individual man of natural existence, of flesh and blood.

The logical result is that all born within the dominions of His Majesty are subjects, natural-born subjects, anywhere in His dominions; the relationship of Sovereign and subject is a personal not a territorial relationship.

Another logical result would be that as the governance of the King over his subjects did not, as to those born out of England, depend upon his being King of England, those who were his subjects because they were born in England, should not assert sovereignty over those in different case.

As a fact, Englishmen did not affect to have the right to govern Scotland, nor Scotsmen to govern England; but it was different with the Colonies. Even when these had been granted legislatures, control was exercised over them by the

"Home Authorities"; this might be justified in the infancy of these communities *ex necessitate rei,* but when they had advanced to a patent capacity for self-government, there was no proper basis for it. The omnipotent Parliament, indeed, declared its right; and, so long as the power of Parliament so to do was admitted, opposition was rebellion. It was in vain for the Colonists to insist upon the unconstitutionality of such measures—and armed resistance was their only course, unless they were to admit their own inferiority.

That was the beginning of the end; the principle deducible from *Calvin's Case* grew and is still growing. Several parts, including Canada, of the British Empire have become self-governing and are not interfered with by any other part, either by what we still call "the Mother Country" or any other.

The King to whom we [2] owe allegiance is an individual man of flesh and blood. When he enters into a contract, it is sufficient to mention him only once; his official and statutory title, of course, is added. But it is not enoûgh that agents, plenipotentiaries, delegates, from one part of his dominions, shall sign for him—they indeed bind him *quoad* that part of the Empire from which and to represent which they were sent, as well as any "possession" of that part; but that is all. Accordingly there is a signature or a ratification for every self-governing part.

When the British plenipotentiaries signed this Convention for the King, to make their act perfectly clear, they made of record this formal declaration—"*Les Plénipotentiaires britanniques déclarent que leur signature ne lie aucune des parties de l'Empire brittanique, membre distinct de la Société des Nations, qui ne signerait pas séparément la Convention ou qui n'y donnerait pas son adhésion,*" "the British plenipotentiaries declare that their signature does not bind any of the parts of the British Empire, a distinct member of the League of Nations, which

[2] The author is Mr. Justice Riddell of the Supreme Court of *Ontario, Canada.*

does not sign the Convention separately or which does not give its adhesion thereto." They sign, however, "*pour tous les Protectorats, Colonies, Possessions ou Pays sous mandat britannique,*" "for all the Protectorates, Colonies, Possessions or Countries under British mandate."

The Delegate of Canada signed for the King in respect of Canada (with certain expressed reservations).

So, too, in the case of a Convention respecting collisions at Brussels, September 23, 1910, the ratification was made February 26, 1913, by Great Britain for herself and many of her "Colonies and Possessions"; by Canada, October 1, 2, 1914; by New Zealand, May 29, 1913; by Newfoundland, March 30, 31, 1914.

Another Convention of the same date was ratified at the same times.

The thought that the rest of the British Empire would vote in the League of Nations as Great Britain should direct —which, of course, lay at the root of the "Lenroot Reservation"—has proved erroneous; and Mr. Kellogg has asked the six nations of the Empire separately to sign his Treaty of Paris—if and when signed, it will be signed separately for each nation.[3]

All this is the legitimate and logical consequence of *Calvin's Case*, the case of the *Postnati* in 1608, three hundred and twenty years ago.

August 21, 1928.[3]

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[3] *Editor*: The Treaty of Paris was signed, separately, by the six nations of the British Empire on August 26, 1928.

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GEORGETOWN LAW JOURNAL

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Washington, D. C., U. S. A.

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WILLIAM F. WALSH

THE ORIGIN OF THE PATENT AND COPYRIGHT CLAUSE OF THE CONSTITUTION
KARL FENNING

JAMES MADISON AND THE FEDERAL CITY
FRANK SPRIGG PERRY

THE FIRST LEGAL EXECUTION FOR CRIME IN UPPER CANADA
WILLIAM RENWICK RIDDELL

and

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uous a part. He afterwards filled the important station of Secretary of State, and was subsequently for eight years President of the United States. Thus, his whole life was intimately connected, first with the formation, and then with the administration, of the Constitution."

CONCLUSION

The connection of James Madison with the Capital City was as intimate as his connection with the Constitution. He was a member of the Continental Congress which first took up the location of a permanent seat of Government. Madison was present at the time of the "mutiny" which led the Continental Congress to adjourn from Philadelphia to Princeton. As a member of the first Committee of the Continental Congress on the District of Columbia he was instrumental in bringing in a report favoring exclusive authority by Congress over its place of residence. In the Constitutional Convention Madison was one of two who offered motions to create a Federal District. The *Federalist* afforded Madison an opportunity to again explain the purpose of the creation of a district exclusively under Federal control. In the Virginia Convention Madison supported the Constitutional provision for an exclusive authority over the seat of the newly formed government. And it was Madison in the first session of the first Congress under the Constitution who, in dramatic fashion, defeated the Germantown site. Finally Madison enters into the closing scene as a passive, if not an active, participant, in the bargain of the assumption of State debts for the location of the city on the Potomac.

The "founders and fathers of the Constitution were great men." When a native of the Federal District looks back upon its early history, there must arise in his breast a feeling of loyal and patriotic pride. The city of his residence created by the Constitution is coupled with the name of his country's first President, and with the names of its earliest and most profound statesmen. It is rightly named after Washington, the greatest of all Americans. But the form of this Federal City and its character and location were shaped and moulded by the hand of James Madison.

THE FIRST LEGAL EXECUTION FOR CRIME IN UPPER CANADA

By WILLIAM RENWICK RIDDELL

THE well known Quebec Act of 1774[1] extended the limits of the Province of Quebec as far south as the Ohio, and as far west as the Mississippi; the Treaty of Paris of 1783 gave all the territory to the right of the Great Lakes and connecting waters to the new Republic; but for a time Britain held possession of the border posts, Michillimackinac, Detroit, Niagara, etc., ostensibly, at least, as a pledge for the United States implementing the contract in the Treaty that there should be no legal impediment to the collection of the debts owed by citizens of the United States to British subjects—a contract notoriously not carried out, nor was the United States able to carry it out.

Accordingly, when by the Canada or Constitutional Act of 1791,[2] the immense Province of Quebec was divided into the two Provinces of Upper and Lower Canada, the former Province, *de facto*, included what is now Detroit as well as much other territory now part of the United States. A supposed suggestion, that the Detroit people should be considered in any different position from those in what the British territory, *de jure* as well as *de facto*, was received by Lieutenant Governor Simcoe with the utmost indignation; and, in fact, until the delivery to the United States in 1796, under the provisions of Jay's Treaty, no distinction was made between those in the anomalous position of belonging to two nations and those in admittedly British territory, except that the former had no vote for Members of the Legislature, and were consequently subject to the injustice of which the Colonies had complained, "Taxation without Representation".

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[1] 14 Geo. III, c. 83 (1773).

[2] 31 Geo. III, c. 31 (1790).

Detroit was no more free from crime than the rest of the world; and it had the fortune to furnish the victim of the first execution for crime in the new Province of Upper Canada.

The story goes back to Boston and Montreal before Upper Canada was born. On February 18, 1785,

> "Elijah Cooper of Williams-town-bay-State, or Boston-State in North America, Farmer & Shoemaker, for and in Consideration of the Sum of Thirty two Pound, ten Shillings of lawful Money of the Province of Quebec [about $130 of our money] and one gray Horse",

sold to John Turner, a merchant of Montreal,

> "a certain Negro-Man, of the Age of Twenty-two Years or thereabouts, called Josiah Cutten".

An Imperial Act of 1787 [3] had placed Negroes in the same category as "Houses, Lands . . . and other Hereditaments"; that is, made them Real Estate, and consequently in the conveyance the seller "granted and confirmed" the Negro, as though he was a farm. The purchaser did not long keep his purchase; we find him on March 29, 1785, selling him to David Rankin, of Montreal, merchant, and making a similar deed, — the purchase money was fifty pounds of lawful money of Quebec [say, $200].

How the slave got to Detroit is wholly unknown; but we find, January 13, 1787, the Detroit firm of merchants, Wiliam St. Clair & Co., selling him to Thomas Duggan, of Detroit, for

> "the sum of One Hundred and Twenty Pounds, New York Currency [say, $300], payable on or before the first day of May next in Indian Corn & Flour."

These transactions are evidenced by extant deeds copied in the recent publication: *The John Askin Papers.*[4]

Thomas Duggan transferred him to John Askin, a merchant of Detroit, March 28, 1791, for

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[3] 5 GEO. II, c. 7 (1731).

[4] Vol. I: 1747-1795 (Detroit Library Commission, 1928) 284-287.

> "a farm at the River Tranch [now the Thames, Ontario] of Nine acres in front more or less,"

but there does not appear to be more than a memorandum of the sale extant.[5]

In some way that does not appear, one Arthur McCormick, who had been a teacher in Kingston, but had come to Detroit, became half owner of the slave.

All this took place before Upper Canada came into existence on December 26, 1791.[6]

The negro, whose name was variously spelled Cutten, Cuttan, Cutan and Cotton, had very hard luck; on the 18th of October, 1791, he was caught stealing rum and some furs from the shop of Joseph Campeau in Detroit, was taken before John Askin as Justice of Peace, and committed for trial.

The English practice prevailed, as it did for long in this Province, that Courts of Oyer and Terminer and General Gaol Delivery were constituted from time to time for the trial of criminal cases. At that time the territory, afterwards Upper Canada, was divided into four Districts, of which the furthest west, the District of Hesse (afterwards, the Western District) contained Detroit; this continued after the formation of the new Province. In each District, a Court of Oyer and Terminer and General Gaol Delivery sat from time to time; and, before the unhappy negro could be tried, Upper Canada had come into existence.

On September 3, 1792, "His Majesty's Court of Oyer and Terminer and General Gaol Delivery . . . in and for the District of Hesse, in the Province of Upper Canada," sat at L'Assomption, now Sandwich, Ontario; the Court was presided over by William Dummer Powell, First and only Judge of the Court of Common Pleas in and for that District, who lived at Detroit, but, on the erection in 1794 of

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[5] *Op. cit. supra* note 4, at 287.

[6] *Supra* note 2.

the Court of King's Bench for Upper Canada, was appointed its first Puisné Justice, becoming later Chief Justice of Upper Canada.

The negro had a fair trial; but his case was hopeless, and he was rightly convicted. At that time the punishment was death; and this dread sentence was pronounced by Mr. Justice Powell, who said to the unhappy man:

> "This Crime (of Burglary) is so much more atrocious and alarming to society as it is committed by night when the world is at repose and that it cannot be guarded against without the same precautions which are used against the wild beasts of the forest, who, like you, go prowling about by night for their prey. A member so hurtful to the peace of society, no good Laws will permit to continue in it, and the Court in obedience to the Law has imposed upon it the painful duty of pronouncing its sentence, which is that you be taken from hence to the Gaol from whence you came, and from thence to the place of execution, where you are to be hanged by the neck until you are dead . . ."

And it was done, and the young Province paid £2 Halifax Currency for the job. The full account of this trial appears in the records of the Court in the Ontario Archives; and I, in my *Michigan under British Rule,*[7] have given some account of it.

The John Askin Papers, already referred to, have a concomitant circumstance, which will bear mentioning—while the slave was in prison awaiting his trial, a deal was entered into between his co-owners, whereby Arthur McCormick sold his half-interest in him, being "now in Prison for Felony", to Askin for £50 New York Currency [say, $125], "which Negro man should he suffer death . . . I am not answerable for", May 16, 1792.[8]

Hanged he was, and McCormick was not answerable for him.

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[7] William Renwick Riddell, Michigan Under British Rule: Law and Law Courts, 1760-1796, (Lansing, 1926) 333, 347-355.

[8] *Op. cit. supra* note 4 and 5, at 410-411.

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NOTES

BANKS AND BANKING—Liability of Bank, for Accepting Agent's Check on Principal's Account for Deposit to Agent's Personal Credit.

Where an agent, with unlimited power of attorney to draw checks upon the principal's bank account in fact draws to his own account and misappropriates the money, should the bank be held liable to the principal for such misappropriation by the agent?

Decisions upon this point are in conflict. The cases holding the bank liable are based upon the strict doctrines of agency, which involve the question of notice, actual or constructive, to the bank.[1]

[1] Merchants, etc., Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 60 S. E. 880 (1905); Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820 (1904).

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GEORGETOWN LAW JOURNAL

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SOME COMMENTS ON THE RESTATEMENT OF AGENCY; PART II

BASIL H. POLLITT

RIGHT OF REVIEW BY CERTIORARI TO THE SUPREME COURT

FRANK D. MOORE

SOME IDEAS AS TO THE RIGHTS OF THE PREFERRED STOCKHOLDER

RICHARD S. HARVEY

CORRECTION OF ERRONEOUS VERDICTS

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and

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CORRECTION OF ERRONEOUS VERDICTS

By WILLIAM RENWICK RIDDELL

"THE only modes known to the common law to re-examine facts tried by a jury are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo,* by an appellate court, for some error of law which intervened in the proceedings."[1]

This may be quite accurate for some countries if lower case initials are used (as they are here) in the words "common law"; it is erroneous if the words are printed with capitals, thus, "Common Law". After more than half a century of effort, I have never succeeded in persuading a printer—and few editors—that there is a radical difference between "the common law" and "the Common Law"; between "the civil law" and "the Civil Law". It is, of course, possible that the state of the type-box may have something to do with this obtuseness, but it certainly does exist.

The "common law" of any country is the basic law of that country; "the Common Law" is the basic law of England, "the Common Law of England". So the "civil law" of any country is the law in civil matters as distinguished from criminal law. The "Civil Law" is the law of Rome and its daughters. It has been said by the courts, more than once and with perfect accuracy, that the "common law of the Province of Quebec is the Civil Law". The same has been said of Scotland, and might be said of France, Spain and other countries. I am not sure of the terminology which would be employed by the courts of more than one state of the Union in reference to their state's "common law", and do not venture to guess. In like manner, in the old Province of Quebec for a time, the "civil law" was the "Common Law", equally with and in the same way as the criminal law.

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[1] Moore, *Voir Dire Examination of Jurors: II The Federal Practice* (1928) 17 GEORGETOWN LAW JOURNAL 14 n.

In the Province of Upper Canada, for a time, the "civil law" was the "Civil Law", while the criminal law was the "Common Law"; the "common law" was, in part, the "Civil Law" and, in part, the "Common Law".

If, in the passage quoted *supra*, "common law" means the basic, *i. e.*, common law in the ordinary colloquial sense, it may be right in some countries; but if the "Common Law" is meant, the statement is erroneous.

A distinction must be made between civil and criminal cases.

Civil Cases

At the Common Law, the remedy of a litigant who complained of a wrongful verdict was the Writ of Attaint, by virtue of which the offending jury and its verdict were tried by a jury of twentyfour.[2] Originally, an adverse finding by this jury (often called a Grand Jury, but quite distinct in its functions from the ordinary Grand Jury) was followed by the most serious consequences. The convicted twelve jurors lost their "law" and became infamous; they forfeited their goods and the produce of their lands; they were imprisoned and their wives and children thrust out of doors; their houses were razed, their trees extirpated, and their meadows plowed up. The successful Attaintor was reimbursed out of their property for all that he had lost by their false verdict. This punishment was too atrocious for even the hardy Englishman, and it got reduced to a comparatively mild chastisement,—a reasonable fine, half to the king and half to the injured litigant.[3]

The Writ of Attaint continued in use as late as the seventeenth century; the latest case which I have found being *Brook v. Montague*.[4] A little after the middle of the succeeding century, Lord Mansfield was able to say: "The Writ of Attaint is now a mere sound in every case; in

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[2] For the form of this Common Law Writ, see FITZHERBERT'S NATURA BREVIUM, 241, 243.

[3] See the author's PAPER BEFORE THE ROYAL SOCIETY OF CANADA, *A Day in Old Niagra* (1928) §II.

[4] Cro. Jac. 90 (1606).

many, it does not pretend to be a remedy".[5] I have not been able to find any instance of the Writ on this Continent, although, like the action of *Scandalum Magnatum,* it was available theoretically; even in England it was theoretically in force until 1836, when it was abolished with other rubbish.[6]

The desuetude of the Writ of Attaint was undoubtedly due to the practice of granting a new trial, which was wholly unknown to the Common Law, and which seems to have begun in 1350. Amos, in his very valuable edition of old Sir John Fortescue's *De Laudibus Legum Angliae* [7] (which some "cranks" like me still read), says that the practice of granting a new trial "may be traced as high as the year A. D. 1665". For our present purpose, the date of the beginning of the practice is immaterial, but I am confident that Amos has placed the date too late.

Criminal Cases

At the Common Law, there never was power to grant a new trial,—subject to a statement to be made later. If the accused was convicted, that was the end of it. If he was acquitted, there was a sort of revengeful remedy in some cases. In such cases, as to which Blackstone will supply sufficient information, not quite accurate, indeed, but the errors are insignificant, the injured person, or, in case of death, certain of his folk might take an "Appeal" and have a "Battel" or duel. This very imperfect remedy grew practically obsolete, and its being utilized in 1818 by William Ashford, eldest brother and heir-at-law of Mary Ashford, for the murder of whom Abraham Thornton had been tried and acquitted, led to its abolition by the Act of 1819.[8] This statute abolished all right to Trial by Battel as well in civil as in criminal cases.

There was no power to grant a new trial in strictly criminal cases, but in certain cases called criminal but really

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[5] Bright v. Eynon, 1 Burr. 391, 393 (1757).

[6] 6 Geo. IV, c. 30 (1836).

[7] At p. 98.

[8] 59 Geo. III, c. 46 (1819).

civil, as for example, trespassing upon the highway and the like, the courts, when the practice of granting a new trial in civil cases obtained, sometimes granted a new trial. This, however, was confined to quasi-criminal misdemeanors and was not extended to felony.

It is true that in one case this was done: in *Reg. v. Scaife*,[9] the Court of Queen's Bench granted a new trial to a prisoner convicted of robbery at York Assizes before Creswell, J., but this has been authoratively disapproved and the power denied.[10]

Those who read the *State Trials* (and those who do not miss a rare pleasure, intellectually as well as professionally) will remember the case of *Ashley and Simons the Jew*, of which Ashley, the complainant in the trial says that it "is the first precedent of the kind to any person who had been convicted of a criminal offense". This was mixed up with a case of perjury in which Ashley had apprehended Simons the Jew, as he was always called, his first name being Henry. Simons was tried and acquitted; thereupon Ashley charged Simons with a misdemeanor in placing coins in his (Ashley's) pocket to be used as evidence against him.[11] On this trial of Simons, the judge understood the jury to find a verdict of guilty; and the Court of King's Bench was applied to for a new trial. It was established that the judge had misapprehended the jury's meaning, and that there was no intention expressed or in fact that the finding of the jury was one of guilty. Accordingly, a *Venire de Novo* was granted, simply on the ground that there had been no verdict.

That a new trial, or *Venire de Novo*, was not to be granted where there had been a verdict, however much dissatisfied some of the jury might be with it, so long as they did not ex-

[9] 17 Ad. & Ed. (N. S. 1851).

[10] Attorney-General of New South Wales v. Bertrand, 1 Priv. Counc. 520 (Law Rep. 1867), 18 Law Times (N. S.) 752. In Rex v. Inhabitants of Oxford, 13 East. 410, in the note at p. 415 the matter is discussed.

[11] The Indictment is given at full length in 20 HOWELL'S STATE TRIALS 682-3.

press their dissent when the verdict was being given in, became manifest in one of the most interesting cases ever tried: that of *Elizabeth Canning,* which, a puzzle to her contemporaries, continues to the present time, nearly a century and a three-quarters afterward, to be a subject of dispute among equally qualified writers who have formed and express diametrically opposite and utterly irreconcilable opinions upon it. Elizabeth Canning, a young girl of about eighteen, told an extraordinary story of kidnapping and robbery, and brought about the conviction of two women, who just escaped hanging through the efforts of some who were convinced of the falsity of the charge. They were pardoned, and the girl placed on trial for perjury in May, 1874. The jury first brought in a verdict which plainly meant that she had sworn to what was in fact untrue but she believed to be true,—"Guilty of perjury, but not wilful and corrupt". No judge at the present-day would act as the Recorder, William Moreton did. The proper course was to tell the jury that their finding was equivalent to an acquittal, but Moreton sent them back instructions on the crucial point,—to "find her guilty of the whole indictment, or else acquit her'. The jury returned within sixteen minutes with a verdict: "Guilty of Wilful and Corrupt Perjury." Two of the jurymen afterwards made affidavit that they did not intend to find her guilty of "deliberate, wilful and intended perjury in swearing facts which she knew to be false". An application was made to the Court of King's Bench, and the case of *Simons the Jew* was relied on. But here there was no question of mistake on the part of the judge, there was no doubt of the verdict actually given by the jury, there was no pretense that the non-concurring jurymen had expressed any dissent when the verdict was returned, so the application failed. If there ever was a case for executive clemency, surely this was one, but hearts were hard in those days, and Elizabeth Canning was banished to America for several years, to be hanged out of hand if she returned during that period. She went to Connecticut, married a respectable man there, and there ended, the mistake of identification made by her.[12]

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[12] 20 Howell's State Trials 262-692.

It is not without interest to know that last year we had in Ontario a similar case of jurymen not appreciating, as they said, the effect of their verdict. There was no new trial, but executive clemency was exercised and the sentence of death commuted to life imprisonment.

I have, in the above, said nothing of the right which existed in theory to "appeal to the Foot of the Throne" in every case of alleged injustice. This was never done in criminal, and seldom in civil cases, and it disappeared even in theory in 1641, being destroyed, so far as England is concerned, by the Star Chamber Act of that year. The exercise of the right in the American Colonies before 1776, and in Canada and other parts of the British Empire before and since, up to the present time, forms a tempting subject for discussion, but, strong as the temptation, strong as it is, must be resisted for the time being.

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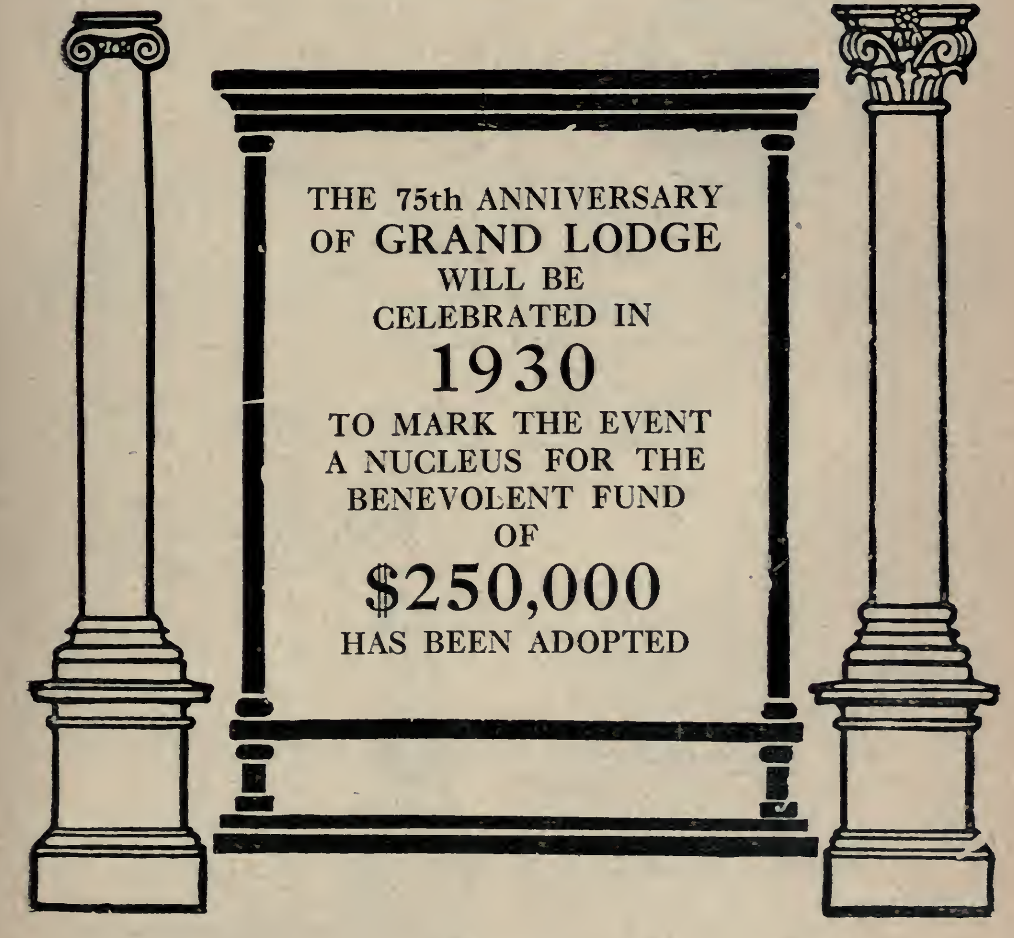
THE MASONIC SUN



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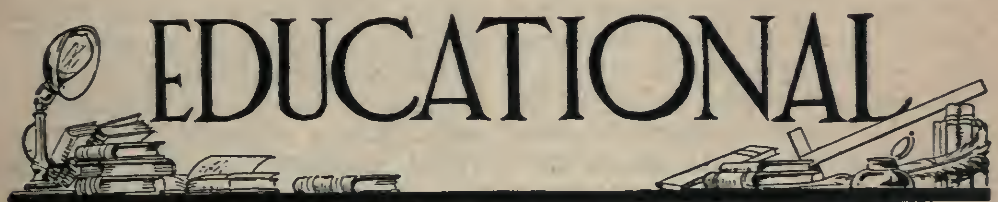
The casket will not be opened, but when rebuilding has sufficiently progressed it will be reinterred in company with a new casket.—The Freemason, London, Eng.

TWO INTERESTING ARTICLES FROM THE PEN OF MR. JUSTICE RIDDELL

Recognizing the well-known ability of the Hon. Mr. Justice Riddell as an author, as well as a versatile writer, we asked him to give us for publication in the Masonic Sun some further account of the customs of "Adoption," and of the "Francs Macons Plaideurs." He has kindly done so; also he has sent us an article on "Pythagoras' Doctrine of Numbers and Free Masons." Both of these articles appear in this issue of the Masonic Sun.



WOMEN IN FREE MASONRY A CENTURY AND A HALF AGO

By the Honourable William Renwick Riddell, LL.D., F.R.H.S., Etc.

An octavo volume, published at Geneva in 1786, recalls an almost forgotten phase in Free Masonry on the Continent of Europe; it is entitled "Les Francs-Maçons, Plaideurs," and is in four parts, 246 pages in all.

The author is evidently a skilled writer, his French is good, his Latin quotations are apt, and his style persuasive. I do not intend to say much of the book itself—it is largely a satire which the author pretends he found when strolling at the Tuileries in Paris, and purports to be an account of a dispute in the Lodge of St. John of Jerusalem between two sets of Masons, Machabee, Jeremie and Naboth on the one side and Theglatsalasar (the Venerable Master), Barrabas and Aaron on the other, which began with the admission of two women, the wife and daughter of Brother Barrabas into the Lodge—under the name of Adoption. The Master—whose name is, of course, a travesty of the biblical Tiglathpileser—took the side of the women, in whose house he lived; and that faction prevailed. The others took an Appeal to the Provincial Lodge of which Melchisedeth was President; and again, on failure, to the "Chamber of the Provinces, near the Grand Orient of France, sitting at Paris." As they say, they were "obliged to claim from the G.O. the justice which was their due."

That the work is not veridical history though not without a certain *vraisemblance* appears plainly from the "Warning to the (feminine) Reader" prefixed, which reads: "This

book should be read by men only; ladies who are so ill-advised as to read it, will pay for the pleasure with a wart on the tip of the nose. Fair Reader, who have started, desist, stop quickly . . . if you keep on, look out for the wart. Don't imagine, however, that you have come so far with impunity, but . . . you will get off with a freckle on the left nipple which you will have to show to the author when he demands it; you need not think to disavow the freckle, for it will be repeated in smaller form on the right jaw—without harm to beauty, however."

What we are concerned with here is the elaborate, if anonymous, preface, which, the author says: "Il faut la lire," it must be read.

He begins by speaking of the delightful recollection of the day he was admitted a Mason, although he then received but the shell of Masonry, and its hidden fruit can be obtained only by meditation and labour. Since the dissolution of two Lodges with which he was connected, he rarely attended Lodge; but Masonry was ever in his thoughts, and he found pleasure in discussing what true Masonry was—for Masonry like medicine has its charlatans. He had little sympathy with the view that it was but the successor of the Mysteries of Isis, of Ceres, of Bacchus, of the Bona Dea, formerly celebrated in Egypt and Greece. Masonry is an antidote for egoism, for materialism, a shield against those pretended philosophers of the day who carry their impious audacity so far as to defy T.G.A.O. T.U.

In some Lodges, Masons have gone so far as to alter the very substance of Masonry. "They have in France in our day carried licence to such a length as to conjure up a Masonry of women, under the name of Adoption: women are now introduced into our Lodges which are consequently called *Arches* . . . Our symbols, our emblematical decorations and almost our very mysteries are offered to their exoteric view—a disastrous abuse, which saps Masonry at the root itself.

Once by chance, I found myself in an Arche (I sincerely beg pardon from T.G.A. and all my brethren for this crime of Lése-Masonry) ; I was especially surprised to see that the dear Sisters who were initiated were not at all alarmed at the sacrifices of their modesty required in the ceremonies, inept indeed, but certainly pressed with undue freedom. These ladies—who, moreover, did not justify the good taste of the brethren—were beyond any question, of the kind who find difficulty in blushing. I am inclined to believe, moreover, that all who are admitted to the Arches are of the same kind." He assails the "Petits-maîtres François," who have even wished to introduce into the Masonic sanctuary those whose curiosity they have aroused by indiscreet chatter; he says: "to lend colour to the offence, you have conceived a kind of parody (for Adoption is not Masonry)—you are none the less, guilty."

He calls upon the Masons of the Scottish Directory to take precautions against the vicious practice, to preserve the sacred fires and not to permit Masonry to be degraded by admitting indiscriminately people "of every age, of every condition of life and every station," for, if this practice goes on "you will count as many Masons as individuals."

After giving examples of what true Masonry means (which I must leave to another paper), he goes on to complain that most Masons owed their

initiation to an abuse of Masonry, having received it in a tavern for the price of a dinner to the initiators. This, of course, refers to the claim of individual Masons in sufficient numbers to initate without any warrant from a Grand Lodge, to which I have referred in my article "Simcoe as a Free Mason.' ' See the Masonic Sun for November, 1925.

He gives a shocking description; some "make of Masonry . . . a shameful matter of money; they choose their initiates with less precaution that the chief of a band exercises to obtain recruits . . . some in whom dissoluteness and drunkenness replace cupidity, content themselves with obtaining enough to enable them to make ample libations at the expense of their silly and crapulous neophytes . . . for that class of brethren the most important thing in Masonry is the banquet . . . I know that such Masons are seldom recognized and admitted into Lodges constituted by the Grand Orient."

So far as I can discover, the practice of "Adoption" never prevailed on this Continent—but that enquiry must be deferred for the time.

PYTHAGORAS' DOCTRINE OF NUMBERS AND FREE MASONRY

By the Honourable William Renwick Riddell, LL.D., F.R.H.S., Etc.

The extraordinary vagaries of eighteenth century Masonry on the Continent of Europe have, as is well known, been the source of interest and amusement—not to say, amazement—to all students of the History of our Craft.

Perusing recently a work published in Geneva, *An X de la Republique,* (1801) at the celebrated *Imprimerie de Bonnant,* I was more than ever impressed with the bizarrerie and extravagance of the then existing conception of Masonry, its origin, essence and objects.

It is entitled *"Ce Que C'est Que La Franche-Maçonnerie,"* "What Freemasonry Is:" and is the production of M. Pierre de Joux, Orator of the Lodge of Fraternity in Geneva, Switzerland.

The three Lodges of Prudence, Fraternity and the Rising Sun of the Grand Lodge of Geneva met together to celebrate St. John's Day, 1801,—properly the celebration should have been on Thursday, June 24, but it was adjourned till the following Sunday, "de moins détourner les F.F.·. de leurs occupations civiles"—"the less to take the Brethren from their civil occupations."

Amongst other addresses was one in three parts by De Joux: it was so much admired that the three Lodges determined to have 1,200 copies of it printed and distributed among the three Lodges—"in order," as the resolution reads, "to answer the different questions . . . raised every day as to the origin, institution, object and effect, past, present and (presumed) future of the Order of Freemasonry," but "without disclosing to the public in what consist the mysteries of our Order, our labours, our tests, our secrets, the decorations of our Temples, etc., etc."

A modern Freemason would despair of doing anything like what was desired under such restrictions; but Brother De Joux attacked the task bravely; and for nearly ninety pages, he defends the "twenty millions of . . . Freemasons, alternately jested at and defamed . . ." To a considerable extent the work is an answer to the very strong

arraignment of Masonry by the Abbé Barruel and that still stronger and more effective of Professor Robeson* of Edinburgh University — more effective because Robeson had himself been a Mason of some prominence.

It is not the purpose of the present article to discuss the Oration—it has merit, it quotes and accurately translates the Phaedo of Plato, the Golden Verses of Pythagoras, the Metamorphosis of Apuleius, the Aeneid of Vergil, the Hamlet of Shakspere, and is plainly the production of a gentleman and a scholar.

It is shot through, too, with common sense and a proper regard to historic fact, all too rare in Masonic writings almost to our own day—the Orator has little sympathy with those who find the origin of modern Masonry in the Crusaders returning from the Conquest of the Holy Land, or in the original organization of human society, or in the Initiates of the Ganges and the Nile, or those in ancient Rome or "the religious Mysteries of Eleusis celebrated by Socrates and Plato on the smiling shores of Attica."

But the Oration as a whole is a characteristic sample of what was considered Masonic literature in France and Germany of the day—almost incomprehensible mysticism and metaphysical and transcendental maundering, passing for philosophy, which was considered edifying in much the same way as a great deal of mediæval and at least some little of modern exhortation from platform and pulpit. This, some of us seekers after fact call "twaddle;" but it must have its uses, there is so much of it.

We have all heard such sentiments as "Every good man is a Freemason without knowing it"—"the simplest morality and the purest virtue are synonymous with Freemasonry" — "in Masonry there exists, known to all Masons the most important secret of all . . . the key of the whole edifice, the only thing that can satisfy the most legitimate desire—to know," etc., etc.

The purpose of this Paper is to give an account of an Appendix added by De Joux to his Oration, which he calls "A Succinct Exposition of the Symbolic Value of Numbers, according to the use made of them by the Pythagoreans and the mysterious Societies of Antiquity intended to facilitate the interpretation of those found in this work."

The author does not say or suggest that Masonry had its origin in whole or in part from Pythagoras, born 590 B.C., and living most of his active life in Magna Graecia; but "all things having been created according to the eternal proportions of numbers, social harmony has also its relation to them as the laws owe their existence to them. They are in some sort the basis of universal order and the bond which units all things. I believe," he adds, "that I render my readers some service in giving them the interpretation of the language of numbers in the sense

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*Mr. John Robeson, Professor of Natural Philosophy at Edinburgh University, one of the teachers of our Canadian Robert Gourlay, is now remembered only by his book attacking Freemasonry, of which I have three copies—it has been well called "a lasting monument of fatuous credulity," but it has the merit of sincerity. It is entitled "Proofs of a Conspiracy against all the Religions and Governments of Europe, carried on in the Secret Meetings of Freemasons. Illuminati and Reading Societies," 1797, Edinburgh, 8vo., with subsequent editions in Edinburgh, 1797; Dublin, 1798; London, 1798, and New York, 1798.

lent to them by the Pythagoreans; and I consider it the more appropriate inasmuch as no modern writer has ever understood or offered any explanation of them; and in order that Freemasonry making a use of numbers almost the same as that of Pythagoras, those which are here met may not hereafter trouble any understanding."

The Orator is wholly justified in saying that certain Freemasons and certain schools of Freemasonry made use of numbers almost like the Pythagoreans—and he might have added, with the same effect of talking what any clear-headed man of the present day would call rubbish.

He begins, of course, with Unity, which "was for the ancient Philosophers the symbol of general harmony; it represented the invisible centre and fruitful source of all reality; again, not being composite, it represented the simple and eternal Entity (l'Etre) ; in fine, Unity as the generating principle of Numbers became, for the Sages, the essential attribute, the sublime characteristic and the very seal of Divinity."

Then comes Two, the Binary, which presents the opposite idea where commences the unhappy knowledge of good and evil—there is no apparent reference to mankind having become two by the creation of Eve before the knowledge of good and evil was acquired.

"Everything that is *double, false,* opposed to the *single reality* was depicted by the binary number. It is well-known that the Romans dedicated to Pluto the second month of the year and that on the second day of the same month they appeased by sacrifices the spirits of the dead . . . The number two expresses also the state of confusion and of contrariety in which human nature finds itself where everything is double; thus, night and day, cold and heat, health and illness, error and truth, the two sexes."

Equally vapid is the Ternary which "was for the Pythagoreans an interesting number and it was, as it were, revered as sacred in antiquity . . . and, in reality, there are only three divisions possible in any comprehensible being: there are only three figures in Geometry because there is no point in space around a given point which we can not make equal to a *triangle,* a *square* or a *circle.*"

This, an old Professor of Mathematics may be allowed to characterize as nonsense, mere meaningless and silly, if sententious verbiage. "The ancient chemist distinguished three elements, *salt, sulphur and mercury,* the respective actions of which upon animals they refer to the three divisions of the body, the head, the chest and the abdomen. Moreover, able modern physicians recognize only three elements," fire, water and earth, rejecting air, fire dominating the *animal,* water the *vegetable* and earth the *mineral* kingdom.

"So, also, there are only three Graces, also only three essential degrees in Freemasonry—so, too, Freemasons venerate in the triangle the most august of mysteries, that of the *Sacred Ternary,* the object of our devotion and our religion." An extraordinary jumble of theology, mythology, pseudo-science and mysticism which passed for profundity in those cricles—and the like of which still passes for profundity in some circles. One may be unable to see the bottom of a stream because of its depth, but that may happen only because it is muddy.

Then comes the Triple Ternary or Nine, still more sacred because "each one of the three elements which constitute our bodies being *ternary*, *water*, containing both earth and fire, *earth* containing particles both igneous and aqueous, *fire*, in its turn being tempered by globules of water and earthly corpuscles which form its aliment, none of the three elements being found disengaged wholly from the others and every material substance being composed of these three elements of which each one is triple . . . three times three . . . becomes the symbol of every corporisation . . . moreover, every circular line has for its sign the number nine among the Pythagoreans . . . etc., etc." *ad nauseam*, for more than two octavo pages, ending up with the nine Muses.

The Quaternary or number four is the emblem of motion and of the infinite—the symbol of the eternal and creative Principle neither corporal nor sensible. "So matter being represented by the number nine or three times three and the immortal spirit by . . . the number four, the Sages say that man, being deceived . . . in going from four to nine, the only road to take " to get out "is to go from nine to four"—whatever that may mean.

The Quinary or number five is made up of three and two—"it therefore expresses the state of imperfection, order and disorder, happiness and unhappiness, life and death . . . seen on earth." Also, curiously enough, it symbolizes "marriage because it is composed of two, the first even number, and three, the first odd number." Can anyone fathom the logic of this?

The Sages apply the Senary or number six to the physical man and seven to his immortal spirit.

Bro. the Honourable William Renwick Riddell

Seven is formed of three and four and so indicates perfection: or of six and one and consequently indicates the centre or the soul of everything, etc., etc.

The Orator "abstains from speaking of the number eight although it may be of the highest importance, and there is an infinity of things to express by it; but he gives us three pages concerning the number ten which "designates all the marvels of the Universe . . . the mysterious Societies employ it as a sign of concord, of love and of peace, inasmuch as the two hands, joined together, form by means of the fingers the number ten, and two persons who

wish to unite closely press each other's hands in token of reciprocal friendship."

Meeting the objection that in place of the three elements of Pythagoras and the Freemasons, the modern chemists had discovered thirty, he would say that they understand the word "element" in quite another sense from ours, "for they recognize as elements only the bodies or substances which cannot be decomposed while we on the other hand consider that *every element is triple,* that everything in nature is compound and that *there is nothing simple but unity."* Which, again, is either simple verbiage or worse.

The Orator concludes by saying that time alone will show the truth of his assertions, "we have already openly gone back to the opinions which the modern philosophers have rashly despised . . . For, in the language of Numbers as in that of Words, why is there not for those as for these a renascence?

"Multa renascentur quae jam cedi-
dere, cadentque,
Quae nunc sunt in honore, si volet
usus."

With this quotation from the *Ars Poetica* of Horace—the *Epistola ad Pisones* of us Victorians—I hail the names of Shepley, Watson, Whiting, all good Victorians and good Masons—but we could not have quoted these verses without completing them:
"Penes quem arbitrium est, jus et norma loquendi," the author closes as inept a dissertation as ever was written in mediæval times.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto,
June 16, 1928.

A MASONIC CREED

To look up in the light of reason to
the gracious Being above,
As the infinite source of wisdom, and
the source of infinite love;
To follow in all submission wherever
His will may lead;
Such is a Mason's mission, and such
is a Mason's creed.

To trust in His infinite justness in
the light of His work which
saith:
"I am thy Heavenly Father," such is
a Mason's faith;
That the spirit of love may guide him
wherever his feet may fare;
Such is a Mason's faith and hope,
and such his constant prayer.

And this is a Mason's duty: always
to live and move
On the planes of square and level
under the law of love;
Love which forgives and forgets the
faults of a brother man,
Nor fanneth the dying embers of
hate into life again;

Which holds up the hands of a
brother, carries relief to the
poor,
And greets with a hearty welcome
the stranger at his door;
Which rescues a brother from the
gutter of despair,
And soothes from the brow of sorrow
the wrinkles of doubt and care.

--The South Australian Freemason.

CHIPS FROM THE CHISEL

Opportunity is not a tangible thing; it is a condition—and frequently it is a condition of mind.

Take a seat on the mourner's bench and only the grief-stricken will sit beside you.

Clean-up the Source of WEEDS

1. **In vacant lots and partially cultivated fields.**
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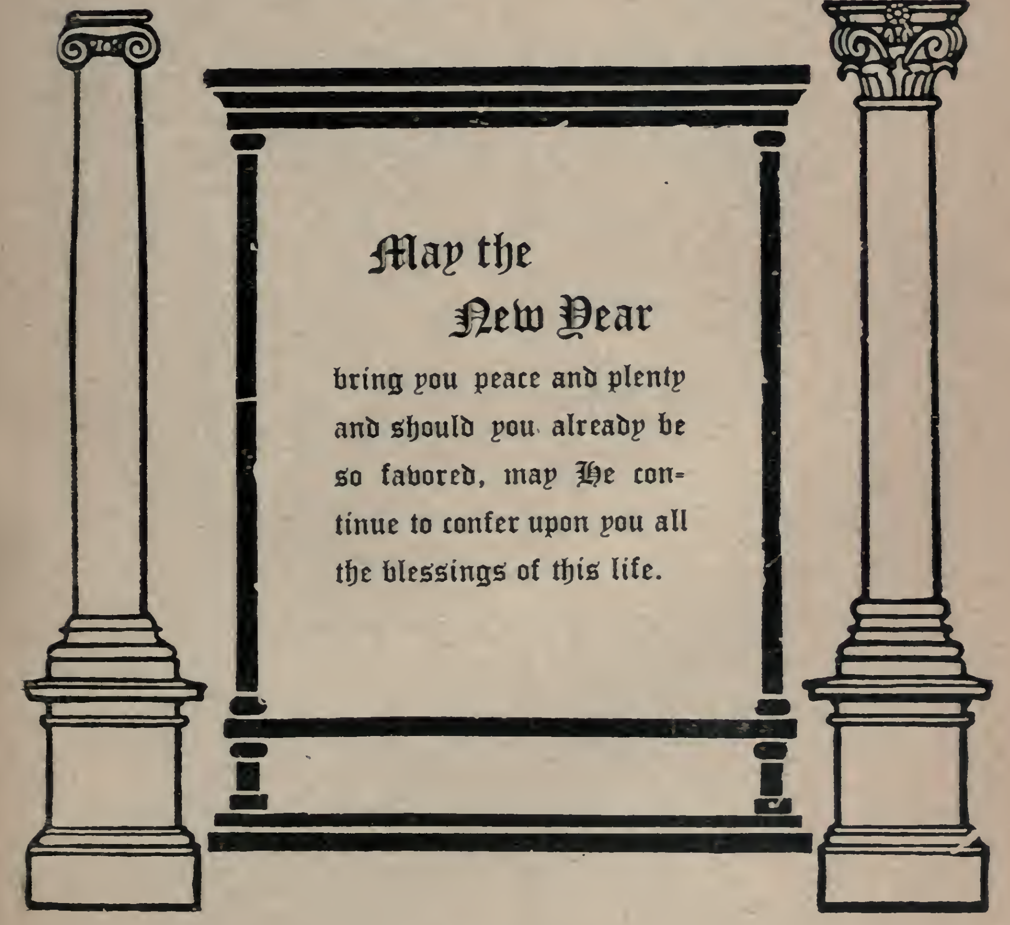

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PROFESSOR JOHN ROBISON AND HIS ATTACK ON FREE-MASONRY

By the Honourable William Renwick Riddell, LL.D., D.C.L., F.R.H.S., Etc. (Justice of Appeal, Ontario)

[Address to "The Toronto Society for Masonic Study and Research."]

John Robison, born at Boghall, Stirlingshire, Scotland, in 1739, the son of a Glasgow merchant, and intended from infancy for the Ministry of the Kirk of Scotland, was one of the ablest men that even Scotland ever produced. Educated at Glasgow, at the University in that city and graduating at the age of 17, he, in consequence of certain scruples conscientiously entertained, declined to turn to Divinity; and, like our own Richard Cartwright, Jr., of early Upper Canada, sought a life in other fields. It was not from any doubt as to the cardinal beliefs of his Church that Robison took this step, any more than it was the case with Cartwright—both remained pronounced and reverent Christians, though both declined Holy Orders, for reasons which were wholly valid with them though we are not able to see that they need have had much if any force. Such men are to be honoured, even if they are not quite understood.

A fine mathematician, he was recommended by the celebrated Dr. Adam Smith as Assistant to Dr. Dick, Professor of Natural Philosophy (which we now call Physics); but Dick thought him too young, and he went to London, furnished with fine testimonials, hoping to become Tutor to the Duke of York, son of King George III, who expected to go to sea, as common talk had it. However, the Duke went into the Army instead of going to sea; and became a creditable Officer, especially after he became Commander-in-Chief. It is not without interest for us that it was after him, that Simcoe called this place "York," rejecting the old name of Toronto, which was not returned until 1834. The Duke had had some trifling successes in the Low Countries; and in 1793, Simcoe in his honour named the Harbour "York" in "respect to His Royal Highness." So came the name to Town and County.

Robison, in 1759, the year after he went to London, secured the appointment of Tutor to the son of Admiral Knowles, who had been expected to accompany the Duke of York; and was rated Midshipman on the *Royal William*, on which ship, his pupil was Lieutenant. He continued in the Marine Service for three years, in which time, he had relations with Canada. Joining the expedition of Wolfe, he went with him up the River St. Lawrence to Quebec; he was very useful, being engaged in making surveys in the River and adjoining territory. He was with Wolfe the night before his death, when he visited the Posts on the River; but does not seem to have been present at the Battle on the Plains of Abraham. Continuing in his position for three years and improving himself in Navigation, he returned to England in 1762, then was employed in Jamaica; he returned to Glasgow, where he studied Law and Chemistry, and was somewhat closely connected with James Watt—he, later, was of great assistance to Watt, as it was largely on his evidence that Watt succeeded in his action in 1796 to protect his patent from infringement. In 1766, he succeeded Dr. Black as Professor of Chemistry in Glasgow University and lectured with great ac-

ceptance and to large classes of undergraduates and others.

In 1770, he accompanied Sir Charles Knowles as Secretary to Russia, where in 1772, he was created Inspector-General of Marine Cadets; and was held in high esteem by the governing classes; but he tired of this and accepted the nomination to the Professorship of Natural Philosophy in the Edinburgh University, tendered him by the Magistrates and Town-

THE HONOURABLE WILLIAM RENWICK RIDDELL, LLD., D.C.L., F.R.H.S.

Council in 1773. He lectured "with great fluency and precision of language . . . . on the sciences of mechanics, hydrodynamics, astronomy and optics, together with electricity and magnetism." One of his pupils at the University was Robert (Fleming) Gourlay, who became, in the second decade of the 19th Century, such a prominent figure in this Province, and who is not yet forgotten. Gourlay speaks of him with great respect, "the profound Mr. Robison."

He continued in active service until his death in 1805. He earned encomiums from many quarters—Sir James Mackintosh calls him: "one of the greatest mathematical philosophers of his age"; James Watt, who knew him if anyone did, says: "He was a man of the clearest head and the most science of anybody I have ever known"; Henry Hallam speaks of him with the greatest respect for removing Bacon from the pedestal of demigod upon which the unwise had set him, and placing him in his rightful position of a useful guide. His biographers, his admirers and his critics all give him credit for absolute honesty and the most sincere desire for the right—a real endeavour, at all times and on all subjects, to do complete justice.

Now, this was the man who, in 1797, published a book, which, it is not too much to say, attracted the attention of the public in an uncommon degree —and worried and puzzled the Masonic world to an unprecedented extent; and this was increased by the fact that the author was himself a Mason in good standing. The title read, "PROOFS of a CONSPIRACY against all the RELIGIONS and GOVERNMENTS of Europe, carried on in the Secret Meetings of FREE MASONS, ILLUMINATI, and READING SOCIETIES. Collected from good authorities, by JOHN ROBISON, A.M., Professor of Natural Philosophy, and Secretary to the Royal Society of Edinburgh. *Nam tua res agitur paries cum proximus ardet* . . . ." The quotation from Horace, Epistolarum, I, 18, 84, "For it is a matter of concern to you when the adjoining wall is blazing," indicates as, indeed, is manifest from his book throughout, that he had not neglected or forgotten his classics— he might have added the verse following: "Et neglecta solent incendia sumere vires."

A second edition appeared at Edinburgh in 1797, a third at Dublin in 1798, a fourth (calling itself the Third) at London in 1798: nor was its vogue confined to the British Isles, as we find an edition published at New York in 1798, and a French translation in Paris, 1798. All these editions are practically the same except the first, to which a long postscript was added in the second and subsequent editions. In this paper, I make use of the London edition of 1798, which has on the title page after the above copied words, the following: "The Third Edition, corrected.—London, Printed for T. CADELL, Jun., and W. DAVIES, Strand; and W. CREECH, Edinburgh, 1798."

The book has been characterized as "a lasting monument of fatuous credulity;" and it well deserves the characterization. One has great difficulty in understanding how a man of the intellect and acumen of Robison could possibly father such a production; one would think him the last man in the world to do so; but the depths of human credulity, as the heights of human faith, have not yet been measured. It is not to be forgotten that even a genius like Sir

Isaac Newton was responsible for considerable which we should characterize as rubbish, if it came from a less eminent hand.

Robison was a Mason when he went to Russia in 1770; he belonged to a Lodge in Edinburgh working the English Rite, or what was practically identical with the English Rite of the Grand Lodge of 1717. A great deal has been said and written, and, no doubt, will be said and written concerning the Scottish Masons and Scottish Masonry; but there will be no controversy over the fact that by the end of the 18th Century, there was little if any distinction between English and Scottish Masonry as actually practised. Robison has no hesitation in saying, as he does more than once, that England was "the birth-place of Masonry;" and when in St. Petersburg, he connected himself with the English Lodge. At home, the Masonic Lodge "was considered merely as a pretext for passing an hour or two in a sort of decent conviviality, not altogether void of some rational occupation," treating with a smile "the story of old Hiram." He was amazed, when visiting the Continent in 1770, to find that Masonry was there taken seriously: "the differences of doctrines or of ceremonies," which at home, were regarded as "mere frivolities," he found "on the Continent . . . matters of serious concern and debate." He was initiated in a very splendid Lodge at Liège, of which the Prince-Bishop and the chief Noblesse were members, and visited French Lodges at Valenciennes, Brussels, Aix-la-Chapelle, Berlin and Konigsberg. Perhaps the most curious event in this Masonic excursion was the "very elegant entertainment" given him at St. Petersburg "in the female *Loge de la Fidelite'*, where every ceremonial was composed in the highest degree of elegance, and everything conducted with the most delicate respect for our fair sisters, and the old song of brotherly love was chanted in the most refined strain of sentiment." This seems to have been a Lodge of women only, not a Lodge in which the odd custom of "Adoption" was in vogue, such as that which I have described in an Article: *Women in Free Masonry a Century and a Half ago*. The Masonic Sun. Vol. XXXI, (July, 1928), pp. 17, *sqq.*, from the book issued in 1810 from the celebrated *Imprimerie de Bonnant* and called "Ce Que C'est La Franche-Maçonnerie." In that book, we are told that the writer was "especially surprised to see that the dear Sisters who were initiated were not at all alarmed at the sacrifices of their modesty required in the ceremonies, inept indeed, but certainly pressed with undue freedom. These ladies—who, morever, did not justify the good taste of the brethren—were, beyond any question, of the kind who find difficulty in blushing." In Germany, apparently, not the same success was met in preserving the modesty of the initiate—at all events, some time afterwards, Robison had information of the initiation at Frankfort of a young lady, who was received under the feigned name of Psycharion (which, by the way, is Plato's name for Dear Little Soul); Robison says that, men initiating, the account of the initiation "shows the most scrupulous attention to the moral feelings of the sex," but, unfortunately, "the confusion and disturbance which followed, which, after all their care, it occasioned among the ladies, shows, that when they thought all

right and delicate, they had been but coarse judges."

And so, he thinks, women are not so blind, after all: he does not seem to have thought out the question whether men, mere men, could under any circumstances and upon any matter, decide so as to receive the approval of the fair sex, "fair" being here used in the physical and not the judicial sense. Nevertheless, he finds the Discourses or Addresses delivered on that occasion "are really ingenious and well-composed, were they not such as would offend my fair countrywomen."

It was not, however, till some years after his return to Scotland that he began to pay serious attention to the Continental Masonry in "which," as he says, "I had learned many doctrines and seen many ceremonies which have no place in the simple system of Free Masonry which obtains in this country."

Before going into the results of his enquiries, it may be of advantage to find what were his principles and his conception of the right religion and government which he was to find conspired against by Freemasonry. There can be no possible doubt of Robison's absolute rectitude and patriotism, of his sincere desire that his country and all other countries should have the best possible government and religion—it is equally certain that he thought that Scotland had the best of Kings in George III. (he undoubtedly did not agree with the allegations of the Declaration of Independence about "the Farmer King"—but then, nobody did at that time, whatever may be the case now); he thought that the form of government in Church and State could not be much improved; and, if improvable at all, not in the way the Radicals desired. "All that is, is right," was his creed: he was a High Tory, as Toryism was then understood, and would have despised the lukewarm Conservatism of a later day. Moreover, he took the manifestoes of the new Secret Societies and their founders or leaders at their face value—perhaps his mathematics and physics had made him a literalist, though, as an old Professor of Mathematics myself, I hope that the study of these sciences has not always that result. We Masons believe our Craft is founded on eternal principles of truth; but we know that a certain amount of mysticism is essential in every esoteric society, and always has been, from long before the times of Pythagoras: a certain amount of hyberbole, exaggeration, apparent misstatement even, is inevitable; and must be taken into account; no Mason takes as literal the horrible imprecation—disgusting, if taken literally—as to what should happen if he were false to his pledge. No one, for a moment, thinks that if he had "faith as a grain of mustard-seed," he could physically remove a mountain of actual rock; or that nothing would be impossible for him: in the Church of which Robison was so important a member, and of which he was an ornament, it was not expected even of the Moderator, that he should "hate . . . his father and mother and wife and children and brethren and sisters;" and that the Archbishop of Canterbury, at the other end of Britain, did not sell all that he had and give the proceeds to the poor, I am reasonably certain. Every reasonable man must understand that such statements are not to be taken literally, and must read them accordingly.

So, too, in national affairs, allowance must be made for conventional, traditional and ceremonial expressions—no one, now-a-days imagines

that the King is "King by the Grace of God," but we all know, as he knows, and is proud of the fact, that he is "King by grace of an Act of Parliament."

Moreover, I am sure that Robison did not give sufficient attention to the German character: that as he says, "is the very opposite to frivolity; it tends to seriousness . . . . singularity and wonder . . . are to them irresistible recommendations and incitements; they have always exhibited a strong predilection for everything that is wonderful or solemn or terrible . . . and . . . have been generally in the foremost ranks, the gross absurdities of magic, exorcism, witchcraft, fortune telling, transmutation of metals, and universal medicine have always had their zealous partisans, who have listened with greedy ears to the nonsense and jargon of fanatics and cheats . . . many have been . . . rendered ridiculous by their credulity . . ." But he quite fails to recognize what is very important, that while a German philosopher evolves a camel from his inner consciousness, he never asks anyone to accept it as a real camel of flesh and blood, and his admiring followers know that it is a creature of fancy only. In other words, many a German Thesis is in reality a mental exercise, and is not expected to be taken seriously and in every-day life as a real camel.

Robison's politics, too, are of importance to be considered: he in this regard gives no uncertain sound; as I have said, he is an old-time Tory, a Tory of the time when a Tory was an out-and-out Tory, and would scorn to be called a Conservative; everything was for the best in the British Isles, the best in the best of all possible worlds; they "exhibit the finest specimen of civil government that ever was seen on earth, and a national character and conduct not unworthy of the inestimable blessings that we enjoy:" the nations which "wished to have a constitution . . . an *improvement* on ours," utterly failed: the Parliament might be improved, indeed, by not electing so many merchants, for he thinks "the Gentry are proper objects of our choice for filling the House of Commons:" it is all wrong to object to Ministerial corruption for "Ministerial corruption is the first fruit of Liberty, and freedom dawned for this nation in Queen Elizabeth's time, when her Minister bribed Wentworth. A wise and free Legislature will endeavour to make this as expensive and troublesome as possible, and therefore will neither admit universal suffrage nor a very extensive eligibility." And the Establishment was as admirable in Church as in State; in short, the only improvement anywhere in the Kingdom would be to limit the franchise and the eligibility to be elected a Member of Parliament.

Bearing in mind the kind of man he was, we shall be able to understand, if not to sympathize with, his criticism of the Societies he attacks.

One almost shudders to think what this fine old crusted Tory would have said to the suggestion that a working man should have a vote; and it is quite certain that if he could while dreaming have had a vision of a time when a working man should not only vote but have a seat in the House of Commons and even form a Government and create Lords Chancellors and Peers, he would have waked up with the memory of a ridiculous phantasia —Ramsay MacDonald would be to him as impossible a character as Jack the Giant-Killer.

Let us now see what it was that

caused such deep concern and alarm to this intellectual, learned, experienced, honest and patriotic Scot. A Society had come into existence on the Continent and had a few branches in Britain (as was supposed, although I have not been able to satisfy myself as to this); it was named "The Illuminati." The story of this curious order has been told more than once, and there is no mystery about it. I have carefully examined the works, chiefly German and French, which deal with it; but the account given in Gould's excellent *History of Freemasonry*, can be relied upon as accurate, so far as it goes—see Vol. III, pp. 375, *sqq*.

Adam Weishaupt was a well-meaning dreamer, a sort of a pre-Marx Marxian, with rather more than his share of German mysticism—he could evolve not only a camel, but a whole political, economical, sociological system out of his inner consciousness, and talk about it as though he expected it to materialize. Educated under Jesuit masters, he quarreled with them and, thereafter, he had to meet with their enmity in every way. Born in 1748 at Ingolstadt in Bavaria, he received his education at the University of that City, and in 1772 and 1775, he was appointed to important chairs in his Alma Mater. A dreamer, if ever there was one, he conceived the idea of forming a Society of the young for the best purposes, that is, the advancement of virtue and the extirpation of evil and vice throughout the world. This idea of a secret society revolutionizing the world and bringing in a Millenium when Satan, evil, vice,—call it by what name you will—was to lie and

"Writhe in pain,
And die amid its worshippers,"

was as old as Pythagoras, and much older. It is doubtful if mankind since the Stone Era has ever been without such reformers with such schemes.

Son of a professor and himself a professor, Weishaupt had the faith and confidence of the classic pedagogue in the knowledge derived from books, the proud sufficiency, the doctrinal and pedantic tone, the dictatorial spirit, the radical ignorance of real life. He saw men and society only by way of books and he was convinced that a man who like him could read what had been written from the most remote antiquity, necessarily possessed the real knowledge and could resolve every problem that presented itself to a human being. He always believed that he was in his professor's chair, he never ceased to consider the Order which he created as a great class and its members, students who should humbly and docilely submit to the authority of the master.

Sometimes, care must be taken in reading of the "Illuminati," to distinguish this organization of Weishaupt's from other organizations which took the same name; there were several of them—the *Alombrados* of Spain early in the 16th century destroyed by the Inquisition as heretical; the *Guerines* of France about a century later; another in France after about another century which went to pieces in the Revolution; an association of mystics in Belgium somewhere about 1750-1770, etc. Some so-called Pythagoreans can scarcely, if at all, be distinguished from one or other of these Societies—most of whom, be it said, thought or said they had the most philanthropic objects in view, but some of whom can hardly be considered as pursuing these objects by the wisest or most direct methods.

Weishaupt began his Society with the title *Perfektibilisten,i.e.,* Perfectibilist; but it had nothing in common with the so-called Perfectibilists in religious history. It spread with considerable speed through the whole of Catholic Germany; and numbered among its adherents, men of the highest standing, such as Goethe, Nicolai and Herder. The expressed object of the Society was to combat ignorance, superstition and tyranny, chiefly but not exclusively in the field of religion—to this, Weishaupt seems to have been moved by hatred of and opposition to his old teachers, the Jesuits, whom he never forgave and who never forgave him. He undoubtedly taught and urged as an object of his now Society, opposition to ignorance, superstition and tyranny, chiefly in the field of religion, indeed, for he rejected all national Church-foundations, all formal dogma as declared by the existing Churches, and, in fact, all form whatsoever in public worship. How this would naturally strike the strict Scot with his Established Church and formal worship, need not now be considered.

Had Weishaupt and his confreres been content to fight religious battles alone, it is not unlikely that he would have been left unmolested by the "Secular Arm," whatever might have been done to him by the Church or Churches. He did not so act; with his views and his enthusiasm, it is hard to see how he could restrict himself to religion; at all events, he ventured into the realm of the State and its constitution, and advocated Republican opinions utterly opposed to the passive obedience views then held, but by no means so opposed to the principles of the British Constitution as Robison supposed. Some of his views are commonplace with us. For example, what the Elector of Bavaria most bitterly complained of was that Weishaupt with his doctrines of the rights of humanity was preaching that the people should actually govern themselves leaving to the Sovereign but the name and the privilege of wearing the Crown. That does not shock a British subject; but those were the days on the Continent of Kings by the Grace of God. The list closed the other day with the name of name of William II. of Prussia.

The Order received fresh vigor and vogue by the adherence of the extraordinary character, Baron von Knigg ,and at length received a limited amount of support from the perverted Masonry of Germany and France.

The Reading Societies so fulminated against by Robison seem to have been inaugurated in 1784—one is spoken of at the beginning of July of that year. They met once or twice a month in a private home, and some of the company read aloud from a book selected from among those recommended by the Order. These not being secret but rather public and open, they did not come within the prohibition of the Decree of June 22, 1794, to be spoken of later.

When by this Decree, the Illuminati were prevented from meeting in secret Lodge, they gathered in small groups to form "Reading Societies," "in which the young might continue to regulate and inform themselves according to the directions of the Statutes" of the Order. They are known to have continued until January, 1785.

After capturing or securing the assistance of the Masonic Lodges, the Society became more important: the other brands of so-called Masonry, the

Rosicrucians, the Jesuits, all made war on Weishaupt and his interlocking body of enthusiasts; not only private fulminations, but also vituperation, barely concealed as argument, filling the Press, were employed, the attention of the authorities in the State was drawn to the Radical and revolutionary principles of the Order, and the end became inevitable—on June 22, 1784, an Electoral Edict suppressed the Illuminati in Bavaria, and the Masonry which had allowed itself to be made a tool of by the Illuminati shared their fate, for the Edict purported to suppress Secret Societies altogether in Bavaria. The Illuminati obeyed the decree, protesting innocence of all wrongdoing, and producing their books in evidence of their innocence; all their protestations were in vain; another Edict followed, and then came persecution: Weishaupt fled and took refuge with Ernest II, Duke of Saxe-Gotha, a Freemason, and survived till 1830; others of the leaders also fled, the Order came to an end carrying with it to destruction, Freemasonry in Southern Germany. The Illuminati never reappeared, although an occasional group has used the name from time to time. It is difficult to account for the disquiet, which can almost be called terror and panic, which this small body of men, never at its best having more than 2,000 members, caused in more than one European State (never in Britain, be it said), it may be that the reason is to be found in the enmity, unrelenting and unscrupulous, displayed against Weishaupt by his former teachers, the Jesuits, now turned his bitterest foes—and it must be said that he hated them as much as they him. The old story of the iron pot and the earthen pot colliding was retold, Weishaupt playing the part of that of earth.

The alarm of Robison is even more difficult to account for; all danger had ceased, the Order of Illuminati had been dissolved, never to reappear, the Reading Societies had, finally, gone down with it, the number of Lodges of Illuminati in Britain must have been small, and the members insignificant; true, the Revolutionary doctrines were being spread broadcast throughout Europe, but by much more important and much more manifest agencies than the defunct or dying Order, while he himself absolves British Masonry of the stigma of heretical and revolutionary views or aims. It is still more difficult to understand why he linked Masonry with Illuminism and Reading Societies attached to Illuminism—in his Title-page, joining Masonry, which in Britain, at least, was wholly innocent of the challenged doctrines and propaganda, in common reprobation with the sinning organizations of the Continent.

It is in no small degree owing to this ineptitude, that this amazing work has earned the characterization, already mentioned, of "a lasting monument of fatuous credulity," a characterization fully deserved.

It is time, now, that we should turn to the book itself. He begins by stating that in 1795—*ten years* after the dissolution of the Order, be it noted—his attention was called by perusing a German periodical, to the schisms in Freemasonry; he had been a somewhat active Mason, himself; and he first tells of his experiences on the Continent in Masonry, so different from his own. His curiosity being aroused by what he read, he made enquiries, going into the matter fully and at length, he found that "AN ASSOCIATION HAS BEEN FORM-

ED for the express purpose of ROOTING OUT ALL THE RELIGIOUS ESTABLISHMENTS, AND OVERTURNING ALL THE EXISTING GOVERNMENTS OF EUROPE" (I use his own capitalization). He goes on to say of this feeble and now practically defunct institution: "I have seen this Association exerting itself zealously and systematically, till it has become atmost irresistible." After such a statement, without a shadow of a shade of justification except from Bavarian calumny, almost anything could be believed of Robison's credulity and want of reliability, which I, for one, am wholly unable to account for in a man of his intellect, character and attainments. The only explanation that at all approaches plausibility, is that he read and relied upon some of the productions of the Bavarian Jesuits—and that explanation comes short of being completely satisfactory.

His first chapter on Schisms in Free Masonry is fairly accurate; in it, he details some of the vagaries of so-called Masonry in France and Germany, the *Chevalier Maçon Ecossois,* preceded by the Degrees of *Novice* and *Eleve,* and with them leading up to that of Parfait Maçon, the "Chivalric" Degrees, *Philosophe, Pellerin, Clairvoyant,* etc.; *the Chevalier de Soliel, Chevalier de l'Orient, Chevalier de l'Aigle, Chevalier Bienfaisant, de la Sainte Cité, Amis reunis de la Verite'*—then, passing over into Germany, we have the Lodge *Theodor von der guten Rath, Philalethes, Rosycrucians, Chevalier de l'Epée,* the *Tempelorden* or *Orden des Strikten Observanz,* the nonsense of Baron von Ruth, the lies of the soi-disant Johnson, Baron Knigge's honest, earnest but silly efforts and the results obtained, culminating (as perhaps it will be considered), in the great and glorious (to give credence to the exultant claims of its members) institution of the Eclectic or Syncritic Masonry of the United Lodges of Germany. Then made an insidious invasion into these innocuous if childish systems, the hideous enemy of all that was right, calling itself Illuminism. The origin and progress of Weishaupt's Order is fairly stated, even if we cannot quite believe that all its preceptors and leaders were fiends in human form, determined to destroy all that was worth while in Church and in State. I do not detail the accusations, some apparently honest misunderstanding of the meaning of the language employed, more due to taking *au pied de la lettre,* the highly hyperbolic and mystical expressions and the doctrines expressed in words understood by the initiated only—I wonder what a non-initiate would think of some of our perfectly innocent "mysteries!"

It is quite true that Weishaupt taught the desirability of abolishing Church Establishments connected with or controlled by the State; but so did and do Presbyterians and Baptists in England, and Episcopalians and Baptists in Scotland, and the Independents everywhere: the system had no place in the United States (after a short period in certain States), and in this Province, it was the source of constant trouble and discontent when even partially in vogue, and hardly anyone has thought of it for a century. Nay, in Scotland itself—and this may possibly account for some of Robison's invective—there was more than a little discontent, which showed itself in the formation of Dissenting Churches and culminating in the great Disruption of 1843.

As to religion apart from Church government it is rather difficult to determine quite clearly what Weishaupt really taught—I am not sure that he quite knew himself. Some have called it Deism, I should rather call it Theism, a belief the minimum of what is required of every Mason of our Rite, a belief in the G.A.O.T.U. He did not require more, as our Masonry does not require more; whether he insisted that the belief should go no further, as our Masonry does not, I find myself unable to be certain: I think not, but I may well be in error. In any case, he did not go so far as to advocate anything but persuasion, and he did not go anything like the length the English Deists openly did. Yet, this is called a "conspiracy;" anything more absurd can hardly be conceived by the most vivid imagination.

So, too, as to the State, the views of Weishaupt were the views of the best intellects of the day, the views which have made the New British Empire, the New Commonwealth of Nations; he was more moderate than the contemporary French writers, not to speak of certain visionary Germans, while there is scarcely a word which the new nation of the United States of America, fully recognized in 1783 by Britain as an independent nation, would not accept as sound doctrine. Of course, no one would expect such views to be palatable to one who objected to merchants in the House of Commons, and thought bribery by the Ministry, not only permissible but the mark of liberty, and therefore laudable—at least, so long as it was confined to the landed gentry. The doctrine of human equality was abhorrent to him: it was "not intended . . . that all may be at rest and happy, even though all *were* equal, but to get rid of that coercion, which must be employed in the place of morality, that the innocent rich may be robbed with impunity by the idle and profligate poor." And nowhere do we find in Robison a word of sympathy for the poor or a word of rebuke for the rich. What the Order sought in its actions and teachings was "to overturn the present constitutions of the European States"—that may be conceded, but he goes on "in order to introduce a chimaera which the history of mankind shows to be contrary to the nature of man. Naturam expellas furca, tamen usque recurret." Of course, human nature is always about the same, but that, we moderns do not think a reason why we should go on always in the old paths; the old is not necessarily the best, and changes are not only wholesome, they are inevitable as knowledge grows from more to more. This was an abhorrent doctrine to our old Tory Professor.

If there is one thing more absurd than another in this succession of phillipics, it is the appeal to the authority of Sir Kenelm Digby as more cogent than that of Sir Isaac Newton, himself.

I have no intention to go through this extraordinary book, and discuss all its vagaries; but I cannot resist the temptation to say a few words on one subject. Remembering the admiration which he expressed at the proceedings of a Women's Lodge, the *Loge de la Fidelité,* when on his visit to the Continent, it is at least singular that he devotes page after page assailing Weishaupt for his desire to enlist women in his cause,—the real author of the scheme seems to have been Zwack, one of Weishaupt's best workers. Zwack suggested "a project for a Sisterhood, in subserviency to the designs of the Illuminati." This,

Robison considers shear villainy, without one redeeming feature. "There is nothing in the whole constitution of the Illuminati that strikes me with more horror than the proposals . . . to enlist women in this shocking warfare with all that 'is good and pure and lovely and of good report.'" He urges his countrywomen "by the regard they have for their own dignity, and for their rank in society to join against these enemies of human nature and profligate degraders of their sex . . ." Otherwise they may "fall from that high estate to which they have arisen in Christian Europe, and again sink into that insignificancy or slavery in which the sex is found in all ages and countries out of the hearing of Christianity." Listen to that, ye politician women! "Their *business* is supposed to be the ornamenting themselves . . . Everything is prescribed to them *because it makes them more lovely,*" etc., etc.

The proposition to form Lodges of young women was never carried out or even submitted to the Order. In any case, Zwak might have called to its support the example of the Orders of feminine Chivalry of the time of the Crusades, or the crowds of young girls and even nuns who followed the troops and made use of their nights to make recruits for the future.

That the scheme to divide women into two classes, the chaste allured by the opportunity to procure good reading, and the unchaste allured by the opportunity to gratify their passions, was as rascally as it was absurd, all will agree—and neither the rascality nor the absurdity is diminished by the proposition that the latter class should not only act as spies, but also turn in to the Order the money made by prostituting their bodies.

Probably, enough has been said to indicate the character of this book; and the charges are now too stale to merit investigation.

Nowhere does Robison so much as suggest that the Masonic Lodges in Britain, or Masonry as known in Britain had the villainous designs attributed to Illuminism; and the inclusion of Freemasonry in the list of conspirators on his Title-page is a gratuitous libel, the object of which, I find myself unable to fathom. Freemasonry even of the continental kind did not make use of Illuminism, but Illuminism of Freemasonry; in other words, Illuminism never became a part of Freemasonry but Freemasonry's degrees were made a part of Illuminism.

Whatever the intention and however weak the assault on Masonry, it probably had much to do with the prejudice undoubtedly existing in certain parts of Scotland against Masonry which continued down to well within the last century, and which I am informed still exists in some parts of Scotland, as it is known to exist in some parts and some circles of Canada.

It will suffice to give one instance of record of the operation of this prejudice. In a work intituled *Reports of certain Remarkable Cases in the Court of Session and Trials in the High Court of Judiciary, by William Buchanan, Esq., Advocate;* Edinburgh . . . 1813, is given a Report of a case in 1800. In Maybole, Ayrshire, had existed a Royal Arch Lodge for some years—it will be remembered that at that time in some jurisdictions, the Symbolic and Royal Arch Degrees were worked by the same Lodge—in 1800, for no reason that ever became known, a report was circulated, possibly based upon Robison's accusations, that the members were

making "use of the profession of Free Masonry merely as a cover for principles hostile to the Government and Religion of the country," which, it will be recognized, was precisely the accusation of Robison. No ground was ever shown for the charge; but two members, John Andrew, a shoemaker, and Robert Ramsay, a cartwright, were arrested and kept in prison for a time. Tried at the Circuit Court at Ayr in the autumn of 1800, they were unanimously acquitted. The Lord Justice Clerk (Lord Hope), sarcastically says in a proceeding growing out of this charge: "I suppose this Mason-lodge was magnified into the most dreadful society that ever existed . . . . very heavy and very dreadful charges brought against it."

But, after all, no great harm was done by Robison by his ridiculous attack except to his own reputation—So Mote It Be, even *in aeternum*.

Osgoode Hall,
Toronto,
September 22nd, 1928.

