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EDITORIAL

Capital Punishment

. . . Until you are dead,
And may God have mercy on your soul.

". . . the padre is only halfway through the Lord's Prayer, but the hangman grabs the lever and the trap springs open with a screech of unoiled hinges. Like a long black sack, the victim drops. The rope tightens with a thud. The body bounces at the end of it, the pinioned arms and legs jerk spasmodically . . .", the padre slowly, methodically finishes the Lord's Prayer.

The medieval punishment the death sentence, an extremely crude and barbaric means of restraining certain serious crimes, is still meted out to violent offenders, following one supposes, the old precept of "an eye for an eye and a tooth for a tooth." The result through the centuries of such a punishment has not been encouraging to say the least, but countries such as Belgium, Denmark and Sweden have far less crime of a serious nature per population since the death sentence was abolished.

Many people harbour the conviction that too much emphasis is placed on punishment and not enough attention given to the causes and cure of crime. It is probably not an overstatement to say that the majority of crimes can be traced to social—economic causes. However, this conconclusion in itself is no antidote for the ultimate result evolving from serious crime, the decree of Capital Punishment; but it should fain be considered when the sentence is being determined.

God's commandment, "Thou shalt not kill", should not be elaborated on. It does not say "Thou shalt find out such and such first before you kill". It just simply says, "Thou shalt not kill", so to take a life deliberately is murder. God warns us that not even those things which are regarded as legal among men are to be done. We the people are guilty of a breach of the commandments when through our legal procedure we allow a human being to be executed.

Capital Punishment is now mainly prescribed for crimes which are committed with the widest variety of degrees of moral guilt. When we speak of capital punishment we usually associate it with the offence of murder. However, there are other offences for the commission of which this penalty may be awarded. Death by hanging may be ordered for the crimes of murder, treason, piracy and spying. In the case of the former it is now more common.

The Canadian Criminal Code states that punishment is to be the same on conviction by verdict or by confession. Further, the Criminal Code states that everyone who commits murder is guilty of an indictable offence and on conviction thereof, shall be sentenced to death. In all cases where an offender is sentenced to death, the sentence or judgment to be pronounced against him shall be, "you are to be hanged by the neck until you are dead". The form of the sentence as aforesaid usually ends with the consoling words, "and may God have mercy on your soul".

From the above it would appear that we are still operating on the pre-Christian dictum of an eye for an eye and a life for a life. Such barbarism and brutality can scarcely be called a punishment, because punishment is for the living and ends with death.

The word "punishment" is not used in the Russian Penal Code; instead, the four words, "measure of social defence", are used. Capital Punishment is the "highest measure". It is only applied for various crimes against the state. On the other hand, the so-called social measures applied to crimes against individuals are very mild.

The social measure for culpable homicide which is murder is imprisonment for a term not exceeding ten years. The significance of this is not that the penalty is very little in comparison with the crime, to the extent that it does not fit the crime, but rather that the death penalty does not result.

Capital Punishment in the 19th Century was applied indiscriminately. Almost all crimes were considered as felonies and hanging was a part of the punishment for felony. The number of offences to which Capital Punishment was applicable increased year by year in proportion to the increase in the number of conceivable offences against property. It was not until much later that Capital Punishment was extended to a murderer without the option of a fine.

The fear of the gallows as a deterrent, so far as homicide was concerned, was greatly diminished by the indiscriminate use of it in relation to offences of a different character. When the criminal might be executed for stealing a sheep, as well as for murder, he had not the slightest inducement to refrain from murder if he was detected in the act of carrying off the sheep.

Gradually the number of capital offences was reduced until by the latter years of the 19th

century according to statutes then passed, actual murder was the only offence (except treason) for which a sentence of death could be pronounced.

What a barbarous custom hanging is as a death penalty for criminals. That human justice should demand a life surpasses all understanding.

It has been said that, "he who lives by the sword shall perish by the sword;" it has also been said with equal force, "what you sew you reap". These two literal quotations literally translated may be the basis for the continuation of our present system of Capital Punishment. How this could be the case is not readily understood for when serious thinking is applied both connote in essence a deeper clearer meaning.

The reform in the punishment exacted for murder, namely Capital Punishment has received considerable agitation recently in the Parliament of Great Britain. Further, the press has of late taken up the cudgels for the advocates of suspension of the death penalty with the ultimate result in view of abolition of it.

The controversy that has been raised brings to the fore, two important points for consideration. The first is the retributive aspect of punishment in general; the second is the assumption that the death sentence is entirely different from other penalties and is governed by a different set of principles.

Both these views, that punishment should not be retributive and that the death sentence is in a class by itself have been acknowledged by right-thinking indviduals for some time. However, many people on the other hand, take a contrary position.

The retributive theory of punishment has been criticized severely due to the prevalent idea associated with it of vengeance. This idea is certainly not in keeping with our present concept of legal justice and ethics.

As a deterring force in the prevention of further homicides, or any crime for which the penalty exacted could be death, there is little validity. If such was the case, then by the age we live in, crime for which a death penalty would result should be a thing of the past. Apparently the deterrent element is lacking in the actual practice of Capital Punishment and therefore no logical or rational basis for the maintenance of it exists.

Two wrongs do not make a right and it would seem from this truism that Capital Punishment with all the horror it involves should give way to a more humane method of exacting a debt to society. In Great Britain there was a movement afoot, to replace Capital Punishment by life imprisonment. This was done, but only for a five-year period. Apparently an increase in the number of murders committed and other serious crimes led the government to a renewal of the old system.

From time to time clergymen and laity alike have expended considerable time in studying the complicated subject, Capital Punishment. On such occasions the present system has appeared to be the one they adopted; not because it it necessarily the best one, but rather because no alternative could be agreed upon. Hanging is an unnecessarily crude way of ending a human life. A less gruesome form of execution such as electrocution or gassing have been suggested, but The House of Commons has been adamant and has felt that if the execution was to be a deterrent it should be as deterrent as possible, and such requests have been turned down.

Many people are of the belief that no human being or group of human beings is superior enough to sentence another human being to death. Such an undertaking is not the responsibility of inferior humans but the job of God, who will punish sooner or later those who have avoidably erred.

It is not through sympathy for the victim that opposition to the death penalty arises. In most cases, the persons concerned are deserving of the greatest possible punishment short of death itself, for taking a life as punishment has such a brutalizing effect on any community. Moreover, it is an unfortunate commentary on our modern civilization that we have not passed this stage.

There should be a substitution of some other method for hanging. It is a terrible state of affairs when, as happened prior to a recent hanging in Toronto, many nervous people lay awake dreading the fatal hour; while others seeking a thrill gathered in crowds at the place of execution. Sensitive residents of a community should not be made nervous and distraught by the knowledge that a hanging is taking place near by.

Years ago people drove long distances, and spent a whole day picnic-style, to see a wretch or two drop through a trapdoor. In recent decades they are presumed to have developed such delicacy of feeling that a public hanging would repel them. This does not seem to be the case when one considers the crowd of a thousand people that waited with baited breath in the vicinity of the Don Jail for a report that a hanging had just taken place. It tends to show that the drift to fine sensitivity has not been as extensive as suspected.

The demoralizing effect of such a public exhibition; the effects of brutalizing scenes in the minds of people, conjured up by our legal machinery in allowing a human being to be put to death is certainly a relic of barbarism. Surely life imprisonment would be a more compatible sentence and one that would adequately serve the ends of justice and the debt owed by the culprit to society.

However, it has been held that the substitution of life imprisonment places prisoners in a position where no matter what they do while incarcerated, nothing worse can befall them. This is contrary to our present system in penal institutions in that under the penal conditions existing at the present time prisoners receive many privileges and certain freedoms which they can be denied on the slightest pretext. These privileges and freedoms are zealously guarded and preserved by them.

The extreme sentence given to recent atom bomb spies in the United States is indeed shocking when one considers the barbarity of it. This is particularly noteworthy when the evidence adduced upon which the judgment rests is considered. Clemency would appear to be in order in such cases; or life imprisonment in mitigation of capital punishment, under the circumstances.

Judges in India have had a discretion to impose either the death sentence or the life sentence for murder at least since the Penal Code became law about ninety years ago. Other countries have progressed further and abolished the death penalty altogether. In the South American Countries of Argentina and Venezuela, and in the United States Territory of Puerto Rico, as well as a number of states of the United States, murderers are subjected to life imprisonment instead of death.