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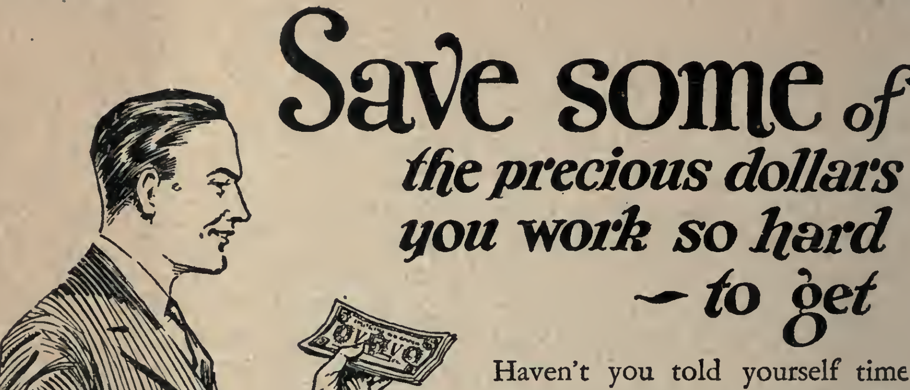

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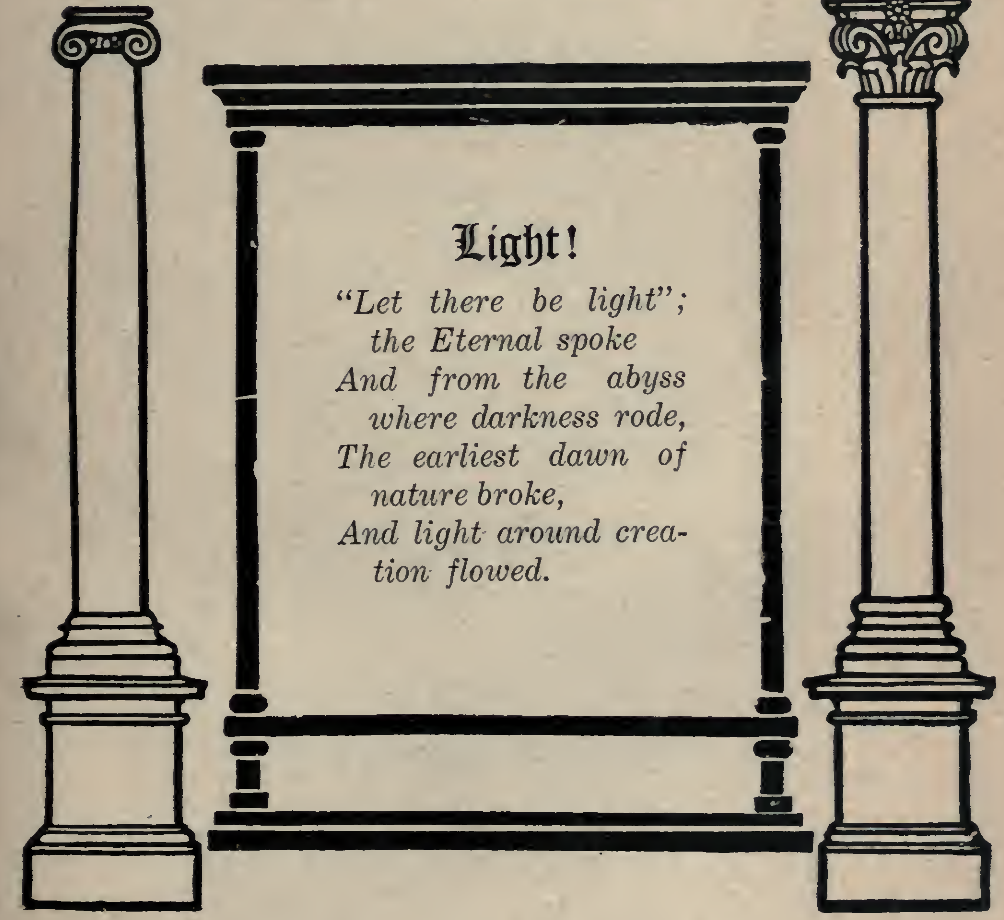

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People Will Talk

If you listen to all that is said as you go;
You may get through the world but 'twill be mighty slow,
You'll be worried and fretted and kept in a stew
For meddlesome tongues must have something to do—
And people will talk.

If quiet and modest, you'll have it presumed,
That your humble position is only assumed,
You're a wolf in sheep's clothing, or else you're a fool,
But don't get excited—keep perfectly cool—
For people will talk.

And then if you show the least boldness of heart,
Or a slight inclination to take your own part,
They will call you an upstart, conceited and vain,
But keep straight ahead—don't stop to explain—
For people will talk.

If quiet and modest, you'll have it fashioned your hat—
Someone will sure take notice of that—
And hint rather strong that you can't pay your way;
But don't get excited, whatever they say—
For people will talk.

If your dress is in fashion, don't think to escape,
For they criticise them in a different shape—
You're ahead of your means, or your tailor's unpaid,
But mind your own business, there's aught to be made—
For people will talk.

Now the best way to do is to do as you please,
For your mind, if you have one, will then be at ease,
Of course you will meet with all sorts of abuse;
But don't think to stop them—it's not any use—
For people will talk.

—Author Unknown.

A MONTHLY JOURNAL DEVOTED TO THE INTERESTS OF MASONRY
IN CANADA

"And God Said, Let there be Light"

Vol. XXXIII. No 3 TORONTO, SEPTEMBER, 1929 Price $1.50 Per Annum

AN EXPOSURE OF MASONRY IN ENGLAND NEARLY TWO CENTURIES AGO

By the Honourable William Renwick Riddell, LL.D., D.C.L., F.R.H.S., Etc.

(Justice of Appeal, Ontario)

There are always those who desire to find out clandestinely secrets to which they are not entitled; and always those who for one reason or the other are anxious to proclaim upon the house-tops what others wish to keep esoteric. Masonry is not exempt from such, and never was, either on this Continent or the Old World. The unhappy William Morgan of Batavia, N.Y., whose treason and death in 1829 convulsed the United States, and had an appreciable effect upon the history of the World was the most noted example on this Continent; while in the Old World, their name is Legion.

In England, the first case of exposure of Freemasonry of which I find any certain information was in the fourth decade of the 18th Century.

The Mother Grand Lodge of the World, the Premier Grand Lodge of England was instituted in 1717; and eight years afterwards, the "Grand Lodge of all England" was instituted at York: these two worked side by side without mutual recognition until the end of the Century when the York Rite disappeared from England. The "Ancient" or "Atholl" Grand Lodge, a schismatical body split off in 1751, but the breach was healed in 1813—all regular Masons in England being thereafter "Ancient, Free and Accepted Masons."

A few years before 1740, an Alderman of London, Samuel Pritchard by name, published a Pamphlet, *Masonry Dissected* which is the first Expose of which I can find any definite trace. He swore in an affidavit annexed to his publication that he was a Mason and that his book was a true and perfect copy of the Ritual in every respect. As, in the book itself he copied an Oath of Secrecy to which he had sworn in the Lodge, he marked himself down as a perjurer and a sneak. I have not been able to secure a copy of this work, though I have been looking for it for more than two score years and, therefore, I can give no account of its contents.

But, apparently in 1740, appeared a small Pamphlet, intituled: *The Free Mason Examin'd or the World Brought out of Darkness into Light . . . . by Alexander Slade, late Master of three Regular Constituted Lodges in . . . . Norwich. London. Printed for R. Griffiths in Paternoster-Row.*

This Pamphlet is also very rare; but, as it has been reprinted, its contents are available; and in this Paper, I propose to make use of them.

Slade, on his own showing, is a liar and without any sense of shame. He boasts that he was never initiated as a Mason and accounts for his knowledge of the secrets in this way:—his father was made a Mason about 1708 when Sir Christopher Wren was Grand-Master, at the oldest Lodge in London, then held at the Goose-and-Gridiron Alehouse in St. Paul's Churchyard: he continued a Member of that Lodge about 34 years till his death. On his death, the son became master of all his effects and, one day, found a paper containing the Ritual—it was endorsed: *A Freemason's Instruction.* It will be seen that the knowledge he claims to have obtained was so obtained by reading a paper which his deceased father was holding as a profound secret; but the son has no hesitation in dishonouring his dead father by spreading it to the world. He says that Pritchard was a scoundrel for disclosing what he had sworn to keep secret; but, as he had not given an Oath to keep secret what he learned, he was himself guiltness!

He applied himself to the study of the Manuscript thus obtained, and mastered it. Going to Norwich on business, he represented himself as a Mason to his host, the Master of a Lodge there, pretending that he had been made a Mason in Antigua a few years before. Meeting the tests, he was accepted as a Mason, and taken to the host's Lodge where he witnessed an Initiation: subsequently, removing to Norwich, he became Master of three different Lodges in that city. "As some unforeseen Misfortunes occasioned me to leave Norwich. . . I came to London, where I was advised by some of my Friends, who are not Masons, to publish this Account of Freemasonry for a small Support in my necessitous Circumstances": and the dishonourable cur does so accordingly, adding: "Therefore, those Ladies who have hitherto censured the Freemasons so hard, as to think them guilty of the worst of Crimes, and those Gentlemen who have long neglected to be made, thinking the Secret too dear a purchase, have at length an Opportunity, for a Trifle, of knowing the whole Mystery, which now absolutely remains no longer a Secret.

Hence the Pamphlet which was to to obtained for Five Shillings.

At this time, there were the two Grand Lodges in England; but there were then and for some time thereafter independent Lodges, which had no Charter or Dispensation from any Grand Lodge, and claimed an inherent right to work independently —they called themselves "Masonic Lodges," and at this distance of time there is no way of arriving with anything like certainty at the likeness or unlikeness of the Ritual of any of them to that established by the Regular Grand Lodge: nor do I attempt to determine the authenticity of this Ritual or do more than give an account of it.

Solomon's Temple had not yet been found to be the birth-place of Masonry; and our good friend Hiram Abiff and his *alter ego,* Adonhiram, were still to be heard of. The first Lodge was held "in a pleasant Plain of Baylon, called Shinar on the Banks of the River Tygris. . . an hundred and one years after the Flood": but Freemasonry did not begin until one hundred and fifty-four years after Noah's Flood at the building of the Tower of Babel, when the first Grand Master, Nimrod, called by Masons, Belus, finding that the Brethren could not understand each other by reason of the Confusion of Tongues, assembled a Grand Lodge and in-

structed them how to converse by Signs. His first injunctions were Silence, Secrecy and Brotherly Love.

Masonry, according to Slade had two Degrees, the Minor's Degree and the Major's Degree: of these, the Ritual is given. But, there is clearly indicated a Degree higher than these, and corresponding to our Master's Degree, of which we have not the Ritual or even an express mention.

It may be mentioned that in the Illuminati Order, Illuminatus Minor was the first real Degree and Illuminatus Major or Scottish Novice, the third: Le Forestier, *Les Illuminés de Bavière*. . . pp. 258, 265. This terminology does not seem to have been adopted in France under the Adonhiramite Rite.

For the Minor's Degree, the Candidate is led to a door where stands a man with a drawn sword, who, informed by the Conductor that there is a person wishing to be made a Mason, leads him into a dark room, where he is stripped naked "in order that all the Lodge might be well assured they were not imposed on by a Woman." This, "because it is well known that Women in general cannot keep their own secrets, much less those they are entrusted with," as witness the story of Samson and Delilah. "This man had no sooner revealed the secret, wherein his great Strength lay, to his dearly-beloved Mistress, than she . . . betray'd him to the Philistines . . . . for which reason Women are thought not proper to be trusted with the Secrets of Masonry, and Samson was never after that numbered among Freemasons." Not even the threat by a wife of withdrawal of cohabitation should induce a Mason to tell her, "because he may as easily persuade her that there is nothing more in it than a Set of Friends well met, and assembled to be merry or tell her any Tale that is plausible."

After having been stripped naked, the candidate is clothed by the Master with the "Badge of Innocence," i.e., a loose white garment of Linen or silk, and sworn to secrecy—the oath is given. Then he is raised by the Wardens, the Robe removed and he is clothed by the Brethren in his own garments: the Master gives him a white leather Apron; but he receives no Sign, Token or Word in this Degree. This seems to be the whole ceremonial.

Before he can obtain the Major's Degree, he must learn his Catechism which is given at full length—it begins with an account of the founding of the Order by Nimrod or Belus, and its spread into Assyria, &c.: and then becomes personal. The Question is put:—"In what manner was you made?" "Then says the candidate:—

"Tell me by what Authority
Thus strictly you examine me,
How I was made a Mason Free."

The Examiner says:—

"From *Belus* great I had this Power.
Who laid the Plan of *Babel's* Tower:
Then who has such Authority
As I, who Master am to thee?"

This suffices; the candidate humbly says:—

Since from that Mighty Man of Fame
The Pow'r you have, you justly claim:
From thee, the Secret I'll not hide,
Who art my true and faithful Guide."

Then the story is given of the ceremonies of Initiation.

He states the Proof required of a Minor before he is admitted a Major:—

"The Minor is enjoined to Secrecy
Before he can be made a Major Free;
Before he can receive the Major's Word,
He oft must guard the Lodge with flaming Sword:

He must be silent, sober, and discreet,
And to his Brethren all affectionate;
Then may he to great *Babel's* Tow'r repair
And on him take a Major's Character."

If the candidate knows his catechism, he is given a Signet; if, however, he cannot learn it, he must give every Member of the Lodge, a Pair of Gloves for himself and a Pair for his wife—upon which, he gets the Signet. Having, *quacunqua via*, obtained the Signet, the candidate continues, and being told that by his good behaviour alone he can obtain the Major's Secrets, he says, producing the Signet:—

"By that alone they could not be obtained;
But I by that a Golden Signet gain'd,
Which will admit me into that Degree.
That I may work among the Majors Free."

Then the Master:—

"Attend my Brethren all that round me stand.
While I obey great *Belus'* dread command.
Our Brother here upon Examination,
Desires I'll place him in a higher Station;
A Minor Character has well maintain'd
And answer'd all things well; by which he's gain'd
The Signet rare, which *Belus* did ordain
For such as could the Minor's Art attain,
That they may to the Tow'r repair and be
Receiv'd to work among the Majors Free
'Tis then my Will and Pleasure that he may
Begin to work, and enter into pay."

In the Major's Degree, the initiate is taught a lot about the Tower three miles in diameter and nine in circuit, with a passage to the top on the outside. "and like a winding Stair-Case, of a very great breadth, so that Camels and Carriages might go up and down, and turn with Ease," built in 53 years by the labor of 500,000 men "to make them a great name, and also to save them from a second Deluge." Sabas, eldest Brother of Belus takes him in to Belus from whom he receives his warrant to work: and then come the First and Second Signs of a Mason, the First and Second Tokens, and the First and Second Words (which modern Masons would not recognize) and then the presentation to him of a Square, Level, Plumb Rule and Compass, the uses of which are:—

"That we may work both regular and true,
And Virtue's Paths most ardently pursue:
For by these Tools we learn Morality,
As well as we learn the Art of Masonry."

The constitution of a "Regular Lodge" of six is taught—the first Regular being composed of the six sons of Chus, the eldest son of Ham, the youngest son of Noah—their names being Belus (the Master), Sabas (the Superintendent), Evilas and Sabathes (the Wardens) and Sabactus and Ramus (the two Deacons): Belus who was the youngest of the six became their Master "because he was an active enterprising man, and was the first person who proposed the Building of the Tower: He was likewise the original Projector of forming Men into Society, for which he always will be celebrated by the Masons, which is the most ancient Society on Earth." Then chants the Examiner:—

"If thou to *Babel's* Tow'r hast been.
And hast our first Grand Master seen,
Of that same Tow'r thou hadst the Plan,
From that renown'd and mighty Man."

The Candidate:—

"The Plan of Babel's Tow'r I have,
Which last of all, great *Belus* gave."

The Examiner:—

"Welcome loving faithful Brother,
Thou well hast answer'd all:
If we keep true to one another,
The Craft will never fall."

And so ends the initiation into Masonry.

The very curious practice of compelling a Candidate who could not learn or could not remember his catechism, to give a pair of Gloves

to each Brother present for himself and a pair for his wife reminds one of what was said to be a practically universal custom in French Masonry long after this time. In the Rules of the Friends of Perfect Union, formed in Leghorn by the French Officers in occupation in the last years of the 18th Century, which were taken possession of by the Grand Duke on the withdrawal of the French, and in 1803, published in Leipsic in a German Translation, it is stated that "in all Lodges, the custom is that the newly-initiated shall give to every brother present at his initiation a pair of men's gloves and a pair of woman's gloves as well as to pay for the Banquet-Lodge": but as this was found to be a burden in many cases, in that Lodge, only one pair of gloves (men's and women's) and a lambskin to make his apron would be required of the initiate and one ticket for the Banquet. See *Archiv der Freymaurerer-Loge zu Livorno. . .* Leipsic. . . . 1803, pp. 33, 34.

It is sometimes worth while for a Mason to compare what is thought to be Masonry at various periods and in various countries.

WILLIAM RENWICK RIDDELL
Osgoode Hall,
Toronto,
February 15th, 1929.

CLAIMS AMERICAN ORIGIN FOR FRENCH GRAND LODGE

The Grand Lodge of France is really more American in origin than English, it is claimed by a prominent Mason of the United States. The organization, he states, which bore this name during the 18th century in France, failed to withstand the turmoil of the French Revolution. After the schism in 1773, which split it and which gave rise to the Grand Orient, the Grand Lodge continued to be active for a while, but the events of the terrible period which followed were so hard on it that it disintegrated and, in 1799, passed into the Grand Orient.

In reality the present Grand Lodge was founded in 1804 by the Supreme Council of the Scottish Rite, which had previously been established by a delegate from the Supreme Council of the Southern Jurisdiction, U.S.A. All of the Supreme Councils at that time had lodges from the First to the Thirty-third Degrees. The lodges of the Supreme Council of France formed the Central Grand Lodge of France.

This organization, changed to its present name, was composed entirely of lodges when it acquired, by assent of the Supreme Council, its full autonomy. It then called itself the Grand Lodge of France. It is the only French Masonic body from which the Supreme Council will receive members into the Scottish Rite Degrees.—Kansas City Freemason.

WHAT IS IT?

Is there anything wrong with present day Masonry? This can be answered by one word, "No," providing, of course, that one does not permit extraneous matter to enter into and around the lodge. Changes are creeping into the fraternal just as they are in other matters engaging the attention of men. It is an important matter of creeds, fundamentalists and modernists striving for some recognition in this changing age. We, too, have fundamentalists and modernists, but under different names, and it may be that some of us have failed to recognize the element playing a part in the affairs of the Craft.—Masonic Tidings.

The Masonic Sun

A Journal devoted to the Interests of Freemasonry in the Dominion of Canada

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IN SUCH AN AGE!

To be alive in such an age!
With every year a lightning page
Turned in the world's great wonderbook
Whereon the leaning nations look
Where men speak strong for brotherhood
For peace and universal good;
When miracles are everywhere
And every inch of common air
Throbs a tremendous prophecy
Of greater marvels yet to be.
O' Thrilling Age!
O, Willing Age!
When steel and stone and rail and rod
Welcome the utterance of God
A trump to shout his wonder through
Proclaiming all that man can do.

To be alive in such an age!
To live in it!
To give in it!
Rise, soul, from thy despairing knees,
What if thy lips have drunk the lees?
The passion of a larger claim
Will put thy puny grief to shame.
Fling forth thy sorrow to the wind
And link thy hope with humankind:
Breathe the world-thought, do the world-deed,
Think highly of thy brother's need.
Give thanks with all thy flaming heart,
Crave but to have in it a part—
Give thanks and clasp thy heritage—
To be alive in such an age!

—Angela Morgan.

SEEING THE CANADIAN NATIONAL EXHIBITION IN A MASONIC SPIRIT

It is a wonderful privilege, a great study and a magnificent sight to wander through this splendid educational institution and mentally and physically realize how far we have advanced in this age, particularly within the last quarter of a century, through the continuous and persistent efforts of science and labour. To the thoughtful and studious Craftsman the Exhibition holds fascinating interest, as at every turn we see our symbolisms and teachings demonstrated by practical use for the good of mankind.

On a beautiful afternoon during the first week when the smiles of the Great Architect of the Universe bathed the Park in glorious sunshine, we visited the fair and wandered through the grounds with its huge good-natured and law-abiding throng that had gathered there. Pausing on a rise on the beautiful plaza just above the band stand we feasted our eyes on the magnificent view that presented itself from that splendid vantage point—a combination of God's handiwork supplemented by the labours of man. The beautiful blue of heaven's canopy meeting the placid waters of Lake Ontario as a background; the trees and beautiful flowers adorning the same, and the green verdure on which the feet buoyantly trod, crowded with good-natured sight-seers, then turning

BENJAMIN FRANKLIN AND CANADA

AN ADDRESS
DELIVERED BEFORE THE
EMPIRE CLUB

BY
HON. MR. JUSTICE W. R. RIDDELL

NOV. 15th, 1923

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BENJAMIN FRANKLIN AND CANADA

AN ADDRESS BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.,
JUSTICE OF THE SUPREME COURT OF ONTARIO

Before the Empire Club of Canada, Toronto.
November 12, 1923

The death blow to the old British Empire was struck in Canada in 1759, on the Plains of Abraham, when Wolfe died victorious, cheered in death by the cry, "They run."

The blow, however, narrowly failed of being ineffective; it might well have produced no wound at all, not to speak of one that was fatal; and had it not been for Benjamin Franklin, the old British Empire might have not received even a shock but have survived for many years.

Benjamin Franklin, printer, journalist, scientist, diplomatist, moralist, statesman, patriot, all in the first rank, was in 1757, at the age of fifty-one (1) sent to London by the Colony of

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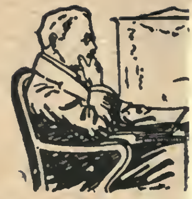
(1) "The Americana," Vol. viii, Art. "Franklin, Benjamin," makes him in the 41st year of his age when in 1757 he was sent to London by his Province; it also says that he spent the next 41 years of his life practically all in the diplomatic service. As Franklin was born in 1706 and died in 1790, these figures should be 51st and 31 respectively.

Hon. William Renwick Riddell is a graduate in Arts and Science of Victoria University and a gold medallist of the Osgoode Hall Law School. The honorary degree of LL.D. has been conferred upon him by a number of universities in Canada and the United States, also the degrees of L.H.D. and J.U.D. He is a Justice of the Supreme Court of Ontario.

Mr. Justice Riddell has given much study to historical and constitutional problems, especially those connected with Britain, the United States and Canada, and the Empire Club is indebted to him for much valuable information on these and kindred matters.



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Pennsylvania with a petition to the King, George II, that Pennsylvania might be permitted to tax the lands of the Penn estates for the defence of the Colony from the French and Indians (1). It was during his residence as Agent for Pennsylvania at the Court of St. James (Massachusetts and Connecticut also utilized his services) that the ancient Universities of St. Andrews and Oxford honoured themselves as well as him by conferring upon him the degrees of LL.D. and D.C.L. for his literary and scientific attainments; and to his friends and admirers, he was thereafter "the Doctor."

He was still in London when Quebec surrendered in September, 1759.

England was weary of war: the Seven Years' War, which she had entered in 1756 to save Prussia from destruction by France and her allies—*absit omen*—glorious as it was, was depleting her resources; and in 1759 it was not going too well with her ally, Frederick. The Government headed by Pitt were set on prosecuting the war with vigour and were fairly well supported by the country. The splendid victories on this Continent were encouraging but not sufficiently so to prevent voices in some influential circles—generally Tory, indeed—being raised to stop the war and give up to France the conquered territory. Franklin opposed this step whenever and wherever an opportunity offered. We find him writing to Lord Kames from London, January 3rd, 1759, saying: "No one can more sincerely rejoice than I do, on the reduction of Canada; and this not merely as I am a colonist, but as I am a Briton. I have long been of opinion that the *foundations of the future*

(1) It will be remembered that in this Province, we long had a similar grievance. Clergy Reserve lands were held free from their share of taxation, kept in many cases unimproved but increasing in value by the settlement and clearing of neighboring lands—the "unearned increment."

buoyantly trod, crowded with good-natured sight-seers, then turning

grandeur and stability of the British Empire lie in America; and though like other foundations, they are low and little now, they are, nevertheless, broad and strong enough to support the greatest political structure that human wisdom ever yet erected. I am, therefore, by no means for restoring Canada. If we keep it, all the country from the St. Lawrence to the Mississippi will in another century be filled with British people. Britain itself will become vastly more populous by the immense increase of its commerce; the Atlantic sea will be covered with your trading ships; and your naval power, thence continually increasing, will extend your influence round the whole globe and awe the world. If the French remain in Canada, they will continually harass our colonies by the Indians, and impede if not prevent their growth, your progress to greatness will at best be slow, and give room for many accidents that may forever prevent it." (1)

But Franklin did not confine his efforts to private letter-writing; he talked—and he was a most persuasive talker—to all of the slightest influence with whom he came in contact. The suggestions made by "some among our great men" who in 1759 had begun to prepare the minds of the people to surrender Canada because to keep it would draw on Britain the envy of nations and occasion a confederation against her, that Canada was too large and not worth possessing anyway, he combated "every day and every hour" and, as he rightly thought, with some success. He knew the English people, and he employed with skill and acumen the arguments which

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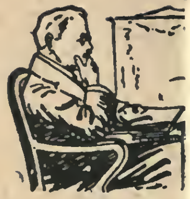
(1) *The Life of Benjamin Franklin, written by Himself:* By John Bigelow; London, 1879, vol. 1, p. 399. This letter, as it seems to me, may well put an end to the supposition that Franklin had an *arrière pensée* in writing the "Canada Pamphlet" about to be spoken of in the text. See my Article, "The Status of Canada," *Journal issued by American Bar Association,* June, 1921, pp. 293, sqq.



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would have the greatest weight. The old British Empire was built on the plan of the old Roman Empire—Colonies and Provinces existed and were retained not for themselves but for the Mother Country. There was indeed no direct tribute exacted as in Roman times, but the Colonies paid an indirect tribute in affording a market for English goods and English trade—England was an essentially trading nation, and all her conquests had been for commercial advantages. The money spent for defending the Colonies was a premium of insurance against loss of trade. Accordingly, Franklin's weightiest argument was that by keeping Canada, the nation would save two or three millions a year, then spent in defending the American Colonies: and moreover, the Colonies would thrive and increase much more rapidly and so furnish a vast additional increase in the demand for British goods.

He did not confine himself to such arguments as this, but indulged in many other topics which he urged on occasion according to the company he was in or the persons he addressed.

Franklin, as a man loyal to his Province and his mission, had always in view in these discussions the interests of America; he did not trouble himself then or later about the interests of Canada, and only in a minor degree about the interests of the Mother Country (1).

But Franklin had another arrow in his quiver, more effective still; and that he now sped with marvellous skill. He turned to account his dexterity and ability as a pamphleteer.

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(1) See his letter to John Hughes from London, January 7, 1760; Bigelow, *op. cit.*, p. 402. He ends this letter: "And, on the whole, I flatter myself that my being here at this time may be of some service to the general interest of America." My own opinion is that his being there at that time revolutionized the world and changed the course of human history.

buoyantly trod, crowded with good-natured sight-seers, then turning

It was the age of pamphlets; and it is possible that there were some written by Franklin which have disappeared or cannot be identified as his, but two we know of with certainty. The first in point of importance, and probably in point of time, is the celebrated "Canada Pamphlet." (1).

William Pulteney, who had been a power in his day, had destroyed his political prestige in 1742 by accepting a peerage, becoming Earl of Bath (2). He was hated by the King, George II, and never again was of importance; although the King in 1746, invited him to form a government, he failed.

But he was never content with his position: from time to time he made public appearances, like "an aged raven": his speeches had a little of the old ring of the times when Walpole feared his tongue more than another man's sword. The Earl had selected as travelling tutor for his son, the Rev. John Douglas, a native of Fifeshire, a graduate of Oxford and a former Army Chaplain: he presented the clergyman to two churches and they were close friends. Dr. Douglas (he took his D.D. degree in

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(1) The full title is "The Interest of Great Britain considered with regard to her Colonies, etc."—the pamphlet is very rare (my own copy cost me £8). It was almost certainly published by May, 1760; it is probably that referred to in Franklin's letter to Lord Kames dated London, 9, 1760,—Bigelow, *op. cit.*, vol. 1, p. 404—in which he says, "Enclosed you have the production such as it is."

(2) Horace Walpole, Earl of Oxford, says in a letter to the Countess of Ossory from Strawberry Hill, July 17, 1792, that Pulteney "had gobbled the honour but perceived his error too late, for the day that he entered the House of Lords, he dashed his patent on the floor in a rage, and vowed he would never take it up; but it was too late—he had kissed the King's hand for it." Walpole's *Letters*, Cunningham's edition, vol. IX, p. 379; see also do, do. vol. i, p. cxliii. Walpole certainly got the better of him; and he himself said "he lost his head and was obliged to go out of town for three or four days to keep his senses." See. D.N.B., vol. xlvii, pp. 28, sqq.

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1758), had undoubted ability, and at the Earl's direction or suggestion he wrote several political pamphlets (1).

Pulteney early in 1760 induced Dr. Douglas to write a pamphlet on the war; and Dr. Douglas accordingly wrote "A letter on two Great Men on the Prospect of Peace and on the Terms." The "two Great Men" were the elder Pitt and Newcastle who had formed a Coalition Government three years before and had raised and spent money for war purposes with a profusion which appalled more timid financiers—but which would in the recent war have been considered trifling. This pamphlet Walpole calls "very dull": it deals with the terms necessary to be insisted upon in the negotiations for peace, and gives reasons for preferring Canada to the conquests in the West Indies—Guadaloupe had been taken in January, 1759. This pamphlet was answered by another written by William Burke, "Remarks on 'A Letter to two Great Men'" which contained opposite opinions on this and other subjects (2).

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(1) He should be remembered for his vigorous, able and successful defence of John Milton from the charge of plagiarism made against him by William Lauder, another Scotsman and M.A. of Edinburgh. See D.N.B., vol. xv, pp. 337, 338.

(2) Horace Walpole, Earl of Oxford, says in a letter to George Montagu, from Arlington Street, January 14, 1760: "There is nothing new but a very dull pamphlet, written by Lord Bath and his chaplain Douglas, called a 'Letter to Two Great Men.' It is a plan for the peace and much adopted by the city, and much admired by those who are too humble to judge for themselves." Walpole's *Letters*, Cunningham's edition, vol. iii, p. 278. Walpole does not seem to have mentioned the Answer, or the "Canada Pamphlet." I have not seen either the Letter or the Answer: the former I have seen advertised for sale only once and I failed to acquire it; I have never seen the latter advertised. The substance of them, however, is made sufficiently clear in the Canada Pamphlet—Bigelow does not notice them.

buoyantly trod, crowded with good-natured sight-seers, then turning

Now was Franklin's opportunity and he took advantage of it in the "Canada Pamphlet" (1) which was published anonymously in 1760; a second edition eliding certain matter irrelevant to the general purpose and amending the terminology in some respects (2) appeared in 1761, published with Franklin's

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(1) It would seem that Franklin wrote this pamphlet on the request of Lord Kames. Writing to Kames from London, May 9, 1760, Franklin says: "I have endeavoured to comply with your request in writing something on the present situation of our affairs in America in order to give more correct notions of the British interest with regard to the colonies than those I found many sensible men possessed of. Enclosed you have the production such as it is. I wish it may, in any degree, be of service to the public." Bigelow, *op. cit.*, vol. 1, p. 404, thinks this the "Canada Pamphlet," and I agree with him.

(2) David Hume seems to have criticized the language of the pamphlet: Franklin in a letter to him from Coventry, September 27, 1760, thanks Hume for his "friendly admonition relating to some unusual words in the pamphlet. It will be of service to me." He admits "*pejorate*" and "*colonize*" are not in common use and gives them up as bad, "for certainly in writings intended for persuasion and general information one cannot be too clear; and every expression in the least obscure is a fault." He thinks "*unshakeable*" clear, but he "gives it up as rather low"; and "the word *inaccessible* though long in use among us in not as yet, I dare say, so universally understood by our people as the word *uncomeatable* would immediately be which we are not allowed to write." Bigelow, *op. cit.*, vol. 1, p. 412. "Pejorate," to make worse, is still an unusual and stilted word: Franklin in the first edition of the "Canada Pamphlet" in the "observations concerning the increase of mankind, etc," omitted in the second edition used the word in the sentence, "Slaves also pejorate the families that use them." *The Works of Benjamin Franklin, LL.D.*, 2nd edition, London, vol, 2, p. 388. This essay was written in 1751. Robert Louis Stevenson uses the word (1893) in his *Catriona:* I do not recall its appearance elsewhere. It sounds odd to hear the word "colonize" characterized as obscure—it had been in use from Bacon's time, 1622; and is one of our commonest and most generally understood words. I do not know of a word to take its place. Franklin used it in the second edition, see p. 139. "Inaccessible" had been in use at least for two centuries, and it is very common at the present time—"uncomeatable" is still taboo in literary circles, but not unusual in familiar parlance.

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name as author, and is printed in Franklin's Works (1). This is really a reply to the "Answer" and only incidentally is the "Letter" considered.

Franklin begins by demanding security from the "barbarous tribes of savages that delight in war and take pride in murder, subjects properly neither of the French nor the English, but strongly attached to the former by the art and indefatigable industry of priests, similarity of superstitions and frequent family alliances. There are easily and have been continually instigated to fall upon and massacre our planters even in times of full peace between the two crowns, to the certain diminution of our people and the contraction of our settlement." He points out the absurdity of forts as a sufficient protection against the French and the Indians; and urges that the possession of Canada is the only security. Answering the claim that the American colonists were wanting conquests made for them, he spiritedly says that these colonists "are in common with the other subjects of Great Britain anxious for the glory of her crown, the extent of her power and commerce, the welfare and future repose of the whole British people . . . . . they have been actuated by a truly British spirit to exert themselves beyond their strength." Then he artfully suggests that if Canada is retained, the people in the colonies will spread over the mountains and take up land, making a market for English goods whereas if not, they must for their own safety remain confined within the mountains, go into manufacturing and afford goods

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(1) *The Works of Benjamin Franklin, ut supra*, vol. 3, pp. 89-143—this edition being readily available, I shall cite in this paper. The Pamphlet was "printed for Becket," London, 1761. Two editions were also published in Boston; and a long answer was also published there. It seems quite certain that while Franklin supplied most of the information, Richard Jackson wrote at least two-thirds of the text of the "Canada Pamphlet."

buoyantly trod, crowded with good-natured sight-seers, then turning

"cheap enough to prevent the importation of the same kind from abroad, and to bear the expense of its own exportation." "But," he adds, "no man who can have a piece of land of his own sufficient by his labour to subsist his family in plenty is poor enough to be a manufacturer and work for his master . . . while there is land enough in America for our people there can never be manufacturers to any amount or value." Franklin counters: "how can the author of the Remarks counselling the return of Canada to France, justify the retention of Guadaloupe which he represents as of so much greater value?"

Then he goes into the relative value of the two countries in an argument eminently fitted for his audience (1).

True, the trade with the West Indies is a valuable one but it has long been at a stand—limited as our sugar planters are by the scantiness of territory, they cannot increase much, and that evil will be little helped by our keeping Guadaloupe: the trade with the people in the northern colonies doubles in about twenty-five years—the exports to Pennsyl-

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(1) There never was a more astute diplomat than Franklin, and he was extraordinarily able in feeling his audience and adapting his methods accordingly.

To indicate the strong feeling in favour of the retention of Guadaloupe it may be mentioned that Pitt in his Speech in the House of Commons, December 9, 1792, on the motion to approve the Preliminary Peace Treaty—he was so excessively ill that the House unanimously desired him to speak sitting—said that he had been blamed for consenting to give up Guadaloupe . . . . He wished to have kept the Island; he had been overruled on that point; he could not help it; he had been overruled many times on many occasions. He had acquiesced, he had submitted . . . . *The Parliamentary History of England* (Hansard), vol. XV, col. 1264. The motion passed the House 319 to 65, Pitt generally approving—he had left the Government with Temple shortly before on the question of War with Spain; the Papers relating to his negotiations with France are in do., do., cols. 1018-1210. The Peace was actually signed February 10, 1763.

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vania alone having increased in 28 years 17 times, the population having increased but four times. Suppose Guadaloupe does export £300,000 in sugar every year; who profits by it? Why, the French inhabitants of the Island who will not be dispossessed and who will spend no more than before on English manufactures. But Canada retained, and so the American colonists made safe, "the annual increment alone of our present colonies without diminishing their numbers or requiring a man from hence is sufficient in ten years to fill Canada with double the number of English that it now has of French inhabitants"—and all will be customers of England (1).

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(1) The expectation expressed concerning the French population of Canada is interesting. "Those who are Protestants among the French will probably choose to remain under the English government; many will choose to remove if they can be allowed to sell their lands, improvements and effects; the rest in that thin-settled country will in less than half-a-century from the crowds of English settling round and among them be blended and incorporated with our people both in language and in manners."

When Canada was retained on the Peace of 1763, it was confidently expected that it would soon be settled by an English-speaking community, and not a few merchants came in to Quebec and Montreal from Britain and the American Colonies to the south; the Royal Proclamation of 1763 promised the protection of the English law; and free lands were offered to settlers. The expectation that many French Canadians would remove proved fallacious, as but a negligible part went to France, although they had full leave to dispose of their property and had eighteen months to do it. No great English-speaking immigration set in until the Revolutionary War; and the French refused to blend with the newcomers in language or in customs—rather the reverse was the case. The movement to unite the Canadas in 1822 was in essence a movement to overwhelm the French Canadians; and Lord Durham's scheme of Union (1840) had the same result in view. All these designs proved vain imaginings—the astute statesmen failed to reckon with the virility and love of language of the French and the fertility of French mothers.

The most curious part of this pamphlet is that in which he contests the argument in the Answer that the American colonies would become dangerous to Great Britain if allowed to grow. "Of this, I own, I have not the least conception when I consider that we have already fourteen separate governments on the maritime coasts of the continent; and if we extend our settlements, shall probably have as many more behind them on the inland side. Those we now have are not only under different governors, but have different forms of government, different laws, different interests, and some of them different religious persuasions and different manners. Their jealousy of each other is so great that however necessary an union of the colonies has long been for their common defence and security against their enemies and how sensible soever each colony has been of that necessity, yet they have never been able to effect such an union among themselves, nor even to agree in requesting the mother country to establish it for them. Nothing but the immediate command of the Crown has been able to produce even the imperfect union, but lately seen there, of the forces of some colonies (1). If they could not

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(1) In Pepperrell's expedition against Louisbourg, 1745, were troops from Massachusetts, Connecticut, Rhode Island and New Hampshire—Pennsylvania declined to join. Benjamin Franklin in Philadelphia wrote to his brother in Boston, "Fortified towns are hard nuts to crack, and your teeth are not accustomed to it; but some seem to think that forts are as easy to take as snuff"—and he used his influence against Pennsylvania joining.

Parkman, *A Half-Century of Conflict*, Champlain Ed., Boston, 1897, vol. 2, p. 70.

Probably the reference in the text is to the American contingent in the war then going on; troops were contributed by Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, Pennsylvania, Virginia, Maryland, North and South Carolinas, New Jersey—not all at the same time or in the same expedition. "The Royal American Regiment" took part as an Imperial contingent in the campaigns of 1759, 1760.

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agree to unite for their defence against the French and the Indians who are perpetually harassing their settlements, burning their villages and murdering their people, can it be reasonably supposed there is any danger of their uniting against their own nation which protects and encourages them, with which they have so many connections and ties of blood interest and affection and which it is well known, they all love more than they love each other? In short, there are so many causes that must operate to prevent it that I will venture to say, an union amongst them for such a purpose is not merely improbable, it is impossible."

Franklin's task was not yet complete: the cry for peace continued, and to meet that by casting discredit on its authors, he wrote another article which he sent to the *London Chronicle;* it was afterwards published in the *Gentlemen's Magazine.* He pretended to have found in a bookstall an old quarto without title page or author's name, containing discourses addressed to some King of Spain, translated into English and said in the last leaf to be printed in London by Bonham Horton and John Bill, "Printers to the King's Most Excellent Majestie, MDCXXIX" (1)

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(1) No doubt, Franklin had seen such a colophon: Bonham Norton (1565-1635) was a King's Printer: D.N.B., vol. xli, pp. 225, 226: but the book is a myth. The date of Franklin's Letter is not certainly known, but Sparks says, "its contents show it to have been written towards the close of the French war and probably in 1760, or the year following. Under the disguise of a pretended chapter from an old book and an imitation of an antiquated style he throws out hints suited to attract attention and afford amusement." I think Sparks quite underrates the purpose and effect of this communication: it is a most ingenious and telling document calculated to cast suspicion on the advocates of peace. The Ency. Brit., 11th ed., vol. 11, p. 25, says it "had a great effect." I think, however, it is in error in dating it before the "Canada Pamphlet." See Bigelow, *op. cit.*, vol. 1, pp. 414, 415 and note. Franklin

he adds: "The author appears to have been a Jesuit. . . . . Give me leave to communicate to the public a chapter so *apropos* to our present situation (only changing Spain for France) that I think it well worth general attention and observation, as it discovers the acts of our enemies and may therefore help in some degree to put us on our guard against them." There had been writings and discourses, he says, in Britain like those recommended in the Spanish book; and although so far they had little effect as "all ranks and degrees among us persist hitherto in declaring for a vigorous prosecution of the war in preference to an unsafe, disadvantageous or dishonourable peace, yet as a little change of fortune may make such writings more attended to and give them greater weight, I think the publication of this piece as it shows the spring from whence these scribblers draw their poisoned waters, may be of public utility."

Then he copies what purports to be a chapter from the old book.

"Chap. XXXIV.

On the Meanes of disposing the Enemie to Peace."

It is in the main a recommendation to the King of Spain who is supposed to be at war with England to gain by proper meanes, i.e., by bribery, "Menne of Learning (in England) ingenious Speakers and Writers who are nevertheless in lowe Estate and Pinched by Fortune . . . . in their Sermons, Discourses, Writings, Poems and Songs to . . . . magnifie the Blessings of Peace . . . . expatiate

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signed the communication to the *London Chronicle*, "A Briton."

While Franklin frequently declared that in the "Canada Pamphlet" he received considerable assistance from a learned friend who was not willing to be named, but who is now known to have been Richard Jackson, Agent for Massachusetts and Connecticut, no one has ever doubted that Franklin was the sole and only author of this production.

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on the Miseries of War, the Waste of Christian Blood, the growing Sacrifice of Labourers and Workmen, the Dearness of all foreign Wares and Merchandise, the Interruption of Commerce, the Capture of Ships, the Increase and great Burthen of Taxes. Let them represent the Advantages gained against us as trivial and little Import; the Places taken from us as of small Trade and Produce, inconvenient for Situation, unwholesome for Ayre and Climate, useless to their Nation and greatlie chargeable to keep, draining the home Countrie both of Menne and Money . . . ," etc., etc.,—precisely the arguments which had been used to bring on a peace with the surrender of Canada, and precisely the arguments used by the agents of Germany in the late World War. Nothing was better adapted to throw suspicion on the Pacifists, whom Franklin looked upon as dangerous to England, and more dangerous to America. (1)

Franklin's argument prevailed: Canada was retained; the fear of French-Canadians and French-Indians was removed; what Vergennes had prophesied took place: the Thirteen Colonies rebelled and the old British Empire was rent in twain to be in time destroyed and a new British Empire built on the old foundations, composed of "practically independent sister States co-operating for the common good," (2) whose Prime Ministers meet on an equality in the Imperial Conference (3).

But Franklin was not done with Canada when he had successfully advocated its retention by Britain.

(1) See this curious production in Bigelow, *op. cit.*, vol. 1, pp. 416-420; the communication to the *London Chronicle*, do., do., pp. 414-416.

(2) The language of the Prince of Wales as accurate as it is inspiring.

(3) The words of Mr. Baldwin, Prime Minister of Britain, reported this morning, November 15, 1923.

buoyantly trod, crowded with good-natured sight-seers, then turning

When the Thirteen Colonies found their grievances intolerable and sent Delegates to a Continental Congress at Philadelphia, the Congress soon cast its eyes to the North, and thought of obtaining Canada as the Fourteenth. Military invasions were made into Canada by Continental troops: Quebec was besieged and Montreal was taken. Other means were used; concealed emissaries were sent to win the adherence of Canadians to the American cause; and the Congress made an Address, October 26, 1774, to the Canadians, inviting them to send Delegates to the Congress which was to meet at Philadelphia, May 10, 1775 (1). The Address, however, specifically said: "We do not ask you . . . to commence hostilities against the government of our common Sovereign." This Address having no effect, it was later decided to send a Letter to the Inhabitants of Canada. Montreal was in the possession of the Americans when, January 24, 1776, Congress directed a Letter to the Canadians:—"We will never abandon you to the unrelenting fury of your and our enemies; two battalions have already received orders to march to Canada" (2). And, Thursday, February 17, 1776, it was "Resolved, That a Committee of Three (two of whom to be Members of Congress) be appointed to proceed to Canada, there to pursue such instructions as shall be given by Congress." Franklin was appointed along with Samuel Chase of Maryland and Charles Carroll of Carrollton, the last named being a Roman Catholic. Congress also "Resolved,

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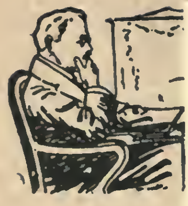
(1) This address is believed to be the production of John Dickinson, of Pennsylvania, aptly termed the "pen of the revolution": it is an exceedingly clever piece of work, and might have had some effect if the French-Canadians could read. It is well known that Benjamin Franklin on his return from his fruitless mission to Canada said that the next mission should be of schoolmasters. The address is printed in full in Kingsford's *History of Canada*, vol. 5, pp. 262-267.

(2) This was agreed on, January 24, 1776: see Force, *American Archives*, ser. iv, vol. 4, p. 1653.



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That Mr. Carroll be requested to prevail on Mr. John Carroll to accompany the Committee to Canada to assist them in such matters as they shall think useful."

John Carroll was a kinsman of Charles Carroll, a Jesuit priest of great learning, courteous and conciliatory, gentle in his bearing and thoughtful of others, heretics or otherwise; he afterwards became the first Archbishop of Baltimore. Both the Carrolls were fluent French scholars, having been educated at the Jesuit College at St. Omer. The Commissioners, accompanied by Father Carroll and a French printer, Mesplet, arrived at Montreal. The priest served one Mass and endeavoured to convince the French clergy of the importance to them of joining the American cause: Franklin and his colleagues made the same attempt with the laity; Mesplet printed two papers and stopped, as not one in five hundred of the populace could read. The whole mission was a dismal failure. Why?

Outside of those of the English-speaking who were already in favour of the Americans, the English-speaking were loyal—and as to the French-Canadians, the mission was doomed to failure from the beginning.

They were, as they are, devout Catholics, holding their religion as an inestimable blessing which they should transmit unimpaired to their children. They looked up to and revered their priests; and the priests could read if they could not. There was a very able Bishop at Quebec, Briand, who kept a vigilant eye on his flock and on everything that did or might affect them, spiritually or materially. He saw to it that the priests were made aware of the principles expressed by the Continental Congress in an Address to the people of Great Britain adopted, October 21, 1774, complaining of the Quebec Act of 1774. This Act had been passed by the Imperial Parliament for the purpose of satisfying the French-Canadians; it

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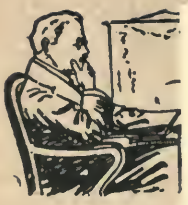
has reintroduced the former Canadian Civil Law displaced in 1763 by the English Law, and had allowed the Roman Catholic clergy to obtain tithes from the members of their own Church. The Continental Congress complained to the people of Great Britain that by this Act, Canada was intended to injure the Colonies, "to be so extended, modelled and governed . . . . that by their numbers daily swelling with Catholic emigrants from Europe and by their devotion to an Administration so friendly to their religion they may become formidable to us and on occasion be fit instruments in the hands of power to reduce the ancient free Protestant Colonies to the same state of slavery with themselves. . . . . Nor can we suppress our astonishment that a British Parliament should ever consent to establish in that country (Canada), a religion that has deluged your Island in blood and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world." (1)

It was also known that this was not mere idle chatter or *façon de parler:* it expressed the real sentiments of the vast majority of the Congress—the Thirteen Colonies as a whole were furiously anti-Catholic (2), and with the exception of one Pro-

(1) Force, *op. cit.*, ser. iv, vol. i, p. 290—in an earlier part of the same address, the Congress had said: "We think the Legislature (i.e., the Imperial Parliament), is not authorized to establish a religion fraught with sanguinary and impious tenets."

(2) One Roman Catholic writer says that the American Colonies were indulging in an orgy of anti-catholicism; and the language is not too strong.

There are so many who, as Morley says of Froude,—*Recollections by John, Viscount Morley,* Toronto, 1917, Vol. 1, p. 280—"think the quarrel between Protestant and Catholic the only thing in the universe that matters," that they think anyone contemptible who with Daniel O'Connell can say: "Every religion is good, every religion is true—to him who in his due caution and conscience believes it. There is but one bad religion, that of a man who professes



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vince, to be a Catholic there was to lose the rights of a citizen.

Franklin, it would seem, was objectionable to the French-Canadians (although not to the English-speaking) in another way—they remembered his efforts twenty years before to cause their country to become part of the British domain, and la Nouvelle

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a faith which he does not believe; but the good religion may be, and often is, corrupted by the wretched and wicked prejudices which admit a difference of opinion as a cause of hatred."

In many part of the Thirteen Colonies "a Protestant family ran a fearful risk in harboring a Romanist." Shea's *History of the Catholic Church in the United States*, N.Y., 1890, p. 498. Even after the Declaration of Independence, which is very generally supposed to have put an end to this religious intolerance, the *New England Primer*, which was put in the hands of very many children, had cuts of the "Man of Sin." The edition of 1779 contains a picture of the martyrdom by burning of John Rogers in 1554 and the statement: "A few days before his death he wrote the following advice to his children, 'Abhor the arrant whore of Rome and all her blasphemies. And drink not of her cup; obey not her decrees.'" See Paul Leicester Ford's, *The New England Primer;* Riley's, *The Founder of Mormonism*, London, 1902.

The mutual tolerance in old Quebec of Protestant and Catholic has been underrated. While there was almost from the beginning, certainly from 1763 a strong anti-English and anti-French feeling, there never was any anti-Protestant and anti-Catholic feeling. As is well known, Lord Durham in his celebrated Report, 1838,—which showed the state of society in Lower Canada after decades of dispute and recrimination between French and English—was (somewhat to his own astonishment) able to say: "It is indeed an admirable feature of Canadian society that it is entirely devoid of any religious dissensions. Sectarian intolerance is not merely not avowed, but it hardly seems to influence men's feelings." Lucas' *Lord Durham's Report*, Oxford, 1912, vol. i, pp. 239, 240; vol. ii, p. 39. And this when Harriet Martineau in her *Society in America*, 4th Edition, 1837, vol. ii, p. 322, could say: "Parents put into their children's hands as religious books, foul libels against the Catholics which are circulated throughout the country. In the west I happened to find a book of this kind which no epithet but 'filthy' will describe." Qu.? *Maria Monk's Awful Disclosures*, 1836.

buoyantly trod, crowded with good-natured sight-seers, then turning

France to cease to be united to the old (1). For whatever cause or combination of causes, Franklin left Canada a very few days after he entered it, leaving it to work out its own destiny; and so far as is known he never saw it again.

But Canada has him in great measure to thank for her being as she is the brightest jewel in the British Crown, and for her flying the flag that braved a thousand years the battle and the breeze; and she may forgive him for the fruitless attempt to sever her destinies from the rest of the British world. He succeeded because he could persuade Englishmen; he failed because he could not persuade French-Canadians; for both his success and his failure, we are devoutly thankful at this time of Thanksgiving.

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(1) Garneau, the leading French Canadian historian of Canada in his *Histoire du Canada,* Paris, 1920, vol. ii, p. 368, says:—"Franklin n'avait pas été longtemps en Canada sans voir que tous ses efforts seraient inutiles: les Canadiens se rappellaient avec quelle ardeur il avait engagé l' Angleterre à entreprendre la conquête de leur pays, vingt ans auparavant." The authorities cited are not conclusive in that regard. *Journal of Charles Carroll,* p. 23; John Bigelow's *Franklin's Complete Works,* N.Y., 1887-8, vol. iii, p. 43. Some of the biographers of Franklin express astonishment at his being selected for the mission, having written the "Canada Pamphlet;" but I do not think that had anything to do with his failure.

NOTE.—Mr. Justice Riddell having prepared an Address at the request of THE HISTORICAL SOCIETY OF PENNSYLVANIA on "BENJAMIN FRANKLIN'S MISSION TO CANADA AND THE CAUSES OF ITS FAILURE", the officers of that Society requested him to preface the Address by an account of Franklin's efforts to retain Canada in the Empire. He did so by reading part of the above paper; and the part so read is printed in the Proceedings of the Pennsylvania Society with the following memo:

"It having been suggested that it would increase the value and interest of the Paper read before the Historical Society of Pennsylvania on Benjamin Franklin's Mission to Canada and the Causes of its Failure were some account given of his part in earlier years in having Canada become part of the British Empire, I have therefore here prefixed portion of an Address

before the Empire Club of Canada at Toronto, November 15, 1923, dealing with the little known but very important episode in the life of Franklin and in the history of the world. The Empire Club very gladly gives its consent to the use of this Address by its sister organization, the Historical Society of Pennsylvania; and sending its warmest greetings, hopes that the unity between and among the English-speaking peoples may continue and increase *in aeternum.*"

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BENJAMIN FRANKLIN and CANADA

BENJAMIN FRANKLIN'S MISSION TO CANADA and the CAUSES OF ITS FAILURE

BY THE

HONOURABLE WILLIAM RENWICK RIDDELL,

LL.D., F.R.S.C.,

Justice of the Supreme Court of Ontario

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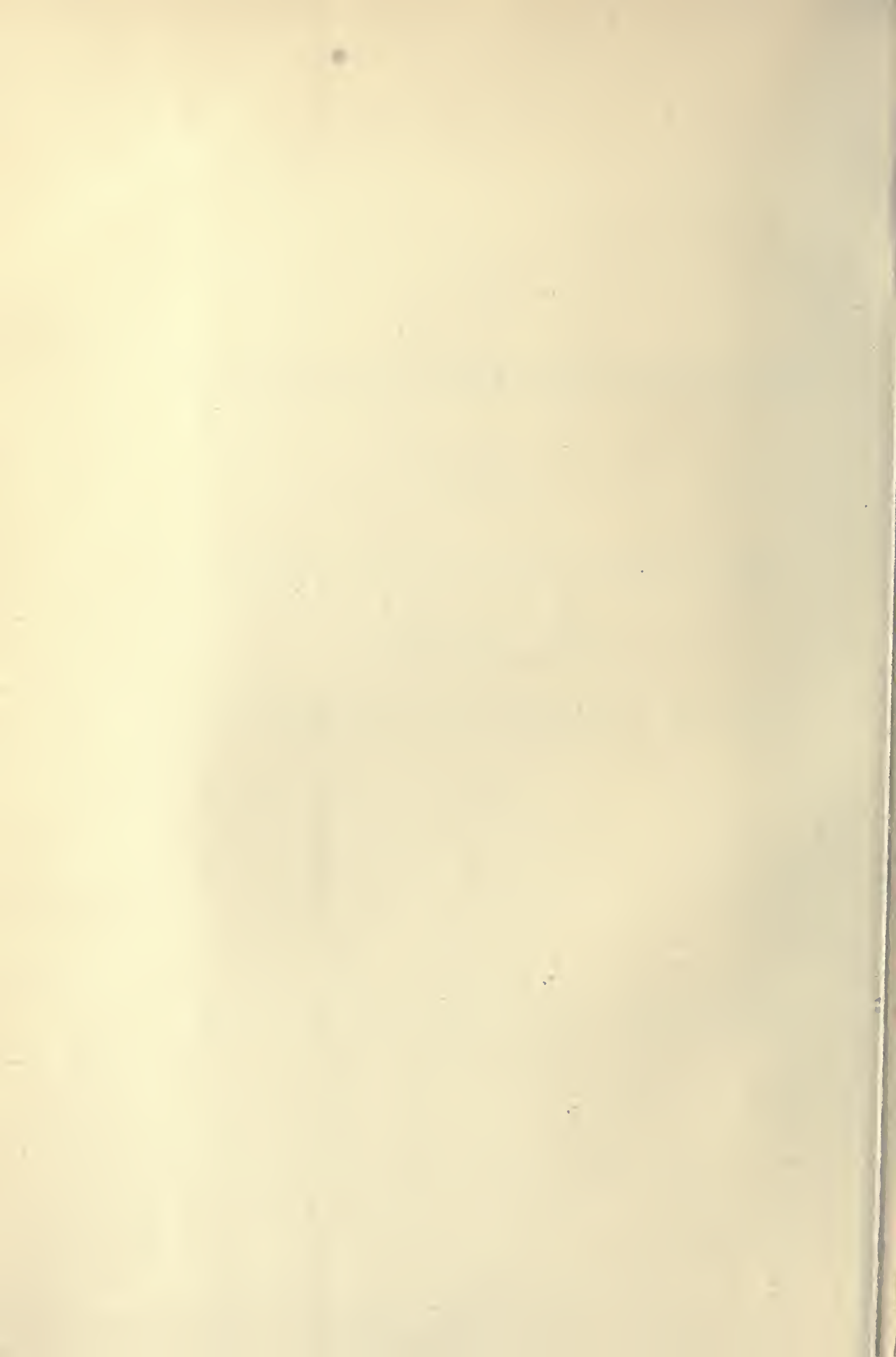

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[*For References, see pages 13 to 16.*]

INTRODUCTION.

[Note: It having been suggested that it would increase the value and interest of the Paper read before the Historical Society of Pennsylvania on Benjamin Franklin's Mission to Canada and the Causes of its Failure, were some account given of his part in earlier years in having Canada become part of the British Empire, I have therefore here prefixed portion of an Address before the Empire Club of Canada at Toronto, November 15, 1923, dealing with this little known but very important episode in the life of Franklin and in the history of the world. The Empire Club very gladly gives its consent to the use of this Address by its sister organization, the Historical Society of Pennsylvania: and, sending its warmest greetings, hopes that the unity between and among the English-speaking peoples may continue and increase *in aeternum.*—W. R. R.]

The death blow to the old British Empire was struck in Canada in 1759, on the Plains of Abraham when Wolfe died victorious, cheered in death by the cry, "They run."

The blow, however, narrowly failed of being ineffective; it might well have produced no wound at all, not to speak of one that was fatal; and had it not been for Benjamin Franklin, the old British Empire might have

not received even a shock but have survived for many years.

Benjamin Franklin, printer, journalist, scientist, diplomatist, moralist, statesman, patriot, all in the first rank, was in 1757, at the age of fifty-one[1] sent to London by the Colony of Pennsylvania with a petition to the King, George II, that Pennsylvania might be permitted to tax the lands of the Penn estates for the defence of the Colony from the French and Indians. It was during his residence as Agent for Pennsylvania at the Court of St. James (Massachusetts and Connecticut also utilized his services) that the ancient Universities of St. Andrews and Oxford honoured themselves as well as him by conferring upon him the degrees of LL.D. and D.C.L. for his literary and scientific attainments: and to his friends and admirers, he was thereafter "the Doctor."

He was still in London when Quebec surrendered in September, 1759.

England was weary of war; the Seven Years' War which she had entered in 1756 to save Prussia from destruction by France and her allies—*absit omen*—glorious as it was, was depleting her resources; and, in 1759, it was not going too well with her ally, Frederick. The Government headed by Pitt were set on prosecuting the war with vigour and were fairly well supported by the country. The splendid victories on this Continent were encouraging but not sufficiently so to prevent voices in some influential—generally, indeed, Tory—circles being raised to stop the war and give up to France the conquered territory. Franklin opposed this step whenever and wherever an opportunity offered. We find him writing to Lord Kames from London, January 3, 1769, saying:—"No one can more sincerely rejoice than I do, on the reduction of Canada; and this not merely as I am a colonist but as I am a Briton. I have long been of opinion that the *founda-*

tions of the future grandeur and stability of the British Empire lie in America; and though like other foundations they are low and little now, they are, nevertheless, broad and strong enough to support the greatest political structure that human wisdom ever yet erected. I am, therefore, by no means for restoring Canada. If we keep it, all the country from the St. Lawrence to the Mississippi will in another century be filled with British people. Britain itself will become vastly more populous by the immense increase of its commerce; the Atlantic sea will be covered with your trading ships; and your naval power, thence continually increasing, will extend your influence round the whole globe and awe the world. If the French remain in Canada, they will continually harass our colonies by the Indians, and impede if not prevent their growth, your progress to greatness will at best be slow, and give room for many accidents that may forever prevent it.'"[2]

But Franklin did not confine his efforts to private letter writing: he talked—and he was a most persuasive talker—to all of the slightest influence with whom he came in contact. The suggestion made by "some among our great men" who in 1759 had begun to prepare the minds of the people to surrender Canada because to keep it would draw on Britain the envy of other nations and occasion a confederation against her, that Canada was too large and not worth possessing anyway, he combated "every day and every hour," and, as he rightly thought, with some success. He knew the English people, and he employed with skill and acumen the arguments which would have the greatest weight. The old British Empire was built on the plan of the old Roman Empire—Colonies and Provinces existed and were retained not for themselves but for the Mother Country. There was indeed no direct tribute exacted as in Roman times; but the Colonies paid an indirect tribute in affording a market for English goods

and English trade—England was an essentially trading nation, and all her conquests had been for commercial advantages. The money spent for defending the Colonies was a premium of insurance against loss of trade. Accordingly, Franklin's weightiest argument was that by keeping Canada, the nation would save two or three millions a year, then spent in defending the American Colonies: and, moreover, the Colonies would thrive and increase much more rapidly and so furnish a vast additional increase in the demand for British goods.

He did not confine himself to such arguments as this, but indulged in many other topics which he urged on occasion according to the company he was in or the persons he addressed.

Franklin as a man loyal to his Province and his mission, had always in view in these discussions the interests of America; he did not trouble himself then or later about the interests of Canada, and only in a minor degree about the interests of the Mother Country.[3]

But Franklin had another arrow in his quiver, more effective still; and that he now sped with marvellous skill. He turned to account his dexterity and ability as a pamphleteer.

It was the age of pamphlets, and it is possible that there were some written by Franklin which have disappeared or cannot be identified as his; but two we know of with certainty. The first in point of importance, and probably in point of time is the celebrated "Canada Pamphlet."[4]

William Pultency who had been a power in his day had destroyed his political prestige in 1742 by accepting a peerage, becoming Earl of Bath.[5] He was hated by the King, George II, and never again was of importance; although the King, in 1746, invited him to form a government, he failed.

But he was never content with his position: from

time to time he made public appearances like "an aged raven:" his speeches had a little of the old ring of the times when Walpole feared his tongue more than another man's sword. The Earl had selected as travelling tutor for his son, the Rev. John Douglas, a native of Fifeshire, a graduate of Oxford and a former Army chaplain: he presented the clergyman to two churches and they were close friends. Dr. Douglas (he took his D. D. degree in 1758) had undoubted ability, and at the Earl's direction he wrote several political pamphlets.[6]

Pulteney early in 1760 induced Dr. Douglas to write a pamphlet on the war: and Dr. Douglas accordingly wrote "A Letter to two Great men on the Prospect of Peace and on the Terms." The "two Great Men" were the elder Pitt and Newcastle who had formed a Coalition Government three years before and had raised and spent money for war purposes with a profusion which appalled more timid financiers—but which would in the recent war have been considered trifling. This pamphlet Walpole calls "very dull": it dealt with the terms necessary to be insisted upon in the negotiations for peace, and gave reasons for preferring Canada to the conquests of the West Indies—Guadeloupe had been taken in January, 1759. This pamphlet was answered by another, by William Burke, entitled "Remarks on 'A Letter to two Great Men,' " which contained opposite opinions on this and other subjects.[7]

Now was Franklin's opportunity, and he took advantage of it in the "Canada Pamphlet,"[8] which was published anonymously in 1760: a second edition eliding certain matter irrelevant to the general purpose and amending the terminology in some respects,[9] appeared in 1761, published with Franklin's name as author and is printed in Franklin's Works.[10] This is really a reply to the "Answer" and only incidentally is the "Letter" considered.

Franklin begins by demanding security from the

"barbarous tribes of savages that delight in war and take pride in murder, subjects properly neither of the French nor the English, but strongly attached to the former by the art and indefatigable industry of priests, similarity of superstitions and frequent family alliances. These are easily and have been continually instigated to fall upon and massacre our planters even in times of full peace between the two crowns, to the certain diminution of our people and the contraction of our settlements." He points out the absurdity of Forts as a sufficient protection against the French and the Indians: and urges that the possession of Canada is the only security. Answering the claim that the American colonists were wanting conquests made for them, he spiritedly says that these colonists "are in common with the other subjects of Great Britain anxious for the glory of her crown, the extent of her power and commerce, the welfare and future repose of the whole British people . . . they have been actuated by a truly British spirit to exert themselves beyond their strength." Then he artfully suggests that if Canada is retained, the people in the colonies will spread over the mountains and take up land making a market for English goods, whereas if not, they must for their own safety remain confined within the mountains, go into manufacturing and afford goods "cheap enough to prevent the importation of the same kind from abroad, and to bear the expense of its own exportation"—"But" he adds "no man who can have a piece of land of his own sufficient by his labour to subsist his family in plenty is poor enough to be a manufacturer and work for a master . . . while there is land enough in America for our people, there can never be manufacturers to any amount or value." Franklin counters: "how can the author of the Remarks counselling the return of Canada to France, justify the retention of Guadaloupe which he represents as of so much greater value?"

Then he goes into the relative value of the two countries in an argument eminently fitted for his audience.[11]

True, the trade with the West Indies is a valuable one but it has long been at a stand—limited as our sugar planters are by the scantiness of territory, they cannot increase much and that evil will be little helped by our keeping Guadaloupe: the trade with the people in the northern colonies doubles in about twenty-five years—the exports to Pennsylvania alone having increased in 28 years 17 times, the population having increased but four times. Suppose Guadaloupe does export £300,000 in sugar every year: who profits by it? Why, the French inhabitants of the Island who will not be dispossessed and who will spend no more than before on English manufactures. But Canada retained and so the American colonists made safe, "the annual increment alone of our present colonies without diminishing their numbers or requiring a man from hence is sufficient in ten years to fill Canada with double the number of English that it now has of French inhabitants"—and all will be customers of England.[12]

The most curious part of this pamphlet is that in which he contests the claim in the Answer that the American colonies would become dangerous to Great Britain if allowed to grow. "Of this, I own, I have not the least conception when I consider that we have already fourteen separate governments on the maritime coasts of the continent: and if we extend our settlements, shall probably have as many more behind them on the inland side. Those we now have are not only under different governors, but have different forms of government, different laws, different interests and some of them different religious persuasions and different manners. Their jealousy of each other is so great that, however necessary an union of the colonies has long been for their common defence and security against their enemies and how sensible soever each

colony has been of that necessity, yet they have never been able to effect such an union among themselves, nor even to agree in requesting the mother country to establish it for them. Nothing but the immediate command of the crown has been able to produce even the imperfect union, but lately seen there, of the forces of some colonies.[13] If they could not agree to unite for their defence against the French and the Indians who are perpetually harassing their settlements, burning their villages and murdering their people, can it be reasonably supposed there is any danger of their uniting against their own nation which protects and encourages them, with which they have so many connections and ties of blood interest and affection and which it is well known, they all love more than they love each other? In short, there are so many causes that must operate to prevent it that I will venture to say, an union amongst them for such a purpose is not merely improbable, it is impossible."

Franklin's task was not yet complete: the cry for peace continued and to meet that by casting discredit on its authors he wrote another article which he sent to the *London Chronicle;* it was afterwards published in the *Gentlemen's Magazine.* He pretended to have found in a bookstall an old quarto without title page or author's name, containing discourses, addressed to some King of Spain translated into English and said in the last leaf to be printed in London by Bonham Norton and John Bill, "Printers to the King's most excellent Majestie, MDCXXIX;"[14] he adds "The author appears to have been a Jesuit. . . . Give me leave to communicate to the public a chapter so *apropos* to our present situation (only changing Spain for France) that I think it well worth general attention and observation, as it discovers the arts of our enemies and may therefore help in some degree to put us on our guard against them." There had been writings and

discourses he says in Britain like those recommended in the Spanish book; and although so far they had little effect as "all ranks and degrees among us persist hitherto in declaring for a vigorous prosecution of the war in preference to an unsafe, disadvantageous or dishonourable peace, yet as a little change of fortune may make such writings more attended to and give them greater weight, I think the publication of this piece as it shows the spring from whence these scribblers draw their poisoned waters, may be of public utility."

Then he copies what purports to be a chapter from the old book.

"CHAP. XXXIV.

ON THE MEANES OF DISPOSING THE ENEMIE TO PEACE"

It is in the main a recommendation to the King of Spain who is supposed to be at war with England to gain by proper Meanes (i. e., bribery) "Menne of Learning (in England) ingenious Speakers and Writers who are nevertheless in lowe Estate and Pinched by Fortune . . . in their Sermons, Discourses, Writings, Poems and Songs to . . . magnifie the Blessings of Peace . . . expatiate on the Miseries of War, the Waste of Christian Blood, the growing Scarcitie of Labourers and Workmen, the Dearness of all foreign Wares and Merchandise, the Interruption of Commerce, the Capture of Ships, the Increase and great Burthen of Taxes. Let them represent the Advantages gained against us as trivial and little Import; the Places taken from us as of small Trade and Produce, inconvenient for Situation, unwholesome for Ayre and Climate, useless to their Nation and greatlie chargeable to keepe, draining the home Countrie both of Menne and Money. . . . " &c., &c.—precisely the arguments which had been used to bring on a peace with surrender of Canada, and precisely the arguments used by the agents of Germany in the late War. Nothing was

better adapted to throw suspicion on the Pacifists, whom Franklin looked upon as dangerous to England, and more dangerous to America.[15]

Franklin's argument prevailed: Canada was retained: the fear of French Canadians and French Indians was removed: what Vergennes had prophesied took place: the Thirteen Colonies rebelled and the old British Empire was rent in twain to be in time destroyed and a new British Empire built on the old foundations, but of "practically independent sister States cooperating for the common good,"[16] whose Prime Ministers meet at the Imperial Conference, the Prime Minister of Great Britain "on terms of perfect equality with him and with each other."[17]

[The Paper continues with an account of Franklin's mission to Canada in 1776 and its failure, and concludes as follows:]

Franklin left Canada a very few days after he entered it, leaving it to work out its own destiny: and so far as is known, he never saw it again.

But Canada has him in great measure to thank for her being as she is the brightest jewel in the British Crown and for her flying the flag that braved a thousand years the battle and the breeze; and she may forgive him for the fruitless attempt to sever her destinies from the rest of the British world. He succeeded because he could persuade Englishmen, he failed because he could not persuade French-Canadians; for both his success and his failure, we are devoutly thankful at this time of Thanksgiving. His success made possible the destruction of the old British Empire—his failure made possible the creation of the new, better and greater British Empire.

William Renwick Riddell.

Osgoode Hall, November 12, 1923.
(Thanksgiving Day)

REFERENCES.

[1] "The Americana," Vol. VIII, Art. "Franklin, Benjamin," makes him in the 41st year of his age when in 1757 he was sent to London by his Province; it also says that he spent the next 41 years of his life practically all in the diplomatic service. As Franklin was born in 1706 and died in 1790, these figures should be 51st and 31 respectively.

[2] *The Life of Benjamin Franklin written by Himself;* By John Bigelow; London, 1879, Vol. I, p. 399. This letter as it seems to me may well put an end to the supposition that Franklin had an *arrière pensée* in writing the "Canada Pamphlet" about to be spoken of in the text. See my Article "The Status of Canada," *Journal issued by American Bar Association,* June, 1921, pp. 293, sqq.

[3] See his letter to John Hughes from London, January 7, 1760; Bigelow, *op. cit.*, p. 402. He ends this letter: "And, on the whole, I flatter myself that my being here at this time may be of some service to the general interest of America." My own opinion is that his being there at that time revolutionized the world and changed the course of human history.

[4] The full title is "The Interest of Great Britain considered with regard to her Colonies, etc."—the pamphlet is very rare (my own copy cost me £8). It was almost certainly published by May, 1760; it is probably that referred to in Franklin's letter to Lord Kames dated London, May 9, 1760—Bigelow, *op. cit.*, Vol. 1, p. 404—in which he says "Enclosed you have the production such as it is."

[5] Horace Walpole, Earl of Orford, says in a letter to the Countess of Ossory from Strawberry Hill, July 17, 1792, that Pulteney "had gobbled the honour but perceived his error too late for on the day that he entered the House of Lords, he dashed his patent on the floor in a rage, and vowed he would never take it up; but it was too late—he had kissed the King's hand for it." Walpole's *Letters*, Cunningham's edition, Vol. IX, p. 379; see also do. do. Vol. I, p. 143. Walpole certainly got the better of him; and he himself said "he lost his head and was obliged to go out of town for three or four days to keep his senses." See D. N. B.,, Vol. XLVII, pp. 28, sqq.

[6] He should be remembered for his vigorous, able and successful defence of John Milton from the charge of plagiarism made against him by William Lauder, another Scotsman, and M. A. of Edinburgh. See D. N. B., Vol. XV, pp. 337, 338.

[7] Horace Walpole, Earl of Orford, says in a letter to George Montagu, from Arlington Street, January 14, 1760: "There is nothing new but a very dull pamphlet, written by Lord Bath and his chaplain Douglas, called a 'Letter to Two Great Men.' It is a plan for the peace and much adopted by the City, and much admired by those who are too humble to judge for themselves." Walpole's *Letters*, Cunningham's

edition, Vol. III, p. 278. Walpole does not seem to have mentioned the Answer or the Canada Pamphlet. I have not seen either the Letter or the Answer: the former I have seen advertised for sale only once and I failed to acquire it: I have never seen the latter advertised: the substance of them, however, is made sufficiently clear in the Canada Pamphlet. Bigelow does not notice them.

[8] It would seem that Franklin wrote this pamphlet on the request of Lord Kames. Writing to Kames from London, May 9, 1760, Franklin says: "I have endeavoured to comply with your request in writing something on the present situation of our affairs in America in order to give more correct notions of the British interest with regard to the colonies than those I found many sensible men possessed of. Enclosed you have the production such as it is. I wish it may, in any degree, be of service to the public." Bigelow, *op. cit.*, Vol. I, p. 404, thinks this the "Canada Pamphlet," and I agree with him.

[9] David Hume seems to have criticized the language of the pamphlet: Franklin in a letter to him from Coventry, September 27, 1760, thanks Hume for his "friendly admonition relating to some unusual words in the pamphlet. It will be of service to me." He admits "*pejorate*" and "*colonize*" are not in common use and gives them up as bad, "for certainly in writings intended for persuasion and general information, one cannot be too clear; and every expression in the least obscure is a fault." He thinks "*unshakeable*" clear but he gives "it up as rather low;" and "the word *inaccessible* though long in use among us is not as yet, I dare say, so universally understood by our people as the word *uncomeatable* would immediately be which we are not allowed to write." Bigelow, *op. cit.*, Vol. I, p. 412. "Pejorate," to make worse, is still an unusual and stilted word: Franklin in the first edition of the "Canada Pamphlet" in the "observations concerning the increase of mankind, &c.," omitted in the second edition used the word in the sentence "Slaves also pejorate the families that use them." *The Works of Benjamin Franklin, LL.D.*, 2d Ed., London, Vol. 2, p. 388. This essay was written in 1751. Robert Louis Stevenson uses the word (1893) in his *Catriona:* I do not recall its appearance elsewhere. It sounds odd to hear the word "colonize" characterized as obscure—it had been in use from Bacon's time, 1622; and is one of our commonest and most generally understood words; I do not know of a word to take its place. Franklin used it in the second edition, see p. 139. "Inaccessible" had been in use at least for two centuries and it is very common at the present time—"uncomeatable" is still taboo in literary circles but not unusual in familiar parlance.

[10] *The Works of Benjamin Franklin, ut suprâ,* Vol. 3, pp. 89–143—this edition being readily available, I shall cite it in this paper. It was "printed for Becket," London, 1761. Two editions of the "Canada Pamphlet" also appeared in Boston: and a long answer also was published. It seems quite certain that while Franklin supplied most of the information, Richard Jackson did most of the work on the "Canada Pamphlet," at least two-thirds of the text being his.

[11] There never was a more astute diplomat than Franklin and he was extraordinarily able in feeling his audience and adapting his methods accordingly.

To indicate the strong feeling in favour of the retention of Guadeloupe it may be mentioned that Pitt in his Speech in the House of Commons, December 9, 1792, on the motion to approve the Preliminary Peace Treaty—he was so excessively ill that the House unanimously desired him to speak sitting—said that he had been blamed for consenting to give up Guadaloupe. . . . He wished to have kept the Island: he had been overruled on that point: he could not help it: he had been overruled many times on many occasions. He had acquiesced, he had submitted. . . . *The Parliamentary History of England* (Hansard), Vol. XV, col. 1264. The motion passed the House, 319 to 65, Pitt generally approving—he had left the Government with Temple shortly before on the question of War with Spain: the Papers relating to his negotiations with France are in *do. do.* cols. 1018–1210. The Peace was actually signed February 10, 1763.