In summation, an incident of particular significance occurred recently which profoundly illustrates the inhuman barbarism practiced by our so-called "British Justice". A young fellow held in the custody of the police at the time of a murder, was hanged for the murder committed by another young fellow. Society had exacted its due penalty and a life had to be taken. Truly, ashamed we must feel, and without doubt, disgraced we are; when such an obvious miscarriage of justice results.

In any Christian society, an innate sense of fairminded justice would follow as a logical consequence from the extenuating circumstances involved in this case. The grim reality resultant, reveals in all its callousness the sadistic bestial nature of man. In furtherance, it may be said that our acceptance of Capital Punishment truly indicates "man's inhumanity to man."

W. K. R

Some Aspects Of The Law Of Negligence

Being a lecture delivered by the Honourable Mr. Justice W. F. Schroeder, a Judge of the Supreme Court of Ontario, Honorary Visiting Lecturer at Osgoode Hall Law School to the Fourth Year Students-at-law of the Law Society of Upper Canada on November 28, 1952.

It has been stated by very high authority that "The place and occasion where Judges expound the law is on the bench and in causes before the Court; it is unsafe for them to essay to do so elsewhere because they invariably involve themselves in controversy". That weighty dictum leaves me quite undismayed, for I have known this unhappy consequence to flow from judgments rendered in all innocence in causes regularly before the Courts. Moreover, I recall having heard several of the Judges delivering special lectures to the students during that more carefree period of my life passed within these sacred walls; so precedent is not lacking. I am, of course, not unaware of the danger which I run of having some young luminary of the Ontario Bar in later years fling my own words into my teeth—but all that I may say here is surely "obiter dictum" and that will have to be my sure defence.

May I say in all seriousness and with the deepest sincerity that the honour which the Benchers have done me and the pleasure which they have given me by their invitation to speak to you, far outweigh all other considerations. I only hope that I shall be able to make some contrbution, however small, to the wealth of legal knowledge that has already been assimilated by you during your course of study at this venerable institution.

I venture to suggest that the great majority of you budding barristers who decide to devote your lives to practicing before the Courts will find that most of your cases are actions in tort, and more particularly in the field of negligence law. Your learned Dean suggested (and I confess that I am still non-plussed as to his reason) that I might touch upon some aspects of the law of negligence. As you know, no one is ever so rash as to argue with the Dean, and so I cheerfully accepted his suggestion. In casting about for a specific subject which I might helpfully discuss with you, I decided that you might derive some benefit from a discussion of the contributory negligence statutes, their origin and their treatment by the Courts; having regard particularly to our experience in the Courts of Ontario and the manner in which the practical operation of our Act is worked out in the trial of negligence actions.

For over a quarter of a century we have enjoyed in the Province of Ontario the benefits of legislation which altered the common law defence of contributory negligence and introduced into our system of jurisprudence what is known in the United States as the law of comparative negligence. As this legislation was enacted in the year 1924, the year in which I was called to the Bar, I have become so familiar with the changes wrought by the statute that it came to me somewhat as a surprise to learn that as late as the year 1950 such legislation had been adopted in only five States of the American Union, and that in some of those five States it had been adopted only to a limited degree in that the applicability of the statute was restricted to cases in which a plaintiff was less than 50% at fault for the accident. I have been advised that in that country legislation upon this subject is in contemplation in many other jurisdictions largely because of the success of Ontario's experience.

Section 4 of The Ontario Negligence Act is the important section which brings about such a revolutionary change in the common law defence of contributory negligence. This section reads as follows:

> "In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively."

Section 5 provides that if it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent, and, by section 7, in actions tried with a jury the degree of fault or negligence of the respective parties is a question of fact for the jury.

It will be observed at once that our statute is designed to permit of an award to a plaintiff

who may have been, in the opinion of a Judge or jury, responsible to the extent of 99%. There is a recorded, though unreported, instance of a negligence case in Ontario which arose out of a shooting accident in the course of a hunting trip. The plaintiff, having lost an eye, had his damages assessed at $10,000.00, but the jury, having found him 98% to blame, he was awarded only the sum of $200.00. I mention this to emphasize the point that in Ontario we have adopted the doctrine of comparative negligence in the most complete sense and have not confined its operation to cases in which the preponderance of blame lies upon the defendant.