[12] The expectation expressed concerning the French population of Canada is interesting. "Those who are Protestants among the French will probably choose to remain under the English government; many will choose to remove if they can be allowed to sell their lands, improvements and effects; the rest in that thin-settled country will in less than half-a-century from the crowds of English settling round and among them be blended and incorporated with our people both in language and in manners."

When Canada was retained on the Peace of 1763, it was confidently expected that it would soon be settled by an English-speaking community and not a few merchants came in to Quebec and Montreal from Britain and the American Colonies to the South; the Royal Proclamation of 1763 promised the protection of the English law; and free lands were offered to settlers. The expectation that many French Canadians would remove proved fallacious, as but a negligible part went to France, although they had full leave to dispose of their property and had eighteen months in which to do it. No great English-speaking immigration set in until the Revolutionary War; and the French refused to blend with the newcomers in language or in customs—rather the reverse was the case. The movement to unite the Canadas in 1822 was in essence a movement to overwhelm the French Canadians; and Lord Durham's scheme of Union (1840) had the same result in view. All these designs proved vain imaginings—the astute statesmen failed to reckon with the virility and love of their language of the French and the fertility of French mothers.

[13] In Pepperrell's expedition against Louisbourg, 1745, were troops from Massachusetts, Connecticut, Rhode Island and New Hampshire—Pennsylvania declined to join. Benjamin Franklin in Philadelphia wrote to his brother in Boston: "Fortified towns are hard nuts to crack, and your teeth are not accustomed to it; but some seem to think that forts are as easy to take as snuff"—and he used his influence against Pennsylvania joining.

Parkman, *A Half-Century of Conflict*, Champlain Ed., Boston, 1897, Vol. 2, p. 70.

Probably the reference in the text is to the American contingent in the war then going on; troops were contributed by Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, Pennsylvania, Virginia, Maryland, North and South Carolinas, New Jersey—not all at the same time or in the same expedition. "The Royal American Regiment" took part as an Imperial contingent in the campaigns of 1759, 1760.

[14] No doubt, Franklin had seen such a colophon: Bonham Norton (1565–1635) was a King's Printer: D. N. B., Vol. XLI, pp. 225, 226: but the book is a myth. The date of Franklin's production is not certainly known but Sparks says "its contents show it to have been written towards the close of the French war and probably in 1760 or the year following. Under the disguise of a pretended chapter from an old book and an imitation of an antiquated style he throws out hints suited to attract attention and afford amusement." I think Sparks quite underrates the purpose and effect of this communication: it is a most ingenious and telling document calculated to cast suspicion on the advocates of peace. The Ency. Brit. 11th Ed. Vol. II, p. 25, says it "had a great effect." I think, however, it is in error in dating it before the "Canada Pamphlet." See Bigelow *op. cit.*, Vol. I, pp. 414, 415 and note. Franklin signed the communication to the *London Chronicle*, "A Briton."

While Franklin frequently declared that in the "Canada Pamphlet" he received considerable assistance from a learned friend who was not willing to be named but who is now known to have been Richard Jackson, Agent for Massachusetts and Connecticut, no one has ever doubted that Franklin was the sole and only author of this production.

[15] See this curious production in Bigelow, *op. cit.*, Vol. I, pp. 416–420; the communication to the *London Chronicle*, *do. do.*, pp. 414–416.

[16] The language of the Prince of Wales, as true as it is inspiring.

[17] The language of the Prime Minister of Great Britain, the Rt. Hon. Stanley Baldwin and of the former Prime Minister of Canada, the Rt. Hon. Sir Robert Borden.

BENJAMIN FRANKLIN'S MISSION TO CANADA AND THE CAUSES OF ITS FAILURE.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL,
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[*For References, see pages 48 to 64.*]

Benjamin Franklin was an accomplished diplomatist of great shrewdness and tenacity; and it was confidently expected by the Continental Congress that valuable results would follow from his mission to Canada in 1776.

His failure was pronounced: so far as we can now judge from extant documents, he was wholly unsuccessful—but it cannot fairly be said that any other result was possible in the existing state of affairs; his failure was due to circumstances over which he had, then at least, no control.

Tout comprendre c'est tout pardonner—or, if not quite that, tout comprendre ce rend très-indulgent.

It will be necessary to the understanding of Franklin's problem that we should examine the state of Canada at the time of his visit.

When de Vaudreuil in September, 1760, surrendered Montreal and, with it, Canada, to the British, General Sir Jeffrey Amherst by Article XXVII of the Capitulation agreed that: "The free exercise of the Catholic, Apostolic and Roman Religion, shall subsist entire."[1] The Definitive Treaty of Paris, February 10, 1763, whereby His Most Christian Majesty of France "cedes and guarantees to His Britannick Majesty, in full right, Canada with all its dependencies," contained in Article IV, the agreement of His Britannic Majesty "to grant the liberty of the Catholic religion to the inhabitants

of Canada: he will, in consequence give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church as far as the laws of Great Britain permit."[2] At this time, it was believed by the Home Administration that the more northern of the Thirteen Colonies by reason of the increase of population had scarcely room for any more inhabitants,[3] and it was deemed wise to attract to Canada settlers, merchants and others, from the American Colonies as well as from the British Isles.

The Royal Proclamation of October 7, 1763,[4] recited that the King was "desirous that all Our loving Subjects as well of our Kingdom as of Our Colonies in America, may avail themselves with all convenient speed of the great benefits and advantages which must accrue therefrom to their Commerce, Manufactures and Navigation." The Proclamation stated that the King had erected four Separate Governments, Quebec, East Florida, West Florida and Grenada, with only the first of which, Quebec, we have any concern at this time.

It is important to bear in mind the Western and Southern boundaries of the new "Government" of Quebec; the Western boundary was a line (in the present Province of Ontario) running from the south end of Lake Nipissim (Nipissing) to the River St. Lawrence in 45 Degrees of North Latitude (about the present Town of Cornwall, Ontario). The southern boundary was along this parallel of latitude to Lake Champlain and "along the High Lands which divide the Rivers that empty themselves into the River St. Lawrence from those that fall into the Sea." The lands to the West, "lying about the Great Lakes and beyond the sources of the rivers which fall into the River St. Lawrence from the North," were intended

"to be thrown into the Indian Country" for the fur-trade: while the limit to the south was so fixed as to prevent interference with the Colonies already established. The Lords of Trade in their representation to His Majesty, June 8, 1763, said: "The Advantage resulting from this restriction of the Colony of Canada will be that of preventing by proper and natural Boundaries, as well the Ancient French Inhabitants as others from removing and settling in remote places, where they neither could be so conveniently made amenable to the Jurisdiction of any Colony nor made subservient to the Interest of the Trade and Commerce of this Kingdom by an easy Communication with & Vicinity to the great River St. Lawrence. And this Division by the height of land to the South of the River St. Lawrence will . . . leave all your Majesty's new French Subjects under such Government as your Majesty shall think proper to continue to them in regard to the Right & Usages already secured or that may be granted to them." Moreover, the Lords of Trade urged that "Planting, perpetual Settlement and Cultivation ought to be encouraged" in Canada as in "Florida and the newly acquired Islands in the West Indies."[5] The Royal Proclamation says: "Whereas it will greatly contribute to the speedy settling our said new Governments that our loving subjects should be informed of our Paternal care for the security of the Liberties and Properties of those who are and shall become Inhabitants thereof, we have thought fit to publish and declare by this, Our Proclamation that we have in the Letters Patent under Our Great Seal of Great Britain by which the said Governments are constituted, given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the Said Colonies will admit thereof, they shall with the Advice and consent of the Members of our Council, summon and call General Assemblies

within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under Our immediate Government: and We have have also given Power to our said Governors with the consent of our Said Councils and the Representatives of the People so to be summoned as aforesaid, to make constitute and ordain Laws, Statutes and Ordinances for the Public Peace, Welfare and good Government of Our said Colonies and of the People and Inhabitants thereof as near as may be agreeable to the Laws of England and under such Regulations and Restrictions as are used in other Colonies: and in the meantime and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to Our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England.'' This, of course, was an express promise to all who were then or who were to be inhabitants of Quebec that they should have the protection of the laws of England until such time as they should have an Assembly representative of the people, to make laws for them—there was also what was almost an express promise that such a representative Assembly would be summoned by the Governor as soon as the circumstances of the Colony would allow.

General James Murray being appointed ''Captain General and Governor in Chief in and over our Province of Quebec,'' his Commission, December 21, 1763, gave him the ''power and authority with the advice and Consent of our Said Council . . . so soon as the Situation and circumstances of our said Province . . . will admit thereof and when & as often as need shall require, to summon and call General Assemblies of the Freeholders and Planters within your Government. . . .'' ''The persons thereupon duly elected by the Major Part of the Freeholders of the respective parishes or

precincts and so returned,'' were to take the oath against the Pretender; and the Governor with his appointed Council and elected Assembly could make laws, statutes and ordinances—until an Assembly should be summoned, this power could be exercised by the Governor and his Council alone.[6]

Murray's Instructions[7] were to the same effect: they, however, were specific that he should conform with great exactness to the stipulations of the Treaty of Paris, February 10, 1763, as to the right of the Roman Catholic inhabitants to ''profess the Worship of their religion according to the Rites of the Romish Church, so far as the Laws of Great Britain permit''; and that he was not to ''admit of any Ecclesiastical Jurisdiction of the See of Rome or any other foreign Ecclesiastical Jurisdiction whatsoever in the Province.''[8]

A number of immigrants from the British Isles and the North American Colonies settled in the Province of Quebec, many of whom claimed—some, no doubt, with justice—that they had been induced to do so by the promises in the Royal Proclamation: these new settlers were called ''Old Subjects'' while the French Canadians were called ''New Subjects,'' the ''Old Subjects'' being generally Protestant, the ''New Subjects'' generally Roman Catholic.

When the country was still under Military Rule, *i.e.,* before the establishment of Civil Government pursuant to the Royal Proclamation, there was not much friction between these two elements—the French Canadian always expected until the very last that Canada would on the Peace be given back to France.[9]

But when Civil Government was introduced, it was not long before there was an agitation by some of the Old Subjects for an Assembly. The French Canadians cared nothing for such a body: while they enjoyed their religion and they were not interfered with in their customs, they were content—not so the Old Subjects.[10]

Governor Murray formed a bad impression of the "Old Subjects" and he had a high opinion of the French Canadians—they were "perhaps the bravest and the best race upon the Globe," while the others were "Licentious Fanatics."[11] In 1766, there were 19 Protestant Families in the Parishes, the "other Protestants, a few half-pay officers excepted, are Traders, Mechanics and Publicans in Quebec and Montreal . . . the most miserable collection of men, I ever knew."[12]

There was another ground of dispute between the Old and the New Subjects—the latter desired the re-introduction of their former law[13] based as it was on the Coutume de Paris, and ultimately upon the Civil Law of Rome: the former insisted upon the Laws of England which, as we have seen, had been secured to them by the Proclamation of 1763. Ultimately the French Canadian prevailed, and the celebrated Quebec Act of 1774[14] was passed.

As this Act plays a very large part in subsequent events, it will be well to state its principal provisions so far as they bear upon our subject. In the first place, the former western boundary is removed: the Province of Quebec is to contain all the territory bounded by a line from Lake Champlain to the River St. Lawrence along the parallel of 45 degrees North Latitude then along the east bank of the River up to Lake Ontario, through Lake Ontario and the River Niagara, along the east and south east bank of Lake Erie to the western boundary of Pennsylvania, southward along this boundary to the River Ohio, along the bank of the Ohio to the Banks of the Mississippi and northward to the southern boundary of the Hudson's Bay Territory. We shall see that this extension of the Province was bitterly resented by the Colonies to the South, although it is expressly enacted "That nothing herein contained relative to the boundary of the Province of Quebec shall in any wise affect the Boundaries of any other Colony."[15]

Then is to be noted a provision which excited much indignation—more in the other North American Colonies than in Canada itself, be it said. Section 5 enacted that those professing the religion of the Church of Rome in the Province might "have hold and exercise the free exercise of the religion of the Church of Rome subject to the King's Supremacy, declared and established" by the Act of 1558, 1 Elizabeth, cap. 1—this was, of course, but implementing the promises of the Articles of Capitulation and the Definitive Treaty; and it is probable that this alone would not have so moved the Protestants to the South. But the same section provided "that the Clergy of the said Church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion"—this is the provision fulminated against as establishing the Roman Catholic Church.[16] Section 6 allows the King to make provision for the encouragement of the Protestant Religion and for the maintenance of a protestant Clergy out of the "rest of the said accustomed dues and rights"—and this was interpreted to mean the religion and Clergy of the Church of England.

The third feature in this Act strenuously objected to, both by the Old Subjects (or at least some of them) in Canada and the Thirteen Colonies, was the omission to provide for an Assembly, and the power given to the Governor and his nominated Council to legislate for the Province.[17] And the fourth, equally objected to, was the provision "that in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of Canada as the rule for the decision of the same."[18] This last was a direct breach of an express promise of the King contained in the Royal Proclamation of 1763 as the preceding was of the implied promise. Nothing could excuse this breach of faith but the gravest necessity—this necessity, Sir Guy

Carleton, Lord Dorchester, the Governor, believed to exist and so did the Home Administration. *Sub judice lis est:* So far as my own investigations enable me to judge, I think they were right. The Act came into force, May 1, 1775—petition against, counter-petition for, it followed: and there was a very serious situation —many of the Old Subjects insisted on the rights of Englishmen, and some did not hesitate to say that they would have the rights of Englishmen even though that meant ceasing to be British.

Let us turn now to the south; the Quebec Act was assented to early in 1774:[19] Franklin was at the time in London and using all his influence against it—we find as early as July 23, 1774, a friend of his writing from London to Philadelphia "that detestable Quebec Bill which is so evidently intended as a bridle on the Northern Colonies."[20]

The celebrated Suffolk County (Pa.) Resolutions passed, September 6, 1774, were the first (so far as I can find) which publicly expressed the objection of the Colonists outside of Canada to the religious features of the Quebec Act. "10—That the late Act of Parliament for establishing the Roman Catholic Religion and the French laws in that extensive country, now called Canada, is dangerous in an extreme degree to the Protestant religion and to the civil rights and liberties of all Americans; and therefore, as men and Protestant Christians, we are indispensably obliged to take all proper measures for our security."[21]

It was not long before the Continental Congress spoke out—September 28, 1774, after condemning the Statutes, (1764), 4 George 3, c. 34; (1765), 5 George 3, c. 35; (1766), 6 George 3, c. 52; (1767), 7 George 3, cc. 41 and 46; (1768), 8 George 3, c. 22, as "subversive of American rights," Congress resolved, condemning "the Act passed in the same [last] session for establishing the Roman Catholic religion in the Province of Quebec,

abolishing the equitable system of English Law and enabling a tyranny there to the great danger from so total a dissimilarity of Religion, Law and Government of the neighbouring British Colonies by the assistance of whose blood and treasure, the said country was conquered from France."[22] So far only the substitution of Canadian law for the "equitable system of English Law," the omission to provide for an elective Assembly and what was called the establishment of the Roman Catholic Religion were all that could be found objectionable in the Quebec Act.

But, Thursday, October 20, 1774, the Congress while "avowing our allegiance to His Majesty," assailed the "Act for extending the Province of Quebec so as to border on the Western Frontiers of the Colonies, establishing an arbitrary government therein and discouraging the settlement of British subjects in that wide extended country: thus by the influence of civil principles and ancient prejudicies to dispose the inhabitants to act with hostility against the free Protestant Colonies, whenever a wicked Ministry choose so to direct them."[23]

The address to the People of Great Britain, adopted October 21, 1774, complained that "by another Act, the dominion of Canada is to be so extended, modelled and governed as that by being disunited from us, detached from our interests by civil and religious prejudices, that by their numbers daily swelling with Catholic Emigrants from Europe and by their devotion to Administration so friendly to their religion, they may become formidable to us and on occasion be fit instruments in the hands of power to reduce the ancient free Protestant Colonies to the same state of slavery with themselves. . . . Nor can we suppress our astonishment that a British Parliament should ever consent to establish in that country a Religion that has deluged your Island in blood and dispersed impiety,

bigotry, persecution, murder and rebellion through every part of the world.''[24] (Only reverence for the Fathers will enable us to repress a smile at the rebuke by those themselves soon to become rebels, to the Church for ''dispersing rebellion;'' and perhaps the less said about ''bigotry,'' the better.)

On the same day, Thomas Cushing, of Massachusetts, Richard Henry Lee, of Virginia, and John Dickinson, of Pennsylvania, were appointed a Committee to draft an address to the People of Quebec and Letters to the Colonies of St. John's (now Prince Edward Island) Nova Scotia, Georgia, East and West Florida ''who have not deputies to represent them in this Congress.''

Now, apparently for the first time, it seems to have struck these ardent protestants that after all, Roman Catholics have or at least might claim that they have some rights, that even French Canadians have the right to the laws and form of government which they prefer.

The address produced by the Committee—John Dickinson[25] is credited with its authorship—is as extraordinary a document as is to be found anywhere—whatever may be said of its candour, no ''Philadelphia lawyer'' ever showed more ingenuity in ignoring awkward facts.

It begins with a compliment to the Canadians who ''after a gallant and glorious resistance'' had, to the joy of the other Colonies, been ''incorporated . . . with the body of English subjects . . . a truly valuable addition both on our own and your account expecting as courage and generosity are naturally united, our brave enemies would become our hearty friends and that the Divine Being would bless . . . you . . . by securing to you and your latest posterity the inestimable advantages of a free English constitution of government. . . . These hopes were confirmed by the King's Proclamation . . . in the year 1763, plighting the public faith for your full enjoyment of these advan-

tages." But ministry had withheld these irrevocable rights—and "as you, educated under another form of government, have artfully been kept from discovering the unspeakable worth of that form, you are now undoubtedly entitled to, we esteem it our duty . . . to explain to you some of its most important branches." No word of the undoubted fact that the Ministry was more than willing to grant that form of government and the Canadians would have none of it.

Then follows a philosophical discussion of the beauties of Representative Government with quotations from Beccaria and Montesquieu, of trial by jury (the French Canadian never got over his wonder that the English conqueror preferred to have his rights determined by the tailor and shoemaker rather than the judge), Habeas Corpus, "holding lands by the tenure of easy rents" (the Frenchman preferred his own ways of holding lands), freedom of the press (there was just one paper in the Province, the *Quebec Gazette,* first issued, June 21, 1764, and which could not live without government patronage).

The Quebec Act did not give them liberty of conscience in their religion—God gave it to them; nor the French laws—the Governor and Council could change them. Apparently the dangerous religion and law were not really advanced by the Act—but what becomes, then, of the grievance?

The Address goes on: "We are too well acquainted with the liberality of sentiment distinguishing your nation to imagine that difference of religion will prejudice you against a hearty amity with us.

"You know that the transcendent nature of freedom elevates those who unite in the cause above all such low-minded infirmities. The Swiss Cantons furnish a memorable proof of this truth. Their union is composed of Catholic and Protestant states, living in the utmost concord and peace with one another and thereby

enabled ever since they bravely vindicated their freedom, to defy and defeat every tyrant that has invaded them. . . . We do not ask you, by this address, to commence hostilities against the government of our common sovereign . . . submit it to your consideration . . . to meet together . . . and elect deputies who . . . may choose delegates to represent your Province in the continental congress . . . at Philadelphia on the tenth day of May, 1775.

"In this present congress . . . it has been with . . . . . . an unanimous vote, resolved that we should consider the violation of your rights by the act for altering the government of your province as a violation of our own. . . . "

This was adopted, October 26, 1774, and it was "Resolved that the address to the People of Canada be signed by the President, and the Delegates of the Province of Philadelphia superintend the translating, printing, publishing and dispersing it. And it is recommended by the Congress to the Delegates of New Hampshire, Massachusetts Bay and New York to assist in and forward the dispersion of the said address."[26]

On the same day, October 26, 1774, the Congress adopted an address to the King in which a complaint was made, *inter alia,* against the Act, "for extending the limits of Quebec, abolishing the English and restoring the French laws, whereby great numbers of English freemen are subjected to the latter and establishing an absolute government and the Roman Catholick religion throughout those vast regions that border on the westerly and northerly boundaries of the free Protestant English Settlements."[27]

There was an active correspondence between certain discontented Canadians—almost all of them English-speaking and in Montreal—and some of the leaders in the Continental Congress: and somewhat exaggerated accounts of the actually existing discontent with the

Quebec Act in Canada were sent from time to time to Philadelphia and elsewhere in the Thirteen Colonies. The City of Quebec itself was generally quiet; but there were several meetings of the dissatisfied at Montreal—the chief grievance being the power by the Act given to the priests to collect tithes. It is true that this was only to affect Roman Catholics, and, generally speaking, French Canadians, but it legalized the status of the priest, restoring to him rights which he had in the French period and under the Règne Militaire which lasted from the Conquest till after the Treaty of Paris. No little of the agitation was due to the influence of the Colonies to the South.

The Pennsylvania Delegates had the Address to the Inhabitants of Quebec, translated and printed by Fleury Mesplet, a Frenchman, then a printer in Philadelphia: but before the French translation reached Quebec, one copy if not more, of the English text was sent there to some of the discontented. A translation into French was there made, and manuscript copies were circulated from hand to hand among the French—the only printer in the Province, who published the *Quebec Gazette,* refused to print it.[28]

This did not escape the notice of Sir Guy Carleton, the Governor, nor did a further attempt a few weeks later to bring the Address before the French—we find Carleton writing from Quebec, March 13, 1775, to Lord Dartmouth: "Several of His Majesty's natural born subjects continue suggesting into the minds of the Canadians, an abhorrence of the form of Government intended by the Act of last Session and least they should not sufficiently understand the Letter addressed to them by the Continental Congress at Philadelphia, have been at the Pains to translate, and not succeeding with the Press here, have put themselves to the expense of sending it to some of the factious Printers to the Southward to be printed off: two or three hundred

copies have actually been imported into the Province and I hope will prove of as little consequence as their former effort: it is needless to trouble your Lordship with a copy of this Letter as it has been transcribed I believe into every American Paper except the *Quebec Gazette.*''[29]

In addition to the written and printed appeals, there were those made *viva voce*—Carleton receives information from Montreal (of date, April 3, 1775): ''There are some People lately come into this Province from New England who I suspect are no better than they should be. One is gone to Quebec and, as I am informed, a second is at Three Rivers and a third remains here [i.e. at Montreal]. I am told that there are three more at La Prairie''; and a meeting had been held there on Saturday, for no good purpose.[30] Another report to Carleton from Montreal of April 6, 1775,[31] referring to these New Englanders, proceeds: ''The Day before yesterday, most of the merchants as well as most of the English, Scotch and Irish of this Town, assembled at the Coffee House here and were harangued by the New Englander. I am told that their assembly was to chuse two Deputies to send to the Congress to be held at Philadelphia on the 10th of next May.'' The next day, April 7, the report is: ''One New Englander, Brown, an Attorney and a member of the Provincial Congress at Cambridge, at a meeting of merchants held at the Coffee House, Tuesday last . . . read a letter addressed to Thomas Walker, Isaac Todd, Blake, Price, Haywood and to all friends of Liberty signed by Adams, Mackay and Warren,'' saying that the late Acts of Parliament were oppressive and unconstitutional—then Walker, a great Republican, harangued the meeting and moved a Committee of Observation like that at Cambridge and to send two Delegates to the Continental Congress. He received no backing. Todd would have nothing to do with the

letter: Walker, Blake, Price and Haywood intend to answer the letter—"Brown is endeavouring to intimidate the Canadians by assuring them that if a man of them should dare to take up arms and act against the Bostonians,[32] 30,000 of them will immediately march into Canada "and lay waste the whole Country."

Thomas Walker was a well known personage of Montreal who had some years before had trouble with the military in which he came off second best: he does not seem to have received fair play—however that may have been, he was discontented with the Government and a constant source of trouble. He was in correspondence with Benedict Arnold, then at Crown Point, and kept him informed of affairs in Montreal. We find Arnold writing him from Ticonderoga, May 20, and from Crown Point, May 24, 1755, the latter[33] letter shows the kind of threat used against the Canadians.

"I beg the favour of you to advise me of the number of Troops with you . . . their movements and designs if possible and if joined by any Canadians or Indians. If any number of the former, you may assure them they will soon see our Army of Prinkins[34] here, men in the Heart of their Country."

The Battle of Bunker Hill was fought, June 17, 1775; the British soldiers on Bunker Hill were appealed to by the American Soldiers on Prospect Hill in a printed Address urging them not to imbrue their "Hands in the Blood of your Fellow-Subjects in America," as they were called upon to do because the American fellow-subjects would "not admit to be Slaves and are alarmed at the Establishment of Popery and Arbitrary Power in One Half of their Country"; and it was hoped that the British Soldiers would "not stain the Laurels you have gained from France by dipping them in Civil Blood."

It is probably too much to say that after the passage of the Quebec Act, it was the main object of attack and

the chief reason for the Declaration of Independence: but it cannot be denied that anti-Catholic feeling had something to do with it—certainly this was manifested again and again.

All this was well known in Canada—a part of the 400 Old Subjects shared the sentiments of the revolutionaries: but hardly a handful of the 80,000 French Canadians could be won over.

The French Canadian while generally willing to defend his own country against invasion was nevertheless unwilling to join the British forces: Maseres writing to Lord Shelburne (afterwards Marquis of Lansdowne) from the Inner Temple, London, August 24, 1775, says that an Englishman arrived from Quebec brought the news that the "Canadians persist in refusing to act offensively against the other Americans but say they are ready to defend their own Province against any invasions the Americans shall attempt to make into it."[35] Carleton's efforts to form an effective Canadian force were without avail: and indeed, it was a somewhat general sentiment amongst Englishmen that such a scheme would be inadvisable in any event. Maseres' letter sufficiently explains this view: "I should be very sorry to see the Canadians engaged in this quarrel for two reasons: 1st, because I believe it would soon produce the ruin of their country, and 2nd, because if the event was to be otherwise and they were to subdue the other Americans, I should not like to see a Popish Army flushed with the conquest of the protestant and English provinces."[36]

Carleton went so far as to request Bishop Briand of Quebec to issue an Episcopal mandate to compel Canadians to enlist but the the Bishop declined, as it would be quite unsuitable for the occasion—he said that if the Governor wished, he would write a Circular Letter to all the priests in the country to direct them to use their best endeavors in the way of private con-

versation to induce the Canadians to engage their services. Carleton accepted the offer; the Bishop did so write but the letter had no effect.[37]

Some of the Seigneurs endeavored to bring into force their authority under the French law, to compel the "habitants" to form a military corps: but the habitants refused and mobbed their former officers, so that they were fain to flee for safety.

The state of Canada in 1775 was perilous—there were only a few troops to protect her, many of the English speaking population, perhaps the larger number of them, were in sympathy with the American Colonists, while the French Canadians as a whole were determined not to act aggresively; and it was at least doubtful whether they could be relied upon even to defend Canada.

Carleton and Britain had in Bishop Briand, a tower of strength: indeed, some Catholic writers do not hesitate to say that Bishop Briand saved Canada for Britain.[38] The last French Bishop, Pontbriand, dying in June, 1760, Briand was consecrated in 1766 and he steadily and strongly supported the loyalist cause.

He knew how his Church was looked upon in the Thirteen Colonies—before 1776, Catholics were allowed by law freedom of worship in two Colonies only, Maryland and Pennsylvania: and even in these Colonies, they were denied the franchise: he knew the language and sentiments of the Addresses of the Continental Congress to the People of England in which his religion was characterized as bloody and as spreading "impiety, bigotry, persecution, murder and rebellion through every part of the world:" he knew what value to place upon the plausible statements of the Address to the Inhabitants of Quebec—he thought that what looked like a change of heart as to his Church was transitory and deceptive—he felt that French Canadian Catholics had nothing to gain from association

with Colonies now rapidly approaching their independence—his Clergy were kept informed and, almost to a man, they remained loyal.

The Continental Congress were unnecessarily alarmed when, Thursday, May 18, 1775, the Resolution was passed with the Preamble: "Whereas there is indubitable evidence that a design is formed by the British Ministry of making a civil invasion from the Province of Quebec upon these Colonies for the purpose of destroying our lives and liberties and some steps have actually been taken to carry the said design into execution:" New York and Albany were recommended to remove Cannon and Stores from Ticonderoga; and Jay, Samuel Adams and Deane were appointed a Committee to prepare and bring in a Letter to the People of Canada.[39] Monday, May 29, the Letter To the Oppressed Inhabitants of Canada is approved—since the conclusion of the war, they were fellow-subjects and now fellow-sufferers, "devoted by the cruel edicts of a despotic Administration to common ruin"; "it was the fate of Protestant and Catholick Colonies to be strongly linked together," and they were invited "to join with us in resolving to be free and in rejecting with disdain the fetters of Slavery however artfully polished": they were told: "By the introduction of your present form of government or rather present form of tyranny, you and your wives and children are made slaves."[39] The fact that they had never had any other form of government and did not want any other form is not so much as hinted at.

When Arnold received orders to invade Canada by way of the Kennebec,[40] General George Washington wrote an Address to the Inhabitants of Canada: "To cooperate with this design and to frustrate those cruel and perfidious schemes which would deluge our frontiers with the blood of women and children, I have detached Colonel Arnold into your Country" [a sort

of homoeopathy]. "Necessaries and accommodations of every kind which you may furnish, he will thankfully receive and render the full value. . . . The United Colonies know no distinction but such as slavery, corruption and arbitrary domination may create." In his Orders to Arnold, he specifically directed him to "check by every motive of duty and fear of punishment, every attempt to plunder or insult any of the inhabitants of Canada," even the death penalty to be inflicted.[41] There is no reason to suppose that Arnold did not do his best—but tradition relates, a century and a half thereafter, stories of robbery, insult and worse—Arnold had little "hard money" and had to pay in Continental Scrip ("not worth a Continental") and his soldiers sometimes got out of hand.[42]

Montreal was taken by Montgomery in November, 1775, and left in charge of Wooster while Montgomery went to Quebec to join Arnold. Montgomery died and Arnold failed through the vigilance and skill of Carleton.

Montreal remaining in the possession of the Colonies, the Continental Congress, January 24, 1776, directed a Letter to be sent to the Inhabitants of Canada: "We will never abandon you to the unrelenting fury of your and our enemies; two Batallions have already received orders to march to Canada."[43] But another step was to be taken: on Thursday, February 17, 1776, it was "Resolved, That a Committee of Three (two of whom to be Members of Congress) be appointed to proceed to Canada there to pursue such instructions as shall be given by Congress."

The Members being chosen, that is, Doctor Benjamin Franklin, Mr. Samuel Chase, of Maryland, and Mr. Charles Carroll, of Carrollton, the Congress

"Resolved That Mr. Carroll be requested to prevail on Mr. John Carroll to accompany the Committee to

Canada to assist them in such matters as they shall think useful.

"Resolved That this Congress will make provision to defray any expense which may attend this measure"— a very prudent Resolution was added: "Resolved That eight tons of Powder be immediately sent to Canada for the use of the Forces there." A few days thereafter, Monday, February 26, 1776, a further reinforcement was agreed on: "Resolved That Monsieur Mesplet, Printer, be engaged to go to Canada and there set up his Press and carry on the Printing business: and the Congress engage to defray the expense of transporting him and his family and printing utensils to Canada and will moreover pay him the sum of Two hundred Dollars."[44]

It is now time to say a word or two of Doctor Benjamin Franklin in connection with the Quebec Act.

In the wonderful letter to his son written when returning to America on board the *Pennsylvania* Packet, Captain Osborne, bound for Philadelphia, dated March 22, 1775, Franklin speaks of a conversation at a meeting, February 5, 1774, with David Barclay and Dr. Fothergill[45] concerning the terms upon which a durable union might probably be produced between Britain and the American Colonies. He had written down "Hints" as to the terms, No. 11 of which was: "11. The late Massachusetts and Quebeck Acts to be repealed and a free government granted to Canada." Franklin notes that at the meeting of February 5, "11. The eleventh refused absolutely except as to the Boston Port Bill which would be repealed and the Quebeck Act might be so far amended as to reduce that Province to its ancient limits"

Then on February 16, Barclay submitted his counter suggestion.

"5. The several Provinces who may think themselves aggrieved by the Quebeck Bill to petition in their

legislative capacities: and it is to be understood that so far as the limits of Quebeck beyond its ancient limits is to be repealed''[46]

Franklin arrived at Philadelphia, May 5, 1775, and was the next day, *nemine contradicente,* added to the Pennsylvania Deputies to attend the Continental Congress, May 10 [47]; and July 3, he was made President of the Committee of Safety at Philadelphia and directed to procure a model of a pike.[48]

It would serve no useful purpose here to review the course of Franklin after his return from England—let us proceed with the story of the mission to Canada.

While the Congress had determined upon a mission to Canada, there was no little difference of opinion as to the Instructions to be given the Commissioners: but at length, the Draft Instructions were considered, March 11, 12 and 19, and the Instructions were settled March 20, 1776. The most important of these was: that the Commissioners should represent to the Canadians, ''that the arms of the United Colonies having been carried into that Province for the purpose of frustrating the designs of the British Court against our common liberties, we expect not only to defeat the hostile machinations of Governor Carlton[49] against us but that we shall put it into the power of our Canadian brethren to pursue such measures for securing their own freedom and happiness as a generous love of liberty and sound policy shall dictate to them.'' Moreover, the Canadians were to be solemnly guaranteed in the name of Congress ''the free and undisturbed exercise of their religion'' and the priests ''the full perfect and peaceable possession and enjoyment of all their estates.''[50]

On March 23, the Commissioners or any two of them were given power to raise a number of independent Companies not exceeding six and to appoint officers; and $1066 2/3 in Continental money was given them in

addition to the $1000 in specie already paid to them—the further sum to defray their expenses.[51]

The Commissioners made their way to New York, thence, April 2, on a river sloop up to Albany where they met General Schuyler; after a short delay they went on to Ticonderoga and Montreal, arriving there, April 29. They found the Army stricken with small-pox and Arnold troubled with the sanitary and financial situation. May 1, 1776, The Commissioners report to Congress: "It is impossible to give you a just idea of the lowness of the Continental credit here from the want of hard money and the prejudice it is to our affairs—"[52] they want $20000 and are disheartened. May 8, "The Tories will not trust us a farthing . . . Our enemies take advantage of this distress to make us look contemptible in the eyes of Canadians who have been provoked by the violence of our military in exacting provisions and services from them without pay—a conduct towards a people who suffered us to enter their country as friends that the most urgent necessity can scarce excuse since it contributed much to the change of their good dispositions towards us into enmity and makes them wish our departure[53]. . . . Your Commissioners themselves are in a critical and most irksome situation, pestered hourly with demands great and small that they cannot answer. . . . In short if money cannot be had to support your Army here with honour so as to be respected instead of being hated by the people, we report it as our firm and unanimous opinion that it is better immediately to withdraw it . . . the inhabitants are become enemies . . . ." Money was needed to pay debts of £14000 and a further sum of "hard money not less than £6000 will be necessary to re-establish our credit in this Colony."[54]

Congress was not deaf to the call for money: May 24, 1776, Hancock writes to Schuyler that Congress was

sending him "£1662.1.3 in hard money which was all that was in the Treasury."

Schuyler had been urged by Chase and Carroll in a letter from Montreal, May 16, "For God's sake send powder and pork," and, May 17, "Press Congress to send paper money as well as specie—let the bills be small;" and, May 27, they reported to Congress that the Army was not above 4000 of whom 400 were sick—two-thirds had not had the small-pox and were liable to be stricken—"Yesterday we seized by force fifteen barrels of flour. . . . You are indebted to your troops treble $11000 and to the inhabitants above $15000."[55]

Franklin was sick in body and mind, utterly dissatisfied with the situation; and he determined to leave Montreal which he did, May 11,[56] after being in that city eleven or twelve days. The double reason given for his return was that his health was bad and he desired to make a report of the alarming situation in person. That his health was seriously affected there can be no doubt: even at Saratoga at Schuyler's he has written farewell to some of his friends: but Franklin was not the man to abandon a post for personal reasons like health if he thought he could be of service to his country by remaining—he saw the situation to be hopeless. There was great cause for alarm, news had come, May 10, of the retreat of the Coloniál forces from Quebec and there was great fear of a British vessel sailing up to Montreal, the River being now open.

With Franklin went the Roman Catholic Jesuit priest, John Carroll, a relative of Charles Carroll of Carrollton, one of the Commissioners; he had been brought into Canada by and with the Commissioners pursuant to the Resolution of Congress already mentioned.

The other two Commissioners, Chase and Carroll, accompanied Franklin as far as St. Johns where they intended to stay until the military situation should

clear: Franklin and the priest went on, Franklin determined to return to Philadelphia on account of his health and John Carroll considering that it was out of his power to be of any service after the Commissioners had left Montreal.

Reversing their route, they left Albany, May 22, by "Chariot which they are to take down to New York."[57] The other Commissioners were not long behind: on May 31, they left for the south and, June 11, they attended the Congress and gave an account of their proceedings and the state of the Army in Canada.[58] Thus ended in complete and decisive failure a mission from which much had been expected.

What were the reasons for this dismal failure?

Not the personnel of the Commission. Franklin was a man of mature years and intellect, without religious or other bigotry, tolerant of the views of others, an experienced and successful negotiator, accustomed to dealing with others than the English Colonist and able and willing to understand the psychology of those not his own people—his subsequent success in France proves his eminent qualifications for such a post.[58a]

Samuel Chase, of Maryland, was in the very prime of life and was one of the most conspicuous and able members of the Continental Congress: an ardent lover of liberty and justice, he was also persuasive and where possible conciliatory.[59]

Charles Carroll, of Carrollton, just under forty, had studied in France as well as London: he was well versed in the French language and understood the French people. An ardent Roman Catholic, and a landed gentleman, he was thus recommended to the Canadian noblesse and priesthood: while he could not boast of the privileges or even freedom of Roman Catholics in the Thirteen Colonies which he represented,[60] he could prove in his own person that it was possible for a Roman Catholic to attain a high and

honorable position in the Congress and country. With them came John Carroll, a Roman Catholic priest, chosen by Popery-hating Congress because he was a Roman Catholic priest. He had been educated with his kinsman, Charles Carroll, at the English Jesuit College at St. Omer, France, and later studied philosophy at Liège; he entered the Society of Jesus at the age of eighteen and was ordained priest at thirty-four. On the suppression of the Society in 1773, he returned to his native Maryland where he was devoting himself to the spiritual care of his co-religionists when the summons came from his kinsman to accompany him to Canada. An amiable, cultured and polished man, sincere and devoted in his religion, he was a patriotic American; while he was under no delusion as to the difficulties of his task, he cheerfully obeyed the call of his country.[61]

Nor was the failure due to the conduct of the Commissioners.

"Received at the landing by General Arnold and a great body of officers, gentry, &c, and saluted by firing of cannon and other military honours—being conducted to the General's house . . . served with a glass of wine while people were crowding in to pay their compliments,"[62] they went to work without delay.

The priest, knowing that to win the clergy would be of most material consequence, brought with him a letter from Father Farmer, of Philadelphia, to Father Pierre Floquet, a Jesuit, and the last of the Canadian Superiors of that Mission. Floquet was a supporter of the American cause: the property of his Order had been confiscated by the British conqueror, and he naturally resented the act. There was no hope of any favorable turn in British sentiment and the only chance of relief was the success of the Americans. Carroll received permission to celebrate mass from the Vicar-General, Monsignor Mongolfier, and did so in the house of Floquet."[63]

But he failed to convince the Canadian clergy that the sentiments of the Address to the People of Great Britain were not the sentiments of the Continental Congress and of the people of the Thirteen Colonies—he could not point to any one Colony in which the Roman Catholic Church and clergy had such privileges as in Canada and he could point to only one and that not his own in which the individual Roman Catholic had the ordinary rights of a freeman.

The Commissioners themselves were equally busy. They at once went into the situation and condition of the military force as well as of Canadian sentiment; on the morning after their arrival at Montreal, they held a Council of War and decided to fortify Jacques Cartier and Deschambault and to build four row galleys or gondolas at Chambly—they even turned over some of the specie furnished for their own expenses, to pay Canadian workmen.

The army was in a very bad condition; the troops were "without bread, tents, shoes, stockings, shirts, &c"; of the 4000, some 400 were sick, some with small-pox and two-thirds had not had that fell disease and feared it. Small-pox was a very real danger: vaccination was two decades and more in the future[64]—inoculation had indeed been introduced into England by Lady Hester Stanhope some sixty years before and the practice of inoculating had spread shortly thereafter into America, but it had not proved satisfactory and had been forbidden in Massachusetts (except in Boston); and generally in the Continental Army as in the British Army it was disapproved by the authorities.[65] As regards the number of those who were sick and the lack of supplies, it was said that men who had pleaded indisposition had many of them been foremost in the flight from Quebec and had carried off on their backs "such burdens as hearty and stout men would labour under," and that they and others had left their

baggage behind—but this was a little later. For much of the unfortunate condition of the troops, the Commissioners blamed General Wooster who had become Senior officer on the death of Montgomery; he, in turn, accused them of improper interference with his authority;[66] Chase and Carroll, at length, recommended his recall.[67]

Neither army nor Commissioners were responsible for the lack of supplies—John Jay recognized the justice of the common view that "the miscarriages in" Canada "are . . . attributable to the inattention of Congress." Charles Cushing who was with the Army could with knowledge and truth say: "The Army in Canada . . . have been shamefully neglected and imposed upon"[68]; and every Commander in almost every despatch complained of lack of supplies and money.

It can hardly be said with justice that Congress was oblivious of or indifferent to the situation—May 23, 1776, it was "Resolved that a Committee of five be appointed to confer with General Washington, Major General Gates and Brigadier General Mifflin upon the most speedy and effective means of supporting the American cause in Canada"—and a Committee was selected composed of John Adams, R. H. Lee, Harrison, Wilson and Rutledge. A committee had been appointed to "collect hard money for the Canadian expedition,"[69] and, May 22, 1776[70] it was "Resolved that the specie now in the Treasury and as much more as can be procured not exceeding the sum of $100,000 to be immediately remitted to the Commissioners for the payment of debts due from these Colonies in Canada and for the preservation of publick credit.

"That the Commissioners in Canada and General Schuyler be informed that we cannot give them any assurance of maintaining our army there by hard money but that this ought not to discourage our operations, Congress being determined to send from these

Colonies supplies of provisions and all other necessaries if hard money cannot be obtained and that in the meantime the best endeavours shall be used to obtain the sum of $100000 in hard money."

The following day, May 24, 1776, Hancock was able to write the Commissioners that he was sending General Schuyler "£1662.1.3 in hard money which was all that was in the Treasury."[71] This was, of course, too late, as the Commissioners had left Montreal by this time and had left Canada before in the ordinary course the money could reach them.[72]

If no one was to blame—certainly not the Commissioners—for the condition of affairs financially in Canada, the same cannot be said of the state of feeling of Canadians for the Americans. I do not go to any but American sources for this. Notwithstanding the protestations of Congress and of Generals, notwithstanding that the French Canadians made no resistance to the entry of the American Army into Montreal and no small or uninfluential part of the English-speaking population welcomed it, it speedily became detested.

So far as appears, no tidings had yet been brought of any misconduct on the part of Arnold's troops on the way to or at Quebec: and the Canadians in and near Montreal were to judge of Americans from personal experience.

A number of French Canadians enlisted in the American service—Moses Hazen commanded some of them.[73]

How stood the matter in a few months?

As we have seen, Congress as early as April 23, 1776, had been informed of injuries offered to Canadians by Americans and expressed their resentment and their intention to punish the offenders: and the Commissioners, May 8, 1776, reported that the Canadians had been provoked by the violence of the military in exacting provisions and services from them without pay.

Moreover acts of violence were not uncomomn against those defending their own, while property was frequently taken without payment and as frequently with payment in worthless promises.[74]

Acts of violence on the part of an English-speaking soldiery were almost unknown in Canada: a rigid discipline was exercised and swift and condign punishment inflicted for any offence of the kind by British soldiers;[75] and it was with amazement that the French-Canadians saw the violent acts of the Americans unpunished and almost unchecked.

It is also clear that notwithstanding the sincere desire of Washington and others in authority, the religion of the vast majority of Canadians and the objects of their veneration were flouted by unwise and undisciplined American soldiers. No one can possibly doubt the cordial dislike of Roman Catholicism by many and the major part of the Colonists of the Thirteen Colonies —it cannot be thought that the Address to the People of Great Britain was a piece of rhetoric and hypocrisy which did not actually express the true sentiments of the Congress and of those represented by Congress. Nor is it at all to be wondered at that this dislike on occasion manifested itself in speech and act. The priesthood were slighted and contemptuously treated— a treatment very galling to those who had been accustomed to be treated with deference amounting to reverence.

The Commissioners being guests at the Chateau de Ramezay (still in existence) had the French Printer, Mesplet, in the Chateau; his Printing Press in the Crypt printed some (only two are known) documents intended to show the good intentions toward Canadians of the Colonists to the South. Outside of the priests and the Seigneurs, there were very few except the Notaries who could read—the Seigneurs were too often treated with as little respect as the priests and the

Notaries were skilled in and devoted to the French Law so much execrated by Americans—it was not to be expected that any advantage to the cause of the Colonies would follow the use of Mesplet's Printing Press and none in fact ever did.[76]

Nor were the Commissioners much more successful with the English-speaking inhabitants of Canada. The very steps taken to ingratiate their cause with these quasi-friends proved more harmful than effective. Officers of the Canadian Militia who had been imprisoned at Chambly for refusing to resign their Commissions were set free, much to Wooster's indignation;[77] all those who had been expelled from Montreal for Loyalist sympathies were allowed to return and the exile of others ceased. All this was along the lines the recommendation of Joseph Hawley to Samuel Adams[78] to give the Canadians a full taste of liberty—but it was wholly opposed to the theory and practice of Wooster who tolerated no expression of sentiment adverse to the American cause.[79] If ever this policy of tolerance could have been successful, it was now quite too late: the English-speaking were divided into two irreconcilable and bitterly hostile parties, the Loyalists hating and despising the American faction as traitors, the latter returning the hate and contempt in full against those whom they characterized as slaves of a tyrannical government across the Sea.

Some of the officers at Montreal in presence of the Commissioners, threw their commissions on the floor and trampled them underfoot, swearing they would never again serve under men who destroyed with one stroke of the pen what they had risked their lives to obtain. One even "damn'd Mr. Chase to his face, swearing when he prayed him to accept an important command, that he would not fire another gun for the Congress till their officers and soldiers were put on an equal footing with their enemies." All in vain—"a cause

that cannot support itself upon the principles of liberty is not worth pursuing. We will not do evil that good may ensue. It is a most substantial wrong to exile a man five hundred miles from his own home only because he is disaffected, &c, &c, &c."[80] Neither persuaded the other—the Commissioners went on on their theory of liberty, the Canadian English felt betrayed and humiliated.

As early as June 11, 1776, Hancock writes to Washington: "Mr. Chase and Mr. Carroll arrived this day: by their account there has been the most shocking mismanagement in that quarter," i.e., Canada:[81] July 1, John Adams laments to Samuel Chase, "Alas Canada! We have found misfortune and disgrace in that quarter . . . evacuated at last,"[82] while, June 17, Josiah Bartlett states to John Langdon,[83] "Dr. Franklin, Mr. Chase and Mr. Carroll are returned from Canada. Their account of the behaviour of our New England officers and soldiers touches me to the quick—by their account never men behaved so badly."

Congress could not pass the matter over: a Committee was appointed to examine into the causes of the failure of the attempt to bring Canada in line with the Thirteen Colonies: July 30, 1776, the Committee reported the reasons as 1—Short enlistment of Continental Troops: 2—Want of hard money and 3—A still greater and more fatal source of misfortunes the prevalence of small-pox.[84]

All these had their influence; but the Committee failed to mention a more important cause for which Congress was itself responsible, namely the bitter attack upon the Roman Catholic religion in the Address to the People of Great Britain. No Address to Canadians, no special pleading of Commissioners, no assurance of Commanders, could persuade the clerical leaders in Canada that Congress did not mean what it said in that Address.

Accordingly, the Clergy headed by the energetic and very able Bishop Briand of Quebec, remained firm in their allegiance to the British Crown. Nothing but very strong reasons could induce the Laity to decline to follow their Clergy: and no such reasons ever appeared but rather the reverse. Their goods taken and service compelled by force; even where payment was in form made, it was so made in worthless paper—there was nothing to induce them to take to their arms the hereditary foe. Under the Quebec Act they had the government and the laws to which they were accustomed and with which they were content, and no prospect was held out for anything more agreeable to their wishes.

As we have seen, the Commissioners were not more successful with the English-speaking part of the community, small as it was.

Under the circumstances, the task was beyond human powers, and no discredit can attach to the failure of Franklin and his colleagues.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto,
October 2, 1923.

REFERENCES.

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[1] These Articles will be found in Shortt and Doughty's *Documents relating to the Constitutional History of Canada, 1759–1791,* Ottawa, 1918, 2d Ed. (hereinafter cited "S. & D."), pp. 7, 25—a most valuable collection.

[2] S. & D., pp. 99, 100, 115. Of the inhabitants before the Conquest, a very small proportion were Protestant: the Archivist of Quebec, M. Pierre George Roy, a competent authority, says: "Sous l'ancien régime très peu de protestants eurent la chance de s'établir au Canada." See his *Le Vieux Quebec,* Quebec, 1923, at p. 151; of the Protestant French not more than two became prominent, Francis Mounet, who was made a Legislative Councillor, and Pierre Du Calvet, who became a traitor but escaped more than suspicion. He was imprisoned by Haldimand and was afterwards lost at sea.

[3] See Report of the Lords of Trade, November 5, 1761, upon the proposal to transport a number of Germans to the American Colonies after the peace: the Southern Colonies were less populated, S. & D., p. 162, n. 2.

[4] S. & D., pp. 163, sqq.

[5] Report, Lords of Trade, June 8, 1763, S. & D., pp. 132, sqq., esp. pp. 138, 139, 140, 141 and 142.

[6] S. & D., pp. 173, sqq.

[7] S. & D., pp. 181, sqq.

[8] See also Letter, Earl of Egremont, Secretary of State, to Murray, Aug. 13, 1763, S. & D., pp. 168–9: Canadian Archives, Q. 1, p. 117.

[9] That would probably have taken place had it not been for the "Canada Pamphlet," 1760–1761, of Franklin, then representing the Province of Pennsylvania at London. See my article, "The Status of Canada," Am. Bar Assn. Journal, June, 1921; also my Address "Franklin and Canada," Empire Club, Toronto, November 15, 1923.

[10] I am speaking generally: a few French Canadians seem to have wished for an Assembly—a few English and Americans were content with the existing form of Government.

[11] Letter, Murray to Lords of Trade, Quebec, Oct. 29, 1764: S. & D., p. 231, Can. Arch., Q. 2, p. 233.

[12] Letter, Murray to Earl of Shelburne (afterwards first Marquis of Lansdowne), Quebec, Aug. 30, 1766. Can. Arch., Shelburne Correspondence, vol. 64, p. 101.

[13] With the possible exception of a few of the noblesse, the French Canadians were satisfied with the English Criminal Law—barbarous as it was, it was less so than their own—and the French Criminal Law was never reintroduced.

[14] The Act is (1774) 14 George 3, c. 83 (Imp); S. & D., pp. 570–576.

[15] This is usually printed as Sec. 2 of the Quebec Act.

[16] Section 7 relieves Roman Catholics from the oath required by (1558) 1 Eliz. c. 1, s. 19: and substitutes one less but at the same time sufficiently drastic.

[17] Section 12 of the Act.

[18] Section 8: "Laws of Canada" means "Laws of Canada before the Conquest."

[19] Apparently January 13, 1774.

[20] Peter Force's ponderous volumes of "American Archives" (hereinafter cited "Am. Arch."), Ser. IV, Vol. 1, p. 627. Perhaps another letter may be of interest. An "American" writes Lord North, London, February 5, 1774: "As an American, give me leave to assure your Lordship that I think the dismissal of Dr. Franklin from the P.M. General in N. A. at this particular crisis one of the most fortunate events that could have happened for that Country . . . the people there never liked the institution and only acquiesced in it out of their unbounded affection for the person that held the office . . . thus will happily end your boasted Post Office so often given as a precedent for taxing the Americans." do. do. p. 501. As is well-known,

Benjamin Franklin was the Deputy Postmaster General for America—the first to be appointed—and dismissed for his activities.

[21] Journals of the Continental Congress, Vol. 1, pp. 34-35: Am. Arch., Ser. IV, Vol. 1, p. 905. It is to be remembered that this Resolution was passed when "the Colonies hold in abhorrence the idea of being considered independent communities on the British Government." The indignation against the "establishment" of the Roman Catholic Church did not proceed from abhorrence of the principle of establishment itself but from hatred of Roman Catholicism—for many years after the Revolution a citizen of Connecticut had to pay to support the Congregational minister unless he could "sign off" by stating that he belonged to another church. See my Article, "Common Law and Common Sense," *27 Yale Law Journal* (June, 1918), p. 798, n. 12. The example is given of such a certificate: "I, J. S., hereby certify that I have ceased to be a Christian and have joined the Episcopal Church."

The Suffolk meeting was a meeting of the Delegates of every Town and District of the County of Suffolk held on Tuesday, September 6, 1774, at the hour of Mr. Richard Woodward, of Dedham, and by adjournment at the house of Mr. Voge, of Milton, on Friday, September 9, 1774—Joseph Palmer, Esq., being chosen President and William Thompson, Esq., Clerk. Am. Arch., Series IV, Vol. 1, p. 776.

[22] Am. Arch., Ser. IV, Vol. 1, p. 910. "All which Statutes are impolitick, unjust and cruel as well as unconstitutional and most dangerous and destructive of American rights." The Convention of Pennsylvania, July 15, 1774, had resolved that "unconditional independence on the parent state is abhorrent to our principles"—and freely acknowledged allegiance to Great Britain, do. do., p. 555. September 28, 1774, Mr. Galloway's motion was carried: "that the Colonies hold in abhorrence the idea of being considered independent communities on the British Government." do. do., p. 905.

[23] Am. Arch., Ser. IV, Vol. 1, p. 914.

[24] I have not met the phrase "dominion of Canada" in any earlier document—of course the present "Dominion of Canada" has no reference to this Address. The Address will be found in Am. Arch., Ser. IV, Vol. 1, p. 920—in an earlier part of the same Address the Congress had said: "We think the Legislature is not authorized by constitution to establish a religion fraught with sanguinary and impious tenets or to erect an arbitary form of government in any quarter of the globe."

[25] For John Dickinson, see *The Life and Times of John Dickinson prepared at the request of the Historical Society of Pennsylvania by Charles Stille*—Printed for the Society, Philadelphia, 1891-5: he was aptly termed "The Pen of the Revolution" and was the first to advocate opposition to the ministerial plan of taxation on constitutional grounds. John Adams seems to have thought him, "a peddling genius." See Letter, John Adams to James Warren, Philadelphia, July 24, 1775, Can. Arch., B 27, p. 349.

[26] Am. Arch., Ser. IV, Vol. I, pp. 930, 934. Kingsford's History of Canada, Vol. V, pp. 262-7.

[27] Do. do. do., p. 934.

[28] See the Letter from a gentleman of Montreal, January 18, 1775, Am. Arch., Ser. IV, Vol. I, p. 1164—the writer says "the French Bourgeois . . . have been so little accustomed to speak or think on subjects of that kind and are so much afraid of giving the smallest offence to Government that they will avoid taking any part in the matter. The noblesse enter very sanguinely into the scheme of raising troops, but the priests we are well assured will disapprove of it."

[29] Can. Arch., Q 11, p. 129. Carleton left Quebec about October 1, 1775, for Montreal after he had made every effort to induce the Canadians to join him. Fortifications were put in an immediate state of repair, and there was great consternation—See Letter to a Gentleman of London from Quebec, October 1, 1775. Am. Arch., Series IV, Vol. 3, p. 925—Washington in a letter to Schuyler, October 4, 1775, says that Captain Gamble writing to General Gage and Major Sheriff says "that if Quebec should be attacked before Carleton can throw himself into it, there will be a surrender without firing a shot," do. do. do., p. 945.

[30] In Carleton's letter to Dartmouth, Quebec, May 15, 1755. Can. Arch., Q 11, p. 164.

[31] In same letter: "Brown" was John Brown as to whom see Prof. Justin H. Smith's *Our Struggle for the Fourteenth Colony*, Putnams, New York and London, 1907, Vol. 1,—90, sqq.

[32] The common name for the New Englanders and those from the Thirteen Colonies generally among the French Canadians was "Bostonais." It may be of interest to quote French-Canadian Dictionaries on the word. *Le Parler Populaire des Canadiens Français* by Dr. N. E. Dionne, Quebec, 1909, says *sub. voc.* "Bastonais:" "Bostonais, citoyen de la ville de Boston. Sous le régime français, les *Bastonais*, c'est-à-dire les Anglais de la Nouvelle-Angleterre, étaient fort redoutés de nos Canadiens." The author might have added that by reason of repeated raids on each other's territory, "nos Canadiens" and "les Bastonais" hated each other a little more than they hated the devil. Indeed the New England divine to impress his flock with the terrors of hell compared the devil and his angels to the French Canadian invaders.

Dictionaire Canadien-Français by Sylva Clapin, Montreal and Boston, n.d., is a little more full. "Bastonais . . . pour Bostonais ou Bostonien, habitant de Boston. Au temps des anciennes luttes, armeés dirigées en Amérique par l'élément anglais contre les Franco-Canadiens, plus tard, lors des démêlés avec les Etats-Unis, les plans d'attaque se préparaient dans la Nouvelle-Angleterre et plus particulièrement dans son centre le plus important, c.-à.-d, Boston.

De là, le nom de *Bostonais* et, par corruptiòn, de Bastonais, donné a tous ceux, que dans le temps s'avançaient du sud, en ennemis, vers les frontières canadiennes. Dans la suite, et la légende brodant sur le tout, *Bastonais* devint synonyme de quelque chose de particulièrement terrible et violent, et plus d'une mère canadienne put apaiser de longues années durant, la turbulence de son enfant, en agitant devant ses yeux ce farouche spectre, en guise de Croquemitaine."

The former passage translated reads: "Bostonais, citizen of the City of Boston. In the French regime, the *Bastonais, i.e.*, the English of New England, were much dreaded by our Canadians"—

The latter: "Bastonais for Bostonais or Bostonian an inhabitant of Boston. During the time of the old armed struggles in America by the English element and the French Canadians and later on during the conflicts with the United States, the plans of attack were prepared in New England and more particularly in Boston, its most important centre. For that reason the name 'Bostonais', by corruption 'Bastonais', was given to all who at those times advanced from the South as enemies towards the Canadian frontiers. Later on, the story being embellished, *Bastonais* became a synonym for anything particularly terrible and violent, and more than one Canadian mother for many years was able to quiet the turbulence of her child by brandishing that wild spectre as a bugbear before its eyes."

[33] Can. Arch., Q 11, p. 196, in Carleton's letter to Dartmouth from Montreal, June 7, 1775: Can. Arch., Q 11, p. 184. The same letter reports that Benedict Arnold, a native of Connecticut and a horse jockey, had surprised St. John's—that the rebels under Arnold (500 men, 1500 volunteers on the way) had surprised Ticonderoga and Crown Point—a party under Ethan Allen, an outlaw from New York, remained at St. John's.

[34] These despatches are copied with very great care—the copyist makes the word read "Prinkins"—possibly "Redskins".

[35] Shelburne Papers (Can. Arch.), Vol. 66, p. 53. Francis Maseres was appointed Attorney General of the Province of Quebec in March, 1766, but returned to England in 1769: he afterwards became Cursitor Baron of the Exchequer. His works on mathematics, especially on the Minus sign, are still worth reading.

[36] The same kind of reasoning was at the bottom of the strenuous objection to the use of Coloured Troops during the Revolutionary and Civil Wars.

[37] Shelburne Papers (Can. Arch.), Vol. 66, p. 53.

[38] E. g., Guilday: *"The Life and Times of John Carroll,"* N. Y., 1922: Tetu: *"Notices Biographivues des Evêques de Quebec,"* Quebec, 1889. Gosselin: *"L'Eglise du Canada après la Conquête."*

[39] Am. Arch., Ser. IV, Vol. 2, pp. 1038, 1833 and 1836. Dickinson and Mifflin were appointed a Committee to get this Address translated into French and have 1000 copies sent to Canada for distribution. do. do. do., p. 1039.

A Canadian is reminded of the vain-glorious Proclamation of General Hull, July 12, 1812, when he invaded Upper Canada. If the Canadians are good, "You will be emancipated from tyranny and oppression, and restored to the dignified station of freemen." This Proclamation is generally attributed to Lewis Cass.

[40] Congress had determined, June 1, 1775, that "No expedition or incursion ought to be undertaken or made by any Colony or body of Colonies against or into Canada:" and, June 27, 1775, it was resolved

that Major General Schuyler should obtain the best intelligence he could of the disposition of the Canadians and Indians of Canada, and "that if General Schuyler finds it practicable and that it will not be disagreeable to the Canadians he do immediately take possession of St. Johns, Montreal and any other parts of the country." do. do. do., pp. 1845, 1855. The Canadians were not consulted as to Arnold's expedition to Quebec.

[41] Am. Arch., Ser. IV, Vol. 3, pp. 763, 4, 5.

[42] I venture to think that sufficient attention has not been given by historians to this extraordinary Anabasis and Catabasis by Arnold—if it had a Xenophon, the story would rival in interest that of the Ten Thousand. The story of the escape of Carleton from Montreal to Quebec is also a thrilling one—"a favourable wind the night before (*i.e.*, November 11, 1775) enabled Mr. Carleton to get away with his little garrison on board ten or eleven little vessels reserved for that purpose, and to carry away the powder and other important stores." Montgomery to Schuyler, Montreal, November 13, 1775. Am. Arch., Ser. IV, Vol. 3, p. 1602. Schuyler in his despatch to the President of the Congress from Ticonderoga, November 27, 1775, says:—"I am informed that all the vessels in which Mr. Carleton had embarked himself, his Troops, and stores have surrendered by capitulation—that Carleton got on shore and was gone toward Quebeck," Am. Arch., Ser. IV, Vol. 3, p. 1682. The next day he adds: "General Carleton stole from aboard the vessels with six Canadians and dressed like one of them: in this disguise he hopes to get into Quebeck; but if he does, the weather has been so severe that I trust he will not be able to leave it, and then he must fall into our hands in the course of the winter if not immediately," do. do. do., p. 1682. This hope proved vain and with tremendous results. See an account of this thrilling adventure in Kingsford's History of Canada, Vol. V, pp. 462, 3. In his letter to the citizens of Montreal on his taking possession of the city, November 12, 1775, Montgomery says that it was "falsely and scandalously reported that our intentions are to plunder the inhabitants," do. do., p. 1596.

[43] Am. Arch., Ser. IV, Vol. 4, p. 1653.

[44] Am. Arch., Ser. IV, Vol. 5, p. 1692: do. do. do., p. 1689.

[45] Dr. John Fothergill, a physician and scientist of note, wrote in 1765, a pamphlet now quite rare, "Considerations relative to the North American Colonies," in which he advocated the repeal of the Stamp Act. In 1774, he collaborated with Franklin in drawing up a scheme of reconciliation: this unfortunately was never taken seriously by the Government. Fothergill is still remembered in medical circles as the first to recognize the specific character of diphtheria: he was a Quaker and very charitable—he gave away about £200,000. D.N.B., Vol. XX, p. 66, Bass, Hist. Med., pp. 651, 657, 719, 739.

[46] Am. Arch., Ser. IV, Vol. 2, pp. 178-1820.

[47] Do. do. do., p. 455.

[48] Do. do. do., p. 1771.

[49] (Sir) Guy Carleton (afterwards Lord Dorchester) Governor of

Quebec, *i.e.*, Canada, 1768–1778, a man of great energy and ability: had such as he been Governors of the Thirteen Colonies, there might have been no Revolution; none would have been needed, the wishes of the Colonists would have been listened to sympathetically: he was the real author of the Quebec Act.

[50] Am. Arch., Ser. IV, p. 411.

[51] Do. do., p. 1650—they were to render an account.

[52] Am. Arch., Ser. IV, Vol. 5, p. 1166; Can. Arch., B 27, p. 389: Smith, *op. cit.*, p. 341, gives a *facsimile* of part of this Despatch. Immediately after the words quoted, we find "Not the most trifling service can be procured without an assurance of instant pay in silver or gold. The express we sent from St. Johns to inform the General of our arrival there and to request carriages for La Prairie was not at the ferry till a friend, passing, changed a dollar for us into silver and we are obliged to that friend, Mr. McCartney, for his engagement to pay the calashes or they would not have been furnished." The Commissioners after staying a stort time with Schuyler at Saratoga had proceeded to Ticonderoga, which they reached in ten days: thence on water three days—landing at night to sleep—to St. Johns: thence by caleche to La Prairie and down the River to Montreal, which they reached in twenty-seven days from New York.

[53] Tuesday, April 23, 1776, on the Report of a Committee, Congress "Resolved that the Commission from Congress to Canada be desired to publish an Address to the People of Canada signifying that Congress has been informed of injuries offered by our people to some of them expressing their resentment at their conduct: assuring them of our attachment to their security, inviting them to state their grievances to our Commissioners and promising ample redress to them and punishment to the offenders.

" Resolved that Instructions be sent to the Commissioners to cause justice to be done to the Canadians agreeable to the above resolve." do. do., 1686. No justice was done to Canadians or punishment to the offenders. I cannot find that any such Address was published; if so, it was a dead letter.

[54] Do. do., pp. 1166, 1237: Can. Arch., B 27, p. 389. The Commissioners had been expected to bring "hard money" with them, but they had not done so—apparently not even a dollar. See note 52 supra.

Franklin himself says in his "Sketch of the Services of B. Franklin to the United States of America" that "in Canada . . . he . . . advanced to General Arnold and other servants of Congress, then in extreme distress, £353 in gold, out of his own pocket, on the credit of Congress, which was of great service at that juncture, in procuring provisions for our army." John Bigelow; *The Life of Benjamin Franklin*, London, 1879, Vol. 3, pp. 424, 425.

[55] Am. Arch., Ser. IV, Vol. 6, pp. 558, 578, 586, 590.

[56] Do. do., p. 587, Chase and Carroll's despatch to Hancock from Montreal, May 17, 1776. Carleton in his Despatch to Germain, Quebec, May 14, 1776, says that intelligence received at Quebec that day from

Montreal from a person who had never deceived, was that Franklin had gone off with Mrs. Walker and Mrs. Price. Can. Arch., Q 12, p. 22.

[57] Letter John Carroll to Charles Carroll, Sr., Philadelphia, June 2, 1776. Rowland *Life and Correspondence of Charles Carroll of Carrollton*, Vol. 1, pp. 170, 171: Guilday's *Life and Times of John Carroll*, New York, 1922, pp. 103, 104.

Despatch from Fort George, May 28, 1776. Am. Arch., Ser. IV, Vol. 6, p. 610.

[58] Am. Arch., Ser. IV, Vol. 6, p. 1702—see also do. do. do., pp. 493, 587, 589.

[58a] Since this paper was written I have seen the characterization of Benjamin Franklin by Dr. Nicholas Murray Butler in his very able and illuminating work, *Building the American Nation*, N. Y., Charles Scribner's Sons, 1923. This is a collection of the Lectures on the Sir George Watson Foundation for American History, Literature and Institution delivered by the President of Columbia University in the summer of 1923 in England, Scotland and Wales; and is "an impressive interpretation of the origin of the American nation largely in terms of the individuals who formed it."

Full justice is done to Franklin's gentleness, persuasiveness, large human sympathy, his restless intellectual activity, his imagination and his wide range of thought. Condorcet's picture of him is quoted with deserved approval:

> "L'humanité et la franchise étaient la base de sa morale; une gaieté habituelle, une douce facilité dans la vie commune, une inflexibilité tranquille dans les affaires importantes formaient son caractère.
> *Œuvres de Condorcet*, (Paris, 1847), III, 415–416."

The first chapter of Dr. Butler's interesting and valuable book contains an admirable account of Benjamin Franklin and Samuel Adams, which invites and will bear reading again and again.

[59] His conduct as Chief Justice of Maryland was without reproach: and his Impeachment as Justice of the Supreme Court of the United States did little credit to the Party responsible for it. His acquittal is one pregnant example of the sense of justice of a free people.

[60] "Everywhere, except in Pennsylvania to be a Catholic, was to cease to possess full civil rights and privileges." Guilday, *op. cit.*, pp. 70, 71.

In many parts of the Thirteen Colonies "a Protestant family ran a fearful risk in harboring a Romanist." Shea's *History of the Catholic Church in the United States*, N. Y. 1890, p. 498. Even after the Declaration of Independence, which is very generally supposed to have put an end to this religious intolerance, the *New England Primer* which was put in the hands of very many children had cuts of the "Man of Sin." The edition of 1779 contains a picture of the martyrdom by burning of John Rogers in 1554 and the statement: "A few days before his death he wrote the following advice to his children 'Abhor the arrant whore of Rome and all her blasphemies, and drink not of her

cup; obey not her decrees.'" See Paul Leicester Ford's *The New England Primer:* Riley's *The Founder of Mormonism*, London, 1903.

The mutual tolerance in old Quebec of Protestant and Catholic has been underrated: While there was almost from the beginning, certainly from 1763, a strong anti-English and anti-French feeling there never was any anti-Protestant and anti-Catholic feeling. As is well known, Lord Durham in his celebrated Report, 1838—which showed the state of society in Lower Canada after decades of dispute and recrimination between French and English—was (somewhat to his own astonishment) able to say: "It is indeed an admirable feature of Canadian society that it is entirely devoid of any religious dissensions. Sectarian intolerance is not merely not avowed, but it hardly seems to influence men's feelings." Lucas' *Lord Durham's Report*, Oxford, 1912, vol. i, pp. 239, 240, vol. ii, p. 39. And this when Harriet Martineau in her *Society in America* 4th Edit., 1837, vol. ii, p. 322, could say: "Parents put into their children's hands as religious books, foul libels against the Catholics which are circulated throughout the country. In the west I happened to find a book of this kind which no epithet but 'filthy' will describe." Qu.? *Maria Monk's Awful Disclosures*, 1836.

There are so many who, as Morley says of Froude,—*Recollections by John Viscount Morley*, Toronto, 1917, Vol. 1, p. 280—"think the quarrel between Protestant and Catholic the only thing in the universe that matters," and they think anyone contemptible who with Daniel O'Connell can say: "Every religion is good, every religion is true—to him who in his due caution and conscience believes it. There is but one bad religion, that of a man who professes a faith which he does not believe; but the good religion may be, and often is, corrupted by the wretched and wicked prejudices which admit a difference of opinion as a cause of hatred."

[61] The life and labours of John Carroll, Archbishop of Baltimore, have been commemorated in many works, *e.g.* Brent, *Biographical Sketch* . . . , Baltimore, 1843: Shea's *History of the Roman Catholic Church in the U. S.* A worthy memorial is at last presented by Guilday's *Life and Times of John Carroll* . . . N. Y., 1922, an accurate and well-written book, of which I have made full use.

[62] Letter from John Carroll to his mother, Montreal, May 1, 1776, Brent, *op. cit.*, pp. 40–43: Guilday, *op. cit.*, pp. 101, 102: Am. Arch., Ser. V, Vol. 5, p. 1167: Kingsford's *History of Canada*, Vol. VI, p. 65.

[63] For this, Floquet was suspended in June, 1776, *a divinis* by Bishop Briand who charged him with seeming justice with having a *Bastonnais* heart. Floquet submitted and was reinstated, but died next year, the last of the Canadian Jesuit Superiors. Guilday, *op. cit.*, pp. 102, 103.

[64] Jenner did not begin his experiments on cow-pox until 1769: and he published his first work on vaccination in 1798. It was not until September 2, 1776, that General Gates was able to write the President of the Congress from Ticonderoga: "Thank Heavens, the small pox is totally eradicated from amongst us, not I can assure you without much vigilance and authority being previously exercised. Am. Arch., Ser. VI, Vol. 3, p. 1267.

[65] John Adams, writing from Philadelphia, July 7, 1776, says: "I hope that measures will be taken to cleanse the army at Crown Point from the smallpox, and that other measures may be taken in New England by tolerating and encouraging inoculation to render that distemper less troublesome." Am. Arch., Ser. V, Vol. 3, p. 1035. The Council of Massachusetts, writing to General Artemas Ward, Watertown, July 9, 1776, says: "The Board was this day informed that you had given liberty to a number of Continental troops now stationed at Winter Hill to receive the small-pox by inoculation. The Board are unwilling to credit such a report as there is an Act of the Colony prohibiting inoculation except in the town of Boston . . . (we) desire your Honour would not permit any of the troops . . . to receive the small-pox by inoculation in any other town except the town of Boston," do. do. do., p. 146.

See also Letter, General Artemas Ward to His Excellency, Boston, July 15, 1766: do. do. do., p. 48.

Governor Trumbull, writing to the Massachusetts Council from Lebanon, August 21, 1776, says: "inoculating for small-pox which has been fallen into by the troops from your State . . . everyway hurts the public service and exposes the troops to that infection. . . ." Am. Arch., Ser. V, Vol. 1, p. 1100. Charles Cushing, writing to his brother from Crown Point, July 8, 1776, says: "The New England forces (got to Sorel) began to be very uneasy about the small-pox spreading among them as but a few of them had it. It was death for any doctor who attempted inoculation. However it was practised secretly as they were willing to run any hazard rather than take it in the natural way. Some inoculated themselves and several officers and myself began it in our own Regiment of Sorel . . . ;" (at Montreal) "the Regiment in general were inoculated for the small-pox." Am. Arch., Ser. V, Vol. 3, p. 129. Others were equally disobedient. General Schuyler, writing to the Congress from Albany, August 26, 1776, says: "Some of the militia from the eastward have inoculated themselves on the march to Skenesborough: that a number of carpenters from Rhode Island have done the same at Skenesborough. I shall instantly write to General Gates on the subject and direct that none of them be suffered to join the army to prevent this terrible disease from again destroying us." do. do. do., p. 984. Major Hawley reports to the Massachusetts Council, July 13, 1776, the men from Northampton, Massachusetts, had "a vehement desire to take small-pox by inoculation before they march." do. do. do., p. 263: August 5, 1776, he reports: "The Granville men and Branford men who have enlisted are without any orders gone into inoculation." do. do. do., p. 779. September 28, 1775, the Committee of Safety of New York would not allow William Powell to have his wife inoculated for the small-pox, as the Congress of the Province had passed a Resolution against it. do. do. do., p. 916.

[66] Wooster, in his communication to the Committee of Congress, Philadelphia, July 5, 1776, says: "The honourable Commissioners from

Congress on their arrival in Canada did *ex officio* supersede my orders and released the above mentioned persons (Col. Dupee, Major Gray, and St. George Dupree) to go to Montreal where Major Gray put on his sword and cockade and strutted around like a victorious conqueror." Am. Arch., Ser. V, Vol. 1, p. 12.

[67] "General Wooster is in our opinion unfit, totally unfit, to command your Army and conduct the war . . . His stay in this Colony is unnecessary and ever prejudicial to our affairs." Despatch to Congress, May 17, 1776, Am. Arch., Ser. IV, Vol. 6., p. 589. Wooster, who had taken second place to General John Thomas, became leader again when Thomas was stricken with small-pox. do. do. do., pp. 587, 593.

[68] Letter, John Jay to Edward Rutledge, New York, July 6, 1776. Am. Arch., Ser. V, Vol. 1, p. 40.

Letter from Charles Cushing to his brother from Camp at Crown Point, July 8, 1776, do. do. do., p. 131; as to the shocking condition of the American troops at Quebec, see a Report, "Headquarters at Quebec," March 28, 1776, Can. Arch., B. 27, p. 380—this also deals with small-pox at Quebec.

Am. Arch., Ser. IV, Vol. 6, p. 1681.

[69] See Letter of Daniel Hopkins to James Warren, November ?, 1775, do. Ser. V, Vol. 3, p. 508.

[70] Do., Ser. IV, Vol. 6, p. 1679.

[71] Am. Arch., Ser. IV, Vol. 6, p. 558—the letter was written from Philadelphia, May 24, 1776.

[72] It cannot be said that finance was the strong side of Congress or that the people generally gave any creditable financial backing to the schemes of Congress. One Philadelphia banker now almost unknown to fame did as much for the finances of the nascent nation as nearly all others put together—without adequate reward, be it said.

[73] Moses Hazen writes to Antill from Montreal, March 10, 1775, that recruiting is going on slowly and that he hopes Antill has been more successful at Quebec—he suggests that the men brought by Duggan from below Quebec be re-enlisted and formed into separate companies, etc., etc. Can. Arch., B 27, p. 387. A Commission as Captain of a Company of Acadians and French Canadians was ordered to be given to Prudhome la Jeunesse, of Montreal, by the Board of War, August 21, 1776. Am. Arch., Ser. V, Vol. 1, p. 1094. See Hazen's Proclamation in French, Montreal, February 10, 1776. Can. Arch., B 27, p. 385, the engagement of his volunteers, do. do. do., p. 397.

[74] Charles Cushing in the Letter already cited, writing from the Camp at Crown Point, July 8, 1776. Am. Arch., Ser. V, Vol. 1, p. 132, says: "Our Army have very much imposed upon the inhabitants: and promised them what they could never perform, which will set them against us"—he was right.

Some evidence of illusage of the habitants and priests may be given from American Sources.

Col. Moses Hazen, writing to General Schuyler, April 1, 1776, Am. Arch., Ser. IV, 5, 869, after stating the changed feeling of Canadians towards the Americans, says:

"Their clergy have been neglected and sometimes ill-used: . . . the peasantry in general have been ill-used; they have in some instances been dragooned, with the point of the bayonet, to furnish wood for the garrison at a lower rate than the current price;" half of the imperfect certificates given in payment being moreover later dishonored by the Quarter-Master General. Hazen encloses as evidence of his representations a letter from one Captain Goforth of the Continental force, commanding at Three Rivers, detailing outrages committed by the troops on their march to Quebec. "A priest's house (Goforth writes) has been entered with great violence, and his watch plundered from him. At another house they ran in debt about 20sh. and because the man wanted to be paid, run him through the neck with a bayonet. Women and children have been terrified, and forced, with the point of the bayonet, to furnish horses for private soldiers without any prospect of pay."

General Schuyler himself says to Washington in his letter from Fort George, April 27, 1776; Am. Arch., Ser. IV, 5, 1098:

"The licentiousness of our troops, both in Canada and in this quarter, is not easily described; nor have all my efforts been able to put a stop to those scandalous excesses."

May 10, 1776, Sullivan writes to Washington, Am. Arch., Ser. IV, 6, 413:

"The licentiousness of some of the troops that are gone on has been such that few of the inhabitants have escaped abuse either in their persons or property . . . Courtmartials are vain where officers connive at the depredations of the men."

In Henry's *Account of the Campaign against Quebec*, Albany, 1877, p. 98, we find an account of the sacking by the troops of the house of a prominent Canadian near Quebec: the author proceeds:

"Though our Company was composed of freeholders, or the sons of such, bred at home under the strictures of religion and morality, yet when the reins of decorum were loosed, and the honourable feeling awakened, it became impossible to administer restraint. The person of a tory, or his property, became fair game, and this at the denunciation of abase domestic villain."

Bancroft, Vol. 4, p. 376, says:

"The Canadian peasantry had been forced to furnish wood and other articles at less than the market price, or for certificates, and felt themselves outraged by the arbitrariness of the military occupation."

[75] For example, General Murray on the capitulation of Quebec at once divided the City into Quarters, where he stationed officers to whom the inhabitants might complain: every complaint was followed by immediate Court Martial, and Court Martial by immediate punishment. He notes in his Official Diary under date, November 16, 1759, "A soldier of the 48th having been tried and convicted to-day of Robbing a French Inhabitant, the Instant it was Reported the sentence was put in Execution (by hanging), in order if possible to put a stop to the Scene of Villainies which had been carried on." Can. Arch., M. 221, p. 38.

In the same Diary, November 14, 1759: "As drunkeness and theft continued to reign prominent vices in the garrison highly prejudicial to the service, I recalled all licenses and ordered for the future every man found drunk to receive twenty Lashes every morning till he acknowledged where he got it and forfeit his allowance of Rum for six weeks." do. do. do., p. 38.

[76] Fleury Mesplet remained behind when the American Troops left Canada: he in 1778 applied for leave to publish a weekly paper—Can. Arch., B. 185, 1, p. 73—and started the *Montreal Gazette* (still in existence), June 3 of that year: he opposed the Government as much as he dared: in his paper he published an attack on the Judiciary as acting unjustly and in disregard of law and right; and he was in 1779 imprisoned with Jotard, his principal writer, and Du Calvet, said to have been unjustly dealt with. Can. Arch., B. 205, p. 45: do. do., B. 185, 1, p. 90. The paper was printed on the press brought from Philadelphia in the old Chateau on Notre Dame Street near Jacques Cartier Square, where it is still shown to visitors.

John Bigelow in his *Life of Benjamin Franklin*, London, 1879, Vol. 2, p. 359 (n) says:

"A printing press and printing apparatus, with hands competent to print in French and English, accompanied this mission. Two papers were issued, when it was ascertained that only one Canadian in five hundred could read. The Doctor very wisely suggested, when he returned, that if another mission was to be sent to Canada, it should consist of schoolmasters."

[77] See note 66 *ante*.

[78] Letter, Hawley to Adams, November 12, 1775, S. Adams Papers: see Smith, *op. cit.*, Vol. 2, pp. 340 sqq.

[79] How far unpopular opinion and action were tolerated in the Colonies may be illustrated by one example gloatingly retailed by Patriots of the time and given in Am. Arch., Ser. IV, Vol. 3, p. 825, under date September, 1775. James Smith, a Judge of the Court of Common Pleas for Dutchess County, New York, was Saturday, September 16 "very handsomely tarred and feathered for acting in open Contempt of the Resolves of the County Committee as was John Smith, of the same place, for like behaviour: they were carted five or six miles into the country. The Judge undertook to sue for and recover the arms taken from the Tories by order of said Committee, who assisted in disarming the Tories, which enraged the people so much that they rose and rescued the prisoners and poured out their resentment on this villainous retailer of the law." This needs no comment.

[80] See the whole story entertainingly told in Smith, *op. cit.*, pp. 340 sqq. This is a valuable and interesting work, somewhat marred by its pseudo-Carlylean style, which constantly distracts the attention from the matter to the manner. The book deserves to be better known.

[81] Letter from John Hancock to Washington, Philadelphia, June 11, 1776. Am. Arch., Ser. IV, Vol. 6, p. 812.

[82] Letter John Adams to Samuel Chase, Philadelphia, July 1, 1776, do. do. do., p. 1194.

[83] Letter, Josiah Bartlett to John Langdon, Philadelphia, June 17. do. do. do., p. 1028.

[84] Am. Arch., Ser. V, Vol. 1, p. 1594: cf. pp. 1596, 1598.

NOTE.

It may be of interest to add here what has been said of Franklin's mission by some Canadian writers.

François-Xavier Garneau: *Histoire du Canada,* 5th revised ed., Paris, 1920, Vol 2, p. 343.

"Le Congrès . . . adopta diverses résolutions, dans lesquelles étaient exposés les griefs des colonies. Parmi ces griefs il plaça l'Acte de Québec. . . . 'Nous sommes étonnés . . . qu'un Parlement britannique ait consenti à donner une existence légale à une religion qui a inondé l'Angleterre de sang, et répandu l'hypocrisie, la persécution, le meurtre et la révolte dans toutes les parties du monde.' Ce langage n'aurait été que fanatique, si ceux qui le tenaient eussent été sérieux: il était insensé et puéril dans la bouche d'hommes qui songeaient alors à inviter les Canadiens à embrasser leur cause et à conquérir avec eux l'independance de l'Amérique. Cette partie de la déclaration ne produisit aucun bien en Angleterre et fit peut-être perdre le Canada à la cause de la confédération. En se déclarant contre les lois françaises et contre la religion catholique, le Congrès armait nécessairement contre lui la population canadienne et violait lui-même ces règles de justice éternelle sur lesquelles il voulait asseoir sa déclaration des droits de l'homme."

Pp. 368, 369, 370. "Les commissaires arrivèrent à Montréal le 29 avril, 1776; Franklin en repartit le 11 mai, peu de jours après la levée du siège de Québec; le P. Carroll le suivit le lendemain. Franklin n'avait pas été longtemps en Canada sans voir que tous ses efforts seraient inutiles: les Canadiens se rappelaient avec quelle ardeur il avait engagé l'Angleterre à entreprendre la conquête de leur pays, vingt ans auparavant. Le Congrés fit donc une faute en l'envoyant vers eux, puisque son nom devait plutôt réveiller dans les coeurs des souvenirs d'hostilité et de vengeance que des sentiments de sympathic et d'union. . . . . Pendant que Franklin s'adressait au peuple canadien, le P (ère) Carroll, en sa qualité d'ecclésiastique, visitait une partie des membres du clergé de Montréal et des campagnes. Il eut encore moins de succès que Franklin. Vainement voulut-il employer les raisons que pouvaient avoir quelque poids dans leur esprit; ils surent en trouver d'autres pour y répondre. Ils lui firent observer que le Grande-Bretagne remplissait les stipulations des traités, que le gouvernement couvrait maintenant de sa protection les anciennes lois et coutumes. . . . On rappela à Carroll que la religion catholique n'avait encore jamais été admise dans telles et telles provinces; que les prêtres en étaient exclus sous des peines très sévères, et que les missionaires envoyés chez leurs sauvages étaient traités avec rigueur et cruauté. On n'était pas persuadé que toutes ces vexations fussent l'œuvre exclusive du gouvernement royal,

d'autant que, quand il s'agissait des catholiques, les colons américains n'étaient jamais bien prompts à faire respecter le droit sacré de la conscience. Enfin, il y avait de singulières contradictions entre l'adresse du Congrès au peuple de l'Angleterre (du 21 octobre, 1774) et celle au peuple du Canada (du 26 octobre). . . . Cette contradiction entre les deux adresses avait porté ses fruits. Quand on lut dans une réunion de royalistes, la partie de la première relative à la réorganisation du Canada, avec la peinture qu'on y faisait de la religion et des usages de ses habitants, l'assemblée exprima sou ressentiment par des exclamations pleines de mépris. 'O le traître et perfide Congrès. . . . Benissons notre bon prince; restons fidèles á un roi dont l'humanité s'étend à toutes les religions: abhorrons ceux qui veulent nos faire manquer au loyalisme, et dont les promesses sout mensongères.'

Ainsi les propositions pompeuses du Congrès finissaient par n'être plus écoutés. Et le clergé et les seigneurs reprenaient leur ascendant sur le peuple. . . ."

Andrew Bell: *History of Canada, Montreal,* 1862. This is a translation of an earlier edition of Garneau, Vol. 2, pp. 146–149. Practically the same as quoted from Garneau.

William Kingsford: *The History of Canada.* Toronto and London, 1893, Vol. 6, pp. 65–70: details the fact but gives no opinion as to the causes of the failure.

Frank Basil Tracy: *The Tercentenary History of Canada,* N. Y. and Toronto, 1908, Vol. 2, pp. 598, 599. "The Commissioners . . . were accompanied by a brother of Charles Carroll. . . a Jesuit. . . . The object of his participation in the expedition was undoubtedly that of influencing the habitants on their religious side. This cannot be said to be the most worthy way of bringing about the result desired; but as their case was rather desperate at that time, the Americans evidently were willing to adopt extreme means to accomplish their ends. The commissioners used all arguments possible. They even tentatively suggested that Canada might be allowed to retain an independent position in its relation to the rest of the States. They were received very cordially by the people of Montreal and in general . . . wherever they went, but the mission was a complete failure. . . ."

W. H. P. Clement: *The History of the Dominion of Canada,* Toronto, 1897, p. 113, simply notes the facts and that the "mission was a failure."

Sir S. P. Lucas: *A History of Canada, 1763–1812,* Oxford, 1909, p. 122. "The commissioners were three in number. One was Benjamin Franklin, and another was Carroll who was accompanied by his brother, a Jesuit priest. The object was to ascertain the actual position of matters military and political and to conciliate Canadian feeling. What was ascertained was depressing enough and the efforts at conciliation came to nothing."

Rev. William H. Withrow, D.D.: *A Popular History of the Dominion of Canada,* Toronto, 1884, p. 281, much the same as Lucas.

Charles Roger: *The Rise of Canada from Barbarism to Wealth and Civilization,* Quebec, 1856, Vol. 1 (all ever published) p. 62.

"The American Congress appointed Dr. Benjamin Franklin, Samuel Chase and Charles Carroll of Carrollton—the last mentioned gentleman being requested to prevail upon his brother, the Revd. John Carroll, a Jesuit of distinguished theological attainments and celebrated for his amiable manners and polished address to accompany them—to proceed to Canada. . . . They (the Canadians) were to have the power of self-government, while a free press was to be established to reform all abuses. The . . . Commission were . . . far from being successful in their attempt to negotiate Canada into revolt. The clergy of Canada could not be persuaded that as Roman Catholics they would be better treated by the Revolutionary colonists than they had been under the British government after the expression of such sentiments as those addressed to the people of Great Britain, on the 21st of October, 1774. The Americans, uncouth in manners were, in truth, most intolerant of papacy."

Most of the Canadian Histories, e.g., Bibaud, McMullen, Bryce, &c., say nothing of this missison. American Histories are readily accessible and I extract the references from a few only.

Of two American works specially concerning the attempt to bring Canada in line with the Thirteen Colonies, one,

Charles Henry Jones: *History of the Campaign for the Conquest of Canada in 1776*, Philadelphia, 1882, pp. 33, 34, says little of the commission. John Carroll failed, "for the clergy were unanimous against the American cause"—a clear mistake.

The other, Justin H. Smith, *Our Struggle for the Fourteenth Colony*, N. Y. and London, 1907, gives a very full account.

Vol. 2, pp. 325–343; 350–352; 354–356.

"John Carroll . . . met a wall of adamant," p. 334, sums up that part of the story.

In Kate Mason Rowland's *The Life of Charles Carroll*, N. Y. and London, 1898, Vol. 1, pp. 140–176 is an account of the Canadian Commission and its failure—the author says:

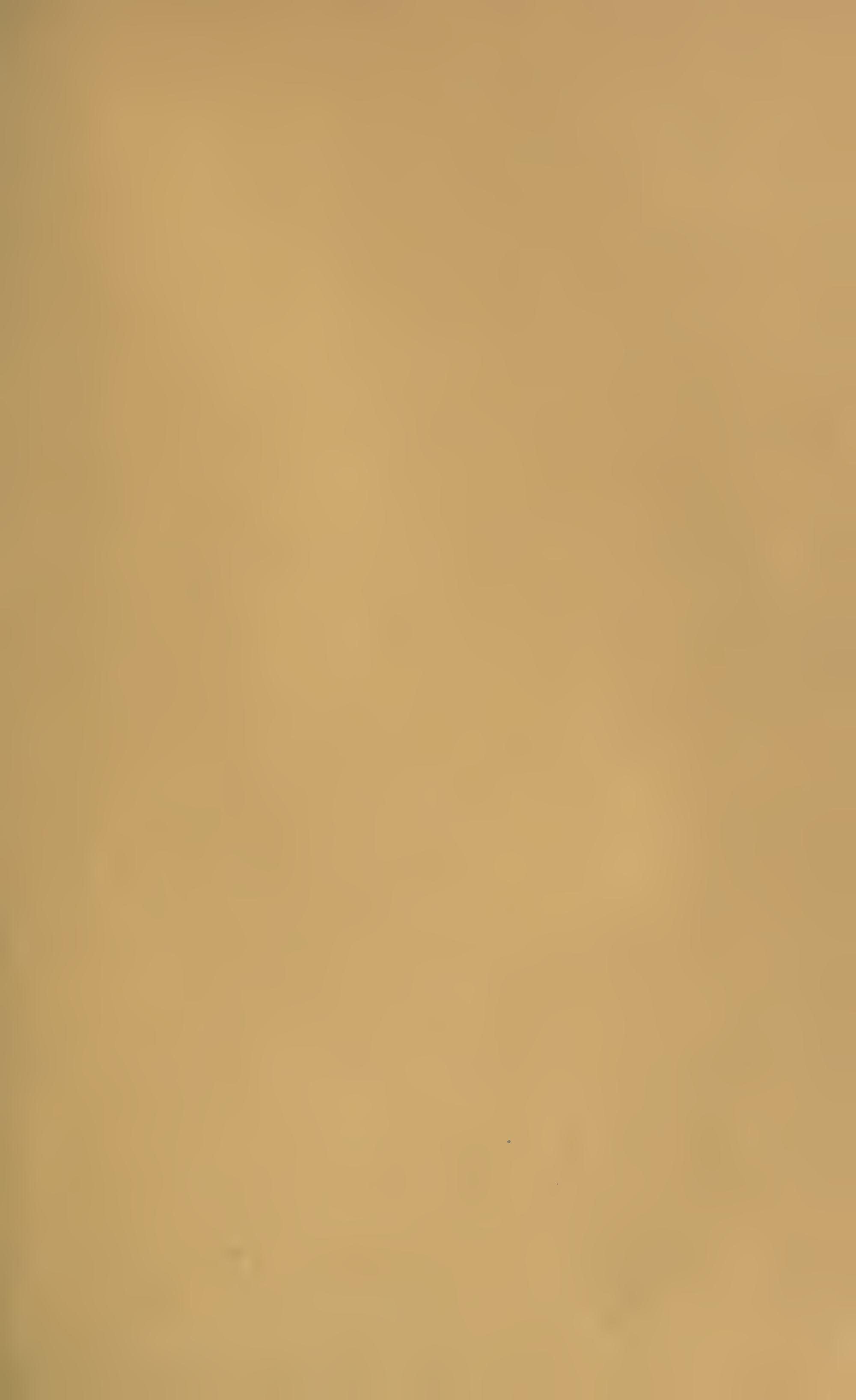
Pp. 146, 147. "Unfortunately, indiscreet politico-religious utterances of Congress had offended the French Canadians and rendered them distrustful of their new friends, while the exactions of the Continental soldiery, who with an insufficient commissariat and no money were forced to forage on the natives for subsistence, widened the breach. In truth Canada . . . had by the Quebec Bill of 1774 been given all that she could desire in the way of civil and religions liberty . . . and the Quebec Bill . . . was one of their (i.e. the Americans') acts of indictment against the English Crown."

The Canada Journal of Charles Carroll printed in an appendix to this volume from the Maryland Historical Society's *Centennial Memorial*, speaks under date, May 11, 1776, of "the bad prospect of our affairs in Canada" but gives no reasons—there is no entry from April 29 until May 11, the period of Franklin's stay.

In John Bigelow's *The Life of Benjamin Franklin*, London, 1879, Vol. 2, pp. 354–359 are given Franklin's letters when he was Commissioner

to Canada. P. 358, May 27, Walker and his wife overtook Franklin "at Saratoga where they both took such liberties in taunting us at our conduct in Canada, that it almost came to a quarrel."

In the same letter (to the Commissioners in Canada from New York, May 27, 1776) Franklin says: "I find I grow daily more feeble and think I could hardly have got along so far but for Mr. Carroll's friendly assistance and tender care of me. Some symptoms of the gout now appear, which makes me think my indisposition has been a smothered fit of that disorder. . . ." To which the editor rather unkindly adds the note, p. 359, "The Doctor's health was always a convenient excuse when he did not wish to give a better. It is not, likely, however, that he would have returned so abruptly if he had not found a state of feeling on the border which was fatal to any co-operation of the Canadians with the revolting colonies."



Woman Franchise in Quebec, a Century Ago

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, F.R S.C.

(Read May Meeting, 1928)

Our sister Province sometimes sets up the claim to have been in advance of the rest of the far-flung British Empire in hat it was in the old Province of Quebec that first in the British world since the Reformation, Roman Catholics enjoyed the full rights of freemen. There is some justice in this claim, but the tolerance cannot be put down to the tolerance of the people of Quebec; it was bitterly resented and, as far as lay in their power, opposed by most of the Protestants in the Province, while the Catholics were themselves helpless. It was the tolerance of the Mother Country, the tolerance, and, be it said, the good sense of the Imperial Ministry that effected the unprecedented gift of all the rights to Catholics which were enjoyed by Protestants. From and after the decision by the Attorney-General, Fletcher Norton, and the Solicitor-General, William De Grey, of June 10, 1765, that "His Majesty's Roman Catholic Subjects residing in the Countries ceded to His Majesty in America, by the Definitive Treaty of Paris, are not subject in those Colonies, to the Incapacities, disabilities, and Penalties to which Roman Catholics in this Kingdom are subject by the Laws thereof", those of that faith have had the same rights as other subjects of the King (1). But there is another claim to precedence in enlightened treatment of a class, which is better founded, though we hear nothing of it—a right not given by the Mother Country but taken by a class in Quebec as a right to which the members of that class were entitled and which placed them on an equality with the rest of His Majesty's subjects in the colony, not belonging to the class, but who arrogated to themselves the right which they ought to share with the less-favoured people.

I mean the right of the Franchise, the Suffrage, which was denied to women throughout the British Empire, and the claim to which was treated with derision whenever advanced as a legitimate claim.

In French times, of course, there was no Woman-Suffrage—there was no Suffrage at all—the same statement is to be made as to the Régime Militaire; but in the Royal Proclamation of October 7, 1763, the King said "We have . . . given express Power and Direction to Our Governors . . . that so soon as the state and circumstances . . . will admit thereof, they shall . . . summon and call General Assemblies

. . . in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government": Shortt and Doughty, *Documents relating to the Constitutional History of Canada, 1759-1791*, 2nd. ed., The King's Printer, Ottawa, 1918, pp. 163, *sqq.*, esp. p. 165.

For reasons that are well-known to students of our history, there was delay in erecting popular Assemblies in more than one part of the British Empire; and Quebec did not receive one when, in 1774, a scheme for her government was elaborated by Parliament which took from the King the constitutional power over the colony. In the Quebec Act, (1774) 14 George III, c. 83, which made statutory provision for the government of Quebec, all legislative power was vested in the Governor and an appointed Council, the recital being made "whereas it is at present, inexpedient to call an Assembly": *op. cit.*, pp. 570, 573.

The agitation for—and against—an Assembly which followed the Quebec Act is too well-known to call for any description here. Among the many petitions sent across the Atlantic to Westminster was one dated November 24, 1784, signed by many in Canada asking for an Assembly; and a committee of influential persons in Quebec and Montreal drew up a "Plan for a House of Assembly", in which, *inter alia*, was contained the provision "That none but males shall either vote or represent": *op. cit.*, p. 754. Who was the author and what the occasion of this provision are equally unknown.

In the debate in the Parliament at Westminster on the Canada or Constitutional Bill in 1791—the debate which made acute, if it did not cause the memorable quarrel between Burke and Fox—there was not a word said concerning Woman-Suffrage; and it seems doubtful if the "Plan" ever was brought to the attention of the Home Administration or of any of the legislators: *op. cit.*, p. 753, note 1. *Canadian Archives*, Q. 42, p. 127; *do. do.*, Q. 43, 2, p. 777. The Debate in the Commons was somewhat animated, the chief objection to the Bill was that the qualification for the voter was placed too high: thus there was an opportunity for anyone who wished to grant women the right to vote, to declare himself. It is quite certain that nothing could be or was further from the minds of the legislators than that they were allowing women to vote in Canada; and no one having the slightest knowledge of the rules for the interpretation of Statutes, could read into the Act that was passed, such a gift. The proceedings in the House of Commons will be found in 28 *Parliamentary History of England* (Hansard), 1376-9: 29 *do., do.*, 359-430, 655-660.

The celebrated Canada or Constitutional Act, (1791) 31 George

III, c. 31 (Imp.), which was passed does not, indeed, contain any prohibition against a woman voting, but no such right is given by implication—the right to vote is not a natural right but is, both historically and theoretically, a right given by the highest authority in the land.

Section 20 of the Act provides that "the Members . . . shall be chosen by the Majority of Votes of such Persons as shall severally be possessed for their own use and benefit" of certain property of a defined character and to a defined amount within the Constituency—if I may be pardoned the use of a word of later birth. There is no mention of sex, specifically, but so far as the pronominal forms can indicate the sex of the voter, there is no hint of the woman—"every voter before *he* is admitted to give *his* vote", must, if required, take the prescribed oaths, amongst them that "*he* is to the best of *his* knowledge and belief duly possessed, &c., &c . . ." "He", "his", "him", are the constant pronominal forms, never "his or her" or the like: the same terminology appears as in the case of Members: see ss. 24, 29. It did not need this to exclude women from the franchise for, as Christian says in his Note to Blackstone's *Commentaries on the Laws of England*. Bk. iv, p. 445: "With regard to the property of women, there is taxation without representation, for they pay taxes without having the liberty of voting for Representatives . . ."

Nor did the Legislature of the new Province of Lower Canada which came into legal existence at the end of 1791 give the franchise to women. The first of the Elections Acts of the Province of Lower Canada was (1807) 47 George III, c. 16 (L.C.): no change was made in the qualification requisite to entitle one to vote, and in s. 15 is a form of oath prescribed to be administered "to every person offering *his* vote"; and in case of refusal to take it, "the Returning Officer shall not admit *him* to vote"—while s. 16 provides punishment if any person "shall . . . perjure *himself*."

It would seem that very early in the history of the Province, some women asserted the right to vote and some actually voted. The first instance of any women voting so far as can be found at this date was in the warmly fought Election of 1809. We are told by Senator L. O. David, in his interesting work, *Les Deux Papineau*, Montreal, 1896, pp. 27, 28 (I translate) "As the law did not forbid women to vote, many . . . went to the Poll to register their vote in favor of the popular candidate. There was one especially noticeable; she was an elderly lady, long a widow, but notwithstanding her age, still fresh and vigorous. When she was asked for whom she wished to vote, she answered with a voice strong and filled with emotion 'For my son, M. Joseph Papineau, for I believe that he is a good and faithful

subject' ". The candidate for whom the lady voted was Joseph Papineau, elected along with James Stuart for the East Ward of Montreal at the General Election for the Sixth Provincial Parliament in October, 1809—dissolved by the Governor next year.

It will be seen that the claim to vote was based not on any express language in the legislation, giving such right to women, but on the absence of language forbidding them to vote.

Apparently this supposed right was asserted in some places and not in others: we find, for example, a statement that women voted in Three Rivers at the Election of 1820. In the Neilson Papers in the Canadian Archives is a letter to John Neilson from M. P. Bedard from Three Rivers, dated July 1, 1820, which contains the following: (I translate) "The election for this Borough was held here yesterday; Mr. Ogden and Mr. Bedard were elected by the men and the women of Three Rivers, for you should know that here the women vote the same as the men": *Canadian Archives*, Neilson Collection, vol. 3, p. 412.

The first appearance in official documents of voting by women, however, is after the Election of 1827. There had been passed an Election Act (1822) 2 George IV, c. 4 (L.C.), which by s.1 provided that the intending voter had the same obligation: "*he* shall take the oath . . .", and cannot vote until "*he* has taken the said oath . .", an entry of "*his* addition . . . *his* abode . . . *his* property . . ." is also directed.

The Consolidating Act of (1825) 5 George IV, c. 33 (L C.), employs the same language; this was the Act in force when the Election of 1827 was held.

At the General Election of 1827, the candidates for Quebec Upper Town were Joseph Remy Vallières de St. Real, Andrew Stuart, George Vanfelson and Amable Berthelot. The returning officer was William Fisher Scott, appointed in July; he opened a Poll near the Bishop's Palace, August 7, and the polling continued until August 15, when de St. Real and Stuart were declared elected.

The proceedings at this election were brought before the House of Assembly; on Thursday, December 4, 1828, Mr. Clouet, one of the Members for the County of Quebec, presented "A Petition of divers Electors of the Upper Town of Quebec . . .", and it was received and read. This Petition alleged that at this election, "Mrs. Widow Laperrier did tender . . . her vote under oath which Mr. Scott did refuse to take and enregister, whereupon a protest against such refusal was served . . ." The petitioners claimed that "this refusal to take a vote offered in the terms of the law" was "a most dangerous precedent,

contrary to law, and tending to subvert their rights and constitutional privileges", and "that as the votes of the Widows were not taken, the return of Mr. Stuart is void . . ." It will be seen that the right was placed on high constitutional grounds; and also that apparently the right was claimed for widows only—*sed qu?* The petitioners indulge in an elaborate argument that widows had the right to vote, not unlike those afterwards advanced in favor of Woman-Suffrage generally, and which never were squarely faced and controverted by its opponents.

No claim was made that the Statutes gave the franchise to women generally; nor was any express claim made for the right of women generally to vote. The Petition, after stating what is undoubtedly true, that "neither in men nor women can the right to vote be a natural right but it is given by enactment", proceeds "That, in point of fact, women duly qualified, have hitherto been allowed to exercise the right in question". (It may be said here that certain charges of corruption were also made in this petition.) Mr. Clouet moved, seconded by Dr. Labrie of the County of York, "That the grounds and reasons of complaint set forth in the said Petition if true, are sufficient to make void the election of the said *Andrew Stuart*, Esquire", and it was "Ordered that the consideration of the said Motion should be postponed till Tuesday next".

This was not the only election in which the right of women to vote came in question: we find that on the same day as the former, December 4, Stuart presented "a Petition of divers Electors of the Borough of William Henry" complaining that at the Election of 1827 the Returning Officer, Henry Crebass had returned Wolfred Nelson as Representative although "James Stuart was . . . elected by a majority of legal votes, yet an apparent and colourable majority in favor of . . . Wolfred Nelson . . . was obtained by the admission of unqualified persons to vote . . ." *Inter alia*, "the votes of women, married, unmarried, and in the state of widowhood were illegally received for the said Wolfred Nelson, although the illegality of such votes was strenuously urged by the said James Stuart . . ."

Andrew Stuart moved, seconded by the Solicitor-General, Charles R. Ogden, a similar motion to that in the Quebec Petition, and the consideration of this motion was set for the following Saturday. The proceedings on the William Henry Petition were interrupted by the presentation on the succeeding Tuesday of a Petition of Nelson himself—this was actually presented by his friend, Mr. Bourdages. Nelson, in this Petition, after denying the facts alleged in the former Petition, claimed that James Stuart (who, by the way, was Attorney-General of the Province) had "caused the votes of several women to be received

and even sent for one to the *Isle aux Noix*, who having been sworn, voted . . ."

The consideration of the Quebec Petition was postponed till the following Friday; but a Motion to postpone the original William Henry Petition till the following Saturday, was negatived on a Division, 29 to 3, and the Motion of Mr. Clouet passed.

On Friday, December 12, another Petition was presented by Mr. Bourages from "Divers Electors of the Borough of William Henry" charging, *inter alia*, "That the said James Stuart received the votes of many women, and that he himself sent to a great distance to fetch them, and putting aside all principle of honor and of delicacy, did, himself, and by his agents in divers instances make all his efforts and employ all his well-known eloquence to a very respectable woman, whose husband had voted, to convince her that upon the same principles on which her husband had voted, she ought also to give her vote, under the pretensions that the property came from her and that the oaths had not been required from her husband . . ."

The William Henry Petitions were on a Division, 32 to 3, ordered to be printed and fifty copies struck off for the use of the Members of the House. The Quebec Petition was also ordered to be printed and the consideration of it was set for the following Tuesday. On this day, Tuesday, December 16, it was referred to the Committee of the Whole to sit on the succeeding Saturday: on that day, it went over, the House adjourning to Monday—but the House rising, it was not reached until February of the following year, 1829. On February 20, 1829, it was revived and ordered for consideration for Monday, the 23rd: reached on Tuesday, a motion was made that the House should resolve itself into a Committee of the Whole, but an amendment to take into consideration in Committee of the Whole on March 2 was carried unanimously. It was not reached till March 12, and then further consideration of it was deferred till the next session as was the consideration of the several William Henry Petitions.

To complicate matters still further, on February 20, Wolfred Nelson had had his Petition presented by his friend and colleague, Mr. Bourdages, asking that the Petition against him should be set aside for the reason that five persons named who were petitioners were, as he alleged, not qualified voters and consequently "a number of the Electors less than that required by law . . . signed the Petition".

The Statute at that time in force was the Act of (1808) 48 George III, c. 21 (L.C.) which by s.1 provided that "no petition complaining of an undue election or return of any Member to serve in the House of Assembly . . . shall be receivable unless . . . presented to the House

within fourteen days after the first meeting of the Legislature . . . also unless such petition shall be signed by at least ten Electors of the . . . Borough . . .". This was continued by (1816) 56 George III, c. 1 (L.C.) till May 1, 1820 and then longer.

Accordingly, if there were of the thirteen signatories of the Petition five who were not electors, the necessary number of signatures had not been affixed and the Petition should not have been received at all.

A motion was made that the last-named Petition should be referred for enquiry—the Act of (1818) 58 George III, c. 5 (L.C.) gave power to the House to appoint three commissioners to examine witnesses, and this was extended by (1821) 1 George IV, c. 32 (L.C.) till May 1, 1825, and then by (1824) 5 George, c. 32 (L.C.) till May 1, 1829, and by (1829) 9 George IV, c. 61 (L.C.) indefinitely.

The motion to refer the Petition of Nelson to a Committee came on again on the morrow when, February 21, it was carried on a Division, 25 to 4; Messrs. Louis Guy, Louis Michel Viger and Joseph Toussaint Drolet were named as commissioners, the first named to be Chairman, on a Division of 24 to 1; and on the same Division, they were directed to "sit on Monday, the second day of March next, at the Borough of William Henry in the Public Room of the Parsonage of the Roman Catholic Church and . . . continue so to do until the said enquiry be completed, which proceedings the said Commissioners shall transmit with all convenient speed to the Clerk of the House". To complete the story of this commission, it should be said that they made the enquiry, but did not report to the House until the next session. We read that their report was laid before the House, February 2, 1830, and preserved on the files; it was not, however, printed, and its contents do not appear.

At the close of the Session of 1829, then, the state of the case so far as it affects our present enquiry was as follows. There were five Petitions, viz:

(1) Complaining of the refusal of the returning officer at Quebec Upper Town to accept the vote of a widow; in this Petition, it is true, the arguments adduced are equally applicable to all women while the expressed claim is only as to the widow, arguing "That in respect of property taxation and duties to the State, the Widow duly qualified by our Election Laws is in every essential respect similarly situated with the man". It is admitted that she is not "liable to Militia duties . . . she is not called to serve on a jury . . . she cannot be elected to the Assembly . . ." It is in this Petition claimed that Mr. Berthelot should have been declared elected instead of Mr. Andrew Stuart. No doubt the reason why the right to vote asserted in this Petition was

restricted to the widow is because only the one woman's vote had been rejected and she was a widow.

(2) Concerning William Henry from thirteen persons claiming to be voters in the Borough complaining that the votes of "Women, married, unmarried and in a state of widowhood" had been received for Wolfred Nelson, and claiming that this was illegal; and for this and other reasons, James Stuart should have been returned instead of Nelson.

(3) From the sitting member, Wolfred Nelson, claiming that Stuart had caused the votes of several women to be received, and was guilty of other named improprieties.

(4) From electors of the Borough, complaining that Stuart had received the votes of many women, and had been guilty of other named improprieties—this, it was claimed, made it right that Wolfred Nelson should "be maintained in his seat".

(5) From Nelson claiming that the above-named petition (2) was irregular and should, consequently, be quashed: the facts alleged in this petition were under enquiry by a committee of three, who were to report the result of their enquiries.

The proceedings above set out appear from the ponderous Folio: *The Journal of the House of Assembly of Lower Canada, from the 21st November, 1828, to the 14th March, 1829*, pp. 81, 82, 116, 122, 139, 182, 516, 535, 536, 680. That the Commissioners on (5) above reported appears from the corresponding Journal of the House for the following year at p. 73, the Session, lasting from January 22, 1830 till March 26.

Nothing seems to have been done further on any of the Petitions —before leaving these proceedings, it may be well to quote what is said of them in a non-official work. In an octavo volume in the Reference Library, Toronto, entitled *The History of the Session of the Provincial Parliament of Lower Canada for 1828-1829*, at p. 48, we find a reference to the two Petitions presented December 4, 1828— "the principal complaint" of the Quebec Petition being "that women were not allowed to tender their votes by the Returning Officer": and in the other, "the Petition stated that a number of women were admitted to vote, that several persons who had voted were now under indictment for perjury and that one had been convicted of that crime". At p. 70, we read the savage attack made upon Nelson by Andrew Stuart when Nelson had his petition presented to the House, December 9; Stuart was called to order several times by the Speaker, M. Papineau: p. 78, Solicitor-General Ogden opposed the printing of the petitions, December 12, containing as they did what "might be mere calumnies". It may, perhaps, be suggested that if papers which

might turn out to be mere calumnies are not to be printed, a considerable saving might be effected in the printing department.

At p. 106 appears what will shed some light on the opinions held at the time as to Woman-Suffrage—on December 16, "Mr. Vallieres (Representative for Quebec Upper Town) said . . . the . . . main point was that of the right of women possessed of property to vote . . . a question of the greatest importance and would bear, not only in this and other cases pending, but on the whole future representation of the Province . . . expressed his fear, derived from the laws recognized in England and the authorities he quoted, especially that of Paley, that it was incontrovertibly the practice of all representative governments, both ancient and modern, to exclude women from any share therein, and that therefore he could not decide in favour of the ladies". Messrs. Papineau (L. J. Papineau of Montreal, West Ward, the Speaker), Viger (Denis B. Viger of the County of Kent) and Bourdages (Louis Bourdages of the County of Buckingham) appeared to be in favour of the admission of women as voters.

I can find nothing further reported concerning Woman-Suffrage until 1834—apparently the Petitions were allowed to drop.

The matter of the right of women to the Franchise was taken up in earnest in 1834, troublous as were the times—and rebellion in the offing.

On Wednesday, January 22, 1834, two resolutions were passed—the one looking to amendments "to the Laws now in force for regulating the Election of Members to serve in the House of Assembly of this Province". This need not be particularly considered, as after the Committee of the Whole determined that it was "expedient to alter and amend" these laws and appointed a Committee composed of Messrs. Neilson, Quesnel, Cuvillier, Rodier and Leslie to "report . . . by Bill or otherwise", the Committee toward the end of the Session on March 3, through Mr. Neilson, reported that they were "of opinion that in the present state of the Session, it is inexpedient to proceed further on the . . . Bill, or on any great alteration in the Election Laws during the present Session"; *Journals of the House of Assembly of Lower Canada, From the 7th January to the 18th March, 1834, pp. 123, 151, 152, 469.*

The other resolution had its effect—temporary, indeed, but that was not the fault of the Assembly. It was that the House should, on the following Monday, resolve itself into a Committee of the Whole "to consider if any and what amendments are necessary to the Laws now in force for regulating the manner of proceeding on Contested Elections and Return of Members to serve in the Assembly of this

Province". The House, accordingly, went into Committee on January 27, and referred the matter to the "Standing Committee of Privileges and Elections, with power to report by Bill or otherwise": February 21, Mr. Bourdages, for this Standing Committee reported with a Bill that was read for the first time and set to be read the second time on the following Tuesday: February 25, it received its second reading and was referred to the Committee of the Whole for the following day: considered, March 1, it was reported with amendments, March 3—the amendments are not of importance here—and passed March 5, when it was sent up to the Legislative Council, returned without amendment, March 12, and received the Royal Assent, March 18, 1834; this Act is (1834) 4 William IV, c. 28 (L.C.) and it seems to have passed both Houses without opposition: *op. cit.*, pp. 123, 124, 152, 308, 365, 366, 390, 467, 468, 469, 478, 489, 492.

By s. 27 of this Act, it is provided, *inter alia*, "that from and after the passing of this Act, no female shall vote at any Election for any County, City or Borough of this Province . . ."

Although this Act, as has been said, received the Royal Assent through the Governor, it had to run the gauntlet of the Imperial Ministry; and the supervision by that Ministry was in those days a very real thing, not at all like the present camouflage of nominal paramount control. The Canada or Constitutional Act of 1791, by s. 31 provides that the Governor is, *inter alia*, to send an authentic copy of every Bill, assented to by him, by the first convenient opportunity to a Secretary of State, and that at any time within two years of its receipt, it may be disallowed. This is, of course, practically the same as s. 56 of the British North America Act; but it was acted upon in those early days, when Canada was still a Colony—or rather two Colonies. At the present time, it is unthinkable that this power would ever be exercised, any more than the theoretical power of the King to refuse his assent to a bill which has passed the two Houses of Parliament—and, in fact, it has been exercised only once since Confederation and then at the instance of the Canadian Government.

So far as appears, there does not seem to have been any objection by the Home Ministry to the prohibition against women voting: it would have been strange if there had been, as this was quite in accordance with British practice—but there was a clause which was considered objectionable, and would be considered objectionable to-day.

On Monday, November 30, 1835, Gosford, the Governor, sent a message to the Assembly, drawing attention to an objectionable clause (s. 18), which gave to Committees on Controverted Elections, &c., the power, if so authorized by Order of the House, "to sit after

the prorogation of the then Provincial Parliament and to report at the ensuing Session thereof". This, it was pointed out in the message, "interferes with the right of the Crown to prorogue the Parliament, and is inconsistent with Parliamentary Law and usage, a circumstance which was probably not remarked at the time of passing the Act, but which has forcibly arrested the attention of His Majesty's Ministers". The Governor recommended, as there was no objection to the Act in any other respect, that a short act should be passed repealing the obnoxious clause "within the period to which His Majesty's right of disallowing the Act is limited by the Imperial Statute of the 31st Geo. III, Cap. 31, Sect. 31".

The message was forthwith referred to the Standing Committee of Privileges and Elections. On Wednesday, December 9, this Committee was directed to report, which it did on Friday, December 11, recommending an amendment: the matter was ordered for consideration by the Committee of the Whole, which decided that it was expedient to make an amendment, Monday, December 14: the Bill was read the third time, December 23, and sent to the Council: the Council returned it with certain amendments, January 9: these were considered in Committee of the Whole, January 29 and the consideration was taken up again February 5, but no report was made to the House, and the matter lapsed. One of these amendments mentioned the prohibition against women voting and proposed to continue the prohibition, but added to the clause by giving members of another class the franchise.

The proceedings in this session, nugatory as they were, will be found in the *Journals of the House of Assembly of Lower Canada, From the 27th. October, 1835 to the 21st March, 1836* . . ., pp. 227, 253, 264, 265, 278, 299, 304, 344, 404, 427. There is not the slightest reason to suppose that the two Houses would not have agreed on a proper bill to carry the required amendment into effect if this had been the only difference between them: the fact is that these were the times of great unrest, rebellion was in the air, and Parliament was engaged in endless strife between the Houses, involving the Governor and Executive Council. Those who wish to obtain a knowledge of the political state of Lower Canada at the time will find it described at large in the histories—*e.g.*, Robert Christie's *A History of the late Province of Lower Canada*, Montreal, 1866, vol. IV. It should be unnecessary to warn the reader to make allowances for the "personal equation" in this as in all writings purporting to be history.

We need not here go into the troubles of the times or the reasons inducing the Assembly in the two sessions preceding the suspension of

the Constitution by the Imperial Act of (1838) 1, 2 Vict., c. 9, to abdicate their functions and thereby prevent any legislation of any kind being passed. That the Preamble of that Act was wholly justified there can be no doubt: "Whereas in the present state of the Province of Lower Canada, the House of Assembly of the said Province . . . cannot be called together without serious Detriment to the Interests of the said Province . . ."

Whatever the merits of the controversy, it is the fact that in these two Sessions, there was no legislation possible; and, consequently, it became necessary for the Home Administration to exercise the power of disallowance, and the offending Act was disallowed, accordingly—not, be it noted by reason of dissatisfaction with that part of it which prohibited the votes of women but for a wholly different and non-cognate reason.

I am not aware of any instance of women voting after the Act of 1834; but it would seem that there was thought to be some danger of the right being asserted, as we find legislation on the subject in 1849.

The two Provinces of Upper Canada and Lower Canada being merged into one Province of Canada by the Act commonly called the Union Act, (1840) 3, 4 Vict., c. 35 (Imp.), the new Province thought it proper to revise and consolidate the Election Laws. On January 22, 1849, an Election Bill was introduced by Attorney-General Lafontaine; it had an easy passage through the House and Committee, having its final reading, April 25: sent up to the Legislative Council on the day of its passing the House, it was passed by that Chamber without amendment, May 8, and received the Royal Assent, May 30, 1849. This Act is (1849) 12 Vict., c. 27 (Can); and in s. 46 is the provision: "And be it declared and enacted: That no woman is or shall be entitled to vote at any such Election for any County or Riding, City or Town . . ."

And so ended the glory in this respect of the French Canadian woman and of Quebec.

The facts of this legislation are to be found in many pages of *Journals of the Legislative Council of the Province of Canada*, vol. VIII . . . 1849, and of *Journals of the Legislative Assembly of the Province of Canada from the 18th day of January to the 30th day of May, . . . 1849.*

It may be of interest to give the subsequent history of this legislation—the provision against women voting came forward on the Consolidation of the Statutes in 1859 as Consolidated Statutes of Canada, c. 6, s. 3, generally cited (1859) C.S.C., c. 6, s. 3. No change was made when the Dominion was formed in 1867 by the British North America Act of that year, or until the time came for revising

the Dominion Statutes. The Commissioners pointed out that much of the Consolidated Statute had been repealed and recommended that the whole Statute should be repealed—no change by way of repeal or otherwise had been made, it may be said, in the provision against women voting. Following the recommendation of the Commission, an Act was passed, (1885) 48, 49 Vict., c. 40 (Dom.). In this act the prohibition was continued, not in express terms, indeed, but nevertheless effectively by the definition given in s. 2, to the word "person", *i.e.*, "a male person, including an Indian, and excluding a person of Mongolian or Chinese race": and it was only a "person" who was by the provisions of s. 3, entitled to vote. Consequently, the woman had, *quoad* the franchise, the same status as a "male person . . . of Mongolian or Chinese race".

On the revision, this became Revised Statutes of Canada (1886), c. 5, s. 2 (a), commonly cited, R.S.C. (1886), c. 5, s. 2 (a).

In 1898, the determination of the right to vote was referred to the several Provinces, the Act of that year (1898) 61 Vict., c. 14, by s. 5 (a) making the qualifications established by the laws of each Province, the qualifications in that Province for Dominion Electors: this was continued in the revision of 1906 as R.S.C. (1906), c. 6, s. 10—this is known as The Dominion Elections Act, 1906, and, by the way, where it speaks of the franchise specially provided for Saskatchewan, Alberta and the Yukon, it uses the expression "male person"—ss. 32, 33.

The believer in Woman-Suffrage will agree with the American poet that

"Civilization doos get for'ard
Sometimes upon a powder-cart"

In 1917, when we were agonizing to save our form of civilization, it was considered proper by those in authority to have a General Election; and in preparation for it was passed The War-time Elections Act to apply during the War and until demobilization. In that Act by s. 1 (*d*), it was enacted as follows:—"Every female person shall be capable of voting and qualified to vote at a Dominion election in any province or in the Yukon Territory, who being a British subject and qualified as to age, race and residence as required in the case of a male person . . . is the wife, mother, sister or daughter of any person, male or female, living or dead" who was serving or had served in the war. This, which obviously was but an instalment, was broadened the next year and every woman could be "a person".

By the Act (1918) 8-9 George V, c. 20, being "An Act to confer the Electoral Franchise on Women", s. 1 (1)", every female person "is

declared to have the right to vote on the same qualifications as a male person". Acts in 1919, 1920 and 1922 need not be considered, as the qualifications are now to be found in the Revised Statutes of Canada (1927) c. 53, in which no distinction is made of sex—the woman is a person again as she thought she was in Old Quebec, more than a century ago.

But this is in Dominion Elections, and each Province has the right, and exercises it, to fix the qualifications for Provincial Elections.

In Quebec, the first legislation after Confederation that calls for consideration was in 1875; in that year was passed "The Quebec Election Act", 38 Vict., c. 7 (Que.), which by s. 8, 1, required of the voter that "He must be of the male sex . . .": the same qualification was contained in the various consolidations, R.S.Q. (1888) Art. 173: R.S.Q. (1909) Art. 180: and now the Quebec Election Act, being Chapter 4 of the Revised Statutes of the Province of Quebec, 1925, by s. 9, says, "No person shall be entitled to vote unless he be of the male sex . . ."

In Ontario, the course of legislation has been different: it is true that the first Statute on the subject, passed after Confederation, (1868-9), 32 Vict., c. 21, s. 4 (Ont.), says bluntly: "No woman is or shall be entitled to vote at any election"; and the same terminology is employed in the Revisions of 1877, 1887 and 1897; R.S.O. (1877), c. 10, s. 6: R.S.O. (1887), c. 9, s. 6: R.S.O. (1897), c. 9, s. 6 (3). Moreover when Manhood Franchise was conferred, it was given to the "male person" only: (1888) 51 Vict., c. 4, s. 3: (1894) 57 Vict., c. 4, s. 4 (1): R.S.O. (1897), c. 8, s. 4—all Ontario Statutes: so also (1907) 7 Edward VII, c. 5, s. 2 (1): R.S.O. (1914), c. 7, s. 2 (1): do. do., c. 6, s. 6. In 1920, however, the Act, 10, 11 George V, c. 2 (Ont.) in s. 6 changed the language; the Act now read "Every man and every woman": this has been continued through the legislation of 1926 and is now the Revised Statutes of Ontario (1927) c. 8, s. 181 (*a*). In Ontario the woman has equal status with the man in Provincial Elections as in Dominion Elections and no one can deny that she is a person— indeed, a person to be reckoned with.

Osgoode Hall, Toronto,
March 9, 1928.

WILLIAM RENWICK RIDDELL.

NOTES

(1) The very complete and accurate publications of the Archives Department of Canada should be consulted by every one desirous of an accurate knowledge of early times in Canada: we have too much fancy and imagination in most of our supposed authorities. The Opinion of the Law Officers of the Crown referred to in the text will be found in a wholly admirable publication of the Archives: *Documents relating to the Constitutional History of Canada, 1759-1791*, edited by Drs. Adam Shortt and Doughty, 2nd edition, Ottawa, The King's Printer, 1918, p. 251.

(2) This story is followed in an Article in the *Bulletin des Recherches historiques*, and also in the interesting Paper of the Honourable Mr. Justice Surveyer, *The First Parliamentary Elections in Lower Canada*, Montreal, 1927.

The incredulity with which this story was received by some (including myself, I must confess) does not seem to me after a careful study of the matter to be in the least justifiable. I am now prepared to accept it at its face value.

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A Day in Court in Old Niagara

BY

The Honourable William Renwick Riddell

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A Day in Court in Old Niagara

By THE HONOURABLE WILLIAM RENWICK RIDDELL, F.R.S.C.

In 1792, 1793, an Englishman visited the Canadas, Upper and Lower, and he has left his impressions of the new countries in a series of amusing and interesting letters (Canadian Letters: *The Canadian Antiquarian and Numismatic Journal,* vol. lx, 3rd series, July-October, 1912). The name of the traveller has not been ascertainable; but internal evidence indicates that he was a lawyer: he certainly was a keen observer with an open mind and no respector of persons.

Arriving at Quebec, October 14, 1792, he was charmed with the peculiar cheerfulness of the French Canadian "who laughs, sings and dances with almost as much *gaiété du coeur* as the European Frenchman was wont to do".

After a short stay in Quebec, he set sail for Montreal, paying $2 for his passage: the hopes for a speedy passage were marred by "the wind coming ahead"; and they had to anchor at Trois Rivières: thence he posted to Montreal, paying a shilling a league and arriving, November 1. "In winter, all is festivity and dancing"; but he could not stay: he left Lachine by batteau, November 3, after passing over nine miles of road, "remarkably bad". But after one day of this method of travel by batteau, whereby his "limbs were benumbed with cold", and camping out for the night, he determined to go by land: he accordingly left the batteau at the Cascades and walked seven miles to Johnstown, "a decent village for this country". After two or three days walking, he took to the batteau again; and, in about three days, arrived at Cataraqui (Kingston). This place he much preferred as the Capital of Upper Canada to Toronto or the "place on the La Franche" (*i.e.,* the La Tranche now the Thames) selected by Lieutenant-Governor Simcoe, (now London).

He set sail for Niagara—fare for cabin passage including necessaries, two guineas and one for servant—a distance of 170 miles passed over in about 30 hours, the peril of sea-sickness being greater than on the Atlantic.

Newark did not impress him favourably; it was "a poor wretched village, with a few scattered cottages erected here and there as chance or caprice dictated".

One is rather astonished to find that though he appreciates the black bass which "for firmness and flavour is only inferior to turbot",

he considers that the Niagara whitefish "in point of flavour . . . can boast but little merit". Mrs. Simcoe, also English to the core, thinks them "most exquisitely good" (Diary, p. 139): and William Kirby sang of them:

> ". . . . of all that swim, the daintiest
> Most beautiful and best! Yea, Catius missed,
> The choicest thing e'er lay in golden dish
> The Addikameng of Ontario" (*The Queen's Birthday*)

Chief Justice William Osgoode, he met and thought that he had much merit as a scholar. "It is evident that the labors of an active profession have not induced forgetfulness of University pursuits. He says good things and is not insensible to those of others". Osgoode, however, while titular Chief Justice of the Province had no Court in which to preside.

To understand the traveller's references to the Courts requires some description of the state of the law at that time in Upper Canada.

Before the Province began its separate provincial career, and while it was still a part of the Province of Quebec under the Quebec Act of 1774, Lord Dorchester, the Governor-in-chief, in 1788, divided the territory afterwards to become Upper Canada into four Districts, Luneburg, Mecklenburg, Nassau and Hesse: he also created a Court of Common Pleas for each District with full civil jurisdiction and presided over by three Judges, all laymen, these Judges having jurisdiction in criminal matters only to commit for trial. (In one of these Courts, that of Hesse, furthest to the West, the laymen appointed Judges declined to act and were replaced, 1789, by one lawyer, William Dummer Powell, afterwards the fifth Chief Justice of the Province.)

In criminal matters, there were for lesser offences the Courts of Quarter Sessions composed of the Justices of the Peace for the particular District: for more serious offences including capital crimes, there was in the old Province of Quebec, the Court of King's Bench which sat at Quebec and Montreal.

When in 1791-2, under the provisions of the Canada or Constitutional Act of 1791, the Province of Upper Canada began its life as a separate political entity, the former Districts were retained with their Courts of Common Pleas—the names of the Districts were changed in 1792 to Eastern, Midland, Home and Western, but the Courts of Common Pleas survived until their abolition by the Judicature Act of 1794. The Court of King's Bench ceasing to have jurisdiction in the territory of Upper Canada, Commissions of Oyer and Terminer and

General Gaol Delivery were issued from time to time for each District: hanging did not become obsolete by any means; many a burglar and forger met a felon's fate.

Newark or Niagara was in the District of Nassau, afterwards the Home District.

In the first appointment to the Bench of Common Pleas of this District in 1788, it had been intended that Benjamin Pawling, Col. John Butler and Robert Hamilton should be the Judges, but by a mistake, Jesse Pawling's name was substituted for Benjamin's: this was, however, soon corrected, Jesse being appointed Coroner for the District and Benjamin taking his place on the Bench. Peter Tenbroek and Nathaniel Petit were added to the three, October 22, 1788. Shortly before the arrival of the English traveller at Newark, Benjamin Pawling, having got tired of the position, retired and Peter Russell was appointed in his stead.

The traveller writes:—

"*Apropos* of Courts of Justice. To one of those coincidences so rare, and therefore so valuable, it was owing, that I was at Niagara when Mr. Peter Russell, judge, Receiver General and an Englishman, delivered his maiden charge to a jury. Never did I more regret being unacquainted with the art of stenography. Posterity would not then have had to regret it as a desideratum.

"In England a charge is a cool business, in Canada it occasionally rises to peculiar animation".

Peter Russell was an Irishman, born at Cork, educated a surgeon, and he served in the army in the medical service for a time: then he received a commission as lieutenant, served in the Revolutionary War, and, being retired on half pay, was on Simcoe's recommendation, appointed Receiver General of Upper Canada with a seat in the Executive and Legislative Councils. He knew no law and was heard to express his wonder that a jury had an even number of members—but, he, when the Court of King's Bench was erected, sought and obtained from time to time, Commissions as Judge *ad hoc* in that Court—even granting them to himself when he became Administrator until checked by the Home Administration. Strongly acquisitive as he was—the current gibe being that he was called Receiver General because he was generally receiving—unconscious as he was of the impropriety of his occupying a Judicial position—he even urged Simcoe to use his influence to have him made a permanent Judge of the Court of King's Bench—he was an honest man and kindly withal—he befriended the exile, Joseph Willcocks, took him into his own home and

made a son of him until he found the young man repaying his kindness by surreptitiously courting his elderly sister, when he had to expel the ingrate from his house, the beginning of a downward career to end in his death at Fort Erie, a traitor in arms against his country.

No doubt the charge to the jury which the Englishman tells of, was not a creditable performance. The following passage shortly precedes that quoted above.

"As trial by jury has been but lately established in the country, it would not be supposed that juries were as yet adequately acquainted with their functions or were sensible of their own powers and importance. They brought, however, to the judgment seat, a steady attention and consciences that troubled least they should judge amiss".

It is gratifying to see such a tribute to jurymen: and I am glad to be able to say after forty-five years' experience that the same could be said almost universally of jurymen of this Province at the present time.

In the case of jurymen in 1793 their attention and care are not to be wondered at, for they were exercising a function which was their birthright, to which most of them had been accustomed but of which they had been denied the exercise for a few years.

The English civil law introduced by the Royal Proclamation of 1763 was abrogated by the Quebec Act of 1774: thereafter, civil cases were (*exceptis excipiendis*) tried by Judges and not by Juries.

Most, indeed, practically all, of the people of the Niagara region were immigrants from the revolting American Colonies, in which the Jury system was in full force: when the Loyalist crossed the River he found no jury: this deprivation was bitterly complained of, but nothing could be done when the District was in the Province of Quebec. When Upper Canada became a separate Province, her first Parliament introduced the English civil law and practice, and then the United Empire Loyalists and a few stray British newcomers had restored to them one of the dearest rights of the freeborn Englishman.

No wonder, then, that the right so treasured and lost awhile was exercised with attention and conscientiousness.

The passage proceeds:—

"An advocate from England, of some authority, determined to avail himself of this apprehensive frame of mind to improve it into a means of influence. Thinking it possible on a particular trial, from the circumstances that the jury would bring in a verdict against his client, he insinuated that in such a case he would bring a writ of attaint against them. A writ of attaint! Just God! does the feudal system still

prevail? or do we live in an age of chivalry? You may well suppose what a fearful doctrine this would have been to establish in such a country. Despotism itself could not have found a more ready instrument than juries acting under such influence. . . A writ of attaint at the close of the 18th century! Think you . . . that there is any Bench in Westminster Hall, whose gravity would not have been shaken by this and the risible emotion felt through the extremist ranks of the Bar".

This advocate could only be John White, the first Attorney General of the Province: the only other advocate at that time in the Province was Walter Roe of Detroit—he, indeed, was an Englishman but he was called in Montreal and he confined his practice to the Western District and did not appear in Court at Niagara—moreover, he could not be said to be "of some authority".

John White, a native of London, called to the Bar at the Inner Temple, 1777, became Attorney General of Upper Canada: arriving in the Province in 1792, he soon acquired, and, until his death, enjoyed a large practice: he was a member of the First Parliament, but was not re-elected. He was killed in a duel early in 1800 by the outraged husband of a lady of whom he had made a scandalous statement, unworthy of utterance if untrue and still worse if true. He was not too careful of what he said or wrote: some of the statements may, perhaps, be explained by the irritation occasioned by ill-health.

The writ of attaint spoken of by White was the well known Common Law remedy given to a litigant who complained of a false verdict: he could sue out a Writ of Attaint (for the form see Fitzherbert's *Natura Brevium,* 241, 253) and have the offending jury tried by a Jury of 24. Originally conviction by this Grand Jury of 24 on a Writ of Attaint was followed by the most serious consequences. The convicted twelve jurors lost their free law and became forever infamous, they forfeited their goods and produce of their lands, they were imprisoned, and their wives and children thrust out of doors, their houses were razed, their trees extirpated and their meadows ploughed up—and the successful attaintor was restored out of their property to all he had lost by the false verdict. This punishment was too atrocious for even the hardy Englishman, and by the time we are speaking of, it was reduced to a comparatively small fine, half to the King and half to the injured litigant.

The Writ of Attaint grew obsolete when the practice of granting a new trial (wholly unknown to the Common Law and apparently beginning in 1350, 24 Edward III) became common: I see that Amos

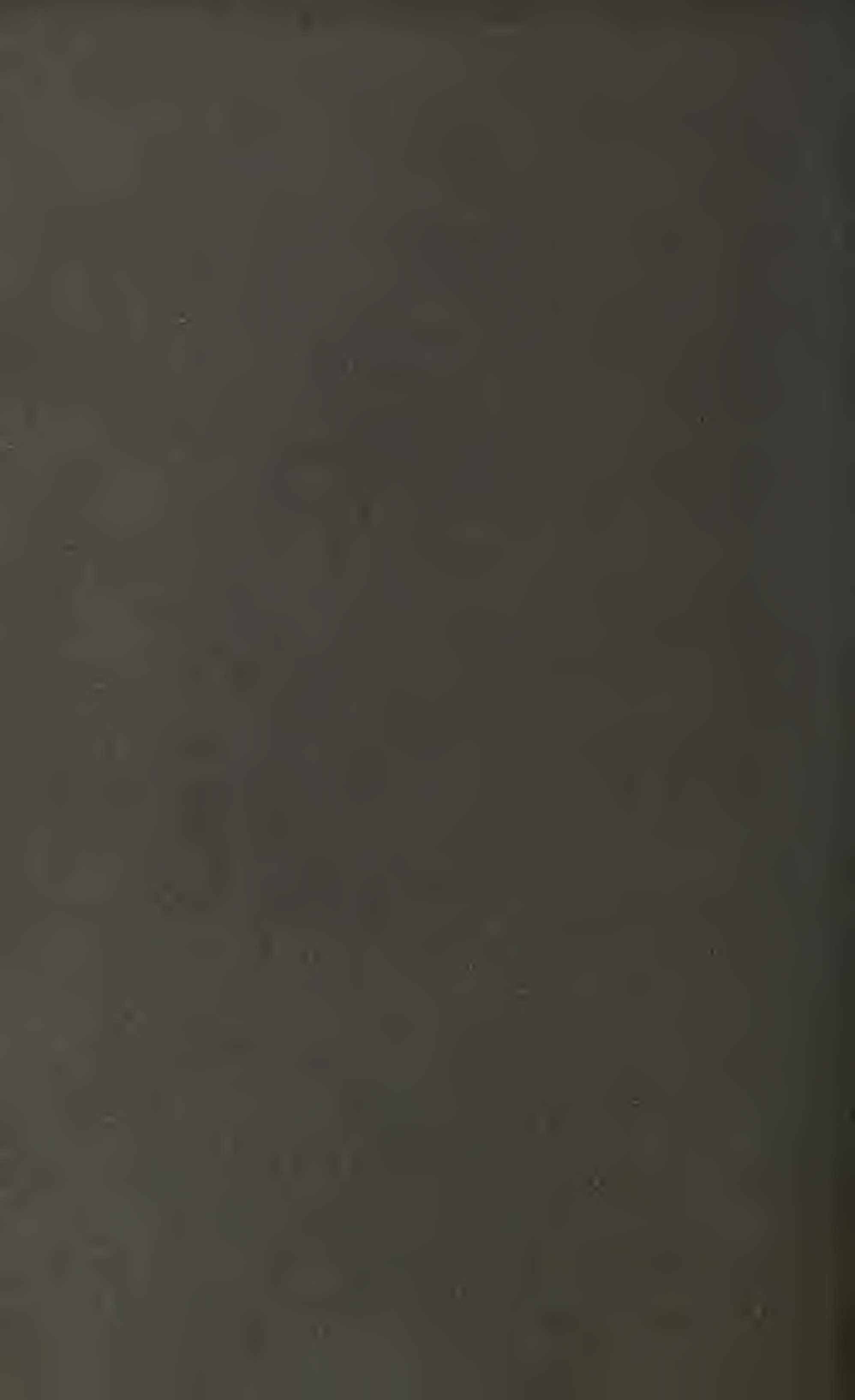
in his valuable edition of old Sir John Fortescue's *De Laudibus Legum Angliae,* says at p. 98, that the practice of granting a new trial "may be traced as high as the year A.D., 1655"; but the statement is misleading, as this practice is certainly much older. Of a Writ of Attaint, I know of no case later than Brook v. Montague, (1606), Cro. Jac., 90: and Lord Mansfield in Bright v. Eynon, (1757), 1 Burr., 391 at p. 393, could say: "The Writ of Attaint is now a mere sound in every case; in many, it does not pretend to be a remedy". But it was not abolished, and the application for it should no more shake the gravity of the Bench at Westminster or excite the risibility of the Bar than the demand a quarter of a century later for trial by Battel in the celebrated Ashford-Thornton case. Trial by Battel was quite an antiquated as the Writ of Attaint.

I do not find any instance of a Writ of Attaint on this Continent; but neither was there any instance of an equally obsolete procedure, an action of Scandalum Magnatum, on this Continent until Mr. Justice Thorpe brought one against Col. Joseph Ryerson in 1806, and would have succeeded if his brother Judges, Scott, C. J., and Powell, J., could have been persuaded that the Parliament of Richard II in 1378 meant to include Judges of the Court of King's Bench of Upper Canada in the words "Justices of one Bench or the other". We should marvel if they had so construed the old statute.

The Writ of Attaint was not abolished in England till 1836, more than three-score years after the time in question: 6 Geo. IV, c. 30 (Imp.)

I may be permitted to doubt that White did threaten the Jury with attaint: it is much more likely that he spoke of the serious nature of their duty, and illustrated his meaning by the Common Law penalty for a false verdict, but *quien sabe?*

Osgoode Hall, Toronto,
November 12, 1927. WILLIAM RENWICK RIDDELL.



// THE CHICAGO BAR ASSOCIATION
RECORD

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PROMOTING THE DUE ADMINISTRATION OF JUSTICE

At a time when the attention of the public is being directed towards party platforms and their meaning, let us turn to our own platform—the By-laws of The Chicago Bar Association. Article II is as follows:

"ARTICLE II.

> The Association is established to maintain the honor and dignity of the profession of the law, to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice."

What is the meaning of all that? What tends to promote due administration of justice? In what way can the Association increase its usefulness?

A good judiciary makes for the due administration of justice. There is no doubt about that. The security of the community depends largely upon the due administration of the criminal laws placed by law in the control of the State's Attorney. In exercising his duties he is called upon to exercise many judgments which are judicial in nature. It seems clear that securing a good State's Attorney is promoting due administration of justice.

But how can the Bar Association increase its usefulness in securing a good judiciary and good State's Attorneys? No one knows lawyers better than lawyers themselves. Their opinion as to a candidate is worth something. The Bar Association has for some years been in the habit, by means of Bar primaries, of giving effective expression to the opinion of its members as to the merits of candidates for the judiciary for the benefit of voters who place reliance upon that opinion. In this respect it has been useful. By giving expression in a similar manner to the opinion of its members as to the merits of candidates for State's Attorney it is likewise

(Continued on next page)

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(Continued from preceding page)
rendering assistance to voters who place reliance upon that opinion and by so doing increasing its usefulness in promoting the due administration of justice.

The danger lies in this,—that the Association may sometimes appear to be engaging in political activities. This, however, is not because the Bar Association is improperly expressing an opinion affecting the due administration of justice, but because the due administration of justice is improperly in politics. After all, under our governmental structure, most things which affect the public good are in politics. It would be very unfortunate indeed if the Bar Association should ever take a partisan position in any election, but this it has not done and the method by which the Bar primaries are conducted is a sufficient guarantee that it will not.

THE BAR PRIMARIES

September 25th to October 1st the Association held a Bar Primary vote with respect to the candidates for State's Attorney and the candidates for the twelve judgeships in the Municipal Court for full term with the following results:

Ballots cast as to State's Attorney....................2656
John A. Swanson............**1545**
William J. Lindsay..........1111

Ballots cast as to Municipal Court candidates..........2624
Howard W. Hayes..........**2296**
Theodore F. Ehler..........**2214**
Frank M. Padden..........**2157**
John F. Haas..............**2135**
William E. Helander.......**2015**
Philip J. Finnegan..........**1940**
Francis B. Allegretti........**1785**
Donald S. McKinlay........**1671**
Frederick W. Elliott.......**1669**
Alfred O. Erickson.........**1537**
Francis Borrelli...........**1521**
John R. Philp..............**1410**
William B. Gemmill........1344
Robert C. O'Connell........1112
Cassius M. Doty............1067
Matthew D. Hartigan....... 951
Alfar M. Eberhardt......... 879
Frank H. Bicek............ 787
Jay A. Schiller............. 760
John Richardson 553
Charles L. Swanson........ 510
Thomas J. Sheehan........ 424
N. A. Lawrence........... 383
Thomas A. Green.......... 368

The following members of the Association constituted the Canvassing Committee: Erwin W. Roemer, Chairman, E. J. Camit, Vice-Chairman, Louis W. Becker, Jr., Frederick D. Carroll, Seymour J. Frank, Karl M. Gibbon, Martin S. Gordon, Arthur A. Maina, Clarence L. Maltby, Thomas B. Martineau, Justin H. McCarthy, John P. McGoorty, Jr., P. D. Miller, Thomas L. Owens, Judson L. Parker, Joseph A. Struett. James H. Turner.

Another Bar Primary was held October 25th to 29th with respect to those who filed petitions to have their names placed on the ballot for Associate Judge of the Municipal Court to fill the vacancy caused by the resignation of Hon. Robert E. Gentzel.

Number of ballots counted..2523

The several candidates received the number of votes set opposite their respective names.

James H. Poage............**641**
J. Kent Greene.............574
W. R. Matheny.............347
James F. Fardy.............245
C. Thomas Hanley..........130
Hyland J. Paullin............100
Pearl M. Hart.............. 90
Harold P. O'Connell........ 69
Mary Berkemeir Quinn...... 49
Thomas J. Shaughnessy..... 44
Robert Berg 37
Arthur A. Maina........... 37
Charles T. Kramer......... 33
Ross Lee Laird............ 29
Alfred M. Cordell.......... 26
Joseph J. Nagle............ 25
Donald E. Malkes.......... 14
John S. O'Donnell.......... 9
Albert E. Teely............. 9
Eugene McCaffrey 8
James C. McGloon......... 7

The following members of the Association constituted the Canvassing Committee: E. J. Camit, Chairman, Edward C. Brooks. James L. Henry, R. Mundhenk, Donald R. Murray, Sidney L.

Hosea W. Wells

Hosea William Wells was born at Delaware, Ohio, January 27, 1856, one of a family of 12 children, and died of heart disease at his home, 312 South Ashland Avenue, Chicago, November 2, 1927.

He was graduated from Ohio Wesleyan University in 1874, and entered the railroad service, where he worked as clerk, telegraph operator and agent for many years.

He was married in 1884 to Virginia Isabelle Hammond, of Brunswick, Missouri, who survives him. He is also survived by his only child, George Hammond Wells, born in 1886, who served as a First Lieutenant of Engineers in the World War, and now resides in Bainbridge, Georgia.

Hosea William Wells entered the Union College of Law in Chicago in 1887, and was graduated and admitted to practice in 1889. He practiced law in Chicago for seventeen years and was a member of the firm of Bowersock & Wells.

In 1906 he was elected an Associate Judge of the newly constituted Municipal Court of Chicago, to which position he was re-elected successively so that he served on that Bench (except for a period of about four months, December, 1914, to April, 1915) continuously till 1923, when he was elected to the Superior Court of Cook County.

In 1927 he was appointed by the Judges of the Supreme Court of Illinois, as one of the Judges of the Appellate Court at Chicago, in which capacity he was serving at the time of his death. This last honor was richly deserved as a reward for long and efficient service and was greatly appreciated by Judge Wells.

A resolution adopted on November 3rd, 1927, by the Judges of the Superior Court of Cook County, Illinois, was in part as follows:

"Judge Wells was a profound thinker, a clear and logical reasoner. In the trial of his cases his mind sought immediately the real issue and he had the capacity to strip away at once all that was insignificant and not germane, and reduced the issue to the very kernel of it. He was a firm, fearless, incorruptible man, and yet a lovable and kindly character. The practice of law and the duties of the judgeship were more than a means of livelihood with him; they were the very meat of his existence. . . .

"In the discharge of his judicial duties he was patient and extremely painstaking. He was courteous in his contact with the Bar and always anxious and alert to reach correct conclusions.

"His judgments were sound and remarkably free from error, as the opinions of the Courts of Review amply demonstrate. We profoundly lament the death of Judge Wells, as a great loss to the Court which he so largely adorned and to the City and State which he so ably and faithfully served."

Julius Reynolds Kline

Colonel Julius Reynolds Kline, a member of The Chicago Bar Association since 1906, died at Springfield, Illinois, on December 20th, 1926.

Colonel Kline was born in Philadelphia, December 15th, 1865. He was educated at the Pennsylvania State Normal School, Alleghany College and Midland University, from which latter institution he received the degree of LL. B. In 1886 he took up his residence in Chicago. He was admitted to the Bar of Illinois in 1891, and thereafter practiced law here until his death. While in Springfield attending a session of the Supreme Court on December 17th, 1926, he was stricken with pneumonia and died after an illness of three days.

Colonel Kline had many interests outside of the practice of his profession. He was a professor of law in the Chicago Law School and took a great interest in public affairs, particularly in State and Federal military matters, serving as Adjutant General of the Illinois National Guard, and Commander of the Illinois Naval Reserve. At the time of his death he was Lieutenant Colonel in the Reserve Corps, Chief of Specialists Section Sixth Corps Area of the United States Army. During the World War in 1917 he was ordered on active duty and assigned to technical and military formation of training camps. He served under the Provost Marshal General's office in the application of the Selective Service Act, and prepared bulletin number five issued by the War Department, and officially used by the local draft boards, for information and instruction of all men of selective service. He was also the author of "Active Duty," an officer's hand book for use of troops regulating internal disturbances and guard duty.

Colonel Kline was an eloquent and forceful speaker, and was frequently called upon for addresses on public and political topics.

On June 3rd, 1899 Colonel Kline married Miss Helena Weiler, of Buffalo, New York, who, together with his brother, Albert R. Kline of Denver, Colorado, survives him.

William K. Pattison

William King Pattison, who passed away November 10, 1927, after a long illness, was born 70 years ago at Thorold, Ontario, Canada. He attended school at St. Catharines, Ont., and at the University of Toronto, and was graduated at Upper Canada Law School. He was called to the bar in 1879, and practised his profession at St. Catharines, where he rose rapidly in public esteem and was chosen Liberal candidate for the Dominion Commons, failing of election by only a few votes. His campaign marked him as a man of unusual gifts. In 1893 he moved to Chicago and with George Shaw, another son of Ontario, Mr. Pattison formed a partnership which continued many years, until Mr. Shaw's death. Later, he took into partnership under the firm name of Pattison & Vise, Isidore Vise, a young Torontonian, who had studied in his office.

Mr. Pattison was a man of sterling patriotism, fervently loyal to both the land of his birth and the land of his adoption; he was one of the founders and for many years president of the British Empire Association. During the World War he was very active in relief work, and was an inspiration to all other compatriots in city and state. One of his chief interests was closer Anglo-American friendship, and in recent years he had been president and business manager of two newspapers, the British American and the Canadian American. Besides his widow, Mrs. Margaret Campbell Pattison, Mr. Pattison is survived by a brother, Thomas F. Pattison of Thorold, Ont., and a sister, Mrs. Jean Bunting of Junkins, Alberta.

LIBRARY OF THE CHICAGO BAR ASSOCIATION

New Books and What the Reviewers Say of Them.

Items from the Law Reviews.

The review in this number of the contents of the Law Quarterly Review for July, 1928, is from the hand of Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario, to whom we desire to express our thanks. We may add that Judge Riddell has promised us further help during the year 1928-9.

LAW QUARTERLY REVIEW

The Law Quarterly Review, which owes its origin to Sir Frederick Pollock, its first editor, is now approaching the end of its 44th volume: the interest and value of the publication have not fallen away.

For many the most interesting part of the latest number (July, 1928) is a letter from Sir Leslie Scott, K.C., Counsel for the Standing Committee of the Chamber of Princes of India, upon the legal and constitutional problems presented by the relationship between the Government of British India and the Indian States.