It has been claimed that this legislation has created a new right of action. In a strict sense that is not so. Nor is it accurate to state that its effect is to take away the defence of contributory negligence. Actually it has modified the effect of that defence. Where formerly contributory negligence was an absolute answer, the Act says that henceforth it is only a partial answer and shall mitigate the liability of the negligent defendant to the extent to which the plaintiff was himself to blame, the limitation of damages being consequential and the true purpose of the statute being to limit liability.

You may be prompted to ask what were the reasons which motivated our legislators to enact the Negligence Act. To put it tersely, it was felt that the former law was outmoded and had long since ceased to work out substantial justice between negligent persons—that the change effected by our statute was more consonant with the modern needs and concepts of society in a changing world, and better adapted to the requirements and habits of the age in which we live; that the doctrines established long before the days of the steam engine, the incandescent lamp, the modern motor car and the jet-propelled aeroplane no longer served to promote the welfare of the members of our modern society and must be replaced by a law which was better adjusted to the increasing complexity of the daily routine and the greater tempo of life in our day and generation. If law is to be the great instrument of power which we, as lawyers, all desire it to be, it must under our democratic concept be in harmony with the will of the people and with the spirit of the times. After all, what are the aims which should animate the law both in its formation and in its administration? First and foremost, the aim of the law must be the attainment of justice, "the great standing policy of civil society", to use Burke's resounding phrase. Justinian, the greatest law giver the world has ever seen, begins his famous Institutes with these words: "Justice is the constant and perpetual will to give every man his due." Lord Macmillan, with that forceful elo-

quence for which he is so well known, says that "Law as framed and administered by fallible human beings must always fall short of the ideal standard of justice, but the more law approximates to justice as justice is for the time being conceived, the more gladly and readily will it be obeyed."

I must confess that in my student days at Osgoode Hall the common law defence of contributory negligence impressed me as monstrously unjust,—a law under which a plaintiff whose negligence may have contributed to the cause of the accident to the extent of 99% stood (theoretically at least) in precisely the same position as a comparatively innocent plaintiff whose negligence may have contributed to the cause of the accident to the extent of no more than 1%. While these are extreme examples and many more moderate illustrations can be suggested, who would deny that there is rank discrimination under a system of jurisprudence which disentitles a plaintiff who is negligent to the extent of only 10% from recovering any compensation whatsoever against a defendant who is responsible to the extent of 90% for the plaintiff's loss and damage but who is permitted to go scot-free. We had reached the stage where we were unable to detect anything more than a perversion or distortion of justice under the practical operation of the common law doctrine relating to contributory negligence and the opinion was widely entertained among our legal thinkers of the day that it was time for a change if the law was to be a servant of the people and attain what must be its true aim.

The common law courts have always fought against recognition of the conception that negligence can be sorted into greater or lesser degrees of culpability based on blameworthiness. Both in England and in America such attempts have been frowned upon as being unscientific in principle and illusory in practice, instances of which will be found in cases relating to bailment and in actions against carriers. Legislative enactactments of the character under consideration have been critcized upon the ground that they have fastened upon the courts the necessity of furnishing a set of scales to measure damages in accordance with an unscientific principle which can at best be merely guesswork. This criticism, in my opinion, fails to recognize that the law as it is is the essence of common sense and requires nothing but that which is in accordance with common sense and demands not absolute certainty but reasonable probability.

In the final analysis the division of responsibility between two or more litigants with a view to determining their damages proportioned to their respective degrees of fault can, with perfect

propriety and safety, be left to the good common sense of the average jury. If they can weigh medical testimony, which is often complicated and difficult to apprehend with a view to determining the quantum of damages, if in the past they were left to struggle with those nightmares of primary, contributory and ultimate negligence, or the doctrine of the last chance, as it is sometimes called, it is not too much to say that they can safely be entrusted with the duties which devolve upon them under a system which recognizes the doctrine of comparative negligence. Have juries not for a very long time been called upon to consider and determine degrees of negligence in criminal cases which involve charges of negligence? It has been my experience both at the Bar and on the Bench that juries, for the most part, arrive at very sensible conclusions in measuring degrees of fault between contending litigants in negligence actions. As Viscount Birkenhead put it in the *Volute* case, (1922) 1 A.C. 129 at p. 144:

> "Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it."