While on the map and in the popular mind, Britain "owns" Indian and India is a "possession" of Britain, the fact is that nearly one-third of India, composed of many states with over seventy millions of people, is not properly speaking British at all. The Princes of this part of India have renounced the right to make war. The whole matter of defence and foreign relations has been placed in the hands of the Crown and the Crown has agreed to protect these States from danger, external as well as internal, "to preserve their frontiers, their constitutions and their rulers" and "to keep available all necessary naval and military forces." This kind of relationship is unique, nothing like it has ever been seen in the world before — and neither International Law nor Municipal Law has any precedents whereby the conduct of the parties may be guided.

Sir Leslie makes clear some points in this peculiar relationship — (1) the determination of Britain to keep her bargain with the Indian States; "perfidious Albion" was a characterization which Napoleon tried hard but failed to attach to her; (2) with the contract the East India Company and the Government of British India had nothing to do — the contracting party was and is the Crown; and (3) the relationship is legal, not arbitrary—based on contract, not fealty or the like.

So far, all is plain sailing: in (4) the proposition is laid down that "The Princes in making [the contracts] gave their confidence to the British Crown and Nation; and the Crown cannot assign the contracts to any third party. The British Government as paramount power has undertaken the defence of all the States and therefore to remain in India with whatever military and naval forces may be requisite to enable it to discharge that obligation. It cannot hand over those forces to any other Government — to a foreign Power, such as France or Japan; to a Dominion Government, such as Canada or Australia; not even to British India." No doubt this is sufficiently accurate for practical guidance at the present time—but is it theoretically true? and may changing circumstances not affect its practical application?

The contracts were technically between the Princes and the Crown — not the Princes and the British Nation, nor between the Princes and the British Government. While undoubtedly neither the people nor the Government of the British Isles would under any circumstances permit the promises of the Crown to be broken, neither of them is the contracting party. Within our own time a revolution has taken place in the conception of the relations of the Crown to the People of the Empire outside of the British Islands. Until but the other day, it was considered that the Crown must be guided in all things by the advice of the Ministry at Westminster—that the Governors sent out to the "Colonies" were subject to the orders of that Ministry and that all legislation was subject to review by it. It is now recognized that there are as many "British Governments" as Dominions, Union, Free State, whatever name the self-governing British country may have; that each of such British Governments advises the Crown through the Governor who now represents the Crown and not the Administration at Westminster, which keeps its hands off. The rest of the Empire is no longer "possessed" by the British Isles.

A real effort is being made to bring British India up to the level of Canada and the Irish Free State, and, if and when that succeeds, there will be no more anomaly in the Crown placing its Indian obligations in the care of the British Government of British India than in placing the making of treaties affecting Canada in the hands of the British Government of Canada—which would have been scoffed at as a wild piece of Republicanism a few years ago.

* * *

Of the cases reviewed Konskier v. B. Goodman, Ltd. [1928] 1 K. B. 421; 97 L. J. K. B. 263 (C. A.), deserves notice as applying an old principle to a new state of facts. It is now elementary law that a continuing trespass gives a new cause of action de die in diem: Holmes v. Wilson [1839] 10 A. and E. 503: in the case in review, A gave the defendants a license to pull down a chimney on his premises, they undertaking to restore it and make good any damage; they left rubbish on the roof of A's house which he afterwards let to the plaintiff. A rainstorm coming on, the plaintiff was damaged. The defendants were held liable as trespassers.

Rex vs. Denyer [1926] 2 K. B. 258; 95 L. J. K. B. 699, draws the distinction, not always recognized in practice, between a legitimate demand for money accompanied by a threat expressed or understood and blackmail. This case, however, has been unequivocally declared to be wrong in law by the Court of Appeal in Hardy vs. Chilton, 44 T. L. R. 470: the Chief Justice has since said that notwithstanding this case, the Denyer decision will be followed in the Court of Criminal Appeal unless and until overruled by the House of Lords. In this unsatisfactory state of the decisions, it would not appear to be safe to rely upon any.

The prima facie permanent and irrevocable character of a contract is again emphasized in Crediton Gas Co. vs. Crediton Urban Council [1928] 1 Ch. 174; 44 T.L.R. 369; but the limitations of the principle are made equaly clear. The Company agreed to light the Municipality's public camps "from and after the first day of September in every year up to the following first day of May inclusive." This was held by Russell J. and the Court of Appeal revocable on reasonable notice.

That manufacturers and wholesale vendors of particular goods are in their contracts with dealers as to the sale price to the public bound by Lord Macnaghten's classical judgment in Nordenfelt vs. Maxim Nordenfelt Co. [1894] A. C. 535 that the contracts must be reasonable both in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, is reaffirmed by the Court of Appeal in Palmolive Co. vs. Freedman [1928] 1 Ch. 264; 97 L. J. Ch. 40; and "that schoolgirl complexion" must be attainable on reasonable terms.

"Money" in a will may mean pretty near anything according to the context; and "the fact that there was no context in itself constituted a context," in Gates, In the Goods of [1928] P. 128; 97 L. J. P. 76, in which the will read "I leave all my money to A. B."

A woman who has committed adultery has no right to pledge her husband's credit in employing a solicitor to sue for divorce,—so said Durnford vs. Baker

[1924] 2 K. B. 584; 97 L. J. K. B. 866; now Arnold and Weaver vs. Amari [1928] 1 K. B. 584; 97 L. J. K. B. 238, decides she is in the same case when she is defendant in divorce proceedings, — and the fact that the Solicitor was not aware of her sin does not help.

The rights of a bare licensee when he is injured by an accident happening upon premises through which he is moving receives careful attention in Coleshill vs. Manchester Corporation [1928] 1 K. B. 776; 97 L. J. K. B. 229, by the Court of Appeal reversing the Court below and emphasizing the dictum (not universally accepted, be it said) of Lord Sumner in Mersey Docks and Harbour Board vs. Proctor [1923] A. C. 253; 92 L. J. K. B. 479 that a thing cannot be a trap where a reasonable man would have expected or suspected its existence. Probably, the last word has not been said on this subject.

* * *

In the articles we may pass over the second part of The Use of the Injunction in American Labor Controversies by Professor Felix Frankfurter and Nathan Greene, containing as it does a full, careful and, so far as I have tested it, accurate quotation of the cases and discussion of the principles.

A very elaborate article on Law Reform by Professor Percy H. Winfield, Rouse Ball Professor of English Law, Cambridge,—his Inaugural Lecture, given for the reason that he "wanted to give one,"—gives some glaring instances of English Law which call for improvement —"Land law . . . on its conveyancing side is still in a shocking condition . . . it takes tenfold more time and expense to get ownership of a bicycle shed than . . . of a diamond necklace worth £20,000." (Why, of course, a necklace is personal property, but a bicycle shed is land and therefore sacred,—an Englishman should no more complain of this than of the practice of punishing much more severely the theft of stealing a watch than kicking the owner's ribs in.) The Statute of Frauds, every clause of which has "cost a subsidy," receives its share of reprobation—its "framers . . . compassed earth and sea to make one reform and left the law twofold more the child of Hell than before." Perhaps so; it depends on one's conception of what is a child of Hell—and it looks at this distance a little odd to see a professor claiming an infernal parent for his subject. Codification, i. e., general codification, is impossible, but piecemeal codification has been successful. Without a revolution, "codification will not rid us of case law . . . legal habits are too strong to abandon judge-made law." Textbooks too often do not "attack the law in really scientific fashion" — there speaks the professor, not the active practitioner —a Bentham, not a Fry. Legal history and the early records are neglected: and the civil Law should be more studied— "in a modest way, we might begin with a comparative study of Scots law"; the lack of this "seems to be a defect in Scotch management of the British Empire."

The article on Matrimonium Juris Gentium by Professor P. E. Corbett is a careful discussion of the Roman law as to marriage between persons one or both being aliens, conubium being in some cases an element to be considered. The author, who is a Gale Professor of Roman Law at McGill University, Montreal, is eminently fitted for his task and it has been well done; the article does not lend itself to quotation.

Professor Edward Jenks' article on Recent Changes in Family Law deals chiefly with four recent Statutes, The Guardianship of Infants Acts, 1925, The Summary Jurisdiction (Married Women) Act, 1925, the Legitimacy and the Adoption of Children Acts of 1926. He vents indignation—wholly justified—upon the draftsman of the third of these, who "has surpassed himself in iniquity" in drawing the Schedule to it. This Act seems to me to be the only one of the four we need speak of here. We have all thrilled when we read of the Lords at Merton some seven centuries ago when "all the Bishops requested the Peers to consent that children born before marriage should be legitimate as those which are born after marriage, because the Church esteems them so. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliae mutare, quae hucusque usitatae sunt et approbatae"—and all the earls and barons with one voice answered that they would not change the laws of England hitherto used and approved (1235-20 Henry III, c. 9). The Lords, backed by the Commons, persisted in punishing innocent but unfortunate children in this way until 1926. An Act closely resembling that of 1926 would probably have been passed some years earlier but for the War. By the Act of 1926, a person born out of wedlock is made legitimate for all but political privileges by the subsequent marriage of his natural parents; — from a filius nullius he becomes filius mariti. There is indeed an exception due to the Bishops in the House of Lords—the legitimation does not take place where at the time of the birth of the child either parent was married to a third person.

A. W. Wright gives the first instalment of an article on French Criminal Procedure, which may be left until the Article is complete—it may, however, be noted that the author insists that "in

spite of a fairly widespread belief to the contrary outside France, the whole system of French criminal procedure is based, as in England, on the presumed innocence of the accused"; and it will be interesting to watch the development of this thesis.

The recent publication by the Selden Society, London, of the Liber Pauperum of Vacarius under the very competent editorship of Dr. de Zulueta has led Professor H. D. Hazeltine to write an article Vacarius as Glossator and Teacher. Vacarius, educated at Bologna during the most brilliant period of the history of that famous school of the Civil Law, was brought to England in 1145, and, as Professor Holdsworth says, he was "the first teacher and real founder of the study of the Civil and Canon Law" in England. Indeed, in Oxford he founded the teaching of law in the Universities, the only kind of law there taught till Blackstone's time and the kind of law that lies behind the Degrees in Law given in course. He produced his Liber Pauperum (Book of the Poor) about 1149. The teaching of the Civil Law was forbidden for a time by King Stephen but the ban was removed and Vacarius continued his activities. The author and the book are somewhat fully discussed in the article.

* * *

We find reviews of Professor Edward Jenks' The Book of English Law, "a book to reckon with and a book to reckon by"; E. Williams' Early Holborn and the Legal Quarter of London, "exact topographical descriptions of the district of Holborn, together with many illustrations and maps . . . peculiarly interesting to lawyers . . .." The British Year Book of International Law, 1927, as to which "it is always a pleasure to review this annual and the editors are to be congratulated on the high standard which they have consistently maintained from the first volume onward . . . the Year Book is as useful and complete as ever"; Julius Goebel's The Struggle for the Falkland Islands, "a book which shows much careful research and thought but is lacking in . . . judicial spirit": Annuario di Diritto Comparato by Professor Galgano, showing "an increasing interest shown by Italian lawyers in the study of Comparative Law"; Dr. Barda's L'Execution spacifique des Contrats a "contrast between the vigorous applications on the Continent of the maxim 'nemo potest praecise cogi ad factum' with the English law of Specific Performance"; Prof. Holdsworth's The Historians of Anglo-American Law, a "stimulating treatment of the development of legal history,"—and some works of purely English interest.

WILLIAM RENWICK RIDDELL

ADMINISTRATIVE LAW

Administrative Justice and the Supremacy of Law. By John Dickinson. Harvard Studies in Administrative Law, Volume II. 1927. Cambridge: Harvard University Press. Pp. x, 403.

The host of present day administrative tribunals and the body of administrative law which is being generated by them, are gradually commanding a place of their own in legal literature. The vital problems in the field are of decidedly recent origin and it is not surprising, therefore, that literary development of the modern phases of the subject is just beginning to appear. When the early books of Wyman (Principles of Administrative Law, 1903) and Goodnow (Principles of Administrative Law in the United States, 1905) were written, the authors were more or less completely oblivious to the troubles of the present day. Their treatises dealt primarily with the law of public officers as executive officials. Since then the "quasi-judicial" function, with all that it connotes, has stepped into the stellar role. . . .

[The book] is a huge job, well done. No student of administrative law can afford to content himself with less than the most careful study of it. And as for "the eleventh-hour brief-maker," while he may not be able to turn to black letter type for aid and comfort in his immediate task, he may well reserve a few evenings to learn from this book of the extraordinarily vital processes which are taking place on the fringes of the law. The stimulation derived will leaven the routine of winning cases in the better beaten paths of the game, and a delightful literary style will make the time consumed pleasantly spent.

—E. Blythe Stason in 26 Mich. Law Rev. 590. (March, 1928.)

Federal Health Administration in the United States. Harper's Public Health Series. By Robert D. Leigh. 1927. New York; Harper and Brothers. Pp. 687.

This is a well-written and interesting description of the public health services of the United States Government. . . .

The book does not purport to be a study in administrative law, but is rather an account of how federal health functions developed, and an analysis of their present problems. The book is on the whole non-technical, and for this reason lays a better basis for an understanding of the problem, and of the need for a more effective co-ordination of the various federal agencies now performing public

health functions. The volume is interesting to read, and its readableness is promoted by the printing of notes at the end of the book rather than at the bottom of pages. An extensive bibliography and an adequate index add to its usefulness.

—Walter F. Dodd of Yale Law School, in 41 Harvard Law Rev. 816. (April, 1928.)

AIR LAW

State Certification of Aerial Carriers— The enactments by the Federal Congress of the Air Commerce Act and by numerous states of the Uniform Aeronautics Act and other comprehensive aerial legislation, have given to aeronautics an unprecedented vitality. This has been manifested in the establishing of privately owned and operated aerial lines throughout the nation, in the insuring of such operations, and in a hundred other ramifications. It is inevitable that the companies which undertake the operation of air mail routes under the provisions of the Air Mail Act, whereby the Postmaster General was instructed to contract for private operation of such lines, should not confine themselves to the carriage of mail. Their expansion into carriers of passengers and property for hire is a foregone conclusion. This development into the field of common carriers will bring the companies within the purview of public service commissions in the various states, and there will arise the question of the necessity of the certification of such aerial companies by the state commissions. . . .

We must conclude that an interstate carrier by aircraft is not required to apply to the public service commission of a state for a certificate of public convenience covering its operation in interstate traffic, and that a state commission can exercise authority over such a carrier only insofar as the carrier engages in intrastate commerce within that state. If this allows such carriage to rest largely within the unrestrained will of the individual, the only apparent solution is further legislation upon the matter by Congress.

—Roger F. Williams in 76 U. of Pa. Law Rev. 585. (March, 1928.)

The Law of Aviation. By Rowland W. Fixel. 1927. Albany: Matthew Bender & Co. Pp. xv, 403.

Law of the Air. By Carl Zollman. 1927. Milwaukee: The Bruce Publishing Co. Pp. xvi, 286.

To anyone who is called upon to examine authorities on questions relating to aviation in the course of his practice any book rescuing him from interminable searches through improperly indexed works is welcome indeed. In so new a subject as aviation three things are needful.

First: Such actual scattered decisions as exist directly passing on aviation questions proper.

Second: Ready reference to statutes on the subject.

Third: A careful selection of analogies with supporting cases on questions that are still open and undecided by direct decision or by legislative act.

The two books by Mr. Fixel and Professor Zollman are complementary to each other and together meet the requirements suggested, of anyone, whether student or practitioner, who is interested in the law of aviation. . . .

In case of an airplane accident a practitioner would turn to Mr. Fixel's work to see whether the particular state in which the accident occurred had, as has Connecticut, a statutory rule that applies the ordinary rule of negligence to aircraft cases or not. He would turn to Professor Zollman for a collection of authorities on the general question of negligence in the absence of statute.

Neither author emphasizes sufficiently the question as to the measure of responsibility that is to be placed upon the shoulders of the operator of aircraft. Both dwell on the propriety of a rule of absolute liability where damage occurs to a person on the ground. Neither stresses the fact that the liability to passengers is, with the exception of Connecticut and probably Massachusetts, a wide open question, the decision of which in particular states will have great bearing on the development of aircraft. Finally, while we can agree with both writers that the claim of the landowner to the airspace to the skies is an outworn formula, we might properly ask for light as to the correct answer to the converse of the question, which is, admitting that the landowner does not own to the skies, does he have any ownership, aside from the right to complain of nuisance, in any air space whatever?

—Chester W. Cuthell in 37 Yale Law Journ. 687. (March, 1928.)

The Vertical Extent of Ownership in Land. By Stuart S. Ball in 76 U. of Pa. Law Rev. 631. (April, 1928.)

The advent of the aeronaut has created the possibility of a number of unprecedented factual situations to confront our courts. The law has inherited, in its sonorous latinisms and quaint medieval conceptions, a storehouse in which imag-

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ELECTION TUESDAY, NOVEMBER 6th, 1928

VOTE THE CHICAGO BAR ASSOCIATION RECOMMENDATIONS

FOR STATE'S ATTORNEY

◯ DEMOCRATIC	Votes	◯ REPUBLICAN	Votes
☐ WILLIAM J. LINDSAY	1111	☒ JOHN A. SWANSON	1545

Candidates for Judges on a SEPARATE JUDICIAL BALLOT
FOR ASSOCIATE JUDGE OF THE MUNICIPAL COURT FOR FULL TERM

◯ DEMOCRATIC	Votes	◯ REPUBLICAN	Votes
☐ MATTHEW D. HARTIGAN	951	☒ THEODORE F. EHLER	2214
☒ PHILIP J. FINNEGAN	1940	☒ WILLIAM E. HELANDER	2015
☒ FRANCIS B. ALLEGRETTI	1785	☒ HOWARD W. HAYES	2296
☒ FRANK M. PADDEN	2157	☒ FREDERICK W. ELLIOTT	1669
☐ THOMAS J. SHEEHAN	424	☐ ALFAR M. EBERHARDT	879
☒ FRANCIS BORRELLI	1521	☐ CHARLES L. SWANSON	510
☒ DONALD S. McKINLAY	1671	☐ WILLIAM B. GEMMILL	1344
☐ THOMAS A. GREEN	368	☐ ROBERT C. O'CONNELL	1112
☐ N. A. LAWRENCE	383	☒ ALFRED O. ERICKSON	1537
☐ FRANK H. BICEK	787	☒ JOHN F. HAAS	2135
☐ JAY A. SCHILLER	760	☒ JOHN R. PHILP	1410
☐ CASSIUS M. DOTY	1067	☐ JOHN RICHARDSON	553

FOR ASSOCIATE JUDGE OF THE MUNICIPAL COURT TO FILL VACANCY

The Bar Association recommends ☒ JAMES H. POAGE.......................... 641

The Chicago Bar Association, after careful examination and report by its Committee on Candidates, by vote of its members, recommends and approves the candidates marked thus ☒. The number of votes received at the Bar Primary is set opposite each name.

THE RECOMMENDATIONS OF THE CHICAGO BAR ASSOCIATION ARE NON-PARTISAN. FOR THIRTY YEARS THE CHICAGO BAR ASSOCIATION HAS BEEN HOLDING BAR PRIMARIES. IN THAT PERIOD ITS MEMBERS HAVE DEMONSTRATED THAT THEIR VOTING IN BAR PRIMARIES, WITHOUT EXCEPTION, IS FREE FROM POLITICAL BIAS, AND THAT IN MAKING THEIR RECOMMENDATIONS TO THE PUBLIC THEY VOTE AS MINISTERS OF THE LAW AND AS PATRIOTIC AND LOYAL CITIZENS, IN KEEPING WITH THE GREAT TRADITIONS OF THE PROFESSION.

EMPLOYMENT SERVICE

Applications for employment as law clerks and associate lawyers are always on file at the rooms of the Association. Members should not fail to make use of this service provided by the Association. Phone State 3267.

THE CHICAGO BAR ASSOCIATION
RECORD
PUBLISHED MONTHLY
Vol. 12 CHICAGO, NOVEMBER, 1928 No. 2

JUDICIAL CAMPAIGN COMMITTEE

ALL DAY LONG on Election Day voters moved their pencils back and forth across the ballots. At times it seems as if they felt an impression abroad that they did not know how to split their ballots and were determined to show what they could do. The result of the judicial election alone shows amazing discrimination exercised by the electorate. It was a demonstration that when voters know how they want to vote they can split any sort of ballot provided them. This should instil new hope in the Bar Association in its efforts to secure the election of a good judiciary.

Its problem is to drive home the merits of candidates approved at its primaries in such convincing fashion that voters will want to vote for them.

This the Association now proposes to do through the vehicle of a Judicial Campaign Committee, the details of which are described in this issue of the Record. This Committee will provide every ward and town in the county with a non-partisan group of disinterested lawyers charged with the function of advising the electorate concerning the judicial candidates approved by the Association. Effective work by it will do much to induce voters to decide on competent judges. They have demonstrated that when once their choice is made they know how to use their pencils.

THE
CHICAGO BAR ASSOCIATION
RECORD
Published Monthly

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William S. Warfield, III.

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Vol. 12 November, 1928 No. 2

CHRISTMAS SPIRITS—1928

Tuesday and Wednesday, December 18 and 19, will see the return of our "Christmas Spirits—1928" in the Bar Association dining room. Music and songs have been completed and all is ready for the first rehearsal to be held early in December. Every human precaution has been taken to preserve strict secrecy, but as the cast is made up almost entirely of lawyers a rumor persists that the episode will disclose an astonishing December Term of the Grand Jury of the World Court.

This year members will be permitted to invite guests including ladies. Watch for further announcements.

BAR ASSOCIATION CANDIDATES SCORE VICTORY

At the election held November 6th the candidates for state's attorney and for judges of the Municipal Court scored the most sweeping victory that has been won by the Bar Association ticket in recent years. Judge John A. Swanson was elected state's attorney by a plurality indicated by the official returns to be in excess of 151,000 votes over Judge William J. Lindsay. Judge Swanson had received 1545 votes in the Bar Association primary to 1111 for Judge Lindsay.

Of the twelve candidates recommended for election to the Municipal Court for a full term eleven were elected. The candidate recommended to fill the vacancy caused by the resignation of Judge Robert E. Gentzel was not elected.

The following is a tabulation of the votes received by the various candidates in the Bar Association primary and the election. The number of votes received in the Bar Association primary appears in parenthesis. Only those who were endorsed by the Bar Association or who were actually elected are included in the following list:

For Judge of the Municipal Court, full term

Candidate	Primary	Election
Haas, R.	(2135)	593,640
Allegretti, D.	(1785)	589,940
Padden, D.	(2157)	589,072
Borrelli, D.	(1521)	581,620
Helander, R.	(2015)	574,901
McKinlay, D.	(1671)	574,466
Hayes, R.	(2296)	569,165
Elliott, R.	(1669)	552,896
Ehler, R.	(2214)	552,550
Finnegan, D.	(1940)	546,420
Hartigan, D.	(951)	534,818
Erickson, R.	(1537)	522,187
Philp	(1410)	501,437

For Judge of Municipal Court to fill vacancy caused by the resignation of Judge Robert E. Gentzel

Candidate	Primary	Election
James F. Fardy	(245)	70,821
James H. Poage	(641)	45,312

A LETTER TO PRESIDENT GORHAM

Dear Mr. Gorham:

I want to thank you, and through you the Chicago Bar Association, for the painstaking and effective work done in connection with the last election whereby eleven of the thirteen candidates for the Municipal bench recommended by the Chicago Bar Association primary were elected at the polls. I congratulate you on this most successful outcome of your efforts.

For a number of years in voting for judges, I have religiously followed the result of your primary, and have urged many others to do likewise. I hope you will feel so encouraged over the results of this last effort that you will continue this method indefinitely, the effect of which, no doubt, will be continually to improve the quality of those who aspire to the judiciary, and raise your standards of qualifications for election.

While it is true that nine of the successful candidates were sitting judges and sitting judges naturally receive preferential consideration at the hands of voters, my analysis of the election returns indicates that the voters followed your primary recommendations in a most amazingly satisfactory manner, and this fact in itself seems to disprove the popular impression that the great mass of voters

LIBRARY OF THE CHICAGO BAR ASSOCIATION

New Books and What the Reviewers Say of Them

Items from the Law Reviews.

ACCOUNTING

Accounting Method. By C. Rufus Rorem, certified public accountant and assistant professor of accounting, University of Chicago. Chicago: University of Chicago Press. 1928. Pp. xvii, 596.

"Accounting Method approaches the important problems of business transactions as a device for measuring and interpreting these transactions. It discusses accounting as a special type of quantitative method and as a tool for economic control. The whole tone of the book emphasizes the fact that accounting is a method which, when applied to simple business transactions, becomes 'elementary accounting,' and when applied to complex situations becomes 'advanced accounting.'

"Accounting Method is practical; it lays a good, thorough foundation for an approach to accounting problems. The uses to which accounting data are to be put are emphasized at every step."
—Publisher's announcement.

ADMINISTRATIVE LAW

Administrative Justice and the Supremacy of Law in the United States. By John Dickinson. 1927. Cambridge: Harvard University Press. Pp. 403.

H. H. L. B. says (44 Law Quart. Rev. 516, Oct., 1928): "In the United States as in this country there has been an increasing challenge by government departments to the doctrine of the 'supremacy of law' which in both countries has for centuries been regarded as the cornerstone of constitutional government." "The tendency in the United States is to substitute executive regulation for regulation by law. This conflict has been admirably described by Dean Pound." A general approval of the contentions of Mr. Dickinson is expressed.

Of course, this is the old story of the professor trying to make an ideal law, and met on every hand by what most people consider the exigencies of business and everyday transactions. I have not met anyone yet who thinks that we would be better off if, instead of regulations, we always had statutory provisions: nor have I met any American or Canadian who fears for the loss of liberty because a board of police commissioners tells him what to do and the legislator does not. *Chacun a son gout.*
—W. R. R.

Constitutionality of Investigations: I. By Federal Trade Commission. By Milton Handler.

Mr. Irwin T. Gilruth writes as follows, for the Chicago Bar Association Record:

In the issue of the Columbia Law Review for June, 1928, Milton Handler, of the Columbia Law School, presents the first of a series of papers with the general title noted. This most interesting and controversial topic—the legal validity of the far-reaching powers granted by Congress—can be understood only in the light of a full knowledge of the intent of Congress and what was before it in passing the Act (U. S. Code Annot., Title 15, Ch. 2, Sec. 41).

The author has devoted his first paper to a full exposition of the means at hand for investigating the business and practices of such corporations as engaged in interstate commerce, at the time when the Act in question was passed, and the paper is particularly valuable in that it pays sufficient attention to the location of the subject within its setting. The President of the United States, in his address to Congress, January 20, 1914, attempted to emphasize the need for legislation by rehearsing the existing conditions which made the passage of legislation timely, and it is interesting to read again a few of his sentences in the light of what has happened in the years following. In speaking of interstate business, the President confidently referred to "changes which opinion deliberately sanctions and for which business waits." He said:

"It waits with acquiescence, in the first place, for laws which will effectually prohibit and prevent such interlockings of the personnel of the directorates of great corporations—banks and railroads, industrial, commercial, and public service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business. . . .

"And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

"The opinion of the country would instantly approve of such a commission. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the manager of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."

The two significant phrases in the text of the bills introduced and the congressional debates which followed were "a clearing house for the facts" and "instrumentality for doing justice to business where the processes of the courts . . . are inadequate to adjust the remedy to the wrong." The supposition that a politically created commission, armed with powers of compelling the submission of reports, answering of questionnaires and the disclosure of the records, might become a judicious (if not judicial) bureau for understanding and illuminating practices and problems of competing corporations, could only have been made by one who was not familiar with the intricacies and the difficulties inherent in the subject matter to be investigated, and not fully acquainted with the paucity of well-trained investigators, even among students who have deliberately chosen the more analogous fields, which scarcity in number is well known to university departments of research and to institutions devoted to statistical studies.

The author of the article in question exhibits his familiarity with these difficulties by his choice of historical facts which are deemed necessary for a proper introduction of any paper on the Constitutionality of "Investigations of the Federal Trade Commission," but the reader is surprised to find no doubt expressed, even in this introductory chapter, as to the inherent improbability of success on the part of those who were attempting to set up the proper machinery for the collection of facts and their interpretation.

Every director of research, in any great university enjoying traditions of scholarly thoroughness, appreciates the difficulty in finding men well equipped either properly to gather data, or properly to judge the value and significance of facts when gathered,—even though he has at call mature students who are trained in distinguishing mere inference from fact and mere assertion from trustworthy conclusions. Similar difficulty has faced governmental departments at all times in our national experience in dealing with regulations of intricate business organizations, and one is continuously impressed by the fact that the Executive and Congress were relying heavily on the history of the Interstate Commerce Commission to furnish some warrant for the hope that a commission could be devised for doing, in the general field of production, what the Interstate Commerce Commission was believed to be doing in the field of transportation.

The fact that the scope of the Interstate Commerce Commission, though broad indeed, was much narrower and much more restrictive than that of the proposed Federal Trade Commission, seemed to have raised no doubts as to the success of the latter.

Again, in the debates preceding the adoption of the sections of the Act creating the Federal Trade Commission, an interesting and valuable picture is furnished of the officers of the Government and legislators proceeding with confidence in setting up remedial agencies, having assumed the desire upon the part of the public for such agencies and the willingness, or at least the unquestioned legal duty, of compliance on the part of those with whom the Commission must deal, whose private records are the only final source of the data desired, whose purposes and policies are constantly changing and at any given time based upon the circumstances making up their commercial environment. Nowhere, from the President's message to the final vote on the Act, does it seem that Congress fully realized that it was little short of inevitable that no use could be made of the data to be collected that would be at all commensurate with the latitude of the powers granted to the commission to obtain such data. At least the futility of granting such broad powers to political appointees might have been predicted, if not questions of the constitutionality that have become increasingly clear as it has become apparent that "a clearing house for facts" has been the least of the objects which the commission has striven to attain.

However, the article is commended to all who are interested in obtaining a comprehensive view of the history and the probable future of this commission, as the author has, with great diligence, collected sufficient of the attendant facts which influenced the legislation, to enable the reader to place himself, now, more than a decade after the event, in the atmosphere of its origin.

The article does not reveal the entire scope of what will be treated under the "constitutionality of investigations," but the succeeding numbers of the paper are bound to be more valuable by reason of

story down to 1858. It breaks off in the midst of the famous contest between Lincoln and Douglas, the prelude to the Presidential election of 1860 and the Civil War. . . .

"The greatness of Lincoln has long been acknowledged by all the world, and the revelation of his imperfections, his failures and his blunders, so far from detracting from it, will but confirm the general judgment. He was great because, in spite of his imperfections, he was able to rise to the height of a great opportunity when at last it came. He was great, because amid the welter of confusion into which the country had fallen, amid all the prejudices and passions which warped the judgment of lesser men, he could keep an equal mind and judge men and affairs with an impartial eye. This was partly due to his native character; for the good-humoured young giant from the backwoods remained a good-humoured giant to the end. Partly it was due to his wide experience of men, which had taught him a large tolerance and, in the end, cured him of saying unkind things even about his enemies. And so he was able to understand and even to sympathize with the point of view of the South, even while fighting it to the death."

—The (London) Times Literary Supp., Oct. 18, 1928, p. 741.

Lincoln, Emancipator of the Nation: A Narrative History of Lincoln's Boyhood and Manhood Based on His Own Writings, Original Research, Official Documents and Other Authoritative Information. By Frederick Trevor Hill. Illustrated. New York: D. Appleton & Co. Pp. 285.

"Long an investigator and student of Lincoln's character and career, and author of two previous books about him. Mr. Hill takes up in this volume the particular phase of his public life dealing with his attitude toward and his connection with slavery and emancipation.

"Mr. Hill sets forth his documented and authoritative argument in graphic, dramatic and vigorous style to show that Lincoln's primary concern was with the saving of the nation as a whole and united, that his emancipation proclamation was not intended to and did not free all the slaves, and that negro freedom was finally accomplished by the States themselves and by the Federal amendment prohibiting slavery. The narrative and argument are brilliantly and illuminatingly handled, and no student of the subject can afford to miss the volume."

—New York Times Book Review.

Paul Vinogradoff: A Memoir. By the Right Hon. H. A. L. Fisher. 1917. Oxford: Clarendon Press. 74 pp., with portrait.

"Within the limits of a slender brochure, the Warden of New College has presented a vivid portrait of a commanding character and a just estimate of a great life work. It need hardly be said that the author brings to his congenial task all the literary accomplishment which he has previously shown in this mode. It is singularly appropriate that the biographer of Maitland should also be the biographer of Vinogradoff, and the ties which already bind together these two illustrious names gain an added strength from the tribute of a common friend.

"As the author observes at the outset, the lives of great scholars 'seldom offer the variety of interest, active or emotional, which attracts the general reader to a biography': but Vinogradoff's life forms a striking exception to this general rule, for apart altogether from its intellectual achievement it has all the drama of vicissitude and all the dignity of an undaunted struggle for passionately espoused principles . . . In the absence of autobiography, this judicious and sympathetic memoir from so practiced a pen will be of lasting value not only to Vinogradoff's pupils and friends, but to those who know him only from his printed works."

—C. K. A. in 44 Law Quart. Rev. 245. (April, 1928.)

The Late Mr. Bolland

The death of Mr. Bolland on September 27 last has removed the most active of that scanty band of scholars which, during the last sixty years, has been engaged in restoring to us our mediaeval common law, by constructing from the MSS. authentic and intelligible texts of the Year Books, and by translating those texts. Mr. Bolland began this work comparatively late in life. He was fifty-five when in 1909, on the death of Mr. L. W. Vernon Harcourt, he took over the work of editing for the Selden Society the report of the Eyre of Kent held in the years 1313-14. . . . His discovery of the Bills in Eyre was perhaps his most important new contribution to the legal history of the late thirteenth and early fourteenth centuries; for it added a new chapter to the early history of equity, and raised important questions as to the relation of the equity administered in this period by the common law judges to the equity later administered by the Chancellor. . . . In his smaller works on the Year Books, he has probably done

more than any other single man since Maitland to prove that the study of Year Books is essential to the historian of all sides of mediaeval life, and that the Year Books themselves are interesting human documents. His three lectures on "The Year Books," and his "Manual of Year Book Studies," are the best introduction to this study; and his lecture on Chief Justice Bereford, which gives us a vivid picture of a long-forgotten chief justice, shows us how much human nature there is concealed in these contemporary accounts of long-forgotten litigation. . . . Obviously Mr. Bolland's death makes this question of the future of Year Book study still more urgent. . . .

It is useless to stimulate the interest of students, unless a student can feel assured that, if and when he has made himself a competent editor of Year Books, there will be a market for his knowledge. What is wanted is a permanent fund, to be administered by some such body as the Selden Society, out of which grants can be made to competent editors of Year Books sufficient to make it worth a student's while to devote his life to this study. A fund of this kind would be the best memorial to the work on the Year Books done by such men as Maitland and Bolland, and would be appropriately called by their names.

—W. S. H., in 44 Law Quart. Rev. 22. (Jan., 1928.)

Cheerful Yesterdays. By the Hon. O. T. J. Alpers, a Judge of the Supreme Court of New Zealand. With a preface by the Earl of Birkenhead, P. C. 1928. London: John Murray, xvii and 370 pp.

"This is a charming book written by a charming man. Judge Alpers knew that he had only a few months to live when he dictated the reminiscences of his gallant and interesting life to his wife. It was a life full of adventure, and its story is told in such a rollicking manner that there is not a dull line in it. Judge Alpers was born at Copenhagen, in Denmark, and he states with justifiable pride that he was the first Dane to be chosen a Judge of a Supreme Court in the British Empire. When he was eight years old his father emigrated to New Zealand where he found the life more difficult than he had expected. Alpers worked his way through school and the university. Then he became a school teacher, with journalism as a side line. Thanks to a review of one of Samuel Butler's books he entered into an interesting correspondence with this strange genius, the letters being printed here in full. When Alpers was nearly forty he decided to enter the profession of the law. It is flattering to learn that in studying for the bar examinations he read the articles in the Law Quarterly, and, owing to his exceptional memory, he was able to quote one page almost verbatim. This feat nearly caused him to be accused of cheating. Soon after he was called, he acquired a large and varied practice, ı the course of which he defended some remarkable criminals whom he describes with humour and sympathy.

"In a short preface Lord Birkenhead pays a beautiful tribute to Judge Alpers' memory."

—44 Law Quart. Rev. 525 (October, 1928).

BLASPHEMY

A History of the Crime of Blasphemy. By G. D. Nokes. 1928. London: Sweet & Maxwell, Ltd.

A. S. D. says (44 Law Quart. Rev. 523, Oct., 1928): "This little book . . . is a very readable as well as learned work, written in polished, if somewhat ponderous, prose" [of course, we have not yet taken to writing our law in poetical form]. It is "fit to figure in a line of books, on this subject, bearing on their titlepages the names of some distinguished masters of the Common Law . . ."

—W. R. R.

BOUNDARIES

Note on Kavanaugh v. Baird, 217 N. W. (Mich.) 2, in 26 Mich. Law Rev. 906 (June, 1928).

This case holds that the meander lines on the Great Lakes conclusively fix the boundary lines for abutting proprietors, but though the abutting proprietors do not own these lands beyond the meander line, they may exercise the ordinary riparian rights over them.

An extended examination of the authorities, with special consideration of the Michigan cases, follows, and the author concludes that the principal case "in holding that meander lines are boundary lines for lands abutting on the Great Lakes, and in holding that the ordinary principles of accretion and reliction do not apply to such boundaries, is wrong on principle and is hardly supported by the Michigan cases cited."

—R. M. G.

CARRIERS

Cases on the Law of Carriers, 2nd ed. By Frederick Green. 1927. St. Paul: West Publishing Co. Reviewed by E. C. G. in 26 Mich. Law Rev. 950 (June, 1928).

The reviewer seems to think that this book is limited too narrowly to carrier cases and does not sufficiently include

cases involving the general principles of bailments on the one hand, nor on the other hand sufficient cases in the ever-growing field of public utilities in general.

—R. M. G.

CHARITIES

(See Contracts)

CITIZENS

Double Allegiance — With his usual vigor, Dean Wigmore in an editorial attacks foreign claims to continued authority over their expatriates naturalized here; he points to French laws asserting such objectionable authority; he points out the danger of divided claims to allegiance, especially in war times, and he advocates, as the only satisfactory solution, complete and formal acceptance by all powers of the doctrine of voluntary expatriation.

—J. M. C., in reviewing Ill. Law Rev. for June, 1928.

The case of *Re Mason* [1928] Ch. 385, affirmed [1928] W. N. 166; 97 L. J. Ch. 321; 44 T. L. R. 603 (see note in 44 Law Quart. Rev. 410, Oct., 1928), is of interest to all British subjects in the world, but probably not to others; and that not for the point actually decided, but for the one coming up almost incidentally and involving the legal conception of the King. Many cases are quoted, but, oddly enough, the most important, i. e., the case of the Postnati in 2 *Howell's State Trials* is not referred to.

—W. R. R.

CONFLICT OF LAWS

(See also Injunctions)

In **Re Schnapper** [1928) Ch. 420, a young lady of Frankfurt-on-Main, where by law she attained majority at the age of 18, was paid her legacy under an English will, which had been paid into court in England. This case followed In Re Hellmann's Will (1866) L. R. 2 Eq. 363, which is not much thought of in Dicey's Conflict of Laws, 4th ed., at 529, n. (t), not (f) as cited in 44 Law Quart. Rev. 404 (Oct., 1928).

Handbook on the Conflict of Laws. By Herbert F. Goodrich. 1927. St. Paul: West Publishing Co.

Professor Joseph M. Cormack of the Lamar School of Law, Emory University, reviews this book in the Illinois Law Review for June, 1928, describing it as an elementary study of the American law on the subject. He singles out for special praise the chapters on Taxation, Judgments, and Marriage; writes less approvingly of the chapter on Contract; and deplores, properly, the absence of a table of cases. An interesting paragraph of this review is as follows:

"The conception that 'movables follow the person' as a basis upon which to posit legal conclusions is well criticized . . . It is pointed out that it is but a 'maxim, which after all con but state a result, not give a reason for it' . . . Likewise it is pointed out that to say that a debtor-creditor relation has its situs or location with the debtor 'is obviously to state a result, not to give a reason for it' Notwithstanding his usual perspicacity the author seems to base his conclusion upon a similar foundation in reasoning, in regard to torts: 'The correct basis is that the foreign law (where the tort occurred) has no extraterritorial effect; and that, when the alleged tort occurred, an obligation was imposed upon the defendant, and this obligation followed the person.' The author did not, of course, originate this method of reasoning in this connection, but only perpetuates it. Similar reasoning is used in dealing with the problem of the effect to be given in other jurisdictions to the decrees of courts of equity. In neither instance is the result to be criticized. Again, in dealing with the question of the legal relations of the various parties when property sold under a conditional sale contract or subject to a chattel mortgage is removed without consent from one state to another, the author seems to base his conclusion, that the consent of the vendor to the removal should not affect his position, upon a conception that his legal relations accompany the physical property across the state line. Here the result seems to be open to criticism. The author correctly points out the artificiality of attempted solutions of problems arising under workmen's compensation laws upon contract theories."

—J. M. C.

A Selection of Cases on the Conflict of Laws. By Joseph Henry Beale, Jr. Two Volumes. 2nd ed. 1927. Cambridge: Harvard University Press. Pp. xvii, 1670.

"The selection of cases on the Conflict of Laws of which the second edition now appears, is not the least of the important contributions which Professor Beale has made towards the study of the difficult problems of this subject. The first edition, which was published in three volumes from 1900 to 1902, was a pioneer

work; taken in conjunction with the numerous articles in which Professor Beale has analyzed various problems in the field and still more with the stimulating discussions into which he has plunged the many students who have attended his lectures on the conflict of laws, it constitutes a service to the cause of legal education in this country as significant probably as that given by Justice Story almost a century before. It has been the work of a great teacher whose kindly character has never failed to kindle affection and whose remarkable skill in dialectic has inevitably driven his pupils to test the validity of even the master's premises. And this is the greatest service which a teacher can render those who hear.

"Very broadly stated, the conventional notions involved in this casebook are that the unique source materials for the study of law are the decisions of courts, that for the purposes of legal study in this country the English and American decisions are rather exclusively to be considered, and that these cases are to be analyzed as evidences of general principles of justice. Of this widely received Langdellian ideal of legal education which has been in vogue in this country for about two generations, the possibilities have been brilliantly exploited by Professor Beale in the present work. With its fundamental assumption, however, that in the field of the conflict of laws or elsewhere law consists in static principle and not in dynamic process and should be studied accordingly, the writer is finding himself increasingly, not so much in disagreement, as dissatisfied. . . . .

"The purpose of legal education in our law schools is not primarily to establish so-called fundamental principles of law in the student's mind, nor is it to make him an adroit special pleader. These things he will learn in any case, in school or later, and sometimes all too adequately. It is rather to lift the horizons of his imagination, to awaken in him social responsiveness, to equip him to solve the future concrete problems of business and to arbitrate the disputes of his fellows in an efficient and a statesmanlike manner. The circumstance to which Judge Cardozo recently alluded in the Carpentier Lectures, that the field of the conflict of laws is regarded as one in which principle and logic reign at the expense of reference to social expediency, will appear from the foregoing point of view either too unnecessarily limited in its analysis and vision or, in so far as it be true, to warrant a highly critical examination of the existing law. It is impossible that questions as to how far our courts should be open to foreign litigation and, if so, what policies shall be affirmed in their decisions, should not ultimately be settled by reference to our informed sense of justice and social necessity. . . ."

—Hessel E. Yntema of Columbia Law School in 28 Columb. Law Rev. 673 (April, 1928).

CONSTITUTIONAL LAW

Constructive and General Appearances, and Due Process. By Paxton Blair of the New York Bar. 23 Ill. Law Rev. 119 (June, 1928).

Mr. John M. Cameron writes as follows for The Chicago Bar Association Record:

Under the above title, Mr. Paxton Blair of the New York bar, discusses the question whether the due-process clauses of the Fifth and Fourteenth Amendments impose any limitations upon the power of courts to treat special appearances as general appearances conferring jurisdiction in those instances in which the defendant is held to waive the limited character of his appearance by motions going to the merits or other steps which are held to defeat the limitation intended.

York v. Texas, 137 U. S. 15, is taken as the leading case. It upheld the constitutionality of a Texas statute making a motion to dismiss a cause for want of jurisdiction over the defendant's person, a general appearance subjecting the defendant thereto. In the decision it was held that, in view of the statute, the way to avoid the jurisdiction was to remain absent, content with the right of collateral attack. As this case was the basis of like decisions upon similar statutes of Iowa and Kentucky, it might be supposed there was nothing left to consider; but the author finds in more recent holdings that the statute cannot be held applicable to suits begun in the federal courts sitting in Texas, a weakening of the Supreme Court's confidence in the doctrine of the three decisions; and he finds an inconsistency between this rule and the one which, as in *Riverside Mills* v. *Menefee,* 237 U. S. 189, upholds the right (in the absence of such restraining statutes) to question the jurisdiction in the very cause in which it was asserted. However, it is plain that the danger involved in directly contesting the jurisdiction in states following the Texas statutory rule is too great to be run, when one considers the language cited by the author from the opinion of Justice Holmes in *Chicago Life Insurance Company* v. *Cherry,* 244 U. S. 25: "If a statute should provide that filing a plea in abatement, or taking the question to a higher court should have that effect (i. e., of a general appearance) it could not be said to deny due process of law. . . .If

After this experience we look with interest in his article for any comment on us and our ways. He tells us our classic contempt instance is that of Judge Peck, who issued an attachment for contempt against an attorney practicing in his court, for publishing in a newspaper a letter which the judge deemed a libel upon him in his judicial capacity. The attorney was sentenced by the judge to one day's imprisonment and eighteen months' suspension from practice in that court. Impeachment proceedings against Judge Peck followed; and although he was acquitted by a single vote, a statute was immediately passed (4 U. S. Statutes 487 [1831]), which sought to abolish constructive contempt of this kind. Moreover, Mr. Laski points out that Mr. Chief Justice Taft has laid it down (Ex parte Grossman, 267 U. S. 87) that punishment for contempt in the presence but not in the actual view of the court, shall not be followed by the summary process applicable to contempts "committed in open court".

While we note a certain detachment in the author's reference to American courts, there is nothing of a disparaging nature. A certain complacency also (perhaps well-founded) is reflected in the following: "It may indeed be argued that the number of cases of constructive contempt in the last half century is proof both of the high reputation which the English courts enjoy and the consequent infrequency with which it has been necessary drastically to comment upon them". Although our own courts do not emerge from the article with any such commendation as this, yet there is nothing to indicate that the distinguished author bears us and our seats of learning and our courts any ill-will.

In conclusion we may say that for an interesting and discriminating presentation of the vicissitudes, in the courts and out, and in Parliament and out, of the power to punish for constructive contempt, lack of space compels us to refer the reader to the article itself. This we do with confidence; the whole subject of constructive contempt is thoroughly well handled.

Contempt by Publication in the United States. By Walter Nelles and Carol Weiss King. 28 Columb. Law Rev. 401 and 525. (April and May, 1928.)

To the Federal Contempt Statute

"Sir John Fox has shown that the modern doctrine that courts have 'inherent' power to punish summarily for certain classes of 'constructive' contempt —mainly contempts by publication out of court—is founded upon a false view of the scope of summary judicial power at common law. He concludes his work with the suggestion that many American decisions may need reconsideration.

"It might be vain to hope that a long stream of adjudication would reverse its course and flow back up-hill on news that its source was a poisoned spring. That a doctrine was founded in falsehood may not always mean that it is presently vicious. If the modern doctrine of contempt by publication were of unchallenged utility and benefit to the society in which it operates, Sir John Fox's suggestion might seem an idle pedantry, and his revelations of historic fact mere curiosities for antiquarians. It happens, however, that satisfaction with the modern doctrine is far from general; that pressure for its reconsideration arises spontaneously, irrespective of historic fallacy or sanction; and that its development in the United States has been spasmodic. We shall here present some indigenous claims for its reconsideration.

"In following its history in this country we shall find that we are dealing with two phoenixes: judicial power to punish summarily for 'constructive' contempt by publication, and objection to it by liberal-minded men. No volume and weight of adjudication can prevent such objection from rising again as often as it is overruled. And conversely, it may seem also that no volume and weight of objection can prevent the summary power from rising again as often as it is extinguished by legislation.

Since the Federal Contempt Statute

I. The Object and Meaning of the Federal Statute

"In an article in the April number, **Contempt by Publication to the Federal Contempt Statute,** (1928) 28 Columbia Law Rev. 401, we traced the early conflict in this country between the doctrine of 'inherent' judicial power to punish summarily for publications which might be held obstructive of the administration of justice, and the doctrine that the freedom of discussion inherent in free government is not subject to summary infringement. Hostility to the former doctrine resulted in the Pennsylvania Act of 1809 limiting summary judicial power, the similar provisions of the New York Revised Statutes of 1829 (which were strongly influenced by the arguments of Edward Livingston in support of his proposed Penal Code for Louisiana), and finally (following a case in which Judge Peck punished one Lawless for propaganda in aid of the validation of a mass of fraudulent land claims backed by Senator Benton and pending in the United States District Court for Missouri), in the attempted impeachment of Judge Peck and the Federal contempt statute of 1831.

II. State Legislation and Decision Before the Civil War

III. Decisions Since the Civil War

. . .

IV

"How shall we account for this subversion, accomplished mainly in the twentieth century, of a principle of American common and constitutional law and policy which was generally recognized and accepted throughout most of the nineteenth?

"Fifty-eight holdings that particular publications constitute contempt are noted in the second column of the Appendix to this article. At least thirty of these cases appear to have been incident to political situations of some intensity. In forty-two the publications impugned the fairness, independence or integrity of a court or judge.

"That the personal feelings of judges were not dormant in these cases there is much evidence . . . in the significant non-occurrence of cases of punishment for publications concerning pending litigation which are friendly to the position finally adopted by the court. It is to some extent true that appellate courts, when they are passing on questions of contempt of courts below, will reverse convictions in which personal feelings palpably entered. But the existence of comity and clannishness among judges, as among army officers or any class of persons similarly situated in station and interest, is inevitable; outside of the law of contempt it appears in the notorious reluctance of appellate courts to hold a trial judge disqualified for interest or bias.

"Friendly backing is obviously more likely than hostile aspersion to influence a judge. It is easier to close a mind than to open one. To fortify a judge in his prepossessions tends to close his mind and so impede his proper discharge of judicial function. This possibility seems never to have occurred to judicial consciousness.

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"It would be rash, of course, to draw from the decisions in a single extraordinary subject any sweeping conclusion as to the nature and tendency of law in general. But a suggestion based on observation vastly wider than ours seems pertinent: 'General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.' If we care really to know the nature of law, it will be worth while to try to ascertain, somewhat statistically, the precise measure of truth in Justice Holmes' magnificent dictum. In such an investigation most of the cases of summary punishment for publication will cry out to be counted for the affirmative. And so to count them and to analyze the nature of the intuition on which they depend may be one of many necessary steps to understanding unconfused by pious hopes and fallacies."

[In a foot-note it is stated that Illinois has had no statute since 1874.]

Character of Publications Held Punishable [Ill]: Prophecy as to decision, construed as aspersion of integrity of Supreme Court—Peo. v. Wilson, 64 Ill. 195 (1872). See *supra* note 53. Aspersion of motives of grand jury in political case—Peo. v. Severinghaus, 313 Ill. 456, 145 N. E. 220, (1924). Ascription of bias in election case—Peo. v. Gilbert, 281 Ill. 619, 118 N. E. 196 (1917).

Theory of Power [Ill.]: Inherent Power. Obstructive publications are constructively in the presence of the court. But cf. Storey v. Peo., 79 Ill. 45 (1875).

CONTRACTS

Mr. Justice Riddell writes the following note for the Chicago Bar Association Record:

Blackmail and Consideration in Contracts, an article in the Law Quarterly Review for October, 1928, by the Editor, A. L. Goodhart, is a serious and learned attempt to hold the scales between the two appellate courts in England, inferior to the house of lords, the one civil (the court of appeal) and the other criminal (the court of criminal appeal),—both statutory courts be it said. The two courts, composed of very able and experienced judges, the cream of the profession in England, differ diametrically in their conception of what constitutes blackmail as distinguished from legal consideration. Of course, the essence of blackmail is the demanding property with menaces "*without any reasonable and probable cause*": and it is upon these last words, that the two courts have parted company.

In the case of *Rex* v. *Denyer* [1926] 2 K.B., 258, decided in March, 1926, the facts were as follows: The Motor Trade Association had by its by-laws the power to place on a "stop-list" the name of any one who sold motor goods above or below a fixed price list, with the result that no member could supply such person with goods. Read, a garage-owner not a member of the association, sold or offered to sell a car below that price. Denyer, superintendent of the stop-list, wrote him that at a meeting of the association it was resolved "that you be offered an alternative to inclusion in the stop-list or payment of £250 to the indemnity fund of this association." "He did not pay, and his name went on the stop-list. This does not look much, if any, worse than a not uncommon fine by a trade union; although perhaps it may be differentiated by the fact that Read was not a member of the

association. Denyer was indicted for blackmail; convicted, he appealed to the court of criminal appeal, and his appeal was dismissed.

The sole point in the case was whether the demand which he made was "without any reasonable or probable cause." Admittedly, the association had the legal right to put his name on the stop-list: this, indeed, had been established by a court by whose judgments the court of criminal appeal was bound, the house of lords, in *Sorrell* v. *Smith* [1925] A. C. 700, approving *Ware, &c.,* v. *Motor Trade Association* [1921] 3 K.B. 40. But the court held that that did not conclude the question, as Lord Hewart, L. C. J., said, in delivering judgment, of the proposition that because the Association had the legal right to place his name on the list it therefore had the legal right to demand money for keeping his name off the list, it "is not merely untrue; it is the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent. There is not the remotest nexus or relationship betewen a right to put the name of Mr. Read upon the stop-list and a right to demand from him £257 as the price of abstaining from that course."

It is not too much to say that this decision was received with considerable disquiet and disapprobation; not only in England, but also in jurisdictions in which the English decisions are received with practically binding respect, there was much dissent among lawyers, judges and others, from the far-reaching consequences of this decision. Many could not see anything either wrong or illegal in what the accused and his association did; or anything else than a legitimate exercise of a power necessary for self-protection. But, unless and until reversed, it was law.

Then came the civil case arising out of this decision. Hardie & Lane, Ltd., had offended in the same way as Read; had been offered the alternative of paying £200 to the association's indemnity fund, and had agreed to pay; they actually paid the first instalment of £100, but, learning of the Denyer decision, they refused to pay the balance, and brought suit for the amount they had paid, as "money had and received" without consideration. The case being tried by a jury, resulted in a verdict for the plaintiffs; but this was reversed by the court of appeal,—a civil court, be it observed: *Hardie and Lane Ltd.* v. *Chilton* [1928] 2 K. B. 306, 320; 97 L. J. K. B. 539, 547.

Scrutton, L. J., went the full length: "The judge below should have withdrawn the case from the jury because the evidence showed only an agreement to forbear from doing a legal act—namely, putting the plaintiffs on the stop list, if the plaintiffs would do an act which was not unlawful, i.e., to pay money which the plaintiffs might legally pay, and the association legally receive, and such an agreement was not a conspiracy, there being neither unlawful end nor unlawful means, and there being, therefore, no evidence of lack of reasonable and probable cause for the demand." This would seem to many of us to be an alarming therefore, and we will be unable to follow the reasoning; beyond question logic of this kind might be taken advantage of by most blackmailers, all but a very few of whom offer to "forbear from doing a legal act,"—although it may at the same time be a dirty and contemptible act,—if the blackmailed "would do an act which was not unlawful, i.e., to pay money which" he, unfortunate man, "might legally pay" and the blackmailer "legally receive."

The editor thinks "the judgment of the court of appeal is correct in principle" but the dictum of Scrutton, L. J., too broad: "this dictum is wider than was necessary for the decision of the case."

In a well reasoned argument, he presses the view that the real line of distinction between blackmail and legitimate pressure (or valid consideration) will be found in the distinction drawn by the law between acts permitted but not assisted, i.e., acts legal in the sense that they are not forbidden by law, on the one hand, and acts permitted and, where necessary, assisted, by the law, i.e., acts that are laudable and so favored by the law, on the other.

If this view prevail, as it well may, the "unruly steed," yclept public policy, will be brought from the stable again, this time to do service in an entirely new species of labor; much worked, possibly, overworked, as it is, it will have another job. Good luck to it; it has done well in the past; and may have an even more useful future.

Most will agree with the reviewer (44 Law Quart. Rev. 408, Oct., 1928) that in *English Hop Growers* v. *Dering* [1928] 2 K. B. 174: 97 L. J. K. B. 569, the only surprise is in the finding of the trial judge. The defendant, a land-owner, had agreed to "deliver to the Society all hops grown by him"; just as the time came to gather the crop he leased his land to a third party. The trial judge held that he "was not in what he did disposing of hops produced, but was merely disposing of land which had hops still growing upon it." No wonder the court of appeal reversed the decision. A more arguable point arose in this case: the defendant was liable to the same penalty whether he disposed of one acre or of sixty-three; the distinction between a penalty, which

the Court will not enforce, and liquidated damages, which it will, is well recognized. In the present case, what certainly looks like a penalty was considered liquidated damages because the defendant's "action in breaking away from the pool may have the same detrimental effect on the Company, whether he breaks away in whole or in part." It can scarcely be considered that this conclusion would be come to by all courts: but with the modern principle of giving effect to the plain words of contracting parties, and leaving them to make their own contracts without any grandmotherly assistance from the courts, and then keeping them to their bargain, unless it is clearly illegal, the decision cannot be said to be unsatisfactory.—W. R. R.

Judicial Theories of the Enforceability of Charitable Subscriptions.—"Conceding that courts will probably enforce such promises when in the form of a bargain, the question remains whether the courts should not entirely throw off the yoke of technical consideration in subscription cases, recognizing that charitable subscriptions are gratuitous promises. Contract law, with its attribute of the necessity of consideration, developed entirely as a business device; a vast number of promises fall outside of the traditional purview of the law court as unworthy of attention. The charitable subscription, however, presents a situation with sufficiently important social consequences, as to justify its enforceability. Charitable institutions play an important part in the life of a community, and since under our present society these charities depend mainly on individual subscriptions, such subscriptions ought to be enforced, not on the basis of contract or estoppel, but frankly on public policy."

—28 Columb. Law Rev. 642. (May, 1928.)

CORPORATE FINANCE

Some Legal Problems Arising from the Use of Various Devices to Effect the Underwriting of Securities.

—28 Columb. Law Rev. 634. (May, 1928.)

The Influence of Securities Regulation Upon Standards of Corporation Financing. By Forrest B. Ashby. 26 Mich. Law Rev. 880. (June, 1928.)

The author in this article analyzes the various blue sky statutes and points out that the present securities acts may be divided into two main types, fraud acts and regulatory laws. The regulatory acts, primarily controlling sellers of securities, are called "Dealer-Licensing" acts under which brokers or dealers apply for annual licenses to sell for their own account securities issued by others. As contrasted with these dealer-licensing acts, other regulatory acts seek to control the securities traffic by supervising each specific issue put upon the market. These latter acts are called "Specific-Approval" blue sky statutes and under them, vendors of securities (whether issuers selling their own issue or professional dealers selling the issues of others) must submit to the Securities Commission detailed information to prove the honesty and merit of their proposed flotations and receive permission from the Commission to sell.

The author then goes on to consider the various departments of corporate finance and to show how each of these departments is influenced by these regulatory blue sky laws. The conclusion is reached that as a result of these laws, the standards of corporation financing have been greatly raised.

The article is a thoughtful bird's-eye view and analysis of present day blue sky legislation and its effect upon corporate finance is general. No statutes are quoted and there are no specific references to particular legislation. The article would be highly instructive to a student taking an elementary course in corporation law, but it is not of any practical value to an active practicing attorney.—R. M. G.

CORPORATIONS

The General Corporation Law of the State of Delaware Annotated. By Josiah Marvel. 3rd ed. 1927. Wilmington: Corporation Service Co. Pp. xxi, 284.

Corporation Procedure. By Thomas Conyngton and R. J. Bennett. Revised by Hugh R. Conyngton. 1927. New York: The Ronald Press Co. Pp. xx, 1479.

"Mr. Marvel's first two editions sold to capacity (see Preface); and the third will no doubt enjoy the same success so long as Wilmington and Dover remain cities of refuge for corporations. This third edition was in a sense compelled by the never to be sufficiently admired Amendments of 1927. Of these Mr. Marvel says (see Preface) that they are 'in keeping with Delaware's settled policy to provide a thoroughly modern, workable, and comprehensive Corporation law.' But even he is not rash enough to offer an interpretation of the new Section 34 on dividends, passed as a result of the decision in the Wittenberg case. Surely the Delaware legislature moves in mysterious ways. . . .

"The new edition of Conyngton com-

A Handbook on Hanging. By Charles Duff. (The Cayme Press.)

". . . Mr. Duff is desirous of bringing capital punishment into disrepute; and had he been a more assured artist in irony this small book would have done very much to achieve his object. As it is, the authentic facts and horrible details which he here presents are, of themselves, sufficient to fill with doubt the most complacent of conservative penologists . . . Much the most telling pages are those occupied with verbatim quotations from the autobiography of the late Mr. Berry. Mr. Berry's specialized devotion to the technicalities of his craft, his artistic detachment, and his complacency are more than Gilbertian. One of his proudest achievements was his celebrated formula $\frac{412}{\text{Weight of the body in stones}} =$ length of drop in feet. Not that he was unduly vainglorious. 'My method of execution,' wrote Mr. Berry, 'is rather the result of gradual growth than the invention of any one man.' But no hangman can ever have been more mathematically curious and calculating. . . . And we must all feel easier for the assurance, by so leading a participant, that 'in carrying out the last penalty of the law, everything is conducted with docorum and solemnity.'"

—The (London) Times Literary Supp., Oct. 18, 1928, p. 757.

CRIMINAL LAW

A Treatise of the Law of Crimes. By William L. Clark and William L. Marshall. 3rd ed. by Judson A. Crane. 1927. Chicago: Callaghan and Co. Pp. lxix, 794.

"If the events of the past six or eight months mean anything, a seer might well look into the future and predict that the subject of criminal law will shortly receive the attention that its importance deserves. Barely a year has passed since the rather pessimistic pronouncement of Dean Pound at the annual meeting of the Association of American Law Schools concerning the dearth of good works, case or text, on the subject of criminal law. During that time Professor Sayre's excellent casebook has made its debut, as has Professor Keedy's new casebook on the administration of the criminal law, and the third edition of that admirable little handbook, A Treatise on the Law of Crimes by Clark and Marshall, has been revised, and has been presented to us by Professor Crane. With these three in one year, it would appear that the future is rosier than anticipated.

"Clark and Marshall's work on Crimes first appeared in two volumes, being published in 1900. The second edition followed shortly thereafter (1905), this edition being in one volume, the revision having been made by Herschel B. Lazell. With reference to the second edition one reviewer said: 'The lawyer who wants a ready reference handbook on the criminal law, in small compass, without discussion of the unusual questions, nor a very exhaustive collection of the decisions on any point, will find this book well suited to his use.' The book has certainly met the expectations of the earlier reviewer. . . . Where the impress of the new editor is evident, it gives one the feeling that the publishers should have let Mr. Crane write his own book, as did Mr. Ballantine in his recent book on Corporations, around the skeleton of the old work, and with a present day freshness.

"As to the mechanical features of the new edition, the improvement is noticeable in the double column notes and better print."

—Norman D. Lattin in 26 Mich. Law Rev. 837 (May, 1928).

DAMAGES

Trial—Apportionment of Damages Between Joint Tortfeasors.—In a suit to recover damages for an accident resulting from the joint negligence of the railroad company and its engineer, the jury assessed the damages against each of the defendants separately at $16,000. Held, this was an attempt to apportion damages between joint wrongdoers, hence the verdict must be set aside. Ross v. Pennsylvania R. Co. (N. J. 1927) 138 Atl. 383.

. . . If the court dismisses the jury without having the verdict reformed, as in the principal case, is there no alternative other than a new trial? In Bartlett v. Hammond, where the trial court after dismissing the jury rendered a joint judgment and inserted therein the single amount, the supreme court criticised this action as amounting to a joint judgment rendered on two separate verdicts. Was this a proper construction of the verdict? In construing a verdict as joint or several, the court should presume that the jury heeded its instruction to return a joint verdict. In the principal case, the plaintiff below was willing to have the verdict construed most strongly against himself, as an award of $16,000 against both defendants, instead of against each. It is difficult to perceive what just end could be served by setting aside the verdict on the technical ground that its wording indicates "an intention to apportion the damages as between the two defendants."

It would seem that the court might have regarded the verdict as defective in form only, and disregarded the words of severalty as mere surplusage, thus construing the verdict as joint in substance, and rendering judgment thereon against both defendants for the single amount.

—26 Mich. Law Rev. 229 (Dec., 1927).

ECONOMICS

Economic Essays in Honour of John Bates Clark. (Macmillan.) **Contemporary Economic Thought.** By Paul T. Homan. (Harper.) **Social Economics.** By F. von Wieser. Translated by A. Ford Hinrichs, with a Preface by Wesley C. Mitchell. (Allen and Unwin.)

". . . The volume of essays which Professor Hollander has edited in honour of Professor Clark does not set out to define, or even illustrate, his position in the development of economics. Rather it illustrates the variety of the scientific interests that are bound together by a common indebtedness to his pioneer work. It happens, however, that almost simultaneously one of the younger American economists, Professor P. T. Homan, has published a collection of studies of the most significant figures in contemporary economic thought, first of which is a sympathetic though critical account of Clark's work. Professor Homan confines himself to English and American economists; but an opportunity of comparing his account of Clark and Marshall with the Austrian version of the marginal theory is given by the addition to the valuable Adelphi Series of translations of foreign economic works of von Wieser's latest and most complete statement of the characteristic doctrines of his school. . . . This excellent translation is an important addition to the student's resources, in spite of prolixity and the difficulty of its language. . . . Anyone who has subjected himself to the discipline of working through Marshall's 'Principles,' or Clark's 'Essentials,' or von Wieser's 'Social Economics,' knows that he is equipped to tackle a complex economic problem as he would never have been without that discipline. That native wit and natural penetration sometimes achieve similar results without the discipline is no argument against its value for the majority of people. The work of Clark's school and generation was, therefore, necessary work, which even its critics unconsciously benefit by and use."

—The (London) Times Literary Supp., Sept. 27, 1928, p. 676.

ELECTIONS

State and Federal Corrupt-Practices Legislation. By Earl R. Sikes, Assistant Professor of Economics, Dartmouth College. 1928. Durham, N. C.: Duke University Press. Pp. 320.

[These four consecutive items from the index will give an idea of the scope of this book:

"Chandler v. Neff, quoted upholding constitutionality of Texas white primary law, 213 f.

Chicago, bribery of voters at elections, 6; violence at Senatorial primary of 1926, 38; causes for non-voting, 51.

Church membership, expulsion from, to influence votes, 53.

Civil service employees, campaign assessments on, 116-18; state restrictions on soliciting campaign contributions from, 129 f; federal regulation of campaign contributions by, 183-88."]

EQUITY

(See also Personal Property)

White and Tudor's Leading Cases in Equity, with Notes. 9th ed. By E. P. Hewitt and J. B. Richardson. 1928. London, Sweet & Maxwell, Ltd. 2 vols. Pp. cxiii, 788, and cxliii, 1072.

E. C. S. W. says (44 Law Quart. Rev. 511, Oct., 1928:) "After an interval of eighteen years, the new [ninth] edition of White and Tudor makes a welcome appearance"; the chief matter reviewed has to do with English legislation; and the work receives rather faint praise. Although the reviewer protests that "these remarks are not intended to belittle in any way the work of the editors in bringing up to date this classic," nevertheless "they might have pruned more drastically."

On this continent, we will, I think, continue to consult this invaluable textbook in the earlier editions, some of the value of which has disappeared in the new edition.—W. R. R.

A Periodical Menace to Equitable Principles, by Harold G. Hanbury, in the Law Quarterly Review for October, 1928, will appear to some unduly alarmist.

Starting with Maitland's oft-repeated iteration of the principle that "equitable rights and interests are not jura in rem," but purely in personam, he finds lawyers avoiding the imputation of priggishness by adopting lay phraseology and talking loosely of "equitable ownership": he finds a shyness in the English lawyer which,

so far as I am able to judge, does not characterize the profession on this continent: here, we use the terminology that suits us and, if anyone does not like it, it does not seem to trouble us much,—*Procul, o procul, profani.*

He thinks that looseness of terminology may not in nine cases out of ten produce harm, but in the inevitable tenth it is disastrous. An instance of this he finds in *Attenborough* v. *Solomon* [1913] A. C. 76, the decision in which he considers "rests on an intolerably strained view of equity, and its logical outcome is a confusion between trust and bailment." The actual decision is not complained of; and the author might have consoled himself with the habit courts have of distinguishing and rejecting "what is not necessary for the decision."

Most lawyers will agree with him that the recent case of *Baker* v. *Archer-Shee* [1927] A. C. 844, can be supported only on the fact that it is a decision upon the wording of a statute, and does not deal with the general law. Lady Archer-Shee was an American; her father, a citizen of the United States, left property in trust for her for life; the trustees, a New York company, paid over to her order the income, after proper deductions for expenses, etc., into a New York bank; she had no interest or control over the corpus, but was only one of several successive beneficiaries, and the trust fund consisted of foreign government securities, foreign stocks and shares, and other foreign property. It was held that her husband was assessable for the full amount of the income of the fund, although no part of it was ever transmitted to the United Kingdom.

Few will share the author's apparent fear that this decision will, or, at least, may, imperil Maitland's rule and be "allowed to upset well-established principles of equity."—W. R. R.

Equity Jurisprudence: A Selection of Cases with Brief Summaries of Principles. By Sherman Steele. 1927. New York: Prentice-Hall, Inc. Pp. xii, 897.

"To have brought within the limits of 900 pages a collection of cases on equity as interesting, variegated and timely as these is a commendable feat of editorial craftsmanship. The editor has condensed the lengthy opinions of American courts and summarized voluminous facts, thus reducing the lengths of the cases to an average of slightly less than three pages each. As far as one can tell without class-room use, this editorial work has been skilfully done. The cases are almost exclusively American and date within the last fifty years. In the more controversial parts of the subject, many of the cases were decided since 1910. . . . The editor apparently set out to emphasize the administrative or remedial aspects of equity, but in attempting to cover the whole field of traditional doctrine he could not adhere to this point of view. In organization and synthesis the present book makes no substantial contribution to existing literature.

"The same is true of the historical introduction, written by the editor. He starts off with some of Langdell's views of equity jurisdiction, and concludes with fragments of the ideas made familiar by Huston and Professor Cook. The discussion is not acute. . . .

"The editor's failure to include all references to law review articles and notes seems indefensible in a book designed primarily for the use of students. The lack of a topical index impairs the usefulness of the book for reference purposes. On the other hand, all readers of the book will be grateful for the attractive and readable type."

—Edwin W. Patterson of Columbia Law School in 28 Columb. Law Rev. 676 (May, 1928).

EVIDENCE

Some Observations on the Law of Evidence. By Robert M. Hutchins and Donald Slesinger. 28 Columb. Law Rev., 432 (April, 1928).

I. Spontaneous Exclamations.

"Spontaneous utterances, exclamations or declarations are, under certain conditions, admissible in evidence though the party who made them does not take the stand. . . .

"One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation. M. Gorphe cites the case of an excited witness to a horrible accident who erroneously declared that the coachman deliberately and vindictively ran down a helpless woman. .Fiore tells of an emotionally upset man who testified that hundreds were killed in an accident; that he had seen their heads rolling from their bodies. In reality only one man was killed, and five others injured. Another excited gentleman took a pipe for a pistol. Besides these stories from real life, there are psychological experiments which point to the same conclusion. After a battle in a classroom, prearranged by the experimenter but a surprise to the students, each one was asked to write an account of the incident. The testimony of the most upset students was practically worthless, while those who were only

slightly stimulated emotionally scored better than those left cold by the incident. . . .

"Thus it appears that the spontaneous declarations regarded with least favor by the courts are more trustworthy than those which most of them admit without question: those where the trial judge rules that the statement was made under the influence of severe physical shock. It is by no means suggested, however, that these last should be excluded simply because other types of evidence assumed to be less reliable turn out, on investigation, to be more reliable. It is suggested, on the contrary, that all these varieties of declarations be admitted. If relevant they should go to the jury; for some are demonstrably more accurate than we have hitherto supposed, and those now admitted are not so inaccurate as to be arbitrarily excluded. To exclude any because they are not the immediate outpourings of an injured person is to insist on requirements shown to be artificial, if not mistaken."

Commentaries on the Law of Evidence in Civil Cases. Based on the work of Professor Burr W. Jones. 2nd ed., 6 vols. 1926. San Francisco: Bancroft Whitney Co. Pp. 5018.

"The work is truly what it purports to be: Commentaries on the existing law of evidence in civil cases. The busy lawyer will find it replete with references to cases in his own jurisdiction and will find that it states the rules succinctly yet fully."

—Maurice R. Norcop in 26 Mich. Law Rev. 838. (May, 1928.)

La Critique du Temoignage. 2nd ed. By Francois Gorphe, Procureur de la Republique at Poitiers. 1927. Paris: Librairie Dalloz. 470 pp.

"English readers will disagree with some of the conclusions or remedial suggestions put forward by the author. . . The book contains a few references to English cross-examination which the author thinks is merely the badgering and brow-beating of witnesses, and likely to create confusion. Like most foreigners, he is unable to realize that the only way to find out if a story is true is to look at it from every possible angle and aspect, to take it to bits and see if it can be put together again, an easy matter for a witness who has nothing to invent to make his story plausible. . . .

"After reading Monsieur Gorphe's very valuable contribution to this branch of the law of evidence on the Continent, one comes to the conclusion that nothing better has yet been devised than the thorough process of cross-examination as practiced in England. It affords counsel the best opportunity of getting at the truth, and the impartial supervision of the Judge gives every protection to the accused and to witnesses."

A. C. W. in 44 Law Quart. Rev. 528. (October, 1928.)

FALSE IMPRISONMENT

Sir Maurice S. Amos contributes to the Law Quarterly Review for October, 1928, a note on Contractual Restraint of Liberty. He is not dealing with a contractual restraint of liberty lasting for a life-time as in the case of the old "Coalers" and "Salters" of Scotland; or of such a restraint of liberty as is implied in Articles of Apprenticeship or the like; but of purely temporary restriction of freedom of action for a particular purpose, singular or repeated.

He deals first with such cases as *Herd v. Weardale Steel, Coal and Coke Co., Ltd.* [1915] A. C. 67, in which a coal-miner, descending a mine, refused to do the work to which he was set, and demanded to be taken up to the surface before the usual time. On being refused, he brought action; but failed, the house of lords holding that his involuntary detention was not "false imprisoment," and that his employers' duty to return him to the surface, being purely contractual, was not broken.

Another class of cases is *Robinson v. Balmain New Ferry Company,* [1910], A. C. 295, which the author finds "less easy to understand." A barrister of Sydney, N. S. W., wishing to cross over to Balmain, went on the company's wharf: this had two turnstiles, one for entry and the other for exit, with a penny charge at each. Finding that the ferry would not leave for twenty minutes, the plaintiff changed his mind and wanted to leave the wharf: he would not pay the penny demanded and he was prevented from climbing the turnstile. Needless to say, he did not belong to this continent; one of us would have paid the nickel, and taken it out in language. He brought an action and got a verdict for £100. A new trial was ordered by the supreme court of Australia, and this decision was sustained in the judicial committee of the privy council, the ultimate court of appeal for all the British world except the British Isles, which, so far, are content with the house of lords. The rule was laid down that "where a man has entered upon another's tenement under a contract or licence, he cannot complain of being falsely imprisoned merely because he is not allowed to go out in a manner in-

consistent with the terms on which he entered."

The New York case of *Lynch* v. *Metropolitan Ry. Co.,* 90 N. Y. 77, is shown to be on a different basis: there is no right to imprison to enforce a pecuniary demand: see also Clark's Case, 5 Co. Rep. 64a: *Sunbolf* v. *Alford,* 3 Mee. & Wels. 248: *Bird* v. *Jones,* 7 Ad. & El., N. S. (Q. B.) 742.—W. R. R.

FOREIGN LAW

A History of Italian Law. By Carlo Calisse. Translated by Layton B. Register. (Murray.)

"A volume on the history of Italian law by Professor Carlo Calisse, a very learned lawyer and a parliamentarian of wide experience, is of singular importance in respect both of its august theme and of the author's wide outlook on ancient and modern juridical problems. Professor Calisse attained his first professorship nearly forty years ago. In 1895 he told the story of Italian criminal law from the sixth to the nineteenth centuries. and in 1903 his 'History of Italian Law' appeared in three volumes. The volume on sources has already been used in the first volume of this series; and now in the tenth volume his histories of public criminal and private law form the three books that make up the volume before us. . .

"Of more interest are the views of Professor Calisse himself on constitutional changes, specially written for this volume. He declares that the War of 1914-18 has shaken public law from its ancient foundations. He cites generally in support of the dictum International law. But in fact International law, after the rude shock, is settling again into foundations that are cemented with something more powerful than the words of text-book writers. . . ."

—The (London) Times Literary Supp., Oct. 4, 1928, p. 708.

GENERAL

Whither Mankind. A Panorama of Modern Civilization. Edited by Charles A. Beard. New York: Longmans, Green & Co. Pp. 408.

"Dr. Beard's aim in this most modern symposium has been one of understanding, to set up a balance sheet of our machine civilization. He has summoned to the task a group of eminent men each of whom casts up an audit of his own special field of interest in contemporary life; and most of whom write vividly and well. .

"Of the sixteen contributions to the symposium those of Hu Shih, Bertrand Russell, John Dewey and Everett Dean Martin are, to the present reviewer, by far the most searching. These men in particular seem to reach for the roots of our bewilderment and to do what they can to disentangle them. Other contributors—notably Dr. C. E. A. Winslow, Stuart Chase and Carl Van Doren—give a more sharply defined, because more objective, report. But every one throws out a challenge that cannot be ignored. . .

"Perhaps by the very nature of his subject Professor Howard Lee McBain was somewhat constrained. Law and government, on which he writes, have had little part to play in the drama of science and the machine. . . ."

—Evans Clark, in the New York Times Book Review.

GREEK LAW

A Working Bibliography of Greek Law. By George M. Calhoun and Catherine Delamere. With an introduction by Roscoe Pound. (Harvard Series of Legal Bibliographies, I.) 1927. Cambridge: Harvard University Press. Pp. xix, 144.

"Professor Calhoun and Miss Delamere's *Working Bibliography of Greek Law,* the first of a series of legal bibliographies to be edited by Harvard University, undoubtedly will 'attract many students of the science of law to the possibilities of this field of study' as Dean Pound states in the introduction. A bibliography of a subject as broad as this is almost certain to be incomplete, but in the period on which Professor Calhoun ranks as one of the most eminent scholars in America, namely, during the supremacy of the Athenian state, there seems to be no omission of importance."

—A. Arthur Schiller of Columbia Law School in 28 Columb. Law Rev. 523. (April, 1928.)

F. E. A. says (44 Law Quart. Rev. 520, Oct., 1928): "this book reflects very notable industry and displays great care and accuracy. . . . Well over two thousand books or articles are cited in all manner of languages with a correctness which only those who have constructed bibliographies can fully appreciate. . . The book is accurate, laborious and learned, and—in the time-honored phrase —it fills a gap."

The Growth of Criminal Law in Ancient Greece. By George M. Calhoun. 1927. University of California Press and Cambridge University Press. Pp. x, 149.

F. E. A. says (44 Law Quart. Rev. 521, Oct., 1928): "The book as a whole marks a very definite advance in the subject, and, not least by its candor and clearness, will be of great service to all students of Greek law."

The Growth of Criminal Law in Ancient Greece. By George M. Calhoun.

Lawyers and Litigants in Ancient Athens. By Robert J. Bonner. 1927. Chicago: University of Chicago Press. Pp. xi, 276.

Greek law, both criminal and civil, has been burdened with the duty of self-justification to an extent unknown to any other historical system. To the incompleteness of our records there has been added the peculiar prejudice of the Romans and of the Renaissance schoolmasters of Europe to the effect that the Greeks were a flighty and tumultuous people, essentially incompetent politically and incapable of devising or enforcing a legal system. That is a strange thing to say of the systematizers of the rest of the world's knowledge. And it is demonstrably untrue. But it has withdrawn from the study of Greek law that repeated and concentrated expert examination which alone in such matters can lead to satisfactory results.

It is not too much to say of Professor Calhoun's little book that it marks an epoch in the study of the subject. He confines himself to the Greek criminal law. The writers on the subject—principally historians and philologists—have taken the law of homicide as the basis of development of Greek law of crimes. Professor Calhoun conclusively shows that this is wholly wrong. Nearly everywhere, and particularly in Athens, prosecution for homicide remained private suits long after a definite criminal procedure had developed. This demonstration constitutes the enduring merit of his book and gives further study of Greek criminal law a new and better orientation. . . .

As to the half-mythical character of Solon, Professor Calhoun exhibits a healthy skepticism. . . .

Professor Bonner's book is of a different kind. It presents, in a form designed both for scholar and layman, an account of legal practice in Athens in the century of the great orators—that is between the end of the Peloponnesian War and death of Alexander. On this we have documents of great value,—the speeches of ten orators selected as a canon in later times and the speeches of others which got themselves mixed up with them. There are further a great many historical fragments of the same period.

From these he pieces together a vivid picture of a community in which litigation was common and every man had necessary business in the courts. We may question the justification of his sub-title (the Genesis of the Legal Profession) and doubt whether the modern legal profession can be derived from the Athenian rhetor, but we cannot question that the methods and the practices of Athenian litigants and their advocates influenced Roman procedure enormously and through that fact set a standard of forensic style.

Any lawyer who reads Professor Bonner's book will feel himself in a congenial atmosphere. Perhaps it will seem sufficiently congenial to make him doubt whether all the statements in the forensic pleas here described are to be taken at full value and make him wonder how our system would impress those who know it only from the addresses of counsel to juries.

The litigation in the case of Pasion's family (described pp. 112-135) may be classed with modern cases in which great fortunes disappear in the conflicting claims that are raised by the death of the founder of a house. This chapter and that on "Notable Trials" (pp. 244-270) will probably be read with greatest interest by the general reader.

—Max Radin (University of California) in 28 Columb. Law Rev. 115 (Jan. 1928).

HISTORY—(LEGAL)

The Privy Council of England in the Seventeenth and Eighteenth Centuries, 1603-1784. Volume II. By Edward Raymond Turner. Baltimore: Johns Hopkins Press,. London: Milford.

"One of the most striking characteristics of history writing in the past decade has been the development of administrative studies. An earlier generation viewed English history as an evolutionary process whereby the Commons steadily gained the initiative from King and Lords, an evolution which appeared to reach its fullest development with the granting of an almost universal suffrage. The administrative historian starts off by refusing to read the ideals of the present into the past: he is concerned mainly with

the concrete things of government: his material consists not of spectacular pronouncements in Parliament or elsewhere, but of the day-to-day correspondence and memoranda accumulated by the various departments of Government wherefrom may be deduced the principles on which an administrative system was evolved.

"By directing the searchlights of research from an unusual angle on our history, the administrative historians have corrected many old errors and have rewritten several parts of English history. . . . ."

—The (London) Times Literary Supp., Oct. 4, 1928, p. 709.

The Historians of Anglo-American Law. By W. S. Holdsworth. 1928. New York: Columbia University Press. Pp. 175.

" . . . With the end of the eighteenth century history begins to have a definite place in literature, and this was preparatory to its entry into the rank of scientific studies. The 'Four Oxford Professors' of chapter III—Maine, Pollock, Vinogradoff and Dicey,—together with Maitland, whose works fills the concluding chapter, were all alike in their determination to maintain the unity of all history, and read English history from the standpoint of the finest philosophical, historical and comparative thought available—in short, to treat all history as one problem, intimately connected with the other major problems of human life. This breadth of view is equally shown in the fourth chapter, where such names as Holmes, Bigelow, Thayer and Ames are side by side with Brunner and Liebermann."

—Theodore F. T. Plucknett of Harvard Law School in 28 Columb. Law Rev. 676. (May, 1928.)

HISTORY (Political)

The Origin of the State. By Robert H. Lowie. 1927. New York: Harcourt, Brace & Co. Pp. v, 117.

The student of the history of law and politics will find this volume invaluable in supplying both data and understanding of their primitive condition. The book should become the starting point of any further discussions of the problems connected with early political organization; its emphasis, as the title indicates, falling upon the political rather than the juridical aspect.

—John Dewey (of Columbia University) in 28 Columb. Law Rev. 255. (Feb. 1928.)

INCOME TAX

Income Tax Law and Practice. By Cecil A. Newport. 1927. London: Sweet & Maxwell, Ltd. 276 pp.

" . . . Every profession has its own little ways, and accountants are no exception; indeed, it would not be altogether amiss to suggest that to the uninitiated the way of an accountant with figures is as mysterious as 'the way of a man with a maid.' Although his intention was not to explain this mystery, Mr. Newport has provided a large number of examples to show in figures the effect of the provisions with which he is dealing. From these examples it is possible to appreciate the method on which an accountant sets to work, and to appreciate some of the main principles which he applies. Possibly this is the greatest merit of the book for the practitioner, but it would be unjust not to add that for the clear statement of broad principles it is also useful. . . . ."

M. E. R. in 44 Law Quart. Rev. 264. (April, 1928.)

INJUNCTIONS

The well-established law that an English court can restrain anyone within its jurisdiction from bringing an action, even in a foreign country—*Carron Iron Company* v. *Mac Laren* (1885), 5 H. L. C., 416, 436, itself an extension of *Penn* v. *Lord Baltimore*—has been enlarged logically and consistently to restraining a person within the jurisdiction from enforcing a judgment obtained in a foreign court: *Ellerman Lines* v. *Read* [1928] 2 K. B. 144: see a note in 44 Law Quart. Rev. 404. (Oct., 1928.)

INSURANCE

I find myself unable to agree with the reviewer (44 Law Quart. Rev. 409, Oct., 1928) that the *Royal London Insurance Society* v. *Barrett* [1928] Ch. 411; 97 L. J. Ch. 177, "may fairly be called a hard case." In a policy of life assurance, the usual clause voiding the policy in case of suicide was inserted, but with the proviso that in such a case "the policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration." The society advanced money to the assured on a mortgage and took an assignment of the policy by way of security, the society to satisfy themselves primarily out of the policy moneys. The assured committed suicide; and the society sued on the mortgage. It was held that the policy was voided, and was not saved by the term in the assignment of it to the

society. Surely that is right; it was contemplated that in case of suicide, the society was to suffer only to an extent that third parties were concerned—third parties being those not contracting.—W. R. R.

The Insurance Commissioner in the United States. By Edwin Wilhite Patterson. 1927. Cambridge: Harvard University Press. Reviewed by E. Blythe Stason in 26 Mich. Law. Rev. 949. (June, 1928).

The reviewer states that this book is "a comprehensive and detailed survey of statutes and decisions concerning the administration of insurance departments of the several states." The book seems to be a careful and accurate analysis of a very technical subject.—R. W. G.

INTERNAL REVENUE

Finality of Determinations of the Commissioner of Internal Revenue. By Roswell Magill in 28 Columb. Law. Rev. 563. (May, 1928.)

"Several recent cases have brought sharply before the courts the question of the extent of their power to review findings and regulations ot the Commissioner of Internal Revenue. In addition, the related question of the power of a Commissioner to review the findings of his predecessor in office has been extensively presented. Since an authoritative judicial determination of these problems is therefore assured, there would be little occasion perhaps for a discussion of them, were it not for the facts that the scope of judicial review, to some extent at least, turns upon the wordings of various statutes, and that these statutes are in something of a state of flux. It may be worth while, then, to consider the powers expressly granted by the revenue acts to the Commissioner; the scope of the review which Congress has provided for; the nature of the powers of review which have in fact been exercised; and finally to summarize the virtues and vices of the scheme of review as it operates in practice.

"Since the substantive provisions of the law are not now being radically changed year after year and since the Commissioner has a great mass of experience in decided cases back of him, one may hope that fewer radical changes in rulings, regulations, or findings will need to be made by succeeding commissioners. In many of the instances discussed above, it is submitted that the power to make such changes has been granted; but it is further submitted that it should be used sparingly. If it is so used, administrative determinations may well receive greater respects both from taxpayers and from courts."

(A second article, dealing with review of determinations of the Commissioners by the Board of Tax Appeals and the courts, will appear in a subsequent issue.)

INTERNATIONAL LAW

The article, **The Jurisdiction of the International Court of Justice over Concessions in a Mandated Territory**, in the Law Quarterly Review for October, 1928, is written by Mr. Norman Bentwich, Attorney General of Palestine; and contains much of value for the study of modern conditions in the Orient, and especially Jerusalem, the ancient home of our religion and much of our civilization.

The wrong-headedness or bad luck of the Ottoman having placed him on the losing side in the recent Great War, at its close he was fated to lose Palestine and the Holy City, Britain receiving the mandate to take care of it. Most of us would have preferred that the United States should undertake the task—the "weary Titan" had enough to bear, and the Giant of the Western World was almost free of world-care: but *Dis aliter visum*, and Britain must take the extra burden.

In the mandate, it was provided that "Concessionary contracts duly entered into before the outbreak of the war" between the Ottoman government, on the one hand, and nationals of the contracting powers on the other, are maintained." Before the war, one Mavromattis, a Greek, had obtained a concession from Turkey for the supply of water and electricity to the city of Jerusalem; and during the war for the like to the Jaffa district: in 1921, after the mandate had come into effect, the government of Palestine gave a concession to one Rutenberg for the generation of hydro-electric power for the whole of Palestine. Mavromattis complained. The British government admitted that the Jerusalem concession was valid, but contended that it was under changed circumstances entitled to cancel it on payment of the expenses incurred by the concessionaire. American lawyers will recognize their doctrine of eminent domain, wholly unnecessary, and therefore wholly unknown, in the commonwealth of British nations. As to the Jaffa concession the British government would not recognize it at all, it having been obtained during the war, and *pendente lite*, as it were: it did not come within the terms of the mandate in any case. Mavromattis not succeeding in his claim, the

Greek government took it up; and, equally failing, laid the matter before the World Court. That court has a strictly limited jurisdiction. Britain contended that the jurisdiction did not extend to this case. The court was composed of eleven regular judges and a judge *ad hoc* to represent Greece: by a bare majority, 7 to 5, the court held that it had jurisdiction in the Jerusalem controversy, and unanimously held that it had none in that concerning Jaffa.

It is not without interest to note that the dissent expressed by Lord Finlay of Britain was concurred in by Judge John Bassett Moore, the American, whose resignation from the international bench will be regretted, not only by those of us who enjoy his friendship, but also by all who share our Anglo-American conception of law, intra-national and international. That regret, indeed, is much diminished by the acceptance of the post by an equally illustrious American lawyer, Charles Evans Hughes.

The author compares the attitude of the International Court with that of the supreme Court of the United States in such cases as *Chisholm* v. *State of Georgia*, 2 Dallas, 419; *Duhre* v. *State of New Jersey*, 251 U. S. 311, overruling Chief Justice Marshall's dictum in *Cohen* v. *State of Virginia*, 6 Wheaton, 264.

The whole story of the several disputes before the International Court is entertainingly and clearly told: and, if nothing else was made to appear, the dignity of a great power like Britain submitting to a decision asserting a jurisdiction which she denied is worthy of observation and comment. When the lesson is learned that in international as in municipal matters, it is righteousness that should decide between contending parties, the end of war is not far off.—W. R. R.

The Origin of the Right of Fishing in Territorial Waters. By Percy Thomas Fenn, Jr. 1926. Cambridge, Mass.: Harvard University Press. Pp. xv, 245.

A. P. H. says (44 Law Quart. Rev. 519, Oct., 1928): "Dr. Fenn has begun his researches with the period before Justinian, and finishes in the early years of the sixteenth century, because, in his opinion, from that date onwards 'further development becomes merely modification of existing theory.' . . . The book is a useful historical introduction to a subject of permanent interest, 'the freedom of the seas'."

Americans will not need to be reminded of the consistent stand taken—at least, in theory—by the United States in favor of "Freedom of the Seas."—W. R. R.

The Law of Nations. By J. L. Brierly. 1928. Oxford: Clarendon Press. Pp. viii, 228.

A. P. H. says (44 Law Quart. Rev. 518, Oct., 1928): "This book is a short introduction to the international law of peace, and is intended both for the general reader who is interested in international relations and for the student who needs an introduction to the standard works on the subject. It is eminently suitable for both classes of readers, and Professor Brierly is to be congratulated on the admirable manner in which he has carried out his plan."

In my own experience, I have found the need of a work to which I might point the student who desired to know something of international law: this seems to fill the gap.—W. R. R.

The Judicial Settlement of International Disputes. By James Brown Scott. 1927. London: Oxford University Press. Pp. 79.

"In reading this book, it must be borne in mind that its lectures were delivered to an audience the majority of which was versed little, if at all, in either international law or general law. Mr. Scott has solved admirably the difficult problem of making clear to a more or less lay audience many fundamental juristic conceptions. The lectures are written with ease and clarity; they are interwoven with quotations and illuminating references only in so far as it is necessary and will not endanger the continuity of the work."
—Francis Deak of New York City in 28 Columb. Law Rev. 518. (April, 1928.)

The Law and Procedure of International Tribunals. By Jackson H. Ralston. Revised edition. 1926. Stanford University Press. Pp. xl and 512.

" . . . There is much more international law in existence—the real raw material, good, bad, and indifferent, but nevertheless the real stuff—than is generally recognized. Mr. Ralston's work is one of the pieces of apparatus that open the door to this mass of material, and he has thereby placed international lawyers under a permanent debt."
—A. D. McN. in 44 Law Quart. Rev. 260. April, 1928.)

The "Lotus" Case. The recent decision of the Permanent Court of International Justice in the case of the S. S. Lotus is of interest both on account of the importance of the points decided or argued, and

also because it is the first occasion upon which the Court, most of whose decisions have hitherto related to the interpretation of treaties, has been called upon to deal with a pure question of customary international law.

—J. L. Brierly in 44 Law Quart. Rev. 154. (April, 1928.)

Prize Law During the World War. A Study of the Jurisprudence of the Prize Courts, 1914-1924. By James Wilford Garner, Professor of Political Science in the University of Illinois. 1927. The Macmillan Company.

The author gives this indication of the scope of his work:

"I have attempted in this work to give a survey of the organization, function and jurisdiction of the prize courts during the World War, to analyze the mass of prize jurisprudence, which may be said to constitute the most important contribution of war to international law, to summarize and compare the interpretation and conclusions of the prize courts of the different countries in which such tribunals were organized and to point out the divergencies of opinion and doctrine which they enunciated upon identical or similar questions."

The book is reviewed by Professor Charles H. Watson, of Northwestern University, whose interesting outline begins in these words (Ill. Law Rev., June, 1928):

"In the first chapter, in a brief review of the organization of the prize tribunals in the various countries, the two prevailing systems are outlined: in England questions of prize are determined by regularly established judicial tribunals; in the continental countries, the courts are composed of more than one judge, some of the members not being judges or attorneys, but naval officers or administrative functionaries. As the author points out, the decisions of the English prize courts, being based upon precedent and supported by authority, are naturally more instructive from our point of view than the opinions of the continental prize courts, which contain a brief statement of facts and the conclusion of the court. It is noted, however, that some of the decisions of the Belgian prize council and some of the German decisions are excepted from this general observation."

—J. M. C.

American Foreign Policies. By James Wilford Garner. New York University Press.

A History of American Foreign Relations. By Louis Martin Sears. Macmillan & Co., Ltd.

"These two books are mutually supplementary. Dr. Sears has written a careful and exhaustive history chronologically of the foreign policy of the United States. Dr. Garner, whose work is well known in England, has put together in the James Stokes lectures for 1927 seven illuminating studies of various aspects of the same. Both writers are reasonable and just, though Dr. Sears might sometimes find Dr. Garner too deeply tinged with that 'anglophil' tradition which has been present in the politics of the United States from the day of the Fathers to the present day. There could be no better way of appraising the 'anglophil' tradition, or of judging to what extent it is so termed by a misnomer, than a careful study of these books."

—44 Law Quart. Rev. 531. (October, 1928.)

Selections from the Second Edition of the Abrege du Projet de Paix Perpetuelle. By C. I. Castel de Saint-Pierre. Translated by H. Hale Bellot. With an Introduction by Paul Collinet. Grotius Society Publications, Texts for Students of International Relations, No. 5. 1927. London: Sweet & Maxwell, Ltd. Pp. 61.

Plan for an Universal and Perpetual Peace. By Jeremy Bentham. With an Introduction by C. John Colombos. Grotius Society Publications, Texts for Students of International Relations, No. 6, 1927. London: Sweet & Maxwell, Ltd. Pp. iii, 44.

Perpetual Peace. By Immanuel Kant. Translated by Helen O'Brien. With an Introduction by Jessie H. Buckland. Grotius Society Publications, Texts for Students of International Relations, No. 7. 1927. London: Sweet & Maxwell, Ltd. Pp. 59.

The Grotius Society is rendering a valuable service in making these and other classics in the literature of international relations so conveniently available in English texts. The service should be appreciated by a wide circle of interested readers no less than by the students of international relations for whom the series is primarily intended.

. . .

The series, as suggested above, should be of interest to a wide circle of readers.

It may be commended especially to those who naively assume that recent attempts to organize international relations more effectively are a kind of panacea conceived by contemporary genius rather than an achivement of slow and painful evolution. Each number, it should be added, contains a good introduction and a select bibliography.

—E. D. D. in 26 Mich. Law Rev. 469. (Feb., 1928.)

INTERSTATE COMMERCE

Note on **The Radio and Interstate Commerce** by C. K. U., in 26 Mich. Law Rev. 919. (June, 1928.)

This article analyzes the power of Congress to control radio broadcasting and concludes that while the commerce clause probably gives Congress power to control the conveyance of commercial messages by radio, the right of control over the radio when used for pure entertainment purposes is not so clear, but that probably the practical advantage of having a central power of control over this tremendous field will not be entirely ignored in construing the commerce clause as applicable to the radio.—R. W. G.

JURISPRUDENCE

For most of us on this continent, the most interesting of the articles in the Law Quarterly Review for October, 1928, is the last, Carleton Kemp Allen's article on The Young Bentham (pages 492 to 508.)

Jeremy Bentham left an enormous quantity of manuscripts, most of which are in the library of the University of London. The publication of Bentham's "Comment on the Commentaries" (of Blackstone) in itself more than justified the action of the Social Research Council of America in granting to Mr. Charles Warren Everett a research scholarship to investigate these Mss.

Bentham at a very early age attended Blackstone's lectures at Oxford; but for some reason not apparent seems to have acquired a personal antipathy to him; and his criticisms of the Commentaries cannot be said to have been written in a judicial spirit. There was, of course, the age-long dispute, never-ending and as active today as it was under Justinian or George III, between the judge, who must take the law as he finds it and is necessarily a worshipper of the god of things as they are, and the professor who is not so much concerned with what the law is as with what it ought to be, who must needs gird at anomalies and endeavor to make law an exact science, which, alas, in the nature of things it never can be, although, indeed, there is no harm in trying, if the desire does not become a dogmatic assertion of fact.

But there was much more than this antagonism in Benthan; his *perfervidum ingenium*— and perfervid, it undoubtedly was—carried him beyond the limits of criticism into what was not far removed from vituperation; and Blackstone was no whit the worse.

Bentham had learning, literary skill, and wit, all of which appear in his writings; but he allowed himself for some inscrutable reason to fall "more and more into the habit of jargon and neologism, developed eccentric theories of syntax, and in the effort after comprehensiveness plunged his reader into a pathless jungle of polysyllables". He had a passion for the invention of terminology, and is not always wholly consistent in his use of his own chosen words, but with all his defects, he was a real legal genius, and had a real knowledge of what law should be. His idiosyncrasies of language did not much if at all obscure the actual merit of his ideas, and the adoring Dumont, to whom we owe much of his work, made no mistake in selecting an object of adoration. Bentham deserves well of his country and of his kind.—W. R. R.

Judicial Method and the Problem in Ogden v. Ogden.—"The case of Salvesen (or von Lorang) v. Administrator of Austrian Property (1927) A. C. 632 suggests a reconsideration of the position of the woman in Ogden v. Ogden (1908) P. 46, and a review of the attempts which have been made to alleviate it by evolution of judicial doctrine. . . .

"The result of the woman's petition for divorce, and of Ogden's later suit for nullity, in which he was successful, show her to have been caught by a complex of rules of law, each of them not unreasonable, but, when fused together, producing hardship. . . .

"This topic seems a perfect example of the interaction of rules of law, and of an alteration in the whole bearing of a complex of rules upon a group of facts by a purely internal logical adjustment within the complex. In so far as this process is valid, we have law as a system peculiarly exemplified. Taken together with the doubtful validity of the purely empirical solution, and with the preliminary exploration of the possibilities of a reference back to social facts, it represents what would appear to be the true spirit of English judicial development of the law, as opposed to the somewhat hasty rejec-

tion of the fetters of logic implied in much that is written today."

—J. D. I. Hughes in 44 The Law Quarterly Rev. 217. April, 1928.)

The Sanctity of Law: Wherein Does It Consist? By John W. Burgess. 1927. New York: Ginn & Co. Pp. vii, 335.

"Dr. Burgess takes us a long and winding road in seeking to answer the question which forms the subtitle of his latest book. It is the much-travelled historical road that leads from the founding of the Roman Empire to the Treaty of Versailles. But though the road is old the quest is new, or at least newly stated. It is to discover how in times past law gained that 'sanctity' which constrained the mind of the citizen, as distinct from the mere 'sanction' which might constrain his body. . . .It is not enough to tell us that the sanctity of law is rooted in the national consciousness of truth and right. In a complex society the national consciousness is not and cannot be so much a unity that it wholly solves our problem. Are there not, for example, certain limits to what law can or should attempt if it is to rest secure in the loyalty of the people? Does not the historical record, with its endless experimentation in lawmaking, by trial and error, by success and failure, throw some light on that profoundly important issue? But Dr. Burgess passes it by."

—R. M. MacIver of Columbia University in 28 Columb. Law Rev. 518. (April, 1928.)

Business Postulates and the Law. By Nathan Isaacs of Harvard Business School, 41 Harv. Law Rev. 1014. (June, 1928.)

"We may venture two propositions: first, that the legal system of any given time or place contributes heavily to the fulfillment of our expectations; and second, that the legal system is by no means alone in this function. The first of these propositions is, of course, generally taken for granted. It is our purpose here not to prove it, but to find out just how the law comes to the aid of the business world. The second proposition, however, is very generally overlooked. . . . The point is that law does not and cannot work alone. The development of law is but a phase of the development of civilization. And when we speak of the part played by law in the satisfying of the postulates of business, we must bear in mind that it does not satisfy those postulates single-handed or exclusively. It is neither without allies nor without rivals. . . .

"Perhaps the nature of the industrial and commercial peace of today may best be illustrated by reference to the exaltation of 'due course' to the level of a major principle by which transactions are to be judged. It is not only, as already indicated, that that which is done in due course is made to stand. The converse is equally true. It is on this basis that a deviation from the simple, ordinary course of business comes to be condemned by the law. Thus, there was until recently nothing unlawful about a preferential payment of a debt by an insolvent. Business condemned the practice and now the National Bankruptcy Act incorporates the business man's point of view. There was nothing illegal until recently in a tradesman's act of selling goods outside of the ordinary course of business. The business conception of due course has, in spite of considerable resistance, been written into the bulk sales laws of many jurisdictions. Many acts that are coming to be recognized as 'unfair methods of competition' are, in the final analysis, condemned because they are contrary to the ordinary established course of doing things—breaches of the peace as the modern business world formulates its requirements of commercial peace."

LABOR
(See Constitutional Law)

LEGAL ESSAYS

Lectures on Legal Topics, 1923-1924. 1928. New York: The Macmillan Company. Pp. viii, 485.

"These lectures, which form the fifth volume of the series, were given at the house of the Bar Association of the City of New York during the court year 1923-1924. While intended principally for members of the legal profession, they cover many topics which will be of interest also the the layman, such as The Reparations Problem, Collective Bargaining between Employers and Workers, Insurance and Business Trusts, Banking Institutions and the Law, Efforts for Divorce Reform, The Administration of the Criminal Law, The Press and the Courts, and Repudiation of Contracts."

—Publisher's Announcement.

LEGISLATION

Legislative and Other Forms. 2nd. ed. By Sir Alison Russell. London: Butterworth & Co. Pp. vi, 28.

C. T. C. says (44 Law Quart. Rev. 513, Oct., 1928): "The forms . . . are partly legislative and partly administrative;

they are such as would be helpful to anyone acting as an attorney-general or member of a legislative council in a colony": and we may let it go at that. Neither the United States nor Canada being a colony, its usefulness on this continent would seem nil, were it not for the bitter complaints now being made in England over the ineptitude of the drafters of statutes at Westminster, indicating that legislators are pretty much the same the world over. —W. R. R.

Index to the Statutory Rules and Orders in force on August 31, 1927, shewing the Statutory Powers under which they are made. 11th ed. 1927. London: Published by His Majesty's Stationery Office. Pp vi and 921.

"Although delegated legislation had already developed to a considerable extent at that time, there existed no systematic record of the various rules and orders. The public, therefore, had no adequate means of knowing whether a statutory power to make orders had been exercised or not. . . .

"It is obvious that with the continual growth of delegated legislation it is rarely safe for a practitioner to advise on any subject until this Index has been consulted. Under the circumstances it is astonishing that it is not better known, and that it is possible to find legal libraries, which are claimed to be up-to-date, without a copy on the shelves."

44 Law Quart. Rev. 258. (April, 1928.)

LEGISLATIVE ASSEMBLIES

Senate Rule XXII. Again Dean Wigmore protests earnestly against the complete veto-right upon legislation which this rule lodges in each of ninety-six senators, and urges the American Bar Association to fight for its abolition.

—J. M. C., in reviewing Ill. Law Rev. for June, 1928.

MASSACHUSETTS TRUSTS

Note by R. L. A. in 26 Mich Law Rev. 916. (June, 1928.)

This note compares business trusts with corporations and discusses the correctness of including Massachusetts trusts under statutes purporting to cover corporations, associations, partnerships and joint stock companies. The note is simply a repetition of what has been said many times before and is interesting only in that it points out the case of Baker v. Stern, 216 N. W. (Wis.) 147, which holds that since all the cestuis que trust could by joining with the trustees of a Massachusetts trust convey the trust property, the Wisconsin statute against perpetuities was not violated.—R. M. G.

MEDICAL JURISPRUDENCE

Taylor's Principles and Practice of Medical Jurisprudence. 8th ed., by Sidney Smith. 1928. London: J. & A. Churchill. 2 vols. Pp. vii, 900, and v, 964.

A. B. H. says (44 Law Quart. Rev. 514, Oct. 1928): "The revision has been carried out jointly by two eminent authorities, the one legal, the other, medical. Mr. W. H. G. Cook and Professor Sidney Smith. The rapid advance in the knowledge of various subjects cognate to forensic medicine has rendered the publication of a new edition very necessary [the last was published only eight years ago]; and the combined editorship has produced a work highly satisfactory in its complete and impartial [whatever that may mean] handling." The tests for blood, identification, Karl Pearson's data of measurements, gunshot wounds and fire-arms, poison, alcohol, all are said to receive satisfactory treatment, while "the status of the medical practitioner is fully and wisely discussed with respect to his liability to give evidence of a confidential character."

I cordially agree that "It is the standard book of reference to both the medical practitioner and the lawyer, and in this edition the editors have . . . considerably enhanced its reputation."—W. R. R. (I should, perhaps, say that before writing this I took another look at the edition of "Taylor" I triumphantly carried off as a prize in 1874, *Consule Planco.*)

MONEY

Das Geld in Theorie und Praxis des Deutschen und Auslandischen Rechts. By Arthur Nussbaum. 1925. Tubingen: J. C. B. Mohr. Pp. xv. 278.

"As the title of this book implies, it is a study of money from a juridical point of view. It is a study marked by characteristic German thoroughness, with a meticulous regard for detail—and is also, in consequence, rather tiresome to read.

" . . . The theoretical discussion is not what the student of the economics of money would expect. The author himself points out the distinction between the "wirthschaftliche" (the economic) and the "rechtliche" (the legal) point of view. In like manner the practical problems deal with concrete questions of individual pecuniary relationships and not with questions of social monetary policy.

" . . . These chapters provide no general discussion affecting the abstractions we call 'creditors' and 'debtors' but rather a discussion that concerns itself with specific rights of the parties to pecuniary contracts when monetary standards are debased, abandoned, reorganized

or replaced. The possible complications in these fields seem to be legion and the legal decisions relating to them show little consistency or harmony. Indeed, the impression that the general economic student retains after laying aside Nussbaum's book is that much improvement all-around would result if 'rechtliche' conclusions rested more securely on an adequate 'wirthschaftliche' foundation."

—E. E. Agger of Rutgers University in 28 Columb. Law Rev. 678. (May, 1928.)

NATIONALITY
(See Citizens)

NEGLIGENCE

Negligence in Law. By James Beven. 4th ed. by William James Byrne, and Andrew Dewar Gibb. 1928. London: Sweet & Maxwell, Ltd. 2 vols. Pp. ccxi and 1638.

"Although it would be going too far to say that Beven on Negligence has become a legal classic, nevertheless as the learned editor states in his preface, it 'is probably as well known as any book on English law.' It has been cited frequently in argument, and it is not unusual to find references to it in the judgments. Its authority, of course, rests to a large extent upon the reputation of its author, who was known for his profound research and his trenchant and sometimes strikingly original arguments. Under these circumstances it is doubtful whether in issuing a new edition it was wise to incorporate in the text the work of the editors without making any attempt by means of brackets to distinguish the new matter. It is impossible, therefore, without the use of earlier editions, to tell where Beven ends and they begin, and it is no disparagement to them to say that their views can hardly carry the same weight as those of the learned author."

—44 Law Quart. Rev. 252. (April, 1928.)

NEGOTIABLE INSTRUMENTS

The Proposed Amendments to the Uniform Negotiable Instruments Law. "Some might question the desirability of an attempt to remedy the Negotiable Instruments Law by patching it, in the light of its history and the stream of criticism to which it has been subjected since its inception. Many might at least doubt whether the energies directed to this task might not with greater profit have been applied to the work of a restatement of the entire statute so as to pronounce its rules in terms of their legal consequences, looking to the specific situations to which those rules have application, and predicated upon a closer conformity to the needs of the mercantile world. The committee which has drafted the present proposed amendments has contented itself with a more modest task in seeking to revise those sections whose more salient defects have invoked the animadversions of commentators and been the seed of judicial dissension or misconstruction in litigated cases—borrowing its suggestions largely from the illuminating Ames-Brannan-Chafee criticism. In the absence of the suggested restatement there can be little doubt that the proposed amendments are a necessary measure to secure the uniformity and predictability of judicial decision which it was the purpose but has not been the fortune of the original Negotiable Instruments Act to achieve."

—28 Columb. Law Rev. 648. (May, 1928.)

Note on **Liability of Surety Who Appears as Maker,** in 26 Mich. Law Rev. 929 (June, 1928.)

In Peter v. Finzer, 217 N. W. (Neb. 1928) 612, the maker of the note which was secured by a mortgage on the maker's land sold the land, the purchaser assuming the debt. Without the maker's knowledge or consent, the holder of the note gave the purchaser an extension of time. The question was whether in a suit by the holder against the original maker on the note, the maker was discharged. It was held that the Negotiable Instruments Law had changed the old common law rule so that under it a surety who appears upon the note as principal is not discharged by such an extension of time. This case represents the prevailing view. The note contains a good consideration of the other authorities and of the probable meaning of the Negotiable Instruments Law.—R. M. G.

NUISANCES

Note on **Filling Stations in Residential Districts as Constituting Nuisances** in 26 Mich. Law Rev. 941. (June, 1928.)

In the case of Carney v. Penn Oil Co., 140 Atl. (Pa. 1928) 133, the operation of a public gasoline filling station in an exclusively residential district, there being no prohibiting zoning ordinance, was enjoined apparently on the grounds of the location of the station and the effects of the operation of the business on the safety and health of persons residing nearby and on the enjoyment and value of their homes.

Filling stations have never been considered nuisances per se, and the question which still remains open and which is of daily importance in Chicago and other densely populated communities is

Les Restrictions Contractuelles a la Liberte Individuelle de Travail dans la Jurisprudence Anglaise. By A. A. Al-Sanhoury. Avec une preface de Edouard Lambert, Bibliotheque de L'institut de Droit Comparé de Lyon. Tome 10. 1925. Paris: Marcel Giard. Pp. xxv and 361.

"The author is a young Egyptian, who has been a disciple of the Institut de Droit Comparé. As Professor Lambert points out in the preface, the author has treated his subject on a large scale. . . .

"The author has described very carefully the history of the legal practice relating to restraints of trade. In treating of this special subject, he has contributed to the development of fundamental principles and conceptions of the law. Besides, he has made evident the reasons why the ideas regarding the restraints of trade have changed, and he has analyzed distinctly the arguments of the judges who had administered justice in the different cases. The book must therefore be regarded as a very valuable work."

—H. W. G. in 44 Law Quart. Rev. 251. (April, 1928.)

ROMAN LAW

The first of the articles in the Law Quarterly Review for October 1928, is by Professor W. W. Buckland; and, to one who (like myself) approached the common law through the door of the Civil Law, is of great interest: it is entitled: *The Conception of Servitudes in Roman Law.* University men in law of the last generation will remember the entrancing dissertations of Story on the civil law; they .ll find this article equally well-written; and, it must be said, more accurate. Our common law easements and the curious learning concerning them owe much to the civil law servitude; not everything indeed, for our English forefolk were too much impressed with their own superiority to the rest of the world to permit their law or any of their institutions to be seriously affected by the outsider.

It cannot be said that the present paper is of any direct value to the lawyer in any country in which the basis of the law is English: or, indeed, in any system of law; it may fairly be described as an interesting study upon some features of a system which is now wholly gone: one will read it as one reads the accounts of ancient Babylonian or Egyptian law. The author begins by stating that "Modern writers have denied that the slave was for the Roman a person, though countless texts make it clear that he was": and rightly shows that this convention involved not the real status of the slave but the meaning of the word "person": it is a matter of terminology, alone. No one has any doubts as to the position of the slave in the Roman law; and if it pleases anyone to say that that status did not entitle him to be called a person, no harm is done. The old logical maxim, "Define your terms," is all too frequently forgotten or ignored, and no small part of the disputes in this world comes from a want of agreement in the use of words. That lesson learned, on turning to the article itself, we find it largely concerned with praedial servitudes, and the "question . . . of the effect on a praedial servitude of abandonment of either of the praedia concerned." I confess despair in an attempt to make this of interest or even intelligible to the practicing lawyer, while anyone who takes an interest in such questions should read the article, itself.—W. R. R.

La Responsabilité de la Custodia en Droit Romain. Par Jean Paris, Docteur en Droit. 1926. Paris: Soc. Anon. du Recueil Sirey. Pp. xxix and 350.

"The author holds with others, that classical law recognized in certain relations a liability for custodia, i. e., responsibility without fault for loss or damage not due to vis major. The work is mainly devoted to an attempt to determine the field of this liability, rejecting it for conductor rei, pledgee, mandatory and, in general, vendor, and to show the state of things under Justinian. Though not all the author's arguments and conclusions are acceptable, and he is too ready to adopt, as proved, previous allegations of interpolation which serve his thesis, he gives us a full and critical account both of the texts and of the literature and a valuable guide to the intricacies of this difficult and perhaps insoluble problem."

—W. W. B. in 44 Law Quart. Rev. 248. (April, 1928.)

Handbook of Roman Law. By Max Radin. 1927. St. Paul, Minn. West Publishing Co. Pp. 485.

Great pains have obviously been taken over the book with a sincre desire to stimulate readers to a serious pursuit of this all too neglected study, and the author is to be congratulated both on his endeavor and on his performance. Those interested in the civil law on this side will be gratified by Professor Radin's graceful acknowledgment of indebtedness to Continental and English writers, and will hope that his generous recognition of transatlantic influence will not endanger the success of the book in its country of origin.

—J. W. C. T. in 44 Law Quart. Rev. 265. (April, 1928.)

SEDITION

(See Blasphemy)

STATUTES

Our modern rule in giving credit to legislatures for knowing what they want to enact as law, for understanding sufficiently the English language to enable them to use the terminology requisite to express their meaning, and for meaning what the words employed mean and not something different—a very violent presumption in many cases—leads to protest against the "careless and slovenly drafting of statutes": and again Don Quixote tilts against the windmill in *Roe* v. *Russell* [1928] 2 K. B. 117: 97 L. J. K. B. 290. The Quarterly reviewer rather favors the Locrian method set out by Gibbon in his Decline and Fall of the Roman Empire, vol. iv, p. 447: "A Locrian who proposed any new law stood forth in the assembly of the people with a cord round his neck, and, if the law was rejected, the innovator was instantly strangled." On consultation with my judicial brethren as to this, it has seemed to them rather drastic for the New World—much as some exasperated judges and other lawyers feel like adopting it sometimes. — W. R. R. (discussing a note in 44 Law Quart. Rev. 405 Oct., 1928).

TAXATION.

Taxation—Necessity for Uniformity—Attempt to Discriminate Between Types of Real Property in Same Taxing District Held Unconstitutional.

The state legislature empowered a commission to divide the defendant city into three zones on the basis of the comparative density of population, of existing city improvements; and of the reasonable outlook for progressive development. The inner zone, enjoying full municipal benefits, was to be taxed at the full rate, the middle one at one half the full rate, and the outer one, suitable for factory sites, at one-fourth the full rate. In an action to enjoin the defendant from making any expenditure under the act, held, for the plaintiff. The statute violated the uniformity clause of the North Carolina Constitution. Anderson v. City of Asheville, 138 S. E. 715 (N. C. 1927).

All the state constitutions except those of Connecticut, New York, and South Dakota require uniformity in taxation even though the relevant provisions of the several state constitutions are worded differently and are based on divergent economic backgrounds. Hence the tax rate must be uniform throughout the taxing district involved, whether it be state, county or local. While the taxing districts need not conform to political boundaries, a special taxing district can be established only for a special purpose and it must be co-extensive with the territory to which the proceeds of the tax are to be applied. The same rule of uniformity governs the mode of assessment, and forbids discrimination, whether by taxing at different rates on the actual value or by assessing different kinds of property at different proportions of the real value. The courts of the various states do not agree on the constitutionality of discrimination in favor of agricultural land within municipal boundaries, but where it has appeared that the new lands would receive little or no benefit from the municipal corporation, or that the sole purpose in annexing the lands was to increase the city revenue, some courts have been inclined to sanction such discrimination. The better rule seems to be the one reached by the instant case under the North Carolina constitution, which requires that "all taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same except property exempted by this constitution," since any discrimination between types of real property in the same taxing district is prohibited. Moreover in the instant case no such special benefit in relation to the different tax rate was to accrue to any one zone as would justify the particular discrimination. The taxes collected in all the zones were for the purpose of defraying the general municipal expenses and since the value of city land would be determined in part, at least, by the benefit received from the city and taxation is based on value, to lower the tax rate on certain lands would be, in effect, to favor them twice. . . .

—28 Columb. Law Rev. 113 (Jan. 1928).

Note on **Remedies For Wrongful Action in the Levy and Enforcement of Taxes** by G. W. B. in 26 Mich. Law Rev. 922, (June, 1928).

This note reviews the principal remedies of a taxpayer against wrongful action on the part of those in charge of tax administration and contains a thoughtful and careful consideration of the equitable remedy of injunction, the legal remedies by suit to recover taxes paid and the direct remedy by Writ of Certiorari from an Appellate Court. The note is carefully reasoned and well worth the attention of the practitioner who happens to have up for consideration this immediate question. —R. M. G.

The Unit Rule—What is Unitary Organization.—The unit rule may be described as a device for allocating to a taxing jurisdiction, values inherent in interstate businesses which cannot be determined by a mere valuation of property or business within a state. Its operation involves a determination of value attributable to a jurisdiction by the use of total valuation as a base and some constant factor as a ratio. Stated thus, the unit rule appears as a means of fixing the fair value of property within the state whether used to find the incidence of the tax or its measure. But to attain that ideal, tax assessors have been forced to steer a wary course between the restriction implicit in the Fourteenth Amendment against taxing property outside the state, and the prohibition against placing an undue burden on interstate commerce. The history of the unit rule in the courts has been mainly a charting of the boundaries of that course. . . .

—41 Harv. Law Rev. 227 (Dec., 1927).

TORTS

Governmental Responsibility in Tort: VII. By Edwin M. Borchard. 28 Columb. Law Rev. 577. (May, 1928.)

The first six parts of this study have appeared in volumes 34 and 36 of the Yale Law Journal.

History and Theory (Continued)

"In addition to the historical doctrines justifying governmental irresponsibility, already discussed, (the doctrines that a corporation is incapable of tort, that the King can do no wrong, and that the State is above the law.), it seems proper to review the more modern doctrines and theories advanced in the nineteenth and twentieth centuries either to deny or to support the responsibility of the State or other public corporation for the torts of its officers.

"The recognition of governmental responsibility for the torts of officers required certain political and social conditions which, until comparatively modern times, hardly prevailed in the western world. It was necessary for political theory to mature to a position according the individual a large measure of recognition for his personal rights, even against the group — a condition possible only in a highly developed political and legal system. Both state and official responsibility advanced with the growth of individualism, demanding protection against invasion of private rights by public officials. On the other hand, a well-developed social sense is required to realize that exceptional losses, due to the imperfections of governmental machinery or the torts [illegible] where they happen to fall, but should be distributed over the group as a whole.

". . . The continental historical development proceeds, in the main, from an insistence, in principle, upon State non-responsibility for tortious 'governmental' acts, with certain exceptions, to the admission, in principle, of State responsibility, with certain qualifications. It will be our purpose to survey this development and to observe the legal theories which have accompanied it.

"We are now interested in an examination of the scientific and doctrinal explanations which have been advanced in support of the responsibility of the State.

"Before entering upon an examination of the theories of responsibility, it seems necessary to note the distinction made in most of the countries of Europe between the 'governmental' and the 'corporate' functions of the State. . . ."

"The early private law analogies and theories of tort responsibility made no particular distinction between the State as a 'corporate' subject of private law and as a sovereign. Curiously, after the evolution of a century in which that distinction became the essential element in the problem, we are now returning, by legislation in Germany and certain other countries in Central Europe, and by judicial construction in France and other countries, to a point where the distinction is again nearly disregarded. In the proposed British and American legislation it remains unmentioned.

"Otto Gierke, one of the most learned jurists of modern times, to whom Maitland paid a tribute rarely equalled, is the spiritual father of the far-reaching German legislation, now strengthened by constitutional provision, making the State responsible for the torts of its officers even in 'governmental' matters. . . . Gierke's argument that there was no justifiable basis for any distinction between 'governmental' and 'corporate' functions in the matter of official responsibility was designed to point out the unwisdom of having made the civil code responsibility cover only 'corporate' activities, leaving responsibility for 'governmental' functions to the confusion of divergent state legislation. He lived to see Prussia (1909) and the Empire (1910) adopt general statutes assuming responsibility for the torts of Prussian and Federal officers respectively, in 'governmental' matters, but he died before the Constitution of 1919 adopted the general principle that Empire and states must assume responsibility for the torts of officers inflicting private injuries within the scope of their employment, regardless of the nature of the function. Much the same development, without the aid of legislation, has

Rationale of Proximate Cause. By Leon Green, Associate Professor of Law, Yale University. 1927. Kansas City: Vernon Law Book Company. Pp. x and 216.

"There is perhaps no question in English law at the present time which is more important or more difficult than that of proximate causation. As the author of this most interesting book has said, in his preface: 'It is undoubtedly the general opinion that the field of legal liability is greatly cluttered by "proximate causation" and that it needs to be cleaned up.' This same view was expressed by Sir John Salmond in his Law of Torts, when he said: 'Finally, there are the unsolved problems involved in the doctrine of remoteness of damage. . . . The true nature of the rule of remoteness of damage is a question on which little guidance is to be obtained from the authorities.' Therefore, Professor Green's attempt to solve the intricacies of this problem is certain to prove of interest to the reader, whether the reader agrees with the solution or not."

—44 Law Quart. Rev. 255. (April, 1928.)

TRUSTS

Right of Life Beneficiary to an Apportionment of Profit Realized by Trustees on Sale of Stock. "The Supreme Court of Pennsylvania, in Nirdlinger's Estate, deals with a question which has very rarely been brought before the courts, despite the numerous cases in which the rights of life tenants and remaindermen have been determined.

"In this case, the testator left his estate to trustees, who were directed to pay the rents, issues, income, dividends, and revenue to certain beneficiaries for life, and at their death to pay corpus to remaindermen. The trustees, acting with proper authority, entered into an agreement for the leasing of five theaters and advanced money for this purpose. A corporation was formed to operate each theater and the trustees received one-fifth of the stock of these five corporations, having advanced a total of $21,370, which the court treats as the price of the stock. At a later date, the trustees sold the stock for $170,000. The life beneficiaries claimed that they were entitled to $40,000 of the proceeds of this sale which, they contended, represented earnings accumulated by the corporations while the trustees were the owners of the stock.

"The court held that the life beneficiaries were entitled to as much of the proceeds of the sale as they could prove to represent earnings accumulated by the corporations during the period in which the trust had been in existence."

—R. B. in 76 U. of Pa. Law Rev. 589. (March, 1928.)

Note on **Constructive Trusts** in 26 Mich. Law Rev. 945. (June, 1928.)

This is a good note pointing out the authorities on the creation of constructive trusts in cases of illegal commingling by express trustees.—R. M. G.

Lewin on Trusts, 13th ed. By Walter Banks. 1928. London: Sweet & Maxwell, Ltd. Pp. ccviii, 1481.

E. C. S. W. says (44 Law Quart. Rev. 509, Oct., 1928): "We are conscious of the advantages of a single volume, but in this case such seems to be outweighed . . . new sections have been added . . . a few misprints and omissions are inevitable . . . it is difficult to estimate the task undertaken by an editor of a work of this dimension; far easier must it be to write a treatise *de novo*." But for the contents no fault is found.

Speaking as a lawyer in a jurisdiction in which English legislation has had no effect, I would say that the value to us is diminished by omissions wholly proper in England, and by additions of no interest to us: but that must be the case with new editions of any of the old favorites. The result is that we will continue to consult the older editions to which we are accustomed.—W. R. R.

USURY

Mr. Justice William Riddell writes as follows for the Chicago Bar Association Record:

Sybil Campbell's article on Usury and Annuities of the Eighteenth Century, in the Law Quarterly Review for October, 1928, pages 473 to 491, gives an illuminating account of the practices at that time whereby the time-honored prohibition of usury was circumvented. The prohibition, believed to be divine, against taking usury from another has, like the other prohibition believed to be divine, "Thou shalt not suffer a witch to live," gone into the discard in most countries: people are allowed to make their own bargains, and no one would believe the evidence of a score of witnesses swearing to seeing an old woman flying through the air on a broomstick to a Devil's Sabbath, even if backed up with a formal confession by the crone herself. But it was not always so: the precept against usury had by the middle of the eighteenth century brought down the rate of interest which might be lawfully taken from the original 10 per cent. to 5 per cent., and an agreement to take more than 5 per cent. on any mortgage or loan was utterly void, and the lender liable to lose

not only his loan but treble its value by way of penalty.

Money always finds its way, and this was no exception. As early as Elizabeth's time, it had been decided that the statutes of usury applied only where the return of the loan was provided for, and that where the capital sum was bona fide "put in hazard," or in other words, where the contract was such that there was a bona fide risk of losing the principal, the contract did not come within the statutes, even if more than 5 per cent. was in fact made on the transaction. In *Fuller's Case,* (1586, Mich. T., 29 Eliz.) 4 Leo. 208, the lender gave £300 to have an annuity of £50 for one hundred years if he, his wife, and four children lived so long; and this was held outside the statutes. Other annuities for the lifetime of the lender are told of. But it seems to have been left for almost another century before the question of the validity of an annuity for the lifetime of the grantor of the annuity came up for adjudication. In *Murray* v. *Harding* (1773) 3 Wilson, 390 (cf. 2 W. Bl. 859) an annuity for the lifetime of the grantor at a price of six years' purchase was upheld, even although it was redeemable at the option of the grantor at the end of five years. Chief Justice De Gray said: "It is essential to the nature of an usurious contract, that there must be (1) a loan; (2) that illegal interest is to be paid for such loan. It is essential to the nature of a loan, that the thing borrowed is at all events to be restored. If that be bona fide put in hazard, it is no loan but a contract of another kind."

It would seem that there was a perfect saturnalia of such transactions in England about that time: a contemporary Pamphlet quoted by the author says "for the first few years this traffic was confined to a narrow circle of avaritious miscreats. Till at length . . . the citizen sees the Jew grow rich by it, the 'squire, the citizen; and for the last ten years it has been an increasing trade. I speak from my own knowledge when I say there are tradesmen who have at this day from ten to thirty and fifty thousand pounds engaged in annuities; that there are private gentlemen who have more; that there are men of landed property who mortgage their estates at 5 per cent., in order to make 12 per cent. by the purchase of annuities; that officers sell their commissions, the clergy their character and religion, and ladies their humanity, their conscience and reputation, to purchase under-valued annuities."

Lord Hardwicke seems to have been perfectly justified in his expression in *Lawley* v. *Hooper* (1745) 3 Atk. 278 (cf. *Hoffman* v. *Cooke,* 5 Ves. 623; *Ex p. Shaw,* 5 Ves. 620). The irate Lord Chancellor breaks out:—"I really believe in my conscience, that ninety-nine in a hundred of these bargains are nothing but loans turned into this shape to avoid the statutes of usury." Of course, it was always to be borne in mind that if it "could be proved that the sale of such an annuity was in truth a 'loan' and only so arranged as 'color or shift' the usury laws applied": but perjury was as rampant in such cases then as at any other time, and it was a more than Herculean task to prove anything adverse to the document.

Then came the Annuity Act of 1777, 17 George III, cap. 26, which required the enregistration of such annuity deeds in chancery. The author gives an account of some of these.

WILLS

Note on the **Right of a Murderer to Take by the Will of the Murdered Person,** in 26 Mich. Law Rev. 947. (June, 1928.)

In *re Wilkins' Estate,* 211 N. W. (Wis.) 652, it was held that where the legatee without knowledge of the will murdered the testatrix and then committed suicide, the will was wholly inoperative so far as the rights of the murderer were concerned.

Ever since the case of *Riggs* v. *Palmer,* 22 N. E. (N. Y.) 188, the question of the right of a murderer to take under the will of the murdered person, with its analogous question of the right of an heir who murders the ancestor to take as heir, has intrigued the legal profession. There is a good deal of modern law on the subject which is well reviewed in this note. For Illinois, see *Wall* v. *Pfanschmidt,* 265 Ill. 180.—R. M. G.

A Concise Treatise on the Law of Wills. By Sir Henry S. Theobald, K. C. 8th ed. By J. I. Stirling. 1927. London: Stevens & Sons, Ltd. Pp. cxxviii and 1151.

"Nearly twenty years have elapsed since the seventh edition of this standard work appeared, so that the task of preparing the new edition has been sufficiently onerous, apart from the responsibility of incorporating the changes effected by the recent property statutes. . . .

"The new edition worthily maintains the reputation achieved by its predecessors, and will be essential to every well-equipped law library.

"A new feature in this edition, which will be found useful, is the inclusion in an appendix of a short collection of precedents."

—D. T. O. in 44 Law Quart. Rev. 238. (April, 1928.)

LIBRARY OF THE CHICAGO BAR ASSOCIATION BOOK NOTES AND LAW REVIEW ARTICLES IN THIS NUMBER

Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario, has reviewed for this number of the Record the October, 1928, issue of the Law Quarterly Review;

Mr. Russell Whitman the June, 1928, issue of the Harvard Law Review;

Mr. John M. Cameron the June, 1928, issue of the Illinois Law Review;

Mr. Richard M. Gudeman the June, 1928, issue of the Michigan Law Review;

Mr. Willard L. King the most recent numbers of the New York Times Book Review.

To all of these contributors we desire to express our grateful appreciation.

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THE CHICAGO BAR ASSOCIATION RECORD

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COMMITTEE ON BENCH AND BAR

A new Committee on Bench and Bar announced in this issue of the Record holds forth much promise. It is composed of ten judges representative of the different courts and twelve members of the Association. It is designed to furnish a convenient instrument for the free exchange of opinions and observations between the Bench and the Bar.

Judges have many opportunities to observe the appearance of evil practices long before they become known to the Bar generally. This Committee furnishes an opportunity for them to bring such matters to the attention of a representative group of lawyers. From time to time the courts may be in need of additional facilities, and may want the help of the Bar in procuring them. Here is the place to ask for such help. Likewise, members of the Bar may from time to time have suggestions concerning the administration of the courts which would promote justice. In this Committee such suggestions can be freely presented. In a host of ways cooperation between the Bench and the Bar through the new Committee should be productive of much good in the administration of justice.

LEGISLATIVE BULLETINS

Special attention is called to bulletins concerning pending legislation of interest to lawyers appearing in this issue of the Record. These bulletins have been prepared by members of the Committee on Amendment of the Law and appear on pages 270-285.

THE
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FINANCING LEGAL AID

In Civil and Criminal Cases

For some time past it has been the yearly program of the Legal Aid Committee of the Bar Association to raise the sum of $15,000 among members of the Association for the Legal Aid Bureau of the United Charities, the sum to be used entirely for civil cases. This program is being modified this year, owing to the fact that the Committee on Defense of Prisoners has no assurance that income from the Raymond Foundation, which it has received heretofore, will be available to it after July 1st. The Committee on Legal Aid and the Committee on Defense of Prisoners, therefore, have agreed to cooperate in order to raise not only the funds required for civil cases, but an additional $3,000 for the defense of prisoners.

The committee's program comprises three steps. First, there will be a letter sent to each member of the Bar Association who has previously subscribed to the fund. Second, those from whom no replies or unfavorable replies are received will be solicited personally. Finally, there will be a general appeal to members of the Bar Association. The amounts received will be supplemented by this year's payments on a general five years' subscription entered into by certain members of the Bar Association some time ago. It is the hope of the committees that members of the Association will be willing to respond to the need for additional funds.

APPOINTMENT OF RECEIVERS

The following report on the subject of the appointment of receivers received from the Committee on the Judiciary is here published by direction of the Board of Managers:

To the Board of Managers of The Chicago Bar Association:

Several months ago you referred to the Committee on the Judiciary an inquiry concerning the proper practice or policy to be followed by the courts of this County in the matter of the appointment of receivers.

The inquiry arose from a communication from Judge Harry M. Fisher of the Circuit Court, who, having heard of complaints and criticism by the Bar in respect to the policy that he had adopted, desired the Association to investigate and report its opinion on the propriety or wisdom of the repeated appointment of the same person as receiver in a large number of cases.

It was quickly seen that no sound conclusion could be reached until all parties in interest had been heard and all of the factors involved had been considered. Accordingly the matter was delegated to a sub-committee of three, with directions to investigate the facts and report its recommendations as to the proper policy to be adopted.

After hearings extending over a number of weeks during which three of the chancellors of the Circuit Court (including Judge Fisher), a number of members of the Bar and several receivers appeared and testified, the sub-committee submitted its report and recommendations which were adopted by the full Judiciary Committee and by the Board of Managers.

At the request of the Board of Managers we have prepared the following summary of the conclusions of the Committee:

The testimony at these hearings brought out three distinct situations in connection with the appointment of receivers wherein a definite policy, in the judgment of the Committee, should be formulated and acted upon by the Court in the appointment of a receiver. These are: first, a situation in which it can be seen at once that because of the very nature of the estate and the intricate problems facing anyone charged with the duty of administering it, there is a need for the appointment of a particular receiver, or of a particular type of receiver; Second, a situation in which the handling of the estate requires no extraordinary skill or talents and all parties to the litigation have agreed upon the appointment of a particular person, whether it be an individual or a corporation: and third, a situation in which the work re-

And I may say in passing that we consulted with every local Bar Association before a Committee was appointed in that particular district. We really only made recommendations to the local Bar as to the members who should serve upon that Committee.

> (Continuing) "to co-operate with the governors of The State Bar in disciplinary matters, and in the 'furtherance of the execution of the provisions' of the State Bar Act.
>
> "These local committees now realize the advantage of having a program of activities to be carried out under the efficient and intelligent direction of the centralized Board of Governors. They have, according to all reports, readily assumed and faithfully performed the task assigned to them."

And in conclusion he says:

> "To sum up the situation in a sentence; the self-governing bar plan of organization is working satisfactorily and efficiently in California."

That is signed by the Hon. William H. Waste, Chief Justice of the Supreme Court.

That, briefly, is the story in so far as California is concerned. Of course, the time is too short—fourteen months is entirely too short to state the ultimate outcome of this experiment. But we undoubtedly have created a feeling of co-operation. There is a very definite trend of thought and action in California today, which to us augurs well for the future. If the Bar fails in California, it will not be due to the fact that this form of organization is not basically sound, but it will be due to the fact of our ineffectiveness and lack of presentation, rather than to the character of the organization.

I may say in conclusion that what has been accomplished has not been accomplished without tremendous effort on the part of the Bar of California, and of the Board of Governors. As I have said, the thirteen members meet at different places throughout the State; and you know that California is a long state. We meet in San Diego. It is 700 or 800 miles from there to San Francisco. We may meet in the northern part of the State the next time. These members travel that distance, and they go that distance to be present at these meetings. In other words, you can see that almost a week is consumed in a meeting; and during the interval there is assigned to a member of the Board for consideration the record, and in this case that I mentioned, over two thousand pages of testimony had to be read over carefully, by the member, so that he might make a written report. He makes a written, and not a verbal report to the Board; so that he may state the you can see that the work is very protracted; and mind you, these men are busy practitioners; and yet that work never seems onerous to them. They are always willing to do their part. It is, perhaps, the untiring energy of that Board that through this first year has made the Bar respond very satisfactorily to the Board, the Bar and the Judiciary of California. I may add that we had the united support of our highest court in the attempt to pass the State Bar Bill.

That is the situation in California today. We have some dissatisfaction. It is not one hundred per cent perfect. We have disbarred quite a number of attorneys, and we have reproved others, and suspended some; and you cannot expect those men to favor an act which deprives them of their right to practice.

We are now studying the question of ambulance chasing, and we are about to appoint a special committee to investigate that thoroughly, and necessarily we have opposition from some members of the legal profession. We do not expect to go along without some effort to repeal the law, or so to curtail its activities that it will not be as effective as it has been in the past.

However, we believe that it has been a success; and again I wish to thank you for the opportunity of being able to appear here and tell you what we have been able to accomplish in this short space of time. (Applause.)

Mr. Bell: May I ask a question?

Mr. Webb: I will answer it if I can.

Mr. Bell: Given the same personnel and the same devotion and enthusiasm, could what the California Association has done be done by a voluntary association?

Mr. Webb: I do not think so, for this reason; in the first place, we have funds. We spent $87,000 last year. Some of that, of course, was capital expense. But we bring home, as I tried to point out, to every member of the Bar, not only those who are interested, but we are making Bar Association men out of men who never cared for Bar Associations, who never were interested in Bar Associations, and who are now good Bar Association men. In other words, when we select a committee, we do not select all men who are active Bar Association men. We select two or three of them for that committee, and then we put on two or three who never did lift a finger in Bar Association work.

After all is said and done, neither a voluntary organization nor a State Bar will succeed unless we can bring the majority of the Bar into a harmonious relation with each other, and induce co-operation. And when we do that, then our

LIBRARY OF THE CHICAGO BAR ASSOCIATION

New Books and What the Reviewers Say of Them.

Items from the Law Reviews.

THE LAW QUARTERLY REVIEW FOR JANUARY, 1929.

[Reviewed by Hon. William Renwick Riddell for The Chicago Bar Association Record]

This number begins as usual with interesting and valuable comments on recently decided cases.

Brooke v. Bool [1928] 2 K. B., 578, is a decision which the reviewer, F. P., says "is easily appreciable by lay common sense"; and he might have added "professional commonplace". Bool had the right to enter a shop which he had let to Brooke, after hours, to see that it was secure; smelling gas, one night he entered, taking with him Morris, a lodger, to help in inspection. Bool examined part of the premises with a naked light and allowed Morris to examine another part in the same way Morris's naked light caused an explosion, and Bool was exonerated by the County Court, when sued by Brooke for damage to his goods. The King's Bench Division reversed this decision; and one rather fails to see how there could be any question as to the liability of Bool.

The Income Tax case of Lavene v. Inland Revenue Commissioners [1928] A. C., 217, is of importance out of the United Kingdom, only as illustrating the power of Parliament to create a new vocabulary with words differing in meaning from their meaning in ordinary use. Brett, L. J., long ago objected to "Parliament insisting upon saying that things are what they are not": Bradley v. Baylis [1881] 8 Q. B. D., at p. 230; but Parliament, nevertheless, at Westminster said that a steam-pipe was a boiler: Reg. v. Commissioners [1891] 1 Q. B. 703: and our Ontario legislature said that a child which was being cared for by a perfectly respectable and reliable husband and wife was a "neglected child": Re S. [1919] 45 O. L. R., 46. In fact, Parliament can do anything that is not naturally impossible,—or, as old Oliver Cromwell used to say, do anything but change a man into a woman or a woman into a man.

Engelke v. Musmann [1928] A. C. 433 (the name of the defendant has no significance) is an instructive decision as to the rights of immunity enjoyed by ambassadors and diplomatic agents. It may fairly be said that the immunity of foreign ... ing; it seems doubtful whether a Don Pantaleone Sa would now be hanged as in the golden days of Charles II: 5 Howell's State Trials, 461.

The doctrine of the Bombay High Court in Abaji, &c. v. Trimbak, &c. [1903] I. L. R. 28 B. 66, that only a remission or dispensation made by agreement will be effective under the provision of the Indian contract act, that "every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him", has after more than twenty years of protest by commentators been authoritatively discredited by the Judicial Committee in Chunna, &c., v. Moel, &c. [1928] 55 Ind. App. 154.

Eshugbayi Eleko v. Gov't of Nigeria [1928] A. C. 459, in addition to the interest attaching to it as showing the wide range of the common law, has the further merit of dealing with the writ of habeas corpus, historically and otherwise. A deposed native chief in Nigeria refused to leave the country as ordered by the governor and was detained. A writ of habeas corpus was refused by one judge, and after a time the chief applied to another; he holding that the one application barred a further application, refused to grant the writ, and his decision was affirmed by the full court. On appeal taken to the foot of the throne, the judicial committee decided that at the common law application could be made in succession to every judge, and the judge so applied to must deal with the application on its merits notwithstanding the refusal by another judge or other judges; and there had been nothing in the way of legislation or otherwise to change the law; consequently the appeal was allowed. A contributor to The Law Journal refers to certain cases from Australia and Canada, among them Re Bowack [1892] 2 B. C. R., 216; R. v. Jackson [1914] 27 W. L. R. 31; R. v. Gee Dew No. 1) [1924] 3 D. L. R., 153, the first and last being from British Columbia, the second from Alberta, but all improperly cited as "Can.", which is proper for the Canadian courts, viz. the supreme court of Canada and the exchequer court of Canada. Each province has its own courts, and the citations should have been "B. C." and "Alta.", respectively. Reference is not made to the cases from Ontario, in the latest of which, R. v. Graves [1910] 2 O. L. R.. 329, 358, the history of the writ is gone into and the conclusion reached that the right still exists to go to every judge in succession until either the writ is granted or the bench all appealed to.

Reckitt v. Barnett [1928] 2 K. B. 244, reviewed in the former number (see 12 Chic. Bar Assoc. Rec. 81) has been reversed in the house of lords, 45 T. L. R.

business methods and ideas—and, if I may say so without disrespect, to common sense.

The case of Gosse Millard Ltd. v. Canadian Government, &c., turns on the interpretation to be placed upon certain provisions of an imperial statute and need not detain us.

The curious case of Gray v. Perpetual Trustee Co., Ltd. [1928] A. C. 397, decides that the mere fact that two persons —generally husband and wife—make mutual wills, benefiting each other, does not in itself import a contract not to alter or revoke; and, in the absence of any other fact, the survivor may make a fresh will even after accepting the benefit under the other will; thus the decision of Astbury J., in Re Oldham [1925] 1 Ch. 75, was approved. The principle laid down was that only when the mutual wills are the result of an agreement, is a trust raised, which is in accord with the general course of decision in English-speaking jurisdictions.

Re Robins [1928] Ch. 721, is a decision on the effect of the drastic law of property act, 1925, in respect of land left in trust to pay the income to certain persons in undivided shares for the life of specified persons and thereafter to sell and hold the proceeds in undivided shares in trust. Re Gaul and Houlston's Contract [1928] Ch. 689, is also on the same Act.

A contributor sends an interesting discussion of Professor Goodhart's article, referred to in the November number of the Record, pp. 92, 93. He comes to the conclusion that any demand would be blackmail in a case in which "any jury would find that there was no colourable claim to be paid any sum of money".

Jeremy Bentham will probably continue to be a puzzle to future generations and to the past and present—why did he write at all? was it so that he might get married? what was the real cause of his detestation, amounting apparently to personal hatred, of Blackstone? did he really care "tuppence" (which is the regular English expression, when something stronger might be, but, *causa modestiae,* or because of the presence of a gentleman of the cloth, is not employed) for the actual state of the law in England, but only for what it ought to be?, &c., &c. A new angle is given to our enquiries by Mr. Bertrand Russell in his "Sceptical Essays"—and no one in England has a better title to write sceptical essays than Mr. Russell. The author says that "Jeremy Bentham was thought to be a very wicked man in his lifetime". F. P., reviewing this book, says with what I believe to be the exact truth: "Certainly, such was not the opinion the Benchers of Lincoln's Inn, who called Bentham to the Bench in 1817. We may presume that they fairly represented the views of their Inn and of the Bar in general, and we conclude that, although the majority of lawyers may have thought Bentham's theories fantastic and his revolt against Blackstone almost blasphemous, they had no personal aversion to him and regarded his learning and philanthropy as creditable to the profession. Indeed, we thought it a notorious fact that Bentham was one of the least molested of prophets. Mr. Bertrand Russell seems to have been misled by taking a jest of Sydney Smith's for earnest". In every word of which, I concur. By the way, it may not be generally known that Blackstone had a trenchant critic in the celebrated Priestley and another in the first chief justice of Upper Canada, William Osgoode.

The first of the Articles is a very exhaustive discussion, with full quotation of authorities, on The use of the injunction in American labor controversies, by Professors Frankfurter and Greene of Harvard law school; nothing seems to have been overlooked or left unsaid on the matter.

Professor Ludwik Ehrlich has a valuable article on petitions of right, which play such a part in countries of the British commonwealth of nations. The history is traced of the methods whereby one injured by the acts of the king obtained relief, ultimately arriving at the modern —or comparatively modern—system of petition of right. The theory still is that it is the king who has unconsciously interfered with the rights of one of his subjects and has only to be informed of the facts to see that right is done to the injured person. This requires that a petition is to be drawn up stating the facts alleged and relied upon, submit this to the attorney-general, and, if there is a plausible case, he directs justice to be done. Of course, "the king" is now an expression for "the people", and the attorney-general acts for the people upon his responsibility to the representatives of the people in parliament, not at all under the direction of the king, although he is only in theory advising his majesty. I pointed out in Orpen v. Attorney-General of Ontario [1924] 56 O. L. R. 327, that the granting or refusing such a fiat was the duty of the attorney-general under his responsibility to parliament, and that the court could not interfere with his discretion. I also pointed out that where the English courts in such cases as In re Nathan [1884] 12 Q. B. D. 461 use the language: "It is the constitutional duty of the attorney-general not to advise a refusal of the fiat unless the claim is frivolous", the word "constitutional" was

used in the English (and Canadian) sense, not the American, and as meaning "in accordance with the principles upon which we think we ought to be governed"; the word in the British sense has not the connotation of something obligatory and, if necessary, to be passed upon by the courts. I feel myself obliged to agree in the implied stricture upon the historical correctness of some of the supposed historical facts, the existence of which (as believed by the Court) formed much of the basis of the leading case of Tobin v. The Queen, 16 C. B. (N. S.) 310, and something might be said as to Thomas v. The Queen, L. R. 10 Q. B. 31.

The article by Mr. H. G. Richardson on "The Calendar of Charter Rolls" is of historical interest, but too technical for the ordinary reader, and does not call for comment.

"French Criminal Procedure" is the subject of another article by Mr. A. C. Wright, who quotes a somewhat pregnant statement "that much of the English criticism of French criminal procedure is due to our own temperamental inability to understand the purposes and working of French institutions. Their complexity, interdependence and their very rivalry inter se constitute the best possible guarantee for accused persons". Possibly it is the same with Canadians who cannot understand why, in Canada, a jury is generally obtained in a murder case in a few minutes and the trial seldom lasts more than one day or, at most, two, while in the United States it takes days, perhaps weeks, to get a jury, and weeks, sometimes, to finish a trial. It has always seemed to me that no people have any right to criticise—in the sense of finding fault with—the practice of the courts of another; every free people have the courts as all other their institutions, as they themselves really desire, and it is nobody else's busines how they conduct them.

Mr. W. T. R. Stallybrass has an article dealing with the case of St. Anne's Well Brewery Co. v. Roberts [1928] 44 T. L. R. 479, 703. While the facts can hardly be paralleled upon this continent, the principles upon which the decision proceeds may be found to apply as well to Chicago or Toronto as to the ancient city of Exeter. The Brewery Co. were the owners of an ancient inn in the ancient city of Exeter, and the defendants were the owners of part of the ancient wall of the city, which they had let to a weekly tenant. Owing to a latent defect, not discoverable by reasonable care, the wall fell down upon the inn, doing considerable damage. In an action based upon Rylands v. Fletcher, or alternately upon nuisance, the plaintiffs succeeded before the trial judge, Acton J., but this was reversed by the court of appeal. Some of the lords justices held that Rylands v. Fletcher did not apply to an owner not in occupation, which doctrine, if held sound in the house of lords, will compel a revision of views held by some of us. This would bring another instance of the annoying *damnum sine injuria,* which modern jurisprudence is trying hard to get rid of. The tenant is not liable: Job Edwards, Ltd. v. Birmingham Navigations [1924] 1 K. B. 341; and if the owner escapes liability, the injured person has no relief. The whole principle requires consideration anew; and this may be done in the house of lords.

The number concludes with an Article by myself intituled "The First Legal Execution for Crime in Upper Canada", which may be found of interest. In 1785, a gentleman—at least "farmer and shoemaker"—of "Williams-town-bay state of Boston—State in North America" sold a negro to a Montreal merchant: the negro, variously called Cutten, Cuttan, Cutan, and Cotton, ultimately got to Detroit and became the property of a merchant there, John Askin. Detroit was still in British hands, and became part, de facto, of the new Province of Upper Canada when it began its separate provincial existence in 1791-2. The negro had the bad luck to be caught burglarising a house in Detroit and stealing some furs. He was taken over to L'Assomption, now Sandwich, Ontario, and tried before the court of oyer and terminer and general gaol delivery, September 3, 1792, presided over by William Dummer Powell, a Boston loyalist, who was first judge at Detroit and afterwards chief justice of Upper Canada. Found guilty, the negro was sentenced to death by Mr. Justice Powell, who likened him to the "wild beasts of the forest, who, like you, go prowling about at night for their prey". And duly hanged he was, costing the province £2 Halifax ($8.00) for the job.

In the book reviews is one by F. P. on "The Trial of Socrates," by Coleman Phillipson. It has been the custom to speak of the trial of Socrates as a travesty of justice. Both author and reviewer agree that the trial was in accordance with the regular practice, that "Socrates * * * had full liberty to defend himself", and "if he had spoken a little more in excuse and a little less in bold justification, he might have gained a majority of votes". "And, after all, the respectable and orthodox Athenians who condemned Socrates did their best according to their lights * * *". In this, I agree; I have been accustomed to compare the trial of Socrates with the more modern case of the patriot, John Hampden, which is constantly referred to as an instance of tyranny, while I venture to assert that any lawyer who examines the proceed-

ings as they appear in the State Trials, without prejudice and with a knowledge of the law of England as it then existed and had existed for centuries, will come to the conclusion that not only did Hampden receive fair play, but also that the decision was the right one. For nearly half-a-century, I have been waiting an explanation of the real puzzle of the life of Socrates, namely, his Daemon. However just the result of the trial of Socrates and of Hampden, they alike spelled the downfall of the systems under which the two heroes were condemned, the one to pay a small sum of money, the other to die by a fatal draught.