If juries in the past were able to deal with all the ramifications of primary, contributory and ultimate negligence, then a fortiori it seems to me that in this enlightened day and age they can be depended upon to deal with questions of proportional responsibility upon common sense principles.

Nowhere in section 4 of the Ontario Act is the word "cause" used. Of course, the common law rule of contributory negligence is based upon causation and causation has been held to be the basis of apportioning blame under The Maritime Conventions Act, 1911, see *Anglo-Newfoundland Development Company, Limited* v. *Pacific Steam Navigation Company*, [1924] A.C. 406, and *The Vectis*, [1929] P. 204.

As was stated by Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Limited*, [1940] A.C. 152 at p. 165:

> ". . . if contributory negligence is not regarded from the point of view of causation it is difficult to see how damage comes to be divided under the Admiralty rule which is adopted in ordinary cases of injury in other systems of jurisprudence, and which persons of authority think should be adopted in ours".

In the year 1927 this was made abundantly clear in the Canadian Courts as appears from a passage in the reasons for judgment of the late Chief Justice Anglin, Chief Justice of Canada, in *Long v. McLaughlin*, [1927] S.C.R. 303 at p. 311:

> "In our opinion, within the meaning of s. 2 of The Contributory Negligence Act of New Brunswick (Stat. N.B. 1925, c. 41) damage or loss is 'caused' by the fault of two or more persons only when the fault of each one of such persons is a proximate or efficient cause of such damage or loss, ie., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence."

This same conception was re-emphasized in the lucid statement of the late Mr. Jusice Crocket in the Supreme Court of Canada in the case of *Koeppel v. Colonial Coach Lines Limited*, [1933] S.C.R. 529 at pp. 543 and 544:

> "This court decided in the case of *McLaughlin* v. *Long*, that the *Contributory Negligence Act* of the province of New Brunswick, which is similar in its relevant provisions to that of Ontario and the other provinces of Canada, effected no change in the law of contributory negligence so far as the meaning of that term is concerned and that damage or loss could properly be said to be 'caused' by the fault of two or more persons within the meaning of sec. 2 of that Act 'only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence'. Contributory negligence therefore implies as it always did, negligent acts or omissions of two or more persons operating together to produce such an emergency or peril as to render it impossible for either or any of them, by the exercise of reasonable care, to avoid the consequences of the negligence of the other or others. There can be no such thing in the case of a collision between two vehicles as contributory negligence on the part of the one driver unless there is negligence on the part of the other which has also materially contributed to bring the collision about, that is to say, has efficiently operated with the negligence of the other to cause it. In that case, the combined negligence of the two drivers is in law the proximate cause of the collision. If, however, notwithstanding that both drivers may have been guilty of negligence, the situation resulting therefrom was such that either, by the exercise of reasonable care, could have avoided the collision, the failure to exercise such care and thus prevent the collision becomes the immediate and sole proximate cause thereof. The negligence of the other in that event cannot be said to have had any effective part in it. It is not a *causa efficiens*."

It is undoubtedly true that our Canadian contributory negligence statutes are based in a large

measure upon the Maritime Conventions Act 1911 (1 & 2 Geo. V. Ch. 57). Prior to the enactment of this statute the rule under Maritime law was that where both vessels were at fault, the damages were to be borne equally. The Act, which was passed to carry out the terms of an international convention, created a new rule for division of loss under which the liability of the owner of one vessel in fault to pay damages to the owner of the other vessel in fault might be increased or decreased from the half damages for which he would have been liable before the Act, the liability to make good the damage or loss being in proportion to the degree in which each vessel was in fault, and if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

In a book on the subject "Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada" written by Cyril Francis Davie, K.C., of the British Columbia Bar, published in the year 1936, the author cautions against the adoption of principles established in the Admiralty Courts for the reason, as he says, that the same rigorous causation test as was applied in the common law courts, was not applied in the courts of admiralty. No doubt instances can be found in the authorities which would justify this observation but I believe that the Admiralty Courts have in the main endeavoured to determine dual proximate fault from the point of view of causation as established over the years in the common law courts.

Great