"Stephen's Commentaries on the Laws of England" has reached its 19th edition, with new editors, by whom it has been "radically revised and largely rewritten", so that "such great changes have been made that it is really a new book". The reviewer, P. R. W., says of it that he knows of no other book that would answer to give a continental student a fairly complete elementary outline of English law . . . except Professor Jenks's 'Book of English Law', which is not . . . as full". No higher commendation can be given.

"Salmond's Law of Torts" appears in a seventh edition; and the editor, Mr. W. T. S. Stallybrass, can boast of one admirer in the reviewer, P. H. W.

"Palmers Company Precedents, Part II" is now in its 13th edition, with wholly competent editors. The reviewer, G. H. H., has "perused the book with profit and advantage"; and so have I.

"The British Year Book of International Law, 1928" comes in for "a good deal of praise" from the reviewer, P. H. W.: but he is quite as sceptical as I am of the inference by one of the contributors that the "pre-war theory of neutrality . . . in its entirety has become a matter of history", which, in the opinion of the reviewer, as in mine, "is too sweeping a consequence to attribute to the covenant of the league of nations",—not to mention the fact that a very important part of the world, which has always been very solicitous for the rights of neutrals, is not a party to the covenant.

"Modern Railway Law", by Ernest Williams, is really a successful attempt "to bring the last edition of Browne and Theobald's Law of Railways up to date". Along with this may be considered Alan Leslie's Law of Transport by Railway", 2nd edition, both being largely upon the English Act.

Norton on Deeds is well known and has now its second edition, which receives none too high praise from H. E. S.

Of Roscoe's "Digest of the Law of Evidence and the Practice in Criminal Cases", which appears in a 15th edition, by Anthony Hawke, the reviewer, A. S. D., says that appearing first nearly a century ago it "owing to the systematic arrangement of its topics" is "still concise in form, and it is difficult to know why it is not more in favour amongst practitioners." This last statement comes as a surprise to me in Ontario; whatever may be the case in England, in Ontario most of us turn to Roscoe at once when a question of Criminal Evidence arises; we here consider it an admirable work.

"Proposals for the Reform of the Rules of Evidence" is academic, however important. Other works reviewed are the second edition of Kennedy's "Contracts of Sale C. I. F."; the second edition of Sophian's "Landlord and Tenant's Act, 1927; the thirteenth edition of "Gibson's Conveyancing"; Dr. Stoyanovsky's "The Mandate for Palestine"; the third edition of Roscoe's "The Measure of Damages in Actions of Maritime Collisions"; "The Students' Conflict of Laws . . . based on Dicey"; and a new work on "The Law of Principal and Agent", by A. W. Peake of Grays Inn.

ADMINISTRATIVE LAW

Administrative Powers over Persons and Property.—A Comparative Study. By Ernst Freund. Chicago: The University of Chicago Press, 1928. Pp. xxi, 620.

Prof. Walter F. Dodd reviews, with approval, Prof. Freund's book in the Illinois Law Review for February.

The reviewer says:

"The author of this volume is primarily responsible for the attention now given to the important problems of administrative law in the law schools of this country. His volume of 'Cases on Administrative Law,' recently issued in a second edition, has determined the scope of law school courses in this field; and his activities as chairman of the special committee on administrative law and practice of the Commonwealth Fund have largely determined the character of special investigations in this field. By the present volume he has still further increased the debt which all students of our legal system owe to him.

"Mr. Freund in the volume now under review analyzes the present statutory regulation of private rights by Germany, Great Britain, New York and the United States government. These jurisdictions present an adequate basis for comparison, and in all of them there has been a great expansion of regulatory legislation during recent years. Mr. Freund properly says that we have been in 'an era of regulation which combined respect for

private right with a growing sense of the social obligations of property and business' (p. viii). The present problems of administrative law are largely created by relatively recent regulatory legislation. The author has wisely confined himself to a limited number of jurisdictions. To have attempted to cover all of the forty-eight states would have made the book a catalogue rather than a critical discussion of legal problems."

And he concludes:

"Mr. Freund does not profess to have produced a systematic treatise on administrative law, but his volume presents the groundwork for such a treatise, and a number of chapters could, without a great deal of additional work, form portions of such a treatise. The reviewer and others interested in the progress of administrative law may well indulge the hope that a comprehensive treatise on administrative law will be Mr. Freund's next published work."

—J. M. C.

ANNOUNCEMENTS

"Sir Dunbar Plunket Barton, whose forthcoming book on 'The Amazing Career of Bernadotte' is announced by Mr. Murray, also has in preparation with Messrs. Faber and Gwyer an illustrated volume entitled 'Links between Shakespeare and the Law'. Here the author has collected all the legal allusions in the plays and poems and grouped them under various headings. In dealing with Shakespeare's references to famous lawyers, such as Sir Edward Coke, and to causes celebres, such as Shelley's case and the trial of Sir Walter Raleigh, Sir Dunbar Plunket Barton has made some fresh discoveries, founded upon a comparison of certain passages in the plays with the case-law of that period. The legal allusions are classified, without a controversial aim, from a lawyer's standpoint. A foreword has been contributed to the book by Mr. J. Montgomery Beck, formerly Solicitor-General of the United States."

—The (London) Times Lit. Supp., Feb. 7, 1929, p. 94.

"Messrs. Chatto and Windus's list includes . . . 'The Prospects of Democracy,' by Alfred Zimmern."

—The (London) Times Lit. Supp., Feb. 7, 1929, p. 97.

"Under the title 'From Leipzig to Cabul,' Mr. Frederic Whyte has translated G. Strathil-Sauer's account of his motor-cycle journey to Afghanistan by way of Asia Minor, Armenia and Persia. The journey ended in the author's nine months' imprisonment in Afghanistan, an experience which afforded him unusual opportunities of studying the judicial methods of that country at first hand. His book is to be published by Messrs. Hutchinson."

—The (London) Times Lit. Supp., January 24, 1929, p. 52.

BIOGRAPHY

Sir Edmund Hornby: An Autobiography. With an Introduction by D. L. Murray. (Constable.)

"Sir Edmund Hornby for a good many years of his life sat as Supreme Judge in the British Consular Courts in Turkey, China and Japan in succession, and it would seem that in this autobiography he found relief and expression for his natural feelings after the long hours of decorum and impartiality on the Bench. Decorous he may have been when actually in ermine, but in official relations he could be a spitfire, and was no respecter of persons, particularly when they were pompous, overbearing or incompetent chiefs. Fortunately for him, he succeeded in getting the theory accepted that as a Judge he was not to be expected to take orders from anybody, and that his sledge-hammer dispatches were to be read and treated with the respect which they and their subject-matter deserved; and it was found convenient by those in authority to allow him to draft the Orders in Council under which he was to act. . . . It was about the end of the Crimean War that he was appointed British Consular Judge in Turkey—as an autobiographer he is the despair of an historian, as he rarely mentions a date and often narrates his experiences out of chronological order —and achieved such a reputation that Turks and Kurds from outside his jurisdiction on several occasions insisted that he should adjudicate between them, and accepted his rulings as if they had been given by the Prophet himself. . . .

"From Turkey Sir Edmund went to China, where he arrived in Shanghai during a period of great commercial activity and prosperity. He recounts a number of illuminating instances of his relations with the Chinese authorities, whom he had to bully with the utmost truculence in order to get justice done. One of these, unofficial, but an important authority all the same, was the King of the Thieves, who showed a useful gratitude to the foreign Judge who had dealt kindly with an ill-treated member of the thief community. He was sterner in his dealings with pirates, and supplies a fascinating account of how he went to Portuguese Macao and smelt out the slave trade, which he found to be almost openly and quite vigorously at work at 5 a. m. in a Portuguese law court. . . .

"Sir Edmund . . . is full of infor-

TRADE ASSOCIATIONS

Foreign Trade Functions of Trade Associations: The Legal Aspects. By Benjamin S. Kirsh in 76 U. of Pa. Law Rev. 891. (June, 1928.)

"The future will witness three concurrent further developments of particular interest to students of the legal phases of these matters. Each will contribute important and necessary elements of an effective and complete plan to equalize, as nearly as is practicable, the competitive conditions between foreign and domestic business organizations. First, the trade association movement within the United States which has taken such rapid strides in the post-war developments in this country, will be a contributing factor in aiding American industry and commerce to cope with foreign competitors. These trade organizations have as their aim, and are accomplishing in practical results, the introduction of economies in production and distribution, the improvement of quality, and the lowering of prices of products, and are promoting the standards of competitive conduct. Their activities contribute to the general adoption of intelligence and stability in the processes of manufacturing and marketing. Secondly, the fostering and aiding, to a greater extent, of the foreign trade of American citizens, by means of taking advantage of the co-operative features of the Webb-Pomerene Act in its present form and probably as it will be amended or further clarified in the future so as to effectuate the general purposes for which it was enacted; and utilizing to greater extent the useful and helpful trade promotive activities of the Department of Commerce, the Federal Trade Commission, and other government agencies. Thirdly, a vigorous enforcement of the Sherman Anti-Trust Act and the Wilson Tariff Act, where foreign combinations are engaged in illegal activities within the territorial jurisdiction of the United States.

"The discussion must needs be restricted to these three general phases because they are of particular interest to lawyers and observers who are interested in legal developments. The next decade promises to resolve, in great measure, to an authoritative solution, many of the perplexing questions which are now being debated."

TRUSTS

The Work of Corporate Trust Departments. By R. G. Page and Payson G. Gates. New York: Prentice-Hall, Inc., 1926.

This book is ably reviewed in the Illinois Law Review for January by Prof. Raymond F. Rice of the University of Kansas Law School. The great extension of corporate service in registering and transferring shares of corporate stock and in administering testamentary and other trusts makes such an addition to legal literature a useful help in modern law offices.

—J. M. C.

Liability of the Trustee under the Corporate Indenture. By Louis S. Posner of New York City in 42 Harv. Law Rev. 198. (December, 1928.)

"With the increase of security issues to such vast sums and their distribution throughout the world, a growing reliance has come to be placed by investors upon the trustee, usually a banking corporation, so that the standing of the trustee has become, in a measure, a certificate of the mortgagor's standing, and serves to 'encourage the sale of securities' and give 'tone to the obligation.' What, then, are the liabilities of the trustee, and to what degree are they enlarged by this attitude?

"However we consider the attitude of the courts, there remains for the trustee a sanction that rises beyond legal standards and calls for the exercise of at least the ordinary care which the facts of a situation demand. That sanction is found in the public confidence which financial institutions engaged in the business of trusteeship of corporate securities have well earned. Their repute and standing are increasingly important factors upon which the public often depends; to which in a measure may now be added the influence of banking houses through which these issues are sold to the public, and which may be relied upon to re-enforce the trustee's vigilance whenever necessary. As an important instrument of finance, the trustee is prepared to accept the plain implications which flow from such confidence —implications which the courts are not likely to ignore. To the credit of these institutions, it must be said that, in practice, their standards of administration have been so much higher than the express requirements of the corporate indenture that comparatively few instances have invoked criticism in the past century."

MOTOR COACH SERVICE BETWEEN COUNTY BUILDING AND NEW CRIMINAL COURT BUILDING.

Route No. 31 operates on Washington Blvd., between the County Building at LaSalle Street and Sacramento Boulevard, (3000 West).

Route No. 30 operates on Sacramento Boulevard at Washington and runs south on Sacramento, through Douglas Park, and via Marshall Blvd., 24th Blvd. and California Blvd. to the Court Building at 26th Street.

As Washington Blvd. is now used as a one-way (westbound) street at Sacramento Blvd., with Warren Ave. (a short block to the south) carrying the eastbound traffic, our coaches of Route No. 31 operate accordingly and the transfer point between Routes 30 and 31 is at Washington and Sacramento coming from the Loop and at Warren and Sacramento going to the Loop.

During the hours when the courts are in session, coaches on the two routes involved leave as follows:

Westbound

Coaches of Route 31 leave County Building at 8:02 A. M., 8:12, 8:19 and then at intervals shorter than five minutes until 9:39; then every five minutes until 9:50; then every six minutes until 2:35 P. M., after which time coaches run every five minutes or closer.

From the transfer point at Washington and Sacramento, coaches of Route 30 leave at 8:16 A. M., 8:24, 8:32, 8:40 and every ten minutes thereafter.

Eastbound

Coaches of Route 30 leave the Court Building at California and 26th Street at 8:30 A. M., 8:42, 8:54 and every ten minutes thereafter.

From the transfer point at Warren Avenue and Sacramento Boulevard, coaches of Route 31 leave at close intervals (less than five minutes) until 8:41 A. M.; then every six minutes until 1:57 P. M. and thereafter every five minutes or closer.

The running time between the County Building and the transfer point is twenty minutes, and about fourteen minutes between the transfer point and the Court Building.

Free transfers are issued on demand, making the fare between the County and Court Buildings, ten cents each way.

—Kay Lorenken, Traffic Engineer.

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EMPLOYMENT SERVICE

Applications for employment as law clerks and associate lawyers are always on file at the rooms of the Association. Members should not fail to make use of this service provided by the Association. Phone State 3267.

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JUDICIAL DECISIONS

Logic and the Habit of the Public Mind.

"THE training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. . . . We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.

"I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."

—Collected Legal Papers by Oliver Wendell Holmes, (Justice U. S. Supreme Court), pp. 181-184.

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REPORT OF NOMINATING COMMITTEE

The report of the Nominating Committee appointed under Article IX of the By-Laws to nominate a ticket of officers to be voted for at the ensuing annual election has been posted on the bulletin board, as prescribed by the by-laws.

Report of the Nominating Committee is as follows:

To the Board of Managers:

The undersigned, appointed as a Committee to nominate candidates for offices to be filled at the next election of the Association, respectfully report the following nominations:

For President ......Francis X. Busch
" **1st Vice-Pres**....William P. Sidley
" **2nd Vice-Pres**...Charles P. Megan
" **Secretary** ......Wm. S. Warfield III
" **Treasurer** ......Walter H. Eckert
" **Librarian** ......Willard L. King

For Members of the Board of Managers:

Richard Bentley
Henry P. Chandler
Paul P. Harris
Philip H. Treacy
Harold F. White

For Members of the Committee on Admissions:

S. Ashley Guthrie
Clay Judson
Oscar A. Kropf
Grover C. McLaren
Frederick J. Newey

Respectfully submitted:

Thomas J. Lawless
Robert McCormick Adams
Richard J. Finn
J. M. Dickinson, Jr.
Bruce Johnstone
Chairman.
Nominating Committee

FEES IN CONFESSION CASES

Recommended for All Courts

On May 13, the Board of Managers approved a recommendation of the Municipal Courts Committee that the same fees be allowed in confession cases in the Circuit and Superior Courts as have been recommended for the Municipal Court.

The matter was referred to the Municipal Courts Committee for the reason that it had recently studied the question and had made a recommendation as to the amount of fees to be allowed where a power of attorney authorizes confession of judgment with "reasonable attorneys' fees". In addition to recommending the same schedule of fees which was recommended for the Municipal Court and as

has been adopted by that court, the Committee recommended that the schedule submitted be a minimum schedule but this recommendation the Board of Managers felt should not be approved.

The Committee reported in part as follows:

"The members of the Committee are unanimously agreed and report as follows:

"1st. That Attorney's Fees in confessions of judgment when stated as 'Reasonable' in the confession clause, should be on the same basis in all courts.

"2nd. That the schedule of fees heretofore recommended for the Municipal Court, and the suggestions hereinafter set forth for the Circuit and Superior Courts should be a minimum fee for the court to allow in the respective cases stated." [This recommendation was not approved by the Board of Managers.]

Schedule of fees as approved by the Board of Managers

1. In confessions of judgments in the Circuit and Superior Courts when Attorney's fees are stated as "Reasonable" in the confession clause of the notes that the attorney's fees for the court to allow be as follows:

a. **$500 and under**—$7.50, plus 15% of the entire sum confessed upon.

b. **From $500 to $1,000**—$72.50, plus 10% of the sum in excess of $500.

c. **Over $1,000**—$132.50, plus 5% of the sum in excess of $1,000.

ADDITIONAL SPACE FOR MUNICIPAL COURT CLERK

The congestion in the office of the Clerk of the Municipal Court has for some time been evident to all who have had occasion to transact business there. Mr. James A. Kearns, Clerk of the Municipal Court, has repeatedly stated that the difficulties were purely in the physical limitations of the present clerk's room. It is impossible to put additional clerks at the counters unless additional counter space can be provided. Accordingly, the efforts of the Municipal Courts Committee were directed toward assisting the clerk to secure additional space and thus provide better service to the public.

When the matter was presented to Chief Justice Olson he recognized its importance and when some of the branches of the Municipal Court were moved into the new Police and Municipal Courts Building at 11th and State Streets, an order was entered directing that Room 812 be turned over for the use of the clerk. Commissioner of Public Works Wolff consented to this change.

In order to accomplish the purpose of the change it will be necessary to tear out the walls between Room 812 and the Clerk's room and between Room 812 and the corridor, to tear out the Judge's bench, and to install additional counters.

The Municipal Courts Committee is to hold a meeting to which it has invited Chief Justice Olson and Alderman Clark, Chairman of the Finance Committee of the City Council, with a hope of obtaining an appropriation to defray the necessary expense of making these alterations.

PROPOSED LEGISLATION

In the report of the Committee on Public Law Offices in reference to its investigation of the Law Department of the Sanitary District of Chicago, published in the April issue of the RECORD, among other recommendations was one to the effect that "The legislature should pass an act prohibiting the employment, directly or indirectly, of any member of that body by any municipality or other public or governmental body, board or commission, and also prohibiting the receipt by such member of any compensation for any service performed by him before any department, board, or commission of the legislative or administrative branches of the State government."

In furtherance of this recommendation the Committee submitted a proposed bill for legislation which rests on two basic principles: (1) under the American system of government, the division of powers into executive, legislative and judicial is fundamental; (2) the constitution of the State of Illinois contemplates that members of the General Assembly shall be responsible only to their respective constituencies and to the State, and shall be free to devote themselves to the interests of the State, and that any relation which impairs this singleness of purpose is inconsistent with a proper discharge of the public duties of such members.

The proposed bill is as follows:

A Bill for an Act to amend an Act entitled "An Act to revise the law in relation to criminal jurisprudence," approved March 27, 1874, in force July 1, 1874, as amended, by adding after Section 214 in Division 1 thereof three (3) new sections thereto, to be consecutively numbered and lettered, and to be designated as Sections 214a, 214b, and 214c.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. The act entitled "An Act to revise the law in relation to criminal jurisprudence", approved March 27, 1874, is amended by adding after Section 214 of Division 1 thereof three (3) new sections thereto, to be consecutively numbered and

lettered, and to be designated as Sections 214a, 214b, and 214c, which said three new sections shall read as follows:

Section 214a. Whoever, being elected a member of the General Assembly of the State of Illinois, shall, during the term for which he shall have been elected, directly or indirectly receive, or agree to receive, any compensation whatever (other than his salary as such member, as provided by law) for any services rendered, or to be rendered, either by himself or another, to or for the State of Illinois, or any political subdivision or governmental agency thereof or thereunder, or to or for any public officer, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $500, or shall be imprisoned for not more than one year, or both.

Section 214b. Whoever, being elected a member of the General Assembly of the State of Illinois, shall, during the term for which he shall have been elected, directly or indirectly receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the State of Illinois or any political subdivision or any governmental agency thereof or thereunder, shall be a party or directly or indirectly interested, before any court, department, bureau, officer, or any public board or commission whatever, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500, or shall be imprisoned for not more than one year, or both.

Section 214c. No member of the General Assembly at any time during the term for which he shall have been elected shall be in the employ of or receive compensation from or hold any official relation to any corporation or person subject in whole or in part to regulation by the Illinois Commerce Commission, or hold stocks or bonds in any such corporation, or be in any other manner pecuniarily interested therein, directly or indirectly; and if any member of the General Assembly become so interested otherwise than voluntarily he shall within a reasonable time divest himself of such interest.

REVIEW OF LEGAL EDUCATION BY CARNEGIE FOUNDATION

"The Annual Review of Legal Education", compiled by Alfred Z. Reed, in behalf of the Carnegie Foundation for the Advancement of Teaching, was released on April 29th and makes most interesting reading. It includes a concise summary of the six hundred pages of facts and conclusions embraced in "Present Day Law Schools", published for the Foundation, and also discusses the subject of bar admission requirements and gives a statistical resumé of the recognized law schools in Canada and the United States.

In general, the author finds that the greatest weakness of legal education and admission to legal practice today is that its formal organization has ceased to correspond to the facts of professional life, and that there is continued an outworn assumption that lawyers must be trained as general practitioners of every branch of the law. While some influence is being exerted to make the system accord with actual present day conditions, the inherent conservatism of the profession itself is the greatest factor in continuing the theoretical unity which is no longer possible under the conditions of a highly specialized commercial age.

Mr. Reed calls attention to the encouraging fact that one hundred eleven of the one hundred seventy-six degree-conferring law schools have a more or less close contact with a college of liberal arts, while twelve others are connected with colleges or schools of business or commerce. Another notable change in the situation is the increase of part-time law schools, most of them conducted at night, their students constituting over fifty-eight per cent of the total number of those taking a legal course. The report recommends that attempts be made to control part of the content of the preliminary college years by instituting supplementary entrance examinations, and also favors a more sparing use of the elective system in the various schools. A distinction is seen between the eastern and western schools which conduct full-time or part-time courses, in that the former have generally established separate divisions for full-time students, whereas the latter lengthen the courses of the part-time divisions, with the usual result of reducing total attendance.

The greater simplicity of Canadian law and the higher bar admission requirements make the problem of legal education in the Dominion much simpler, and Mr. Reed finds in their schools a vital spirit of progress which enables them to profit by the experience of their older colleagues, and seems to promise a ripe future for their usefulness.

Under the head of bar admission requirements, the various changes in certain states regarding preliminary education, registration for legal study, entrance examinations and credit for office work are fully discussed. An unexpected result has occurred in Pennsylvania, which by court order on September 30, 1927, required applicants other than college graduates to pass an examination on subjects roughly equivalent to a high school education, the examination being conducted by the College Entrance Board, rather than the State Board of Law Examiners. So few applicants passed under the first test of the rule that between ninety-eight and ninety-

nine per cent of those registered as beginning their law studies last year were college graduates. Pennsylvania, therefore, though it has expressly repudiated the American Bar Association requirement of two years of college work, has set a standard of general education which in practical application is much higher than that of any other jurisdiction.

Our northern neighbors again appear to advantage in the comparative study of the chief features of bar admission requirements. Each of the provinces of Canada requires at least two years of preliminary college work, except Prince Edward Island, which demands college entrance prior to registration. In Newfoundland, one year of college work suffices.

The report includes a very complete analysis of full-time, part-time and "mixed" law schools in the United States, with all the details of registration, fees, etc., together with extracts from the recommendations of the American Bar Association as to the proper standards to be maintained. There is also a useful bibliography of bulletins, reviews and reports issued by the Carnegie Foundation dealing with legal education and cognate matters.

—Elbridge B. Pierce.

AMERICAN INFLUENCE ON ENGLISH LAW *

It is rather embarrassing to speak after the very kind words which Mr. Megan has just said about me. Last year I received from an Hungarian professor an article for publication in the Law Quarterly. In submitting it he said, "I hope that if you publish this, that I will receive adequate retribution." I am afraid in speaking after Mr. Megan's flattering introduction that my words may receive adequate retribution here.

After having lived in England for almost ten years, the conclusion I have reached is that Americans as a whole are too modest. They suffer from what is described by that much abused term as "an inferiority complex." They do not sufficiently realize the tremendous influence they have on the lives and the thoughts of other countries.

Last year an English periodical published an article entitled "Keep Coolidge out of London." The writer described at some length how American ideas were influencing English life and were altering the habits and the customs of all classes in the community. He reached the conclusion that the influence was an unfortunate one. Whether that is true or not I will not discuss here, but that the effect of American ideas is a powerful one is hardly open to question.

It is a commonplace, of course, that we export material things in ever-increasing amounts. A hundred years ago we shipped nothing but raw material such as cotton, tobacco, and foodstuffs. Within the past twenty-five years we have been sending manufactured goods such as automobiles, typewriters, harvester machinery, gramophones, electrical appliances, etc. But since the war we are exporters in a more important sense. We are not only exporting material things; we are exporters of ideas which have influenced and, to a certain extent, revolutionized the whole world.

Those twin arts, music and dancing, have, after a brief struggle, capitulated to syncopation and the fox-trot. Wherever you go on the Continent, you will hear American music. For that matter, it is difficult to hear anything else. Last summer when I was in Budapest I went to a cafe to listen to one of the famous gypsy bands. I waited for one of the haunting Magyar songs but instead they played "Old Man River." It will not be long before the Black Bottom becomes the national dance of Jugoslavia. Wherever you go, the music and the dancing is American, and the native folk music is gradually disappearing.

It is hardly necessary to mention here the influence of the moving pictures. Hollywood has spread its empire over the world. There are revolts here and there but the domination still continues. So firmly has the American tradition been established that the English pictures are merely imitations of the American ones with all their faults accentuated.

Some of the English newspapers, which are becoming American in makeup with their headlines, cartoons and personal columns, have started a typically American scare campaign against "the invasion of American plays." There is some justification for this for at one time half the theatres in London were filled with American productions. But the influence is even more potent than this for the English producer and dramatist has to a considerable extent adopted the trans-Atlantic manner. There is a snap and speed to American plays, and especially to American musical comedies, which appeals to the English audience. Where an American joke is put over in half a minute, the English joke in a musical comedy formerly took about five, as they explained it and prepared you for it, so that it should not come as a shock.

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* An address delivered by Arthur Goodhart, editor of the Law Quarterly Review, before The Chicago Bar Association, December 29, 1928. The speaker was introduced by Mr. Charles P. Megan.

In literature the influence is less striking. The O'Henry trick ending is still popular with magazine story writers and there are one or two imitators of Sinclair Lewis. In poetry the modern English school has been affected by Whitman and his American followers. The very modern school has enlisted under the Boston banner of T. S. Eliot.

No form of American art has so appealed to European imagination as has the overwhelming power of the new American buildings. The American idea of getting effect by huge masses is having an influence on foreign architects. It is hardly probable that the skyscraper will be reproduced in other countries, but the simplicity, force, and austerity of the modern American structure is being followed in the newer European office buildings.

When we turn from art to business we find the same American influence. Strenuous efforts are being made to introduce in England those features which have made the United States the leading industrial nation of the world. "Mass production," "amalgamation"—even "service"—are heard on every side. The old idea that it is incorrect to push one's wares has disappeared. No longer is the seller a shy violet waiting to be gathered,—he now tries to seize his customers by more blatant means. The English countryside is being ruined by huge advertising signs. Compare Piccadilly Circus today with a photograph of the same place before the war. See the huge advertisement of port wine showing an empty glass slowly filled to the brim by the crimson fluid at which the provincial visitors gape with admiration and some Americans with envy. So popular have the various flashing signs become that the Circus is popularly called "The Scotchman's Cinema."

If there has been this continual infiltration of American ideas into England is it not probable that American legal ideas may have had some influence abroad? We know that the influence of England on our American law did not end with 1776. Every American law library of any importance keeps the modern English law reports, and on its shelves can be found most of the important English textbooks. The leading English cases of the 19th century are included in the American case books and are discussed in the law schools. English procedure is continually cited as a model in American reports, and some English legislation, such as the Bills of Exchange Act, 1882, has been largely adopted in this country. Is there any reciprocity in this matter I will attempt to show you that American influence on English legal ideas is far from negligible. The most convenient way of doing so is by considering (a) American lawyers in England, (b) American legal literature, (c) American law reports, and (d) American law schools.

I am not certain whether, strictly speaking, the United States can claim the first man I will mention for he had left these shores before the Colonies revolted from England. John Singleton Copley, first Baron Lyndhurst, was born in Boston in 1772, his father being the famous artist. In 1775 the family moved to England. After graduating from Cambridge, young Copley was called to the bar, where he was noted for his radical, almost revolutionary, opinions. In 1817, while he was successfully defending Dr. Watson against a charge of high treason, Lord Castlereagh, leader of the Tory party, attended the trial. He was so impressed by Copley's brilliant speech that he sent him a slip of paper on which he wrote: "What a pity it is that your principles prevent your advancement!" Copley answered on the same slip: "They don't." Shortly thereafter he was returned to Parliament for a Tory borough, and in 1819 became solicitor-general. In 1827 he became Lord Chancellor and received a peerage. He served his party well by giving vigorous opposition to all reform measures and by opposing Catholic emancipation and the repeal of the corn laws. His charm of manner is described by Dickens, who had been a reporter in his Court, in *Bleak House:* "He dismissed us pleasantly, and we all went out, very much obliged to him for being so affable and polite; by which he had certainly lost no dignity, but seemed to us to have gained some." He is also said to have been the model for the Attorney-General in Warren's famous novel "Ten Thousand a Year," and is quoted as giving the well-known advice to the law student to study the State Trials. "You could hardly believe me, if I were to tell you how much I have read of them—speeches, examinations, cross-examination of witnesses, reply and summing-up." Lyndhurst died in his ninety-first year more renowned for his charm of manner than for the sincerity of his opinions.

The American who has had the greatest influence on English law is Judah P. Benjamin. He was born a British subject in the West Indies in 1811 but was taken to Louisiana in 1818. As you know, he was Senator from that state, declined an appointment to the United States Supreme Court, and during the Civil War he was attorney-general, secretary of war, and secretary of state of the Confederacy. After the war he escaped to England where he was called to the Bar without having to fulfil the usual onerous requirement of eating dinners for three years. Within a short time he became the leader of the commercial bar, and is said to have made an income of £15,000 a year. Lord Chancellor Cairns considered him for ap-

pointment to the bench. Benjamin had a direct influence on Anglo-American legal relations for, as has been said,[1] "The arguments of that very remarkable lawyer of both America and England before the English courts were replete with American citations and this led many English judges, without question, to a greater consideration of American courts and precedents."

While waiting for his practice, Benjamin wrote his classic work "Benjamin on Sales" which is still the leading authority in England on this subject. Here his knowledge of the civil law which he had acquired in Louisiana stood him in good stead in dealing with a branch of the law so largely based on Roman principles.

There have been other Americans who have been called and have practiced at the English bar. At the present time there are five or six Americans who are members of the Inns of Court. In the United States a man must be a citizen of the state and of the nation before he can be admitted to the Bar, but in England a man can become a barrister, although not a solicitor, without being a British citizen. That is partly due to the fact that it is so difficult, under the complicated British Empire with its various dependencies and colonies, to know who is a British citizen and who is not. These American barristers are playing an important part in explaining to their English brethren the intricacies of the American legal system.

Another direct American influence on English law is to be found in the Americans who are teaching law at Oxford and Cambridge. At Oxford the present holder of the Corpus Chair of Jurisprudence is Professor Ashburner who was born in California. He is an authority on Equity, and on the Rhodian Sea Laws. Until last year Professor Jacobs, now of the Columbia Law School, taught at Oriel College.

At Cambridge, the successor to Maitland in the famous Downing professorship is H. D. Hazeltine, an American, who has held a lectureship at Chicago University. He is an authority on such different subjects as Air Law and the history of Canon Law in the Middle Ages. Mr. G. T. Lapsley, tutor of Trinity College, a graduate of Harvard, is one of the leading authorities on English constitutional history and law. His volume on the county palatine of Durham, cited frequently in Holdsworth's History of English Law, is a model of its kind.

It is interesting to realize that these three Americans are all teaching some branch of legal history in England. If they had attempted to do so at a university in this country they would have found that in America at the present time a legal history of the past has no future. As far as I know, there are virtually no chairs devoted to that subject over here. Yesterday, at a meeting of the Association of American Law Schools, Dean Wigmore pointed out how important it is that provision should be made for the study of American legal history. If it is not done now, many of the important records will disappear and some of the essential material will be irrevocably lost. It is a tragedy that the legal history of a great state such as Illinois should not be adequately written so that future generations may study the development of law during one of the most exciting and creative periods in the world's history. With the great interest over here in the teaching of law, which is manifested by the construction of magnificent school buildings, it does seem as if it ought to be possible for each of the larger law schools, especially for those which are part of the state universities, to create chairs of American or of state legal history.

The second way, in which America has influenced English law is through legal literature. For nearly a century the works of Mr. Justice Story on Agency, Conflict of Laws, and Equity have been cited in the English courts. Miss Munson found over fifty references to him in the years 1876-1914. I have not made an accurate count but I think that it is probably true that next to Coke and Blackstone, Story is cited more frequently in England that any other text book writer. He has not been displaced as an authority, for there are two references to him in recent reports. On the other hand, Kent's Commentaries, for which at one time there was an English vogue, are practically unknown today. For some reason, Cooley on Torts which has had so great an influence on American law, has never appealed to English readers.

Story's popularity is nearly equalled by that of John Chipman Gray, whose books on *Restraints on Alienation* and the *Rule Against Perpetuities* are recognized as authority in England. "Indeed," writes Professor Holdsworth in *The Historians of Anglo-American Law*, "an English specialist on these topics, who differs from Professor Gray on many points, has feelingly complained that the tendency of our judges is to regard him as orthodox if not infallible." Professor Gray's delightful essay on *The Nature and Sources of the Law* is read by many of the students in the law schools and has helped to popularize the study of jurisprudence.

Perhaps the American law book which is best known to the English student is Mr. Justice Holmes' "The Common

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[1] Agnes McNamara Munson, "The Influence of American Law on the English Courts, 48 Am. Law Review 558 (1914).

Law." It is unnecessary for me to point out here what revolution in legal history began with this classic work. Since its publication, no important book on the subject has failed to contain a number of citations from its vast store of learning and philosophic analysis. It is referred to so frequently in the English schools that last year when I was examining at Oxford University I noticed that one man in his paper spoke of the "brilliant work by Lord Holmes."

It is impossible to discuss here the various American scholars whose researches have done so much for legal history. Of their work Professor Holdsworth has said: "The history of many parts of the law of contract and tort; the history of a part of the common law, closely allied in its earlier history to the law of torts; the law as to the possession and ownership of chattels; the history of commercial law; the history of the law of evidence; and the history of procedure—have all been put on a new basis by the writings of American lawyers." Among the various outstanding names he mentions are Bigelow, Holmes, Ames, Thayer, Wigmore, Street, Burdick, Vance, Beale, Gross, Williston, and Langdell. He devotes a special section to Professor Woodbine's great work on Bracton.

Perhaps in no branch of the law has the work of American scholars been of such importance as in the law of torts for here the principles are still uncertain. The editor of the new edition of Salmond on Torts has said: "Our American friends have made a great contribution to the scientific study of the English Law of Torts, and our students should familiarize themselves with the work which has been done for us across the Atlantic." He refers in particular to the Harvard Essays on the Law of Torts and to Professor Bohlen's Studies in the Law of Torts.

Within the past few years English jurists have discovered the works of Dean Pound and of Judge Cardozo, and they are now recognized as leaders in the study of the philosophy of the law. Their influence is a rapidly growing one, and there are signs that they have brought new life to a study which threatened to become sterile. An eminent English judge has described Judge Cardozo's "Nature of the Judicial Process" as the most interesting legal book published in the present century.

It is only natural that the more practical American law books should be of less interest to English readers than are those which deal primarily with principles. There are two, however, which are of importance; Parsons on *Marine Insurance* which has been frequently cited by the Courts, and Brannan's *The Negotiable Instruments Law* which is quoted by most of the English books on this subject.

This list of American law books which I have given is necessarily an incomplete one, but I think that it shows how considerable has been the influence of American legal scholars on English thought.

The influence of the American cases has been less marked for there are fewer references to American decisions by the English courts than one would be led to expect. This is due in large part to the ever increasing bulk of the American law reports. It is impossible for an English library to keep up to date with the cases of even the more important states, and the English barrister has not learned to use the complicated American machinery of digests, cross-reference books, citations, etc., which alone makes the mass of precedents workable. As a result references are usually confined to the Federal and Supreme Court reports.

In Miss Munson's article, to which I have already referred, a search was made in the 11,000 reported cases from 1876 to 1914, and 251 references to American cases were found. An analysis shows that over two-fifths of them occur in maritime law, using that term broadly to include both admiralty and maritime insurance. It is obvious that here the interests of the two countries touch each other most closely and that it is necessary for the law to be uniform. The second place in the number of citations is taken by cases on international law and conflict of laws. During the Great War the citation of American cases on international law increased greatly. Sir Samuel Evans, who was the English Prize Court Judge, tried as far as possible, whenever there was a question which concerned an American citizen, to base his judgment on the opinions of the United States Supreme Court. On conflict of laws there is comparatively little English case material so that it is natural for English lawyers and judges to turn to the American authorities which are particularly numerous here. There have been at least ten American citations on negligence, agency, real property, sales and marriage and divorce. Perhaps the most important single American case cited in the English courts has been Chief Justice Shaw's opinion in *Farwell v. Boston and Worcester Railroad Corporation* (1842) 4 Met. 49, for as Sir Frederick Pollock has said, this is "a judgment which is the fountain-head of all the later decisions, and has been judicially recognized in England as 'the most complete exposition of what constitutes common employment.'" It is interesting to note that there have been so few references to cases on negotiable instruments. This may be due in part to the fact that many of the English cases on

this subject have involved questions under those sections of the Bills of Exchange Act, 1882, which were not included in the Negotiable Instruments Law when it was adopted by most of the states. In estimating the influence of American citations it is important to remember that English opinions are sparing in the number of references they contain. The American habit of including as many citations as possible developed with the written judgment; in England where the majority of the judgments are delivered orally it is essential for the judge to concentrate on one or two cases. 251 citations, therefore, means more in England than it would in the United States.

Thirty years ago in an article on "The Teaching of English Law at Harvard"[2] Professor Dicey of Oxford University prophesied that English legal education would be influenced by the development of the great law schools in America. It is usual to give Langdell and the other great teachers at the Harvard Law School credit for having introduced the case system, and then to stop there. This hardly does them justice for it slightly overrates their work in one direction and greatly underrates it in another. The case system is not as original as some of Langdell's admirers have suggested,—there were case books before he introduced their use at Harvard, and the method of teaching law by the discussion of concrete problems was not unknown to the medieval moot. But, as Dicey has pointed out, Langdell did more than perfect a method. He insisted that law was a science, and that scientific training rather than purely practical experience was essential for the proper training of the young lawyer. For hundreds of years it had been felt that experience in chambers or in the office was sufficient; the American law school proved that a thorough training in the principles of the law and in legal method better fitted a man for the practice of the law. Gradually this idea has been introduced in England, and the great improvement in legal education during the present century is in part due to the direct influence of the Harvard Law School. It is only necessary to mention the effect on the Law School of Cambridge University. Where formerly the emphasis was on Roman Law, the present course is designed to stress the principles of English law. In place of the strict lecture system a modified form of the case book method has been introduced. Moot courts and a Law Journal are flourishing and have proved efficient instruments in legal education. The LL.B. degree is now awarded for graduate study, and a steadily increasing number of men are finding the extra work of value. Most of these changes have been brought about under the influence of the American example.

That the law schools of the two countries will continue to react upon each other is suggested by the fact that between them the interchange of professors and students is more marked than in almost any other academic subject. Within the past ten years four Cambridge professors have given courses in American law schools while an equal number of American professors have lectured at Cambridge. Year after year at Oxford the American Rhodes scholars furnish a large proportion of the best men taking the honours school of jurisprudence and the B.C.L.; while at the Harvard Law School this year there are seven English students doing advanced work. In the past the reputation of the Harvard Law School has so far exceeded that of all the other American schools that foreign students tended to concentrate there, but in the future it is to be hoped that they will be more evenly divided throughout the country.

So far I have been talking about an influence of which we as Americans may feel proud. There is another legal sphere, however, in which the American example has influenced English law by repulsion. Our administration of the criminal law has become a bye word abroad. The technicalities by means of which criminals may escape from justice or indefinitely postpone the execution of their sentences are regarded with astonishment. But what particularly strikes the English lawyer are the brutalities of the police and of the district attorneys which seem to be so contrary to all ideas of civilized justice that they would not be believed if it were not that they were proved by quotations from American law reports. As a result there is nothing the Englishman so much fears as the idea that by some chance the "third degree" method may be introduced into his country.

This was emphasized last year when the famous Sir Leo Money-Irene Savage case threatened for a moment to overthrow the English government. If the Home Secretary had not handled the matter tactfully in the House of Commons by immediately consenting to a Parliamentary enquiry which could hear the whole matter, an adverse vote might have been recorded.

Sir Leo Money is a popular and well-known economist who has written frequently for the newspapers. He met in an informal manner an attractive factory girl named Irene Savage. One night in

[2] 13 H. L. R. 422.

May they were sitting in Hyde Park when they were arrested by two policemen. Sir Leo Money claimed that he and the young lady were discussing economics. The police, however, arrested them on a charge of indecent behavior.

When the case was heard in the magistrate's court, he, after listening to the policemen's evidence and without calling on Sir Leo Money to give evidence, dismissed the charge and said that it was unfortunate that the case had been brought at all.

Then the question arose as to whether the two police officers had committed perjury. It is a usual fallacy to believe that if a prisoner is acquitted then the police who have charged him must necessarily have perjured themselves. This point was discussed in some of the English newspapers, and questions were even asked about it in the House of Commons.

Thereupon Scotland Yard, which is the London police headquarters, decided that they would have to investigate so as to determine whether or not to bring a charge of perjury against the two policemen. They telephoned to Sir Leo Money asking him to grant the police inspector an interview at which the case might be discussed, but he tactfully declined the invitation through his solicitors. Scotland Yard then decided that they ought to discuss the case with Miss Savage. So they sent an inspector of police and a police matron to the factory at which Miss Savage worked. She was asked to come to headquarters, and the manager of the factory advised her to go. She made no protest about going although she later testified that she was afraid to refuse.

When she reached headquarters, she was asked whether she wished the matron to remain with her but she said no. For about two hours the inspector asked her various questions which were taken down by a police stenographer. At half past four, according to the English custom, they had tea. Three cups were brought in, but as there was only one spoon, the inspector said, "Irene and I will spoon together." After tea the questioning recommenced and lasted until seven o'clock. Miss Savage was then put into a police automobile and sent home to her parents. At the door she shook hands with the inspector.

The next day this story, with all its horrid details, was called to the attention of the House of Commons. The cry was raised that Scotland Yard was introducing American third degree methods, that the liberty of the subject was being invaded, and that this outrage must be penalized. Amidst great excitement a committee, consisting of a distinguished, retired member of the Court of Appeal and two prominent members of the House of Commons, was appointed to investigate the matter. After lengthy hearings in public, the committee brought in a divided report, the majority acquitting the police inspector of wrongful behavior in questioning Miss Savage. Since then a Royal Commission has been set up to investigate the whole question as to the powers of the police to question unwilling witnesses, and to lay down rules so that in the future no one shall undergo the horrible experience which Miss Irene Savage suffered.

I think that it is largely because of this feeling towards American criminal procedure which is so frequently expressed in English newspapers and legal periodicals, that Americans get a false impression of the real attitude which the English lawyer has toward American law as a whole. The Englishman realizes that in the teaching of law, in legal literature, and in the judgments of such courts as the United States Supreme Court and the Court of Appeals in New York, America is fully the equal, and in some respects, the superior of England. It is only in the practice of the law that the comparison is unfavorable.

Before I stop I want to say one personal word. I have had considerable experience in legal periodicals, and I was therefore particularly interested when I read the monthly Record of The Chicago Bar Association. Instead of following the definite formal plan which so many of the law magazines have adopted it has started a new line of its own with new ideas. Every editor knows how easy it is to become dull. Your editor, on the other hand, has succeeded in making his paper interesting without becoming frivolous, has made it learned without depressing his readers. And therefore I think The Chicago Bar Association is to be congratulated most sincerely on a magazine which furnishes such strong evidence of vitality and of interest in the law.

PROFESSIONAL ETIQUETTE

The General Council of the Bar has resolved that it is contrary to professional etiquette for a barrister to answer legal questions in newspapers or periodicals: (i) where his name is directly or indirectly disclosed or liable to be disclosed, or (ii) where the questions answered have reference to concrete cases which have actually arisen or are likely to arise for practical decision. (1928, W. N. 205.)

—Annual Survey of English Law, 1928, p. 237.

APPLICATIONS FOR MEMBERSHIP

Each member of the Association is urged to scrutinize the following list of persons who have filed applications for membership. Ten days after the mailing of the Record, the Committee on Admissions begins the work of interviewing applicants whose names are published. Members should deem it their duty to advise the Committee on Admissions as to the fitness or unfitness of any applicant and feel assured that the Committee is always appreciative of assistance rendered.

LESLIE G. AGASIM, 134 N. La Salle St.; Feb. 14, 1929; Harry N. Pritzker, Lawrence Lenit.
NATHAN BARASH, 939 E. 63rd St.; Feb. 14, 1929; Howard R. Brintlinger, Robert F. Carey.
JACK BAUM, 155 N. Clark St.; Oct. 11, 1928; Robert C. Fergus, Henry Bartholomay.
J. MacLEOD BEST, 19 S. La Salle St.; June 14, 1928; Howard R. Brintlinger, Robert F. Carey.
LAWRENCE K. BLANCH, 127 N. Dearborn St.; Minn., Oct. 22, 1928, Ill. Feb. 14, 1929; Isadore Isenberg, Leo L. Brunhild.
JOSEPH V. BRENNAN, 105 W. Adams St.; Feb. 14, 1929; Henry B. Evans, Thomas L. Owens.
WILLIAM C. BURNS, 38 S. Dearborn St.; Oct. 11, 1928; William A. Rogan, Edwin A. Munger.
BERTRAM A. COLBERT, 2740 N. Ashland Ave.; June 14, 1928; Henry B. Evans, Thomas L. Owens.
E. CLARK DAVIS, 507 County Bldg.; Oct. 11, 1928; James F. Clancy, E. J. Camit.
T. EDWARD DAVIS, 5 N. Wabash Ave.; Oct. 14, 1926; Thomas L. Owens, John E. Owens.
THEODORE C. DILLER, 120 S. La Salle St.; Penna. Oct. 3, 1928, Ill. April 11, 1929; Ferre C. Watkins, Allan T. Gilbert.
BENJAMIN H. EHRLICH, 160 N. La Salle St.; Oct. 20, 1913; William J. Mannion, Elmer N. Holmgren.
JOSEPH A. FENTON, 105 W. Monroe St.; Oct. 11, 1928; Joseph B. Crowley, Thomas W. O'Shaughnessy.
LEO MATTHEW FORD, 35 E. Wacker Drive; Ind. 1922, Ill. April 11, 1929; William W. Dixon, James F. Wright.
J. M. HOPKINS, Jr., 38 S. Dearborn St.; Feb. 14, 1929; John D. Black, Edward G. Ince.
A. D. LYNN (Non-Resident), Bunnell, Florida; Ill., Oct. 16, 1924; Fla., March 22, 1926; Henry B. Evans, Harry J. McCormick.
W. M. McFARLAND, 105 W. Adams St.; Ind., June 19, 1920; Ill., April 11, 1929; Roy P. Kelly, E. O. Boshell.
ARTHUR J. McGINNIS, 1808 S. Ashland Ave.; June 14, 1928; Arthur W. Sprague, Howard R. Brintlinger.
CREIGHTON S. MILLER, 231 S. La Salle St.; Mass., Nov. 16, 1927, Ill., Feb. 14, 1929; Thurlow G. Essington, George B. McKibbin.
LAWRENCE J. MILLER, 39 S. La Salle St.; Oct. 13, 1927; Carlos S. Andrews, James B. McKeon.
RUDOLPH M. MULFINGER, 134 S. La Salle St.; Feb. 14, 1929; William C. Boyden, Jr., Thomas Hart Fisher.
LEE L. OSBORN (Non-Resident), La Porte, Ind.; Mich., June, 1905; Ind., June, 1905; Henry Russell Platt, Livingston E. Osborn.
GRIER D. PATTERSON, 38 S. Dearborn St.; Oct., 11, 1928; J. Sidney Condit, James H. Winston.
CASSIUS POUST (Non-Resident), Sycamore, Ill.; April 17, 1915; George E. Q. Johnson, John R. Cochran.
HARRY L. SCHENK, Jr., 175 W. Jackson Blvd.; Feb. 14, 1929; Richard C. Rugen, Arthur W. Pettit.
IRA L. SHERMAN, 18 S. Michigan Ave.; Calif., Nov. 13, 1928; Ill., April 11, 1929; Homer V. Johannsen, Luther W. Tatge.
DAVID JAMES SHIPMAN, 77 W. Washington St.; Oct. 13, 1927; Francis M. King, William C. Graves.
PRESSLY L. STEVENSON, 38 S. Dearborn St.; Penna., Sept. 24, 1928; Ill., Feb. 14, 1929; Martin S. Gordon, Henry B. Evans.
CLINTON O. THOMPSON, 160 N. La Salle St.; Feb. 14, 1929; C. J. Bassler, Rocco DeStefano.
HARRY G. ZIMMERMAN, 69 W. Washington St.; Dec. 13, 1923; Holman D. Pettibone, Benjamin Wham.

SUGGESTIONS FOR BRIEF MAKING

By Hon. George T. Page

Improvements in Procedure and Practice

If there are to be improvements in procedure and practice in the courts, the initiative must be taken and the work done by lawyers and judges. The most that legislative bodies can do is to supply here and there needed powers and retraints.

Improved Briefs and Arguments

Belief that there are many improvements that may be easily made, and that ought to be made, in the methods of presenting cases to the courts of appeal, prompted the writing of a letter in April, 1928, to the chief justices and presiding judges of all those Federal and State courts whose jurisdictions are mainly appellate, asking them to give their ideas as to the desirability and length of oral arguments, and also to send (a) a brief considered to be the best in form and substance, and (b) their court rules. With the letter was sent the suggestions to attorneys made by Judge Evans, presiding in the Seventh Circuit Court of Appeals.*

More than fifty per cent of the judges responded, with the material and information requested. The letters and rules received show that in many instances other courts have had experience similar to those of the Seventh Circuit Court of Appeals, and are striving for improvements in arguments and brief-making.

Pennsylvania and Wisconsin have done much to bring about good brief-making.

It is not deemed practical to draft a rule to be used as a pattern, but the faults which the rules examined seem designed to overcome are indicated under the heading "Common Faults and Suggested Remedies." Those matters, it is hoped, will be helpful to the judges in drafting their own rules.

Oral Arguments

Suggestions that apply as well to written briefs as to oral arguments are hereinafter considered, leaving little to be considered under this heading, other the time limit.

The Supreme Court of California discourages oral argument, but all the other courts seem to desire, and some of them require, such arguments in every case, some of them saying that oral arguments enable the judges to reach quickly

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* Printed in The Chicago Bar Association Record, for April, 1928.

and directly the heart of the case and also that they bring the judges into a closer association with the attorneys and give them a better understanding of the lawyer's point of view.

The time allowed for oral arguments in different jurisdictions varies from one-half hour to two hours on a side. The New York Supreme Court and the United States Circuit Court of Appeals for the Third and Seventh Circuits are the only ones retaining the two-hour rule. Although most of the courts conceded that there may be cases where it will be found desirable to allow a longer time for argument than that fixed by the rules, yet the judges assert that additional time is rarely ever asked. Many judges say that the length of time consumed is largely a matter of habit and not a necessity, and that usually the shorter the time, the better the argument. The chief justices in two of the older states say that the taking of more than half an hour on a side is a waste of time.

While there are differences of opinion as to the time necessary for the best oral argument, the undoubted tendency is toward a material reduction of the time allowed.

Brief-Making, Generally

The mechanics of brief-making is a thing quite apart from, but not of less importance than, the substance of the brief.

The right to file a brief is the lawyer's opportunity to present the facts and his interpretation of them, and his construction of the law. If he does not improve his opportunity so as to lead the court by the most direct route to the meat of the controversy, he has failed to make the most of his opportunity. In these days of crowded dockets, it is important that unnecessary work shall not be imposed upon the courts. Time that is taken and the labor that is required for the study of briefs that are not as good as they can reasonably be made is wasted time and effort. One of the reasons for the suggestions herein made is the belief that unsatisfactory briefs often are due to the fact that counsel do not understand the difficulties confronting the courts. They do not realize that, so far as the facts are concerned at least, that which is an old story to them is to the court a closed book, which the lawyer must open to the court in the right way, at the right place.

Common Faults and Suggested Remedies

The following faults are not uncommon. They are such as may and should be corrected by the lawyer. The matters are suggested in the order in which, preferably, they should appear in the briefs. The words "appellant" and "appellee" are used in referring to the parties.

1. Addresses of Attorneys. In addition to the matters that ordinarily appear upon the cover of the brief, it will be useful to give the addresses of the attorneys.

2. Table of Cases. A table of cases is often lacking. It should appear on the inside of the front cover, and show the cases in alphabetical order with reference to each page of the brief where cited.

3. Index of Subjects. Following the table of cases should be an index of the subjects discussed, giving page references.

4. Repetition of Title, etc. It seems to be a universal practice to copy, on the first page of the brief, the title of the case and all that pertains thereto, already shown on the cover. That serves no good purpose whatever, and the writer suggests that in the interest of economy in money and space it be omitted.

5. Statement of What the Case is About. One of the most serious faults is the failure of counsel to tell the court, at the beginning of his oral argument and/or of his brief, what the case is about. The lawyer who does not tell the court at once what the case is about, and what the controverted issues are, but leaves its members to grope in the dark and guess their way to the questions which they are asked to decide, does not put his best foot forward. Suggested remedies are that, at the beginning of every brief or oral argument, and before the Statement of Facts (this has nothing to do with the Statement of Facts), there should be set out in as few words as possible:

(a) What the case is about.

(b) What disposition was made of it in the court below.

(c) If there was an opinion below, a page reference should be made to the place where it may be found.

(d) There should be a clear and concise statement of the controverted questions. This latter should not be a copy of the assignment of errors.

(e) If there is no dispute about the facts, the court should be so told.

(f) If an instruction is questioned, it should be set out, and reference made to the page where it and the exception preserved may be found.

(g) The same course should be followed as to the contested rulings upon the evidence.

6. Statement of Facts. If there is a good statement of a case, the case is more than half argued. In the Statement, three serious faults often appear:

(a) Counsel gives only that version of the facts favorable to his side. The remedy is, where there are contradictory facts, all versions should be shown.

(b) It is common, but improper, to include arguments in a Statement. The remedy is, do not do it.

(c) Very seldom is there shown the record page where the facts may be found. In case of disputes about facts, such references will save much time and labor for the judges.

(d) The Statement should be both comprehensive and concise.

7. Outline of Argument. One of the most important matters referred to by Judge Evans is a Resume of the Argument, such as is required by the rules of the Supreme Court of Wisconsin in the following language:

> "Every brief shall contain a synopsis or brief resume of the argument, with page references * * *."

It is believed that where briefs are more than a few pages long, such a resume would be a great time-saver.

8. Brief of Argument. It is quite usual to set out under a head "Brief of Argument" each point, followed by a list of authorities intended to support the contention made. There is room in most cases for much improvement.

(a) The statements should not be of abstract propositions, but should present the actual propositions contended for.

(b) If there are cases from courts of last resort supporting a proposition, they should be cited first.

(c) If there are not such cases, the best and highest authorities obtainable should be first presented.

(d) It seems to be thought by many attorneys that it is helpful to their case to cite a great many authorities. One case that is in point will have more influence than a score of cases that are not in point. A comparatively small amount of labor on the part of counsel will enable them to determine the cases upon which they most strongly rely, and an unnecessary burden will be removed from the shoulders of the court if counsel will determine what those cases are, say not more than three in number, and will print them in bold-face type as the first cases cited under each proposition.

(e) In the citation of authorities, the following should appear: the parties, the number of the volume, the page where the case begins, and the page where the matter appears that it is desired to bring to the attention of the court.

(f) Where cases are printed in official volumes, the citation should be to such volumes. Where the citations are to unofficial reports or to books or publications not generally known or readily obtainable, such information should be given as will enable the judges readily to get access to them.

(g) Text-books are often cited without the date of publication or the edition. That fault can be readily corrected. Statutes are frequently cited by references that do not contain information that will enable the judges to find the subject matter in current statutes.

(h) Relevant sections of the Restatement of the Law by the American Law Institute should be cited and quoted.

9. Discuss Points in Order Stated. Points should be discussed in the order in which they appear in the Brief of Argument, and the page where discussion of each point begins should be shown in the margin on the page of the Brief of Argument. This is of considerable importance because it not infrequently happens that in the course of the oral argument it is conceded by one party or the other that propositions relied upon by them have been made and overcome by the opposing party, so that at the close of the argument many of the propositions discussed are permanently out of the case. If the remaining points may be readily located in the brief, much time will be saved.

10. Page References. It is quite common for appellee to undertake to refute a point argued by appellant without indicating where in appellant's brief the point being refuted may be found. It is important that the judges may be enabled, by a proper page reference, to bring before them both arguments at the same time.

One of the most serious burdens imposed upon the judges grows out of the discussion of facts, because of the failure of counsel to give the page of the record where evidence may be found that is quoted, discussed or asserted to exist.

11. Cover Colors. It is not a matter of large importance, but it will often save time and confusion if all appellants should be required to have the covers of their briefs of one color, and all appellees should have theirs of another distinctive color.

THE GENERAL ASSEMBLY

Pending Legislation of Interest to Lawyers

ADOPTION OF CHILDREN

[Senate Bill No. 471]

This bill amends Sections 5, 6, 7 and 8 of the act relating to the adoption of children.

The amendment to Section 5 provides

that children adopted under the laws of this or other states shall inherit from the lineal kindred of the adopted parents the same as if born to them in lawful wedlock except that such adopted children shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the collateral kindred of such parents by right of such representations.

The amendment to Section 6 provides that parents by adoption and their collateral heirs shall take by descent such property as the adopted child has taken through the adopting parents or through the lineal kindred or either of them. Otherwise all the laws of descent and rules of inheritance apply to and govern the property of any adopted child the same as if he or she were a natural child, except that parents by adoption and their collateral heirs shall not inherit any property which such child may have taken from his kindred by blood.

The amendment to Section 7 provides that the two preceding sections shall apply to any case where a child has heretofore been or shall hereafter be declared by any court to be adopted or declared or assumed in any deed or will to be the adopted child of the grantor or testator. The amendment to this section also provides that the wife or husband of the adopting parent and his or her heirs shall be capable of inheriting from such child, and such child shall be capable of inheriting from such wife or husband and his or her lineal kindred, the same as if such wife or husband had become the adopted mother or father of the child.

The amendment to Section 8 cuts off all rights of the natural parents of the child except such rights as are reserved to them by Section 6 of the act.

The effect of the proposed amendment is to enlarge the rights of inheritance of an adopted child so as to give him the same right with respect to lineal kindred of his adopted parents as in the case of a natural child. It also enlarges the right of all heirs except the collateral heirs of the parents by adoption to inherit from the adopted child. It also places the wife or husband of the adopted parent in the same relationship to the adopted child as if such wife or husband herself or himself had been the adopting parent.

—S. Ashley Guthrie.

BLUE SKY LAW

[House Bill No. 711]

Amends Section 4 of The Illinois Securities Law. It provides that bonds and notes secured by mortgage in "Class A" shall not exceed 65 per cent of the fair market value of such real estate or leasehold instead of 80 per cent as heretofore, and that the junior mortgage with all prior liens must not exceed 80 per cent of the fair market value instead of 90 per cent as heretofore.

—Geo. E. Dierssen.

[House Bill No. 712]

Amends Section 4 of The Illinois Securities Law. This amendment requires issuer of bonds and notes secured by mortgage on real estate or leasehold, to file a detailed inventory of the property secured, with the Secretary of State, accompanied by an appraisement to be made by a disinterested person or persons to be selected by the Secretary of State, such appraisement to be verified by oath and the cost of the appraisement to be paid by the issuer.

—Geo. E. Dierssen.

[House Bill No. 742]

Amends Section 5 of The Illinois Securities Law. This amendment eliminates Sub-Section 3 of said section, which classifies securities sold by or to any bank, trust company, insurance company or association organized under the banking or insurance laws, building and loan associations, etc., as "Class B" securities.

[House Bill 380.]

This bill amends section 9 of the Illinois Security Law by adding in Subhead 7 (of said Section) after the words "An appraisement of the assets of the issuer" the following words: "And when the securities issued consist of notes and bonds secured by a mortgage lien upon real estate or a leasehold, a statement showing that the aggregate face value of said notes or bonds (not including interest notes or coupons) does not exceed seventy-five (75) percentum of the fair value of said real estate or leasehold;" this amendment imposes an additional qualification on the securities of the character mentioned over and above that already imposed by the present statute upon all securities coming within Class D. The issuer of notes and bonds secured by a mortgage lien on real estate or leasehold which may come within Class B are already required by the act to furnish among other things an appraisement of the assets of the issuer.

—Paul O'Donnell.

CORPORATION ACT

[Senate Bill No. 496]

Amends Section 104 of the act relating to corporations for pecuniary profit,

approved June 28, 1919. This amendment provides that proof of depositing annual report in the United States mail properly addressed to the Secretary of State, shall be deemed a compliance with this act. It removes the necessity of proving that the Secretary of State has actually received the report.

—Geo. E. Dierssen.

COURTS

Appellate Court

[Senate Bill No. 408]

This bill amends the Appellate Court Act to permit the three divisions of the Appellate Court in Cook County to sit together in such cases as the court may deem advisable. This would permit the court to wipe out differences of opinion which now exist between divisions. The act also repeals that portion of the present statute which provides that the opinion of the court shall be law only in the case in which it is rendered.

The Chicago Bar Association has previously approved the principles of this bill.

—Willard L. King.

City Courts

[House Bill No. 444]

This bill amends the act in relation to courts of record in the cities by providing that service may be had in city courts by publication, when the defendant resides or has gone out of the state, etc., as provided for under the provision of Section 12 and 14 of an Act to regulate the practice in courts of Chancery.

City courts have both law and chancery jurisdiction. House Bill 444 seeks to amend Section 15 of the act so as to provide service by publication in certain instances and make this sort of service available in law cases as well as in chancery cases so far as the language of the amending portion is concerned. Since the section already provides that the writ and process of the city courts shall be issued and executed in the same manner as those of the circuit court there would seem to be no good reason for additional provision or if there is such a reason, the desirable additional provision should be made to apply to the circuit courts as well as to the city courts.

—Paul O'Donnell.

Supreme Court Commissioners.

In 1927 the General Assembly enacted the statute for the appointment of two Supreme Court Commissioners at a salary of $12,500 per annum. This act provided that the provisions of the Act should expire on June 30, 1929. The passage of this Act was advocated by The Chicago Bar Association.

House Bill 120 re-enacts the provisions of this Act and extends the term of the Commissioners to June 30, 1933. The Act has been amended to provide that the salary of the Commissioners shall be $10,000 per annum and has passed both houses.

—Willard L. King.

Rule-Making Power

[Senate Bill No. 469]

This bill is a revision of the bill granting the rule-making power to the Supreme Court. Instead of making an unrestricted grant of the rule-making power as heretofore, the bill enumerates the subjects upon which the Supreme Court may pass rules. It is understood that in its present form the bill is satisfactory to the Labor interests which have opposed the prior bill.

—Willard L. King.

CHANCERY.

Decrees

[Senate Bill 481.]

Senate Bill 481 would amend section 19 of the Chancery Act (Cahill's Statutes, ch. 22, sec. 19; Smith Hurd's Statutes, ch. 22, sec. 19) by providing that where decrees entered without service of process or notice are later challenged under the provisions of this section, if the decree after hearing is confirmed, it shall be ordered to stand confirmed "as of the date when such decree was entered." If not set aside under the provisions of the section, within three years from date, the decree shall be deemed and adjudged confirmed "as of the date when same was entered." It is further provided by the amendment that subject to the right to have such decree set aside, altered or amended, and the right to make redemption from any sale had under such decree as provided by law, the right, title or interest in lands, tenements and hereditaments acquired subsequent to and in reliance upon such decree by a bona fide purchaser for value shall not be affected by any proceeding had under the section.

—Palmer D. Edmunds.

Guardians Ad Litem.

[Senate Bill 498, House Bill 733.]

These bills would broaden the scope of sections 6 and 50 of the Chancery Act (Cahill's Statutes, ch. 22, secs. 6 and 50; Smith Hurd's Statutes, ch. 22, secs. 6 and 50).

Section 6, which now provides for ap-

pointment of guardians ad litem, would provide further that whenever it shall appear that any person or persons not in being are or may become entitled to any future interest, however arising, in any property involved in the case at bar, the court shall have power to appoint a trustee to represent such person or persons and defend in their behalf; any judgment or decree rendered therein to be as binding as though the person or persons were in being and were themselves parties; such trustee not to be liable for costs, and to be awarded a reasonable sum for his charges.

Section 50, which now provides for hearing bills to construe wills, appoint trustees, or quiet titles, would be broadened to provide that where lands or any estate therein are subject to contingent future interest, however arising, and whether a trust is involved or not, and it is made to appear that such lands or estate are liable to waste or depreciation in value, or that the sale thereof and investment of the proceeds would inure to the benefit of the persons entitled thereto, or that it is essential from any other standpoint that such lands or estate be sold or otherwise dealt with, the court shall have power to declare a trust and appoint trustees for such land or interests, to vest title in such trustees, and to authorize a sale or other dealings; the trustees to hold and invest the proceeds under the court's direction for the benefit of those interested.

—Palmer D. Edmunds.

Jurisdiction

[House Bill No. 441.]

This bill amends Section 1 of the Chancery Practice Act, March 15, 1872, by adding the words "and city courts" to the provision vesting the several circuit courts and superior court of Cook County with jurisdiction in chancery cases.

—Martin H. Foss.

CRIMINAL LAW

Arrest

[House Bill No. 703]

House Bill 703 is for an act in relation to police officers and persons arrested by them. It provides that any police officer who arrests a person for a misdemeanor and fails to enter the name of such person and a statement of the offense for which he was arrested in a book or register kept for that purpose within four hours after the arrest, or who fails to furnish the person arrested a written statement of the offense for which he is detained within four hours after the arrest, or who fails to keep a duplicate of such statement on file in the police station or other building where the prisoner is detained, shall forfeit to the person arrested or imprisoned a sum not exceeding $500 to be recovered by the injured person in an action of debt.

—Howard B. Bryant.

[House Bill No. 701]

House Bill 701 adds Section 4a to division VII of the Criminal Code. It provides that any person arrested by a police officer without a warrant or capias shall be examined within four hours after his arrest by the police captain or other officer, and other evidence may be required by the police captain or officer in the examination. If the police captain or officer believes the evidence insufficient to warrant further proceedings the person arrested shall be released, but if there seems to be probable cause for holding the person for further examination the police captain or officer shall book the arrested person.

—Howard B. Bryant.

Error—Supersedeas

[House Bill No. 702]

House Bill 702 amends Section 1 of Division XV of the Criminal Code so that it provides that the court or judge of the Supreme Court upon presentation of the transcript of record and assignment of errors in a capital case shall allow a writ of error and endorse upon the transcript an order that the same shall be a supersedeas. Under the present statute a writ of error and supersedeas is allowed where the court or judge is of the opinion that there is a reasonable cause for allowing the writ and that there is a reasonable doubt as to the guilt of the defendant. This amendment would take away the judge's discretion and make the allowance of a writ of error and supersedeas in capital cases mandatory.

—Howard B. Bryant.

Parole Act

[House Bill No. 441]

Senate Bill 441 amends Section 3 of an act in relation to certain rights of persons convicted of crime by adding a provision that if a person is convicted of a crime while released on probation or parole or after an escape and before recapture, if the crime be punishable with death he may be punished accordingly

but if the crime be punishable with imprisonment and the probation or parole is terminated and revoked the imprisonment for the crime shall not commence to run until the expiration of the term of service under the former sentence.

—Howard B. Bryant.

[House Bill No. 466]

Senate Bill 466 amends Section 6 of the Parole Act by adding a provision that in deciding whether a prisoner or ward shall be paroled the Department of Public Welfare may consider the facts contained in the official statements, but shall in no case assume to act as a court of review to pass upon the correctness, regularity or legality of the proceedings in the trial court or hear testimony as to the commission of the crime or the guilt of the prisoner or ward.

—Howard B. Bryant.

DESCENT.

[House Bill No. 635.]

This bill would amend Section 1 of the Descent Act (Cahill's Statutes, ch. 39, sec. 1; Smith Hurd Statutes, ch. 39, sec. 1) to provide that no person shall receive any estate by descent or distribution or in lieu of dower who has been convicted of murder or manslaughter because of the responsibility of such person for the death of the intestate; that any person indicted under a charge of murder or manslaughter for causing the death of an intestate shall not take any estate by descent or distribution or in lieu of dower from such intestate unless acquitted of such charge; the interest of such person to remain as undisposed of estate until either acquittal or conviction. If conviction results, the interest to be disposed of as the estate of the intestate.

The amendment further provides that any person receiving any estate by descent or distribution or in lieu of dower from an intestate for whose death such person is later convicted of murder or manslaughter shall be liable to the intestate's estate for the interest so received, and may be forced to restore it through appropriate action by any person interested in the intestate's estate.

—Palmer D. Edmunds.

DOWER.

[House Bill No. 662.]

This bill would amend Section 1 of the Dower Act (Cahill's Statutes, ch. 41, sec. 1; Smith Hurd's Statutes, ch. 41, sec. 1) to provide that if the surviving spouse has been convicted of manslaughter or murder of the other spouse, such surviving spouse shall be barred from dower and in such case the estate shall be treated as though no husband or wife survived; any interests already vested and subject thereto or diminished thereby shall be freed from or increased to the extent of such dower interest. If a surviving husband or wife is indicted for murder or manslaughter for causing the death of the deceased spouse, dower shall remain unassigned until such spouse has either been acquitted or convicted of such charge. If any spouse has been endowed and is later convicted of such crime, any person interested in the estate of the deceased spouse may recover from such surviving spouse in any appropriate action the value of such dower interest.

—Palmer D. Edmunds.

HUSBAND AND WIFE.

Separate Maintenance.

[House Bill No. 736.]

This bill would amend Section 1 of the Act in relation to married women (Cahill's Statutes, ch. 68, sec. 22; Smith Hurd Statutes, ch. 68, sec. 22) to provide in effect that married women shall be entitled to separate maintenance only when they are not entitled to sue for a divorce, and until they obtain divorce. The amendment further provides that the court shall have continued jurisdiction to inquire from time to time whether the condition entitling the wife to a remedy under the Act has ceased to exist, and to cancel or modify the original decree in accordance with its findings.

—Palmer D. Edmunds.

INCOME TAX

[Senate Bill No. 39]

This bill, which has passed the Senate and seems likely to pass the House, inaugurates the income tax law in Illinois.

It imposes a tax of 1 per cent on incomes not over $5,000, 2 per cent on incomes from $5,000 to $10,000, and 3 per cent on incomes over $10,000.

The exemptions are: $1,000 for single persons; $2,000 for married persons or married couples; and $500 for each dependent.

If the taxpayer pays general property taxes he may deduct the amount of such taxes (not including special assessments) from the amount of income tax payable.

This bill passed the Senate by a strict downstate-Chicago vote. All senators from downstate voted for it. The same situation seems to prevail in the House. The bill therefore appears to be an effort to remove the burden of taxation

from the downstate and to place it upon Chicago.

Serious doubts exist as to the constitutionality of the bill. Section 1 of Article 9 of the Constitution of Illinois provides:

> "The General Assembly shall provide such revenues as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property * * *."

It has been thought that this clause tied the Legislature to a general property tax. However, Section 2 of Article 9 provides:

> "The specification of the objects and subjects of taxation shall not deprive the General Assembly of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution."

It is contended that this section is broad enough to allow the General Assembly to impose an income tax. However, it would appear extremely doubtful whether a graduated income tax does not violate the principles of uniformity enjoined by the constitution. It would also appear doubtful whether the exemptions granted by Senate Bill 39 do not violate Section 3 of Article 9 of the Constitution which has been held to enumerate all of the property which may be exempted from taxation. (People v. Deutsche Gemeinde, 249 Ill. 132.)

It must be remembered in considering the validity of an income tax law that the Supreme Court of the United States has held that in so far as an income law attempts to tax income from real estate or personal property, it is a direct tax upon that real estate and personal property. Pollock v. Farmers' Loan and Trust Company, 158 U. S. 601. Senate Bill 39 then, would seem not to select another object or subject of taxation but to tax real estate and personal property otherwise than "by valuation" and otherwise than uniformly.

—Willard L. King.

INHERITANCE TAX LAW

[Senate Bill No. 407]

Amends Section 1 of an Act to tax gifts, legacies, inheritances, transfers, appointments and interests in certain cases, and to provide for the collection of same, and repealing certain acts therein named, approved June 14, 1909. This amendment puts lineal descendants of adopted or acknowledged children in the same class as lineal descendants of natural children for purposes of the inheritance tax.

—Geo. E. Dierssen.

[House Bill No. 709]

Amends Sections 3, 4, 21 and 25 of the State Inheritance Tax Law.

Section 3 extends period from six months to eight months in which inheritance tax may be paid without incurring interest.

Section 4 provides that where a tax is imposed on an estate for life or for a term of years, such tax as between the executor, trustee, tenant, tenant for life or for years and other beneficiaries, shall be charged to the corpus of the property in which such estate exists, unless otherwise provided by the testator or transferor, provided, however, that nothing in said amendment contained shall affect the right of the State to resort to any person or property for the assessment or collection of any tax due under the act.

Section 21 provides that the treasurer shall retain and pay into the county treasury 2 per cent on all taxes paid and accounted for by him under this act, and also on taxes for which security has been deposited under Section 25 of this act.

Section 25 provides that whenever a tax on a transfer has been imposed at the highest rate pursuant to this section, the county judge shall also tentatively estimate the amount of tax on such transfer likely to result on the happening of the contingency which will make possible a determination of the correct amount of tax. The executor or administrator may elect to pay this tentative tax and deposit adequate securities for the difference between the tentative tax and the tax imposed at the highest rate, which securities shall be transmitted by the county treasurer to the state treasurer. The amendment also makes provision for substituting other securities and for their sale if necessary. Income from securities shall be credited to the estate. Provides for sale of securities in case of nonpayment of taxes and for surrender of securities when taxes are paid.

—Geo. E. Dierssen.

[House Bill No. 740]

Amends Sections 2, 11, 12, 13, 14, 15, 16, 17, 19, 23 26, 27, 30, of the State Inheritance Tax Law by providing that probate courts shall have jurisdiction over the administration of estates in counties having a population of over 300,000. The probate clerk is vested with authority to appraise such property in the county and is given the power to appoint appraisers in any and all cases. This amendment generally provides that the probate court may act in place of the

county court, and the clerk of the probate court in place of the clerk of the county court.

—Geo. E. Dierssen.

INJURIES

[House Bill No. 638]

House Bill 638 amends Section 2 of the "Injuries Act" by repealing the proviso at the end of the section which provides that no action shall be brought or prosecuted in the state to recover damages for a death occurring outside of the state.

—Howard B. Bryant.

INTEREST.

[House Bill 373.]

House Bill 373 provides findings and verdicts in civil suits shall contain as part of the damages the interest to the date of the commencement of the suit only and shall also state the rate of interest chargeable if any. Further provides that upon the entry of the judgment on such verdict or finding the Court shall compute interest on the amount of such verdict or finding from the date of the commencement of the suit until the date of such judgment at the rate of 5% per annum, "Unless such verdict or finding shows that no interest or a different rate is chargeable."

At present the interest where allowable is computed as of the date of the finding or verdict. The plaintiff loses interest on the time elapsing between the finding and verdict and the day of judgment. The Bill corrects this. It also has the additional advantage or merit in that it enables the plaintiff to compute the interest and set it forth in his pleading as of the day of the commencement of the suit and relieves him of the necessity of recomputing it and proving his computation to be correct before the jury at the trial.

—Paul O'Donnell.

[House Bills 628 and 651]

These bills are identical and they amend Sections 5 and 6 of the Interest Act.

Section 5 at present provides as follows:

"No person or corporation shall directly or indirectly, accept or receive, in money, goods, discounts, or thing in action, or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods, or thing in action, than as above prescribed, except from a corporation."

The amendment eliminates the words "or corporation" from the section, thus possibly making it apply only to natural persons. It is provided that no person shall provide for the payment of interest in advance, or the compounding of interest or the making of any other charge (in addition to 7% interest) whatsoever for any examination, service, brokerage commission or attorney's fee, except that upon foreclosure or entry of judgment an amount of ten per cent may be allowed as an attorney's fee, together with the fees for filing or recording any instrument securing the loan.

Section 6 as it exists at present provides that if any person or corporation contracts to accept from anyone except a corporation a greater interest or discount than 7 per cent. this person shall forfeit the whole of the interest and only the principal can be recovered.

The proposed amendment to Section 6 bars recovery of interest where any such contract provides for the payment of interest in advance, or the compounding of interest, or the making of any charge (beyond the interest at the rate of 7 per cent) for examination service, brokerage commission, or attorney's fee, except an attorney's fee for foreclosure or entry of judgment. This section is complementary to Section 5 but apparently Section 5 does not apply to corporations while Section 6 does.

—S. Ashley Guthrie.

[House Bill 646]

This bill repeals the Interest Act as it now exists and in place thereof enacts that 6 per cent shall be the legal rate of interest in the absence of contract. It permits contracts to be made for 8 per cent instead of 7 per cent as is provided by the present law. The amendment also provides that interest shall not be compounded and that no contract shall be made to increase the rate of interest after maturity on the rate before maturity, except where the obligation does not bear any interest before maturity.

In the case of a contract providing for a greater rate of interest after maturity than before, the entire interest is forfeited, but apparently not the principal, but in a case of usurious contracts the contract is void and neither principal nor interest can be recovered. This last provision does not apply to negotiable instruments purchased by an innocent purchaser before maturity. Usurious interest paid may be recovered and when the original holder of negotiable paper bearing usurious interest transfers

it before maturity to an innocent holder the debtor may recover back the amount of the principal and interest paid by him on the note. A debtor in a usurious contract or obligation may go into court and have it declared void and proceedings thereon enjoined. The act refers specifically to "persons" and corporations are not mentioned. Corporations are not however specifically excepted from its application as in the case of the present act.

—S. Ashley Guthrie.

[Senate Bill 434]

This bill amends the Interest Act by removing limitations as to the rate of interest that may be contracted for in the case of advances of money, repayable on demand, to an amount not less than $5,000.00 where warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments are held as collateral security for the loan.

[House Bill No. 530]

This amendment to Section 3 of the Interest Act provides that where judgment is entered upon any judgment or finding, whether the claim sued on is for liquidated or unlinquidated damages (except where damages are merely nominal or the party charged therewith holds the same as a fund for the benefit of some person without obligation for, or interest therein, or where an agreement exists between the parties that no interest at a different rate from 5 per cent shall be charged) interest shall be computed at 5 per cent from the date of the commencement of the suit, and where judgment is entered upon award or report the computation shall be from the time the award or report is made.

—S. Ashley Guthrie.

JUDICIAL PENSIONS.

[House Bill 499.]

House Bill No. 499. This Act seeks to repeal the Act in relation to the retirement and pensioning of judges of courts of record in Illinois. It does not seem desirable to the writer that the Act should be repealed. When a lawyer spends the time upon the bench required by the pensioning act it is only just that the State should pension him when old age has rendered him unfit for further service. The present method of selection and short tenure of office makes the judicial office comparatively unattractive and no element which would make it more attractive should be taken from it.

—Paul O'Donnell.

LAND TITLES.

Torrens Act.

[Senate Bill No. 480.]

This bill seeks to amend sections 40 and 59 of "An Act Concerning Land Titles," approved and in force May 1, 1897, as subsequently amended. This is the Torrens Act.

The last portion of Section 40 now reads:

"The registered owner of any estate or interest in land brought under this Act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1) "Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall include a verbal letting."

The amendment proposes to omit under (1) above the words, "for a period not exceeding five years." By this amendment there will be no time limitation as to a lease. In other words, the registered owner holds the same subject to an agreement for a lease of any period where there is actual occupation of the land under the lease, even if not registered.

The first paragraph of Section 59 now reads as follows:

"Every mortgage, lease for a term exceeding five years where there is no actual occupation of the land under the lease, contract to sell, and other instrument intended to create a lien, incumbrance or charge upon registered land or any interest therein shall be deemed to be a charge thereon, and may be registered as hereinafter provided."

The proposed amendment will eliminate the words, "for a term exceeding five years." The result is that where there is no actual occupation of the land under the lease it must be registered to create a charge, regardless of the length of the term of said lease.

—William C. Wermuth.

SANITARY DISTRICT OF CHICAGO.

Civil Service.

[House Bill No. 231.]

Amends Section 4 of the Chicago Sanitary District Act and adds forty-nine new sections to be designated as Sections 4a through 4ww. Provides for the appointment, by the president of the board of trustees, of a Sanitary District employment commissioner who shall serve until he resigns or is removed under the provisions of the Act. He shall hold no other public office or employment. Annual salary of commissioner to be fixed by the board of trustees at not less than $5,000 per annum. Provides for the appointment of a temporary board of special examiners to conduct open competitive tests for appointment to the office of commissioner; commissioner to be appointed from the eligible list prepared by the board. Act further provides for two associate Sanitary District employment commissioners, one of whom shall be selected by the president of the board with the consent of the trustees and the other of whom shall be selected by the associate commissioner so designated and the commissioner. Associate commissioners to serve for four years and until successors are appointed and qualified, unless sooner removed. They shall serve without pay, other than compensation for time of actual attendance at meetings of the commission. Further provides for the filling of vacancies in the office of associate commissioner. The commissioner and associate commissioners, together constituting the Civil Service Commission, are given the following functions:

(1) To adopt rules and amendments thereto for making effective the provisions of the Act.

(2) To act upon charges against employees in the classified service.

(3) To prescribe the general policies and procedures to be followed in the administration of the Act.

The duties of the commissioner are prescribed as follows:

(1) To prepare and propose rules for making effective the Act.

(2) To administer the rules adopted.

(3) To ascertain and record the duties, responsibilities, etc. of positions in the Sanitary District service and classify such positions.

(4) To establish and maintain a roster of all employees, showing position held, rate of compensation and every change in employment status.

(5) To prepare an advisory scale of compensation for each class of positions.

(6) To test and pass upon the qualifications of applicants for appointment to, or promotion in, the classified service, to establish eligible and re-employment lists.

(7) To check all payrolls and certify that the persons whose names appear thereon were employed and actually performing the duties in the positions, at the rates, and for the periods indicated, before payment may lawfully be made.

(8) Tho examine into the administration of the Act and report to the board of trustees upon the performance, output, and efficiency of employees.

(9) To make an annual report to president of the board of trustees concerning his work under each of the above duties, with recommendations; report to be printed for public distribution.

The duty of the associate commissioners is to sit with the Commissioner in carrying out the duties of the commission.

The commissioner shall appoint a staff, consisting of such examiners and other employees as may be necessary to carry out provisions of the Act. Board of trustees shall provide sufficient money, pay salary of commissioner and staff and other necessary expenses. Board of trustees shall also provide commission with suitable quarters and accommodations and give commissioner free access to District premises and records. Reports to commissioner are required concerning all appointments and separations and other facts regarding employees.

Bill also prescribes the keeping of records of official acts, such records to be public records; gives commissioner power to administer oaths and compel attendance and testimony of witnesses and production of books and papers; requires the commissioner to establish classes of positions and publish complete description thereof; to allocate positions to classes; to study compensation rates and recommend to board of trustees a scale of compensation for each class of positions; prescribes tests for appointments to positions; describes the nature of tests, manner of holding, and rating competitors. The giving of public notice of tests; the preparation of eligible lists and appointment of certified eligibles. Temporary appointments pending tests, for job employment, and without prior authorization, are also provided for.

The commissioner is required to establish service standards and ratings, based upon actual output, conduct and attendance.

Commission to provide rules for transfers, promotions, demotions, annual, sick, and special leaves, temporary and per-

manent separations, layoffs, suspension, resignation, retirement, and removal.

Liability of appointing and disbursing officers is established; wilfull false statements and fraud prohibited; political assessments and activity prohibited.

Penalties are provided for violations of Act or rules.

—Martin H. Foss.

SPECIAL ASSESSMENTS

[House Bill No 445]

House Bill 445 prohibits and imposes a penalty of fine and imprisonment on anyone who solicits the business of reducing special assessments or other forms of special taxation.

STATE'S ATTORNEYS

[House Bill No. 648]

House Bill 648 amends the State's Attorneys Act to provide that:

> "No person shall be employed by the state's attorney of any county to procure evidence of or to investigate violations of the criminal law unless such person has been examined by the circuit court of that county or a judge thereof in vacation, as to his character, experience, qualifications and fitness for such employment and found to be a proper person to be so employed, which finding shall be in writing and delivered to the state's attorney and kept among the records of his office."

—Willard L. King.

MEMORIALS

(Furnished by the Committee on Memorials)

George E. Brannan

George E. Brannan, a member of The Chicago Bar Association since 1914, died in Chicago on February 2, 1929, at the age of fifty-three years, having been born in Joliet, Illinois, on March 29, 1875. As a young man he was secretary to Congressman Feeley of Illinois and during his service in this capacity at Washington, D. C., he studied law at Georgetown University.

After being admitted to practice in Washington, he came back to his native state and was admitted to the bar in 1902. He was active in the practice of his profession to the time of his death. He made a specialty of municipal law, particularly relating to local improvements, and represented many municipalities in Cook County and throughout the State of Illinois. The nature of his practice and his aptitude for making friends gave him a wide acquaintance which was not confined to the limits of his city or county. In addition to his work as a lawyer, he found time for active direction of several banks and other financial institutions. His summer home at Lake Geneva, Wisconsin, gave him an opportunity for the outdoor life which he enjoyed so much.

Mr. Brannan is survived by his widow, Margaret E. Dempsey Brannan, a son, George E. Brannan, Jr., and two daughters, Mary Loretto and Margaret, as well as by a sister, Miss Julia C. Brannan.

Thaddeus O. Bunch

Thaddeus O. Bunch was born in Ford County, Illinois, October 26, 1874. While he was still a child the family moved to Paris, in Edgar County, and after living there a short time, moved to Arcola, in Douglas County, where he received his preliminary public school education. In 1891 he moved to Olney, where he entered the high school, graduating the following June as valedictorian of his class. He then entered the law office of his eldest sister's husband, Honorable John Lynch (heretofore Assistant Attorney General of the United States and at present the State's Attorney of Richland County), and there prepared for admission to the Bar, taking his examination in February, 1896. He was admitted to the bar the following month, and in the summer of 1896 came to Chicago and commenced his life work as a lawyer.

He was married in Chicago on October 3, 1900, to Tessa L. Beaty of Chicago and three children were born to them, Helen, Donald and Thaddeus, all of whom, and the widow, survive him.

He became a clerk in the office of Shuey & Gann, which firm was succeeded by Gann & Peaks in 1898, and in the same year the firm of Hiner & Waters was dis-

solved. Mr. Bunch joined with Mr. Joseph W. Hiner in the practice and shortly thereafter they were joined by Mr. Jonathan G. Latimer and the firm of Hiner, Bunch & Latimer continued until the retirement of Mr. Hiner in 1912, although the firm name was continued until April, 1919, when the firm of Gann & Peaks having dissolved, Mr. George H. Peaks joined Mr. Bunch and Mr. Latimer and the firm of Peaks, Bunch & Latimer was formed, and that association continued until the withdrawal of Mr. Bunch by reason of his removal to California to reside permanently. He had contemplated at some time to resume the practice in Los Angeles and had been offered a membership in several of the established firms there but had deferred acting until he should have succeeded in establishing his two sons in business. With this in mind, he had acquired a large and valuable storage warehouse property and numerous other business and real estate enterprises which he was engaged in administering until death called him with little warning on November 9, 1928, at Beverly Hills, where the family home is situated.

Mr. Bunch was a man of great integrity. His early practice was along the lines of commercial law and kindred subjects. He was very successful in insolvency and bankruptcy practice. He was a good organizer and reorganizer, had splendid business sense, and his judgment was highly regarded. In the later years of his practice this ability resulted in his growing away from the commercial practice and into corporation and financial work, where he was equally successful, and it is probably true that he overworked, to the shortening of his life. He was a loyal member of our Association, a staunch friend, and had many friends. He was also a member of the Illinois State, and American Bar Associations. During the War he served on the Draft Exemption Board in his district.

Since identifying himself with the community where he had made his permanent home in California, he had with characteristic industry, enterprise and public spirit taken an active part in the civic and public organizations there. One of the newspapers of his home city, commenting editorially upon his death, said: "In the midchannel of life, his faculties keen, and with many years of benefit to give to his fellow men, it seems all too bad that nature made premature demand when Thaddeus Bunch 'wrapped the drapery of his couch about him and lay down to pleasant dreams.'"

Lewis H. Craig

Lewis H. Craig, a member of The Chicago Bar Association since 1908, passed away suddenly on August 16, 1928.

Mr. Craig was born in Newport, Kentucky, on August 3, 1851, the son of Toliver and Sarah Jane Craig. When he was nine years old his parents moved to Moultrie County, Illinois, where he attended the public school. After finishing at the public school he continued his studies at the Sullivan and Hillsboro Academies. To earn sufficient money to complete his education he spent his summer months working on farms in southern Illinois and in the winter months he taught in the country schools. In the fall of 1876 he began the study of law in the office of Judge Edward Lane of Hillsboro, Illinois. In 1878 he was admitted to the Bar. He continued his association with Judge Lane until the latter part of 1879 when he entered into a law partnership with his brother, Harlman H. Craig. After the death of his brother in 1885 he left Hillsboro and came to Chicago where he entered the private practice of law and where he continued to practice law until his death.

Mr. Craig came of an old American family. His ancestors left their old Scottish home early in the 17th Century and came to the United States, settling in Virginia. They saw active service in the American Revolution. Their pioneering spirit carried them over the mountains into Kentucky with Daniel Boone, and their service as pioneers was recognized by the United States Government. One of his family was granted by the Government of the United States a large tract of land in Kentucky in recognition of his pioneer services.

To the many lawyers of the Chicago Bar who knew Mr. Craig, he will always be remembered as a true "Kentucky Gentleman." He loved books and literature. His hobby was history, biography and essays. He was refined and cultured. He was thoughtful and charitable to others. Often without compensation he gave of his services freely to those who needed them and were unable to pay. He always manifested a great interest in the young lawyer and gladly gave to him the benefit of his many years of experience and study. Many

of the younger members of the profession will remember him because of his kindness and consideration to them.

Mr. Craig was an able lawyer. He kept himself well informed at all times in the various branches of his profession. He preferred to maintain a general practice rather than specialize in any one particular field of legal work. He was always energetic and thorough in the preparation of his cases. Loyal to his clients and ever watchful of their interests, he vigorously fought for their rights in the courts and at the same time was considerate and respectful to the judiciary. He was a lawyer in the strictest sense "of the old school." He loved his profession, was jealous of its reputation and adhered rigorously to its ethics. In his dealings with his brother lawyers "his word was always as good as his bond." In his professional life he was idealistic rather than materialistic.

Mr. Craig never married and is survived by his sister, Alice D. Craig, and his many friends.

Joseph H. Defrees

Joseph Holton Defrees, who was born at Goshen, Indiana, April 10, 1858, departed this life at Washington, D. C., February 5, 1929, terminating an exceptionally useful and eventful career.

He was of distinguished lineage. His grandfather (also Joseph Holton Defrees) was a newspaper publisher, a prominent figure, and a Congressman in pioneer Indiana. His early descent is traced from ancestors of distinction in the colonies and in England, Holland and France. Both his mother and father died when he was a little child, and his early education was consequently more or less unorganized. However, at one time he attended Earlham College at Richmond, Indiana, and at another, the preparatory school at what is now Northwestern University. In mature life, he had acquired knowledge and erudition equalled by few.

He began his professional studies in the Goshen office of the famous law firm of Baker & Mitchell. Of this firm, he later became a partner, together with the late Francis E. Baker, Justice of the United States Circuit Court of Appeals for the Seventh Circuit.

In 1882, he married Harriet McNaughton of Buffalo. To them was born one son, Donald Defrees. Both wife and son survive him.

He came to Chicago in 1884, was admitted to the bar early in 1885, and at once began the practice of his chosen profession, his earlier partnerships being Shuman & Defrees and Aldrich, Payne & Defrees. Later he formed a partnership which has been in business continuously since its organization. At the time of his death, he had been its senior partner for nearly four decades. The firm, originally Defrees, Brace & Ritter, was known for many years as Defrees, Buckingham & Eaton, and is now styled Defrees. Buckingham, Jones & Hoffman. Partners in this firm who preceded him to the great beyond were William Brace, Henry Ritter and Marquis Eaton.

During his forty-five years in Chicago, he was active, successful and distinguished in the practice of the law. No name is better nor more favorably known in Chicago legal circles than that of Joseph H. Defrees.

He was a member of the Illinois State Bar Association, The American Bar Association, The Bar Association of the City of New York, and The Chicago Bar Association. Of the latter, he was twice president.

In addition to his distinguished career as a lawyer, he achieved notable success in the world of business. His interests were many and varied. Among the best known of his business enterprises are the Hotels Windermere, of which he had been owner for many years.

Perhaps his most outstanding characteristic was his love of humanity. He loved people, and he was intensely interested in their welfare, as individuals and in the mass. Accordingly, during his later years, he gave much of his time and energy to civic activities. He was president of the Chicago Association of Commerce, and then became active in the Chamber of Commerce of the United States, of which great organization he was Chairman of the Executive Committee 1916-19, Vice President 1915-19, President 1920-21, and Chairman of the Board of Directors at the time of his death.

He was signally honored by three Presidents of the United States, and was appointed and served efficiently on numerous commissions having to do with various phases of post-war stabilization at home and abroad. He was also instrumental in forming the International Chamber of Commerce, and was influ-

ential in its councils. In recognition of his activities in international affairs, the French Government decorated him as a Chevalier of the Legion of Honor.

He was a member of many clubs in Chicago and elsewhere. He was also identified with many civic and social organizations, and was particularly interested and active in the Indiana Society of Chicago, of which he was a founder and twice President, and the twenty-fifth anniversary of which he expected to celebrate in the current year.

From this brief summary of activities and achievements, the most casual reader must appreciate something of his force of character and outstanding mentality. To the lawyers of Chicago, however, who were his intimates, no memorial can adequately describe his vivid personality and compelling personal charm. His cordial, genial and sympathetic nature gained for him intense personal friendships and loyalties, but these were cemented and made enduring by those fine and firm basic human qualities which commanded the respect and admiration of all who came within the circle of his influence.

All men knew that the ethical standards of Joseph Holton Defrees were of the highest, and that in professional, business and public affairs, he never, under any stress, departed from these standards.

He was an idealist—withal a practical idealist. His eyes were ever on the stars, but his feet were always on the ground. Not many like him are born into this world, and his world will not soon forget him. In the annals of the Chicago Bar, his name will have a place of honor for generations to come.

William H. Dellenback

William H. Dellenback, a member of this Association since 1897, was born on a farm near Hinckley, Illinois, in the year 1864 and died February 17, 1928. He was graduated by the University of Michigan, having the distinction of being class orator. He was admitted to the Illinois Bar in 1893, and for twelve years served as Master in Chancery, and for the years 1908-1910 was a State Senator.

As Master in Chancery, his work was thorough and his reports so carefully considered and well drawn that the Chancellors were assisted greatly in making final decisions.

He was a member of many Masonic organizations, having the 33rd degree in Masonry conferred upon him in 1921. He gave much of his time to that work and also rendered valuable service as Trustee of the Congregational Church to which he was much devoted.

His Christian faith touched and colored all of his relationships. He was gracious and courteous throughout the whole range of his professional career, endearing him to all with whom he came in contact.

Mrs. Dellenback, the four boys, Harry, William, Jr., John, and Robert, and a sister, Mrs. H. L. Beitel, Los Angeles, California, remain to perpetuate his memory.

Norton M. Files

Norton M. Files was born on a farm in Lake View (now Chicago) April 28, 1872, the son of Theodore and Josephine Files. He attended public and private schools and business college and studied law at the Chicago College of Law, then a department of Lake Forest University, from which institution he was graduated in 1899 with a degree of LL. B. Later he pursued a special course in practice at Northwestern University and was admitted to the Illinois Bar in 1905. Thereafter he was an assistant in the law offices of Hubert E. Page and Charles M. Osborn and still later was an assistant in the law office of John T. Richards. Following this he was for four and one-half years a member of the editorial staff of Callaghan & Co., law book publishers.

In 1900 he was appointed Assistant Librarian of the Chicago Law Institute, holding that position for a period of 16 years. In 1916 he resigned in order to become associated with the law firm of Jones, Addington, Ames & Seibold, in the general practice of law and particularly the law of patents, trade-marks and unfair trade practice. He was admitted to partnership in this firm in

February, 1920, continuing in the practice of the law with the firm until his death March 15, 1929.

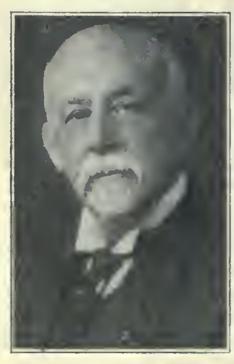
Mr. Files' long association with the Law Institute gave him a thorough insight into law investigations. His knowledge of the law reports, text books, law treatises and writings generally on questions of law was wide and complete and during his years of association with the firm of Jones, Addington, Ames & Seibold his work involved largely law investigations in which he was so well grounded. He was an indefatigable reader and searcher and was never satisfied to leave any investigation until the last remote lead had been exhausted.

Industry and loyalty to the interests of those he served were outstanding in Mr. Files' make-up. He was a man who exhibited kindliness and consideration toward all those with whom he came in contact.

He left surviving him his widow, Emma C. (nee Nervig), a daughter, Mrs. Ruth Loescher, and a brother, Henry.

He was a member of the American, Illinois State, and Chicago Bar Associations. He was also a member of the Patent Law Association of Chicago, a charter member of Blackstone Chapter Lambda Epsilon, and a member of Alumni Chapter of Phi Alpha Delta Law Fraternity.

Francis Lackner



Francis Lackner was born in Detroit in the year 1840, but his family, within a few years of his birth, moved to Milwaukee, then a small frontier town where the boy acquired his education in private schools, studied law and was admitted to practice in his twenty-first year.

He immediately volunteered in the army and was made Second Lieutenant of the 26th Infantry. The regiment participated in the battles of Chancellorsville and Gettysburg. In the latter battle Lackner, then Captain of his company, was wounded, but was able to return to his regiment after two months. With others of the regiment, he was transferred from the East to the vicinity of Chattanooga and participated in the battles of Missionary Ridge. Resaxa, Dallas, Kenesaw Mountain, Peach Tree Creek and others. Meanwhile, Captain Lackner had been called to the Division Staff as inspector, first, on the staff of Major General Carl Schurz, and then on the staff of General Butterfield. When the regiment reached Atlanta Captain Lackner was appointed Major of the regiment and returned to it for service. The regiment was one of the first to enter Atlanta as a part of General Sherman's army. Three months later this army started on its famous march from Atlanta to the sea, and then proceeded from Savannah through South Carolina to Goldsborough, when news of the surrender of Lee reached it.

The remnant of Lackner's regiment, composed of thirty men, was mustered out and Major Lackner received his commission as Lieutenant Colonel by brevet.

Colonel Lackner then settled down in Chicago, where he successfully practiced law for fifty-six years, retiring to South Pasadena, California, where he purchased the Lucretia Garfield Homestead. He died at Pasadena on December 20, 1928.

Colonel Lackner was President of The Chicago Bar Association in 1889 and was one of its charter members. He was a member also of the American Bar Association, the Chicago Law Institute, Union League Club of Chicago, University Club, and was a member of the first Executive Committee of the Municipal Voters' League, which successfully undertook the job of cleaning out the gangsters in the City Council. This League has been for many years a potent influence for good government in Chicago.

Early in his career Colonel Lackner was a member of the firm of Barber & Lackner. Later, after practicing without partners for several years, he organized the firm of Lackner & Butz, about the year 1888, and remained at the head of this firm (later styled Lackner, Butz & Miller, and still later Lackner, Butz & von Ammon) until his retirement. Until about the time of the organization of the last firm Colonel Lackner was very active and successful as a trial lawyer; but for many years prior to his retirement his work was exclusively that of counsellor. Possessed of a brilliant mind and a rare personality, he readily attracted and held a large clientele.

In 1872 Colonel Lackner married Nannie Jussen of Columbus, Wisconsin, who survives him with one son, Francis A. Lackner, of Chicago, and four daughters, Mrs. Franklin N. Corbin of Chicago, Mrs. George Reinecke of Pasadena, Mrs. J. H. Booge of Los Angeles, and Mrs. Charles S. Kennedy of Chicago.

Charles Franklin Morse

Charles Franklin Morse, who had been in active practice at this bar for the last thirty-eight years, died at Touro Hospital, New Orleans, Louisiana, early on March 7, 1929, following an operation for appendicitis.

He was born at Picton, Ontario, Canada, on May 14, 1864, but was brought at a very early age by his parents to Oswego, New York. His forebears had been Loyalists at the time of the Revolution and had gone from New York to Canada. His early years were passed in Oswego. In 1883 he came to Chicago and, after a short service in the office of the Chicago and Western Indiana Railroad Company, he was for five years with the Illinois Trust and Savings Bank. During this period he was so drawn to the subject of the law and felt so strong a desire to enter the profession that he gave up his employment in the bank and began the systematic study of law at the Union College of Law, now the Law Department of Northwestern University. He was graduated in 1891 and at once engaged in the practice of law. He became a member with Edward S. Russell of the firm of Russell & Morse and rapidly made a reputation as a lawyer. After the firm of Russell & Morse was dissolved, he practiced alone until 1912, when he joined with John M. Zane and they continued as partners until Mr. Morse's death.

Mr. Morse was known as an able lawyer and counsellor in financial and business matters and in those matters and in general practice he had a wide experience. Upon his reorganization of the Dodge Manufacturing Company at Mishawaka, Indiana, his services were sought as the executive of that corporation and he acted for a time as its President.

He did not, however, give up the practice, and as soon as it was possible severed his connection with that corporation and thereafter was busily occupied with the demands of the profession.

Mr. Morse at all times maintained the highest standards of the profession, and devoted himself with a single mind to his duties as a lawyer. He was scrupulously exact in fulfilling the character of a practitioner of sterling probity. In all his long service at the bar, he consistently devoted himself to the highest ideals of his profession. In his moments of leisure and relaxation he was an enthusiastic golfer. In his large circle of friends he was cordially liked and his associates in the practice felt in his death an irreparable loss.

Mr. Morse married at Chicago in 1892 Miss Katharine Ames, who survives him. He is also survived by a son, Franklin Ames Morse, and a daughter, Mrs. Kinsley B. Thorndike.

Mr. Morse was at the time of his death a member of the American, the Illinois State and The Chicago Bar Associations, of the Law Institute and of of the University and Glen View Clubs.

Harry C. Levinson

Harry C. Levinson, a member of this Association since 1900, was born in Maryanpol, Russia, March 12, 1879. He was a graduate of Medill High School and attended the Chicago College of Law then the law department of Lake Forest University, from which he was graduated in 1900 with the degree of Bachelor of Laws. The same year he was admitted to the Bar of Illinois. He practiced continuously in Chicago from that time until his death on March 21, 1928, being then the senior member of the firm of Levinson, Rein & Tucker.

In 1902 he was married. He was active in various Masonic organizations, being a Thirty-Second Degree Mason and a member of the Shrine. He was also a member of the Illinois State and American Bar Associations. He was an excellent horseman and an enthusiastic golfer.

For many years he was a director of Temple Israel and of Mount Sinai Hospital, and at the time of his death he was a director of the Chicago-Winfield Tuberculosis Sanitarium, giving unsparingly and gratuitously of his time to these and other charitable organizations with a most commendable enthusiasm and sincerity.

As a practicing lawyer, Mr. Levinson was noted for the painstaking, progressive and resourceful character of his work. For years prior to his death his counsel was sought and he was retained in a great number of real estate and cor-

porate matters of outstanding importance.

Harry C. Levinson will live in the memory of his friends and his associates because of his never-failing, helpful and sympathetic nature, his genial disposition and his high character. No worthy individual or cause sought his aid without mental and material encouragement and relief. He gave of himself and his resources, ever with spontaneous and undemonstrative generosity.

John S. Schaubel

John Sanborn Schaubel, one of the popular younger members of The Chicago Bar Association, and at the time of his death an associate of the firm of Castle, Williams, Long & Castle, died unexpectedly on Thursday morning, September 29, 1927, at the Garfield Park Hospital, following an operation.

He was buried October 1st at Oak Ridge Cemetery following services in the Oak Park Masonic Hall by Siloam Commandery of the Knights Templar, of which he was a member.

He was born in Chicago May 24, 1894, and attended the Calhoun elementary school, Crane high school, and Chicago-Kent College of Law, from all of which he graduated with high scholastic standing. He was a member of Fuller's Inn of the legal fraternity of Phi Delta Phi and was admitted to the Bar in March, 1921.

On December 24, 1916, he was married to Miss Ethel McMaster of Chicago, who survived him. He served in the United States Army during the World War, and thereafter became an active member of Austin Post No. 52 of the American Legion.

Besides his widow, he is survived by his father, Louis A. Schaubel, of Burbank, California; his brother, William C. Schaubel; and his sisters, Mrs. W. G. Reuhl, Mrs. William Witte and Miss Hattie Schaubel, all of Chicago.

Mr. Schaubel's practice was general in its nature, but through connections with insurance companies he practiced considerably before the Industrial Commission. His calm temperament and pleasing personality aided him to success in trial work, and his industry and painstaking disposition made him thorough in his work. He had a good legal mind and sound business judgment, made friends easily, and would doubtless have become a leader at the Chicago bar had he lived. Departing, he leaves with his college, professional and personal associates the memory of a forceful and gennial character, an inspiring companion and co-worker who left the world enriched for his presence.

Elmer Schlesinger

Elmer Schlesinger, a member of The Chicago Bar Association since 1910, died suddenly in Aiken, South Carolina on February 20, 1929.

Mr. Schlesinger was born in Chicago, November 20, 1880, the son of Leopold and Henrietta Mayer Schlesinger. Mr. Leopold Schlesinger was one of the founders of the firm of Schlesinger and Mayer, for many years one of the leading State Street dry goods stores. Elmer Schlesinger attended the Mosely School and Harvard Preparatory School at Chicago, and entered Harvard University from which he was graduated in 1901 with the degree of Bachelor of Arts. He then entered the Harvard Law School and in 1903 received the degree of Bachelor of Laws. He immediately entered the employ of the firm of Mayer, Meyer, Austrian & Platt of which firm his uncles, Levy Mayer (now deceased), and Isaac H. Mayer were members. In 1908 Mr. Schlesinger was admitted as a member of the firm of Mayer, Meyer, Austrian and Platt, and continued in that connection until June, 1921.

On June 15, 1921, Mr. Schlesinger was appointed General Counsel and Vice President of the United States Shipping Board at Washington, D. C. He continued in this capacity until September 1, 1922, when he moved to New York to become a member of the law firm of Stanchfield & Levy, now Chadbourne, Stanchfield & Levy, with which firm he remained until his death.

After his retirement as General Counsel and Vice President of the United States Shipping Board, Mr. Schlesinger devoted his time to the practice of corporation law and achieved particular distinction in that line of practice as counsel to various groups of bankers. The sphere of his influence expanded greatly

during this period, and his individual genius contributed largely to the formation of many important enterprises, the last of which, consummated shortly before his death, being the organization of the Commercial National Bank & Trust Company of New York. He was a director of many corporations, including several New York banks, transportation companies, newspapers and other enterprises.

Mr. Schlesinger was married twice. Two children, Halle, 16 years of age, and Elmer, Jr., 10 years of age, by his first marriage and his widow, Eleanor Patterson Schlesinger, survive him. He maintained residences in New York City, Port Washington, Long Island, and Washington, D. C., at which latter place he was buried.

LIBRARY OF THE CHICAGO BAR ASSOCIATION

Book notes and Law Review articles in this number have been reviewed as indicated:

Law Quarterly Review by Hon. William Renwick Riddell;

Harvard Law Review by Mr. Russell Whitman;

Illinois Law Review by Mr. John M. Cameron;

Michigan Law Review by Mr. Richard M. Gudeman;

University of Pennsylvania Law Review by Mr. D. B. Hatmaker.

The Law Quarterly Review for April, 1929. [Reviewed for The Chicago Bar Association Record by Hon. William Renwick Riddell, Justice of Appeal of the Supreme Court of Ontario.]

The latest number of the Law Quarterly Review (April, 1929) will probably by many be considered not quite so interesting as some of its predecessors; but most scientific lawyers will not find their time wasted in perusing its contents.

Over the familiar initials, F. P., is a note that the House of Lords has reversed the Court of Appeal, and reinstated the judgment of the trial judge, in two cases, one of which calls for no comment, but the other is the cheque case, Reckett v. Barnett [1929] A. C. 176:98 L. J. K. B. 136. A cheque signed by a person as agent was given for his own debt: the principal had written his banker authorizing him to honor all cheques drawn by the agent 'without restriction'—the Court of Appeal held that this amplified the agent's power so as to enable him to draw cheques for any purpose, including the payment of his own debts, 45 T. L. R. 36 (1928). This has been reversed in the House of Lords; and F. P. thinks that "the more natural and . . . common-sense view prevailed." So once more we find that there is no such thing as "common-sense" in law: *quot judices, tot sententiae* — and "you pays your money and you takes your choice."

F. P. also approves the decision in A. & C. Black v. Claude Stacey [1929] 1 Ch. 177, that plagiarism from "Who's Who" is not justified on the principle that the first and true author is the person who furnishes the publisher with the facts of his life, etc.

And good intentions are no more a sure prophylactic against an evil end being reached where a liquidator in a winding-up settles a contentious claim on his own judgment than where he might venture on a road paved with them (that is, however, not F. P., but W. R. R.) See Re Windsor Steam Coal Co. [1929] 1 Ch. 151.

A finality does not seem to have been reached in respect to what is "negligence" in banking legislation: and Lloyds Bank v. Chartered Bank of India [1929] 1 K. B. 40; 97 L. J. K. B. 609, will not help to that end.

Hyman v. Hyman [1929] P. 1; 98 L. J. P. 1, is a curious case; and, while the precise point decided will not arise at all frequently, the principle involved is far-reaching. A wife in a separation deed covenanted not to take proceedings to compel her husband to allow her more than the stipulated maintenance. Two chancery division judges in the full Court of Appeal held that when she afterwards obtained a decree for dissolution of marriage on the ground of adultery, she was still bound by her covenant: the majority, however, considered that she was not so bound—and my brand of common-sense approves. "Matter subsequent" and "implied condition" have not lost their magic.

Re Acklom [1929] 1 Ch. 195; 98 L. J. Ch. 44, we may pass over, as it concerns the statute law: while Re Emerson [1929] 1 Ch. 128, is only of interest as showing how incomplete is yet the assimilation of real and personal property. We still have the relics of feudal ideas to puzzle us; legislation is always piecemeal—and the real estate lawyer ye have always with you.

"Once a Mortgage, always a Mortgage" is repeated and emphasized in Weld v. Petre [1929] 1 Ch. 33; 97 L. J. Ch.

399; and we may pass over as of local interest only Re Norton [1929] 1 Ch. 84, interpreting "binding trust for sale."

ARTICLES. — Professor Holdsworth reviews, in a most sympathetic and appreciative way, Cases in Constitutional Law, by D. L. Keir and F. H. Lawson, Oxford. The constitutional law dealt with is English constitutional law; and except from a historical point of view the book has little of value to the American lawyer, English and American conceptions of the words "constitution," "constitutional," etc., being quite different. See infra.

Dr. C. T. Carr has an exhaustive article on "Revised Statutes," beginning with Bacon's Memorandum to King James I in 1616, and mentioning Lord Thring's epigram that a good code is a good collection of good acts in the same way as a good library is a good collection of good books—an epigram which, to a lawyer on this continent, is nothing less than silly. The statute law commission, Ruffhead, the Record Commissioners, the statute law revision bill of 1927, and other efforts toward codification, come in for discussion. It would naturally shock the traditional conservatism of the Englishman to suggest that the system pursued in many British jurisdictions of revising the statute law every decade or so should be adopted in the old land. For example our province, Ontario, began its separate political existence in 1867; in 1877 the statute law of the province was revised and published in two volumes as the Revised Statutes of Ontario (1877), generally quoted as R. S. O. (1877): then in 1897 came the R. S. O. (1897), and followed R. S. O. (1914) and R. S. O. (1927). This of course was not original with us: it is the method of most, if not all, of the states of the union.

Professor P. E. Corbett has an elaborate and learned article on "The Augustine Divorce," which carefully examines the texts; the first sentence will, I think, not receive full acceptance; if it does, ideas have changed from those consule Planco: the learned author says:—"It seems as nearly certain as most things are in Roman law, that there was no compulsory form of divorce for free marriage in the time of Cicero." I was taught the reverse: but the determination of the question is beyond my powers.

J. W. Gordon, K. C., has an article on "The Crown as a Litigant": this matter will probably be cleared up in the old land by legislation: and, in the meantime, has no interest or value for those outside of the British Isles. Practically all, even of British, countries have their own statutory provisions; while, of course, Americans care not for the crown and its doings.

An article, "The Field of Modern Equity," by H. G. Hanbury, is rather historical than descriptive: it reminds one of Maine to read of "the first transformation" of equity in "the chancellorship of Lord Nottingham . . . . the transformation from a heterogeneous medley of isolated, empirical reliefs into a stable and increasingly rigid system of rules, parallel with and supplementary to those of the common law." But the nature of equitable rights and interests, whether *iura in rem* or not, the proposition that the maxim that "Equity acts in personam" is the very keynote of the equitable jurisdiction, as contended by Ames, Maitland's immense value as "the indispensable Mentor to the young Telemachus about to embark on a voyage of discovery in the sea of Equity," the Court of Star Chamber, the various Judicature Acts, the view of Lord Wrenbury (when Buckley, J.) that the Court of Chancery is not a Court of Conscience [1903] 2 Ch. 174, 195, and Lord Eldon's that "the doctrines of this Court (of Chancery) ought to be as well settled and made as uniform almost as those of the Common Law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case" (I wish that the author had told me what is the meaning of the last clause—or if it has any meaning,)—all these and many other things are adequately discussed. The conclusion reached by the learned author is that "a reconsideration and rearrangement of these maxims (of Equity) is eminently desirable": and, in that statement every lawyer will cordially agree.

The last article is one on "Del Credere," by R. S. T. Chorley, in which the history of the doctrine is fully and carefully traced. The whole article is instructive, but it does not lend itself to quotation, and should be read as a whole, by those interested in the subject. Del Credere seldom makes its appearance in our courts.

REVIEWS. — Pollock's The Law of Torts has reached a well-deserved thirteenth edition and those of us—and their name is Legion—who drank in the law of torts from Pollock, welcome the work in its new form. If there is any lawyer or student-at-law who has not read and reread it, he should not delay to get it.

The lamented death of Paul Vinogradoff was a distinct blow to the science and history of law. His friend, the Right Honourable H. A. L. Fisher, has edited "The Collected Papers of Paul Vinogra-

doff" in two volumes, Oxford: and no better or more competent editor could be found or desired. Mr. Fisher truly says: "Paul Vinogradoff was an arresting figure in the intellectual history of our age . . . the consummate and natural-born cosmopolitan . . . He moved about the world, reading in foreign archives and libraries, conversing with foreign scholars, instructing foreign students with the serene and untroubled composure of a man who finds in every country his familiar home."

Professor Pearce Higgins' "Studies in International Law and Relations" contains "an essentially moderate review of American policy" when dealing with the Monroe Doctrine: the section on "The Papacy and International Law" is of peculiar interest at the present time; but, perhaps, its chief value is in the article "The Law of Nations and the War of 1914," not (according to the Reviewer, E. C. S. W.), "in its condemnation of Germany's alleged incidental breaches of International Law, but in the emphasis laid . . . on the chief moral to be drawn from the history of the Law of Nations; without an equilibrium between the members of the family of Nations, there can be no Law of Nations."

While we of the older school, at least, swear by Pollock on Torts, we must admit that Clerk and Lindsell's "The Law of Torts, is an admirable manual for actual practice; and it is gratifying to notice that it has attained its eighth edition. P. H. W. thinks—and many will agree with him—that it is doubtful that the editors of this edition are right in deducing from Sorrell v. Smith [1925] A. C. 700 and like cases that "there is no independent tort of conspiracy." And the profession in this province, at least, will hope that the desire of the reviewer that in Sutherland v. Stopes [1925] A. C. 47, "the House (of Lords) dealt a mortal blow to the 'Rolled-up' plea in Defamation"—just after we had got the plea in its right place, proportions and effect in Boys v. Star Printing and Publishing Company [1927] 60 Ontario Law Reports, 592.

Chief Judge Cardozo's "Paradoxes of Legal Science" is, in the opinion of C. K. A., "the more refreshing because its sanity and thoughtfulnes spring not only from wide knowledge of authorities but from a deep and daily acquaintance with the concrete problems of law"; and, in my view, this is well founded—most of the propositions for the amendment of law arise from dense ignorance of its concrete problems; the "law reformer" is generally not only an enthusiast—that he should be—but he is also, as a rule, ignorant of the actual problems and difficulties which daily arise in practical life.

"Court Rolls of the Abbey of Ramsey and of the Honor of Clare," edited by W. O. Ault, and published by the Yale University Press, is "a useful collection of documents prepared by the editor to supplement his earlier work, Private Jurisdiction in England"; according to H. G. R., while as a whole, "the volume will . . . be very welcome to students of medieval law, they will regret not a few marks of too hasty preparation," whereby "the text is occasionally barely intelligible."

"Charles Dickens as a Legal Historian," by Professor Holdsworth, is important as showing what many of us have been contending for years, that Dickens was true to fact in almost all that he wrote of a legal nature. See for example my article: Plaintiff's Attorneys; Bardell v. Pickwick, American Bar Association Journal, April, 1922: also my article, Why Pickwick was Gaoled, Illinois Law Review, May, 1922.

"Canada and World Politics," by P. E. Corbett and H. A. Smith, is, according to F. P. W., "a shrewd and judicious study of Dominion status," dealing as it does with "the constitutional and international relations of the British Empire with special reference to Canada." One great obstacle in the way of an American or any non-Briton understanding the constitution of Canada is the difference in the meaning—the connotation, if you will—of the word "constitution" in American and Canadian (or British) use. In the United States, the "constitution" is a written document which means what it says, and if the meaning is in doubt, the courts may be appealed to to interpret the words actually used: in Canada, the "constitution" is the principles, more or less indefinitely expressed, upon which we think we should be governed; and in case of doubt, the question is left to the people. Our written constitution, not infrequently, does not mean what it says; for example, we call the King, King "by the Grace of God" though everybody knows; he knows, and is proud of it, that he is King by grace of an act of Parliament; who owns all the land in Canada and cannot give his son a ranch, and so the Prince of Wales has to buy one like any Canadian; we have a Governor-General who does not govern, generally or any other way; and Lieutenant-Governors who are not in 'lieu' of anyone, and do not govern; Ministers of the Crown who are supposed to be responsible to the King or his representative, but in fact to the people's representatives. The "King can do no wrong" in Canada, because he can do nothing. This work

may do a little to make plain what Canada is—that Canada is no more a possession of England than England is of Canada; and that Canadians are no more subjects of Englishmen than Englishmen are of Canadians. If ever the maxim was true, it is true of the new British Empire, which has been built upon the ruins of the old British Empire which was rent in two by the American revolution.

Hershey's "The Essentials of International Public Law and Organization," the first edition of which received high commendation from Professor Oppenheim, now appears in a revised and improved edition. A. D. McN. thinks it "very able and a very useful book." Of this, everyone must judge for himself; personally, I do not find it satisfying.

"Freedmen in the Early Roman Empire," by A. M. Duff, will appeal to but a very small constituency; and I agree with W. W. B. that the author's translations are sometimes very loose and unsatisfactory. The material, however, is good, and I may be prejudiced by Trinity College, Dublin, tradition.

Gatley's invaluable "Law and Practice of Libel and Slander in a Civil Action," the first edition of which practically displaced Odgers, Townsend and our Canadian King in the working lawyer's library in this province, now appears in a second edition, which well sustains the reputation of its predecessor: Sutherland v. Stopes, ut supra, receives due consideration, as well as other recent cases.

"The Sacco-Vanzetti Case," issued by Henry Holt & Co. of New York, is mentioned as of the "greatest interest to all students of comparative criminal law." I have given my views of this celebrated case in an Article: The Sacco-Vanzetti Case from a Canadian Point of View, in the American Bar Association Journal, December, 1927.

Acts of the Privy Council of England (1616-1617) is of less than usual interest on this side of the Atlantic; America was scarcely as yet.

There are also reviewed Lord Askwith's "British Taverns, Their History and Laws"; Professor V. A. Riasanovsky's "The Modern Civil Law of China": Paul Baratier's "L'Autonomie Syndicale et Ses Limites Devant les Cours Anglaises," a Frenchman's "very competent and careful examination of the nature and extent of the judicial control of Trade Unions in England": Tancrede Rothe's "L'Esprit du Droit chez les Anciens," a worthy successor to his "Traite du Droit Naturel," not yet quite finished: and Francis Deak's "The Hungarian-Rumanian Land Dispute," with an Introduction by our own George W. Wickersham.

On the whole this is a most satisfactory number.

—William Renwick Riddell.
Osgoode Hall, Toronto, May 6, 1929.

ACTIONS

Former Recovery as Bar to Second Suit. "The plaintiff in 1926 brought an action for the breach of the defendant's agreement to build a bungalow for the plaintiff in a good and workmanlike manner, specifying in his claim the particular defects. He recovered. In 1927, the plaintiff brought the present action, claiming damages for failure to complete the same bungalow in a good and workmanlike manner, adding the words 'and with proper materials' and specifying defects different from those in the first action. Held, that no recovery would be allowed as this cause of action was the same as that in the first suit." Conquer v. Boot [1928] 2 K. B. 336.
—77 U. of Pa. Law Rev. 688 (March, 1929).

ADMINISTRATION

[See Wills]

ADMIRALTY

In re the Llewellyn J. Morse, 25 F. (2d) 973, (27 Mich. Law Rev. 331, January, 1929).

For the purpose of a film, a motion picture company bought a full rigged ship. During a battle scene, some actors were killed. The motion picture company brought a petition in admiralty to limit its liability. The petition was denied.

We are not an admiralty lawyer and should therefore have permitted ourselves to smile had the Admiralty Court taken jurisdiction of this case.

—R. M. G.

ADOPTION

Note on Status and Inheritance Rights of an Adopted Child. By R. H. C., in 27 Mich. Law Rev. 438. (February, 1929.)

This note points out that by the weight of authority, the effect of adoption statutes is generally to give the adopted child rights of inheritance only with respect to the property of the parents by adoption, and such adopted child is not made the kin of the foster parents for purposes of inheritance. The cases on the subject are carefully analyzed and the argument is made that the liberality shown in the recent Ohio case of Miller v.

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To the Members of
The Chicago Bar Association:

Our main purpose as an association of lawyers is so to co-operate that we may fully discharge our responsibilities to our clients and to the public. Those responsibilities were never better stated than in the following lines of the English Essayist and Philosopher, Sydney Smith:

> "In all the civil difficulties of life men depend upon your exercised faculties, and your spotless integrity; and they require of you an elevation above all that is mean, and a spirit which will never yield when it ought not to yield. As long as your profession retains its character for learning, the right will be defended; as long as it preserves itself pure and incorruptible on other occasions not connected with your profession, those talents will never be used to the public injury which were intended and nurtured for the public good."

And, so, during the year 1929-1930, let us work more closely together, that we may measure up to the high obligation which our profession imposes upon us.

FRANCIS X. BUSCH,
President.

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THE BAR PRIMARY

To the Board of Managers of
The Chicago Bar Association:

Your Committee, appointed by the President to canvass the ballots in the Bar Primary held with regard to candidates for Judge of the Superior Court of Cook County for six-year term and for candidates for Judge of the Circuit Court of Cook County to fill two vacancies, one caused by the death of Judge Victor P. Arnold and the other by the resignation of Judge John A. Swanson, met at the rooms of the Association, Friday, October 18th, 1929 at 9:30 A. M. completing its work at a late hour of the same day.

The result of the canvass is as follows:

Total number of ballots received...		3,121
Deductions:		
Votes rejected because not accompanied by signature slip ...	50	
Ballots entirely spoiled.......	6	
Total deductions		56
Ballots counted (including 305 partially defective)		3,065

Of the three thousand sixty-five ballots which were counted by the Canvassing Committee, the candidates received the number of votes set opposite their respective names.

John P. McGoorty	2,678
Oscar Hebel	2,541
John M. O'Connor	2,532
Howard W. Hayes	2,444
William M. McSurely	2,439
Jacob H. Hopkins	2,422
Albert C. Barnes	2,416
Robert E. Gentzel	2,407
William J. Lindsay	2,385
Denis E. Sullivan	2,320
Michael L. McKinley	2,228
Joseph H. Fitch	2,209
Charles F. McKinley	2,051
Marcus Kavanagh	1,899
Harry B. Miller	1,876
Samuel Adams	1,865
Harry F. Hamlin	1,626
Hugo Pam	1,624
Martin J. Isaacs	1,575
Charles A. Williams	1,390
Peter H. Schwaba	1,350
William N. Gemmill	1,341
Joseph B. David	1,316
Stephen Love	1,180
Benjamin F. Langworthy	1,145
Joseph J. Sullivan	1,133
William H. Haight	1,095
George E. Dierssen	977
Henry T. Chace	951
Charles O. Rundall	935
E. I. Frankhauser	794
Edward J. Hess	728
George H. Grear	674
Arthur A. Huebsch	609

finally Newman, Levinson, Becker & Cleveland. Mr. Newman was senior member of the firm of Newman, Poppenhusen & Stern, later Newman, Poppenhusen, Stern & Johnston, from 1914 until his death.

Jacob Newman outlived most of his contemporaries. Only a few can recall the legal history of Chicago in the early 90's, during which period he rose to a commanding position at the bar. In these early days when so-called commercial law was a highly remunerative field of practice and when litigation enlisted the best talent in the profession, he was the central figure in many a dramatic struggle. In every case in which he participated, he was a force to be feared and reckoned with. Older members of the bar will recall with what resourcefulness and courage he represented the Illinois creditors of an insolvent merchant of Minneapolis and with what spectacular success their confidence in him was rewarded. No less colorful and equally successful was his prosecution of the Butterine Dealers of Chicago on behalf of the National Dairy Association in 1887, and his litigation with the American Tobacco Company in 1894. In the next year he won a notable victory in a case against the Chicago Gas Light & Coke Company, as a result of which his client received $120,000.00 for capital stock of a par value of $18,000.00. Added renown came to him when as Assistant Attorney General he prosecuted ouster proceedings against the American Tobacco Company, and obtained a decree which barred the tobacco company from the State of Illinois as an unlawful trust. As he grew in experience and judgment his counsel was sought in corporate matters of the first magnitude. He reorganized the Pillsbury Flour Company and the Westinghouse Manufacturing Company and represented the Bondholders' Protective Committee in the reorganization of the Chicago & Milwaukee Electric Railroad Company. His activities were frequently national in scope. The Maple Flooring Association was a product of his organizing genius and he represented this association of lumber dealers in many vitally important controversies.

He gave himself unremittingly to the tasks to which he set his hand. Possessed of boundless physical and mental energy he seldom tired of his work and maintained an alert and enthusiastic interest in a cause long after his associates were exhausted. He did not long reserve his judgment but having laid his plans, proceeded promptly and energetically to their execution. With him the native hue of resolution was not sicklied o'er with the pale cast of thought. Decisiveness and prompt action were the keynotes of his many achievements. His perseverance and tenacity of purpose made him a dangerous adversary even when his cause seemed hopeless.

Two qualities in his nature arrested the attention of those with whom he came in contact. He had an originality of point of view even on the commonplace subjects of the day to which he gave utterance with pungent phrase and forceful expression. He possessed another quality, however, that endeared him to his associates. His was a friendly and genial spirit. It was a pleasure to witness the genuine delight with which he exchanged greetings with his friends. He remembered and kept in touch with them throughout the course of his life, and, at the time of his death, there were few names at the Bar more widely known than his. It was aptly said of him, that he had mastered the art of friendship.

He left surviving him his widow, Minnie Goodman Newman, and three children, John Hugo Newman, Elysabeth Newman Trounstine and George Ingham Newman.

He was a charter member of the Union League Club of Chicago, and a member of the American, Illinois State and Chicago Bar Associations.

Joseph E. Paden

Joseph E. Paden, who died August 9, 1928, was born at Litchfield, Illinois, January 11, 1861. He was the descendant of Scotch-Irish ancestors who came to America prior to the War for American Independence.

His early education was obtained in the public schools at Litchfield, Illinois. Subsequently, he attended the University of Minnesota. After leaving the University, he taught school for a while and then entered Union College of Law at Chicago, Illinois, and graduated from that institution. Union College of Law later became Northwestern University Law School.

Mr. Paden started the practice of law at Litchfield, Illinois. He was elected city attorney of that city at a very early age. His ability and ambition sought for broader fields. The natural goal was Chicago. He came here in 1890. He went

into partnership with Martin M. Gridley, now a judge of the Appellate Court of Illinois, and the firm of Paden & Gridley continued until about 1900. Subsequently, he became senior member of the firm of Paden & Kropf and was head of that firm at the time of his demise.

He always took a deep interest in civic affairs. He was corporation counsel of the City of Evanston where he resided and later on for six years he was mayor of that city. He was also president of the Central Association of Evanston Charities and a member of the American Historical Association and the Illinois State Historical Society. He was also a very active member of the Illinois Mayors' Association and one of its presidents. In the line of professional organizations, he was a member of the Chicago, Illinois and American Bar Associations and of the Law Club.

His reading was very extensive, particularly on historical subjects. He devoted much time to a study of the history of the State of Illinois, from original sources. He collected much valuable historical material and delivered addresses on the Pioneers of Illinois, Abraham Lincoln, Municipal Administration in Illinois and kindred subjects. These addresses as well as historical sketches which he wrote received much favorable comment.

Mr. Paden was a close student and had a broad and thorough grasp of the subjects dealt with in his profession. The law, to him, was a profession of the highest order. He lived up to the noblest traditions and highest ideals of such a profession. He was never too busy to give some time to younger members of the profession who sought his counsel. He handled many important cases and was particularly well versed in the phases of law dealing with trusts, banking and municipal corporations. He was unostentatious and always courteous. While he was a hard fighter for what he thought was right, he was always fair with his opponents and scrupulously honest in every relation. He was not a man to make friends readily but those who learned to know his character and worth became and remained his genuine friends. In his death the Bar has lost an able exponent of those qualities and ideals which have made the legal profession such a power for good in our civic life and the community has lost a citizen of the highest type.

LIBRARY OF THE CHICAGO BAR ASSOCIATION

New Books and What the Reviewers Say of Them.

Items from the Law Reviews.

"The Yale Law Journal feels keenly the loss to itself and to the Yale Law School in the departure of Dean Robert M. Hutchins, whose resignation from the school to accept the presidency of the University of Chicago has recently been announced. Dean Hutchins brought to his post a brilliant mind and a forceful personality. Within the three years of his incumbency, he has gained the respect and admiration of the students and has won the confidence and co-operation of his colleagues on the faculty. New paths in legal education have been blazed within this period, and the emphasis of Dean Hutchins on the relation of law to the social sciences has been a distinct contribution. The school has been fortunate in having received Dean Hutchins' animating touch during this period of his remarkable career."

—38 Yale Law Journ. 1115. (June, 1929.)

THE LAW QUARTERLY REVIEW FOR JULY, 1929.

[Reviewed by Honorable William Renwick Riddell for The Chicago Bar Association Record.]

This number, like its predecessors, begins with Notes on decisions: the writer under the well-known initials "F. P." contributing several.

In Maclean v. The Workers' Union [1929] 1 Ch. 602, what appears to be a correct conclusion—and a conclusion certainly in accordance with common sense as well as decided cases—is reached that the Court will not interfere with a decision honestly arrived at by the governing body of a Society in accordance with its rules and after giving the person affected a fair opportunity of presenting his case; moreover, anyone who has assented to such rules cannot be heard to contend that they are opposed to natural justice. The reviewer adds some interesting and valuable remarks on "Law of Reason," "Natural Justice," and "Law of Nature."

The case of Robert Addie and Sons (Collieries) v. Dumbreck [1929] A. C. 358 has for all jurisdictions governed by English law put an end to the dangerous notion that there is an intermediate stage between the trespasser and the licensee, —at all events, the fact of one being an

infant of tender years does not necessarily make one a licensee whom the circumstances would have made a trespasser if of mature age. A Court of which I was a member had during the present year to consider whether the infant daughter of a truckman whom her father had left sitting in his truck when he left it standing in the premises of a railway, and who was injured when the truck was run into by the negligence of the trainmen, had any right of action against the railway. The trial court held that she was a licensee and awarded her damages: Bettles v. Canadian National Railway Co. [1929] 63 O. L. R. 537; but we reversed that decision and dismissed the action, holding that she was a trespasser: S. C., 64 O. L. R. 211.

The cases of Tilling-Stevens Motors v. Kent County Council [1929] A. C. 354, 98 L. J. Ch. 198, reviewed by F. P.; Re Barrat [1929] 1 Ch. 336, 98 L. J. Ch. 74, and Re Lord Sherborne's S. E. [1929] 1 Ch. 345, reviewed by H. P., are of local interest only, being on English statutes.

E. C. S. W. reviews Blackwell v. Blackwell [1929] A. C. 318, 98 L. J. Ch. 251, which affirms the judgment of the court below sub nom. Re Blackwell [1928] Ch. 614, 97 L. J. Ch. 251; the point is as to a secret trust not imposed by a will, and the decision in Re Fleetwood, 15 Ch. Div. 594 (1880) that such a secret trust could be enforced by the court as part of its general equitable jurisdiction, has always been seriously questioned; but it is now authoritatively affirmed.

The jurisdiction of the Privy Council and its Judicial Committee, considered in Re Transferred Civil Servants (Ireland) Compensation [1929] A. C. 243; 98 L. J. P. C. 39, is of interest to the subjects of King George V. only—those who care for the subject will find a historical and descriptive sketch in my address before the Missouri Bar Association at Pirtle Springs, September 17, 1909. In parts of Ireland, of course, this jurisdiction is just part of the tyranny of the Bloody Saxon.

Hyman v. Hyman [1929] W. N. 131; [1928] P. 1, is a valuable decision by House of Lords on a question which promises to become more important. The decision of Sir James Hannen in Gandy v. Gandy, 7 P. D. 77 [1882], that where a wife in a deed of separation covenanted that she would not claim maintenance from her husband beyond the amount mentioned and provided for in the deed, she was not precluded from claiming alimony on obtaining a judicial separation on the ground of subsequent misconduct of the husband, was reversed by the Court of Appeal (7 P. D. 168). The conclusions of the Court of Appeal are now considerably criticized by the House of Lords as they had been by many of the profession in England; although it cannot be said that they are actually overruled.

The troublesome "Rule against Perpetuities" has been considered by the Court of Appeal in Re Villar [1929] 1 Ch. 243, 98 L. J. Ch. 223, the court affirming the decision below and laying down that a gift will not be void for perpetuity if made with reference to lives actually existing which can be ascertained at the date of the instrument taking effect, whatever difficulty and incertainty there may be in determining the exact date at which the period ends; a limitation will be void for perpetuity only if the lives cannot be ascertained at the date of the grant. Accordingly it was no objection that the period was the lives of the descendants of Queen Victoria alive at the time of the testator's death—the crank ye have always with you and he must be allowed to do what he likes with his own, however great a burden of trouble and expense he lays on those taking an interest under the grant.

The right of the highest bidder to revoke the implied authority of an auctioneer to sign a memorandum binding under the Statute of Frauds, and the duration of this implied authority, were discussed in Chaney v. Maclow [1929] 1 Ch. 161. The irrevocability of this implied authority must now be considered established, notwithstanding the great authority of Leake (Contracts, 7th ed., p. 336); the second question seems to be largely a question of fact in each case, dependent upon the duration of the transaction.

A barrister of London, Ontario, contributes a letter on a question of general interest. In 1905 a contract was entered into for the sale of certain lands in Ontario; this contained the covenant that the vendor in case she refused to carry out the sale should pay the purchaser $300. She did refuse, and the purchaser brought an action for the sum agreed upon. In the county court it was held that the contract was void under the Statute of Frauds, and consequently could not be enforced to compel a transfer of the lands; on this finding was based the conclusion that the contract could not furnish a consideration for the payment of the $300; and the action was dismissed. An appeal was heard by the King's Bench divisional court, composed of Sir Glenholme Falconbridge, C. J., and Britton and Riddell, J.J. The case was very ably argued, the list of cases cited covering nearly two pages of the official report; and we had great difficulty in arriving at a conclusion, our conferences being held

from time to time for nearly two months—an almost unprecedented length of time for that court. In the long run, I wrote a judgment, concurred in, that the agreement to pay on default was binding.

The decision was the subject of considerable comment: Mr. F. P. Betts, K. C., of London, Ontario, a member of our bar, wrote an elaborate article criticising it in the Canada Law Journal of 1910 (46 C. L. J., p. 273, not 26 as printed in the Law Quarterly Review), this was reprinted in the London Law Times comments, 129 L. T. 223; and the Law Quarterly Review, vol. xxvi, 194, commented on it, expressing the hope that the decision might be examined and corected by a higher court. It has not, however, so far as I know, been questioned by any court; the matter is expected to be legislated upon in Ontario, in which case the law will be made clear for the future in this province. One very curious point arose for decision in this case which may be considered worth noticing. The appeal to my court being from the county court, our decision was final; a previous decision of a divisional court was believed to be of importance if it was binding; and the question arose and was fully argued whether we could and should give an independent opinion or should follow the previous decision. The question was complicated by the fact that a divisional court in The Canadian Bank of Commerce v. Perram [1899] 31 O. R. 116, sitting in appeal from a county court decision, had refused to be bound by previous decisions and held themselves entitled, and therefore bound, to give an independent judgment. I disposed of the question in the following language (14 O. L. R. at p. 645): "I think we must give an independent judgment . . . Any other conclusion would lead to a dilemma similar to that which has amused students for twenty centuries and more. The ancient Cretan who asserted so stoutly that 'Cretans are always liars' was proved to be lying, whether he told the truth or not. So, on the plaintiff's contention, we are reduced to the paradox that, if we are bound by a divisional court judgment, we are bound by that in 31 O. R. to hold that we are not bound . . ."

Mr. Betts tells the story in this letter to the Law Quarterly Review.

A note on income tax on judges' salaries in South Africa completes this section.

The first article is on "Judicial Caution and Valour," by Sir Frederick Pollock. The very distinguished author thinks it "is idle to ask in general terms whether our Courts do or do not make law," the "only answer is that they develop and mould it as interpreters, but do not create it as legislators"; and "we may say that the duty of the Court is to keep the rules of law in harmony with the enlightened common sense of the nation." "The problem of judicial interpretation," he thinks, "is to hold a just middle way between excess of valour and excess of caution." Examples are given of wise daring: the whole article is well worth reading: speaking, however, as an expert, I would venture the assertion that the excessively cautious judge is very much less liable to have his knuckles cracked than the excessively valourous one, whether in England where "valour" is spelled with a "u" or in America where it is spelled without it.

The article on The House of Lords, 1689-1783, by Professor Sir W. S. Holdsworth, able and accurate as are all of that author's productions, offers little of interest to the American lawyer.

In the article on Liability of Manufacturers to Persons Other Than Their Immediate Vendees, Francis H. Bohlen discusses the subject with care and copious quotation of authorities, Winterbottom v. Wright (1842) 10 M. W. 100 and other English cases receiving due attention. Cases are also cited from New York, Massachusetts and other American Courts—the opinion of Judge Cardozo in MacPherson v. Buick (1888) 89 N. Y. 470, receiving special attention.

The article by Charles J. Burchell on Canadian admiralty jurisdiction and shipping laws is of purely local interest, dealing as it does with Canadian legislation.

Of local interest, too, is the last article, by S. A. Wiren, on Testators' Family Maintenance in New Zealand. New Zealand, the land of advanced legislation, has given the courts jurisdiction to interfere in certain cases of inofficious wills: and this article traces the course of judicial interpretation of the legislation and of the duty of the court under it.

Then come reviews of recent publications by various hands. F. P. has a short review of Professor Holdsworth's Some Lessons from our Legal History, most of the content of which was delivered in the form of lectures in American universities; the reviewer rightly complains of the Table of Contents.

F. P. also reviews Links Between Shakespeare and the Law, by Sir Dunbar Barton, with an introduction by Hon. James M. Beck. The reviewer gives much praise—not too much, be it said,—to Mr. Beck's very interesting, able, and ingenious preface. Why so much attention was and is paid to Mark Twain in his lucubrations in the matter of the Bacon-Shakespeare controversy, I have never been able to understand; to me there was nothing original or convincing in his effort. I quite agree with Mr.

Beck and F. P.. "Let any man with a sense of English style read in succession an Essay of Bacon's and a serious prose scene of Shakespeare's, and then believe, if he can, that the same man wrote both . . . Bacon speaks in the name of an educated but detached spectator seeing and hearing from the front; Hamlet as an artist who knows the stage thoroughly from the inside. The author of the Essays cared only for the spectacle, the creator of Hamlet for the drama."

The 17th edition of Anson's Principles of the English Law of Contract is reviewed by P. H. W. Due attention is paid to many valuable parts of this valuable work—perhaps the most interesting being that dealing with the "courageous attempt . . . to grapple with what is familiarly known as the 'blue pencil doctrine' relating to the severability of the obnoxious parts of a covenant in restraint of trade." He would be a bold man who would venture to say that the last word has been spoken on this subject. Courts are getting away from the "Fairy Godmother" conception of their functions, which induced them to interfere with people in making contracts to suit themselves, and are rapidly learning to attend to their own business, and leave others to attend to theirs.

An appreciative review of our own Dean Wigmore's A Panorama of the World's Legal Systems by P. H. W. follows. Due credit is given to the author's great reputation and sound scholarship, and the reviewer feels with us that the Dean's "is just the imagination that would plan such an undertaking and just the skill that would turn it into a reality. It should call new disciples to the study of Comparative Law and give fresh inspiration to its apostles."

Another American book, Professor Earl R. Sikes' (of Dartmouth College) State and Federal Corrupt-Practices Legislation, is reviewed by H. D. H.—"It does not profess to be exhaustive"; "It is in the nature of a survey."

E. P. contributes a review of The Confederate Privateers, by William Morrison Robinson, a "book . . . . written from the point of view of the South, and . . . . therefore perhaps . . . . not impartial." It is "a most interesting work, involving a considerable amount of research into a momentous period of American history."

Rather less attention than it deserves is paid to Rupert Emerson's (of Harvard) State and Sovereignty in Modern Germany, "a very interesting and scholarly piece of work . . . . which every constitutional lawyer should read."

Sir Geoffrey Butler's The Development of International Law "is without doubt an important contribution towards the filling of a gap both in legal and historical literature;" the reader "can only admire the skill with which he is led through the seeming confusion of the facts." Along with the last named work comes Oppenheim's International Law in a well-deserved fourth edition, correctly stated to be remarkably complete—this praise Dr. Oppenheim deserves in all his remarkable productions, *me judice*.

The Close Rolls of the Reign of Hen. III, A. D. 1251-1253 will appeal to the antiquarian, but the practising lawyer will probably pass them by.

Findlay's The Law on the Liability of Property Owners and Occupiers for Accidents "should be useful to practitioners, house owners and others dealing with specific cases as well as to students of general principles." It is merely a coincidence, of course, but my own court has recently been called upon to deal with such questions.

Redman's valuable Law of Landlord and Tenant has reached an eighth edition: the very convenient hand-book holds its own even against Woodfall and Foa.

Thomas J. Norton's Losing Liberty Judicially is the cry of the theorist against the hard facts that Courts are, after all, business institutions and they must recognize practical necessity. The book receives scant—or rather no praise from the hard-hearted reviewer. "The real place for Mr. Norton's lament is not before the Bench, but on the floor of Congress. He has really sought to obscure a protest against a political philosophy by clothing it in the robes of an obsolete jurisprudence." And no one can say fairer than that.

—William Renwick Riddell.

Osgoode Hall, Toronto, September 14, 1929.

AIR LAW

A Treatise on Aviation Law. By Henry G. Hotchkiss. 1928. New York, Baker, Voorhis & Co. Pp. xviii, 492.

"The problems involved in the early development of any new industry are always many and complex. Amongst the most baffling problems in aviation today are those concerning the future of aeronautical law, regulation, and insurance. The present unsettled status of these questions, together with the uncertainty regarding their trend, cannot help but act as a deterrent to the advancement of air commerce. Ignorance is partially responsible for the fears of airmen in this direction. Yet it is a fact that adequate data on these subjects have not been readily available in convenient form up to the present. Hence a clear and concise statement of the problem itself would at least render a real service.

"A Treatise on Aviation Law by Henry G. Hotchkiss, renders just that service by stating the problems involved in aeronautics in an admirably clear and concise way."

—Talbot O. Freeman (New York) in 38 Yale Law Journ. 1160. (June, 1929.)

ASSOCIATIONS

Dogma and Practice in the Law of Associations by E. Merrick Dodd, Jr., in 42 Harv. Law Rev. 977. (June, 1929.)

[Reviewed by Mr. Russell Whitman for The Chicago Bar Association Record.]

The meaning of this title is in part disclosed by Judge Cardozo's comment that the tyranny of concepts is a fruitful parent of injustice. "They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic."

It seems that the concept of corporate personality is one of these.

A difference of outlook apparently is developed by Professor Warren in a treatise on the law of unincorporated associations. "In a survey covering over eight hundred pages, he has as his primary purpose the demonstration that if courts admit even a single exception to the rule forbidding them, in the absence of legislative authorization, to view an association as a legal unit or juristic person, they convict themselves of the threefold error of usurping legislative power, disregarding unduly the dogma of *stare decisis,* and throwing the law into needless confusion."

The article in question undertakes to "examine the concept itself"; and in addition, we must "discover what it means, ask ourselves whether that meaning is in accord with social policy as we see it today, and, if it is not, whether the rule of law which the concept appears to give us has not been so eaten into by exceptions or evaded by other rules based upon different concepts that it is no longer entitled to stand unchallenged as a perfect expression of the living law. To that examination this article is addressed."

At this point, or somewhere in perusing the article, the reader is urged (by this reviewer) to reread the Taff Vale case (A. C. 426, 1 B. R. C. 832) and the Coronado case (259 U. S. 344). Follow this with Hemphill v. Orloff, 277 U. S. 537. From these it may fairly be gathered that "the bright line" between bodies corporate and unincorporated is in our author's language "a blurred one."

AUTOMOBILES

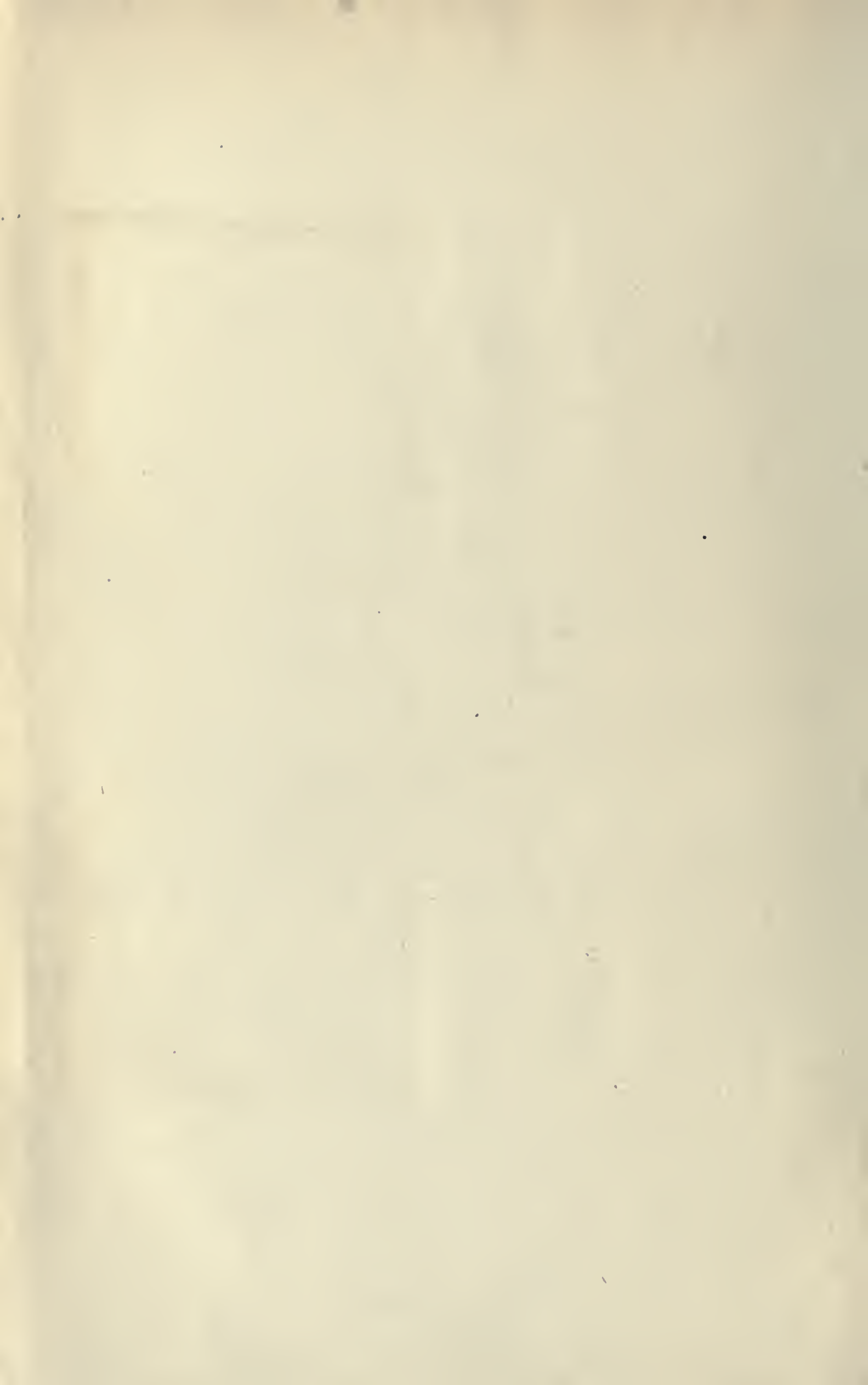
Automobiles — Pedestrian and Car at Crossing, a comment on the recent case of Griffith v. Slaybaugh (C. C. A., Dist. of Col. 1928) 29 F. (2d) 437, in 27 Mich. Law Rev. 947 (June, 1929).

Automobile drivers beware of pedestrians at street intersections!

Again the courts have come to the aid of pedestrians caught in the middle of the intersection by changing stop and go lights. In Griffith v. Slaybaugh, supra, the plaintiffs started across a street intersection on the green light, but before they reached the opposite curb the light changed, giving defendant the signal to go. Defendant proceeded across the intersection and struck the plaintiffs before they reached the opposite curb. It also appeared that defendant was to the right and slightly to the rear of another car which completely obstructed his vision of the plaintiffs. The lower court entered judgments for the plaintiffs and defendant appealed. The Court said, affirming the judgments:

"Plaintiffs entered the crossing while the green signal light was displayed, and having committed themselves to the crossing, they had the right of way until they could reach the opposite curb." . . .

"The condition of traffic in our crowded streets is such that travel by pedestrians is at best difficult and dangerous. If their absolute right to enter upon a crossing when the signal permits it is not sustained, they would be almost without protection. Entering under this invitation, they cannot be charged with contributory negligence, if the signal switches when they are in the street. Caught in this position, the obligation rests upon the drivers of automobiles, not only to observe the situation, but to wait until the crossing is clear. Many automobile drivers seem to imagine that with the shift of the signal they are given a clear right of way against intersecting traffic. In this belief they recklessly start their machines, regardless of persons who are already rightfully on the intersection. It is the duty of drivers of machines to exercise the greatest vigilance and care under such circumstances, not only to have their machines under control, but to stop and wait until pedestrians have had an opportunity to clear the crossing. Failure to observe these precautions constitutes negligence on the part of the driver, which in case of accident is chargeable against him." . . .



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Author Riddell, William Renwick

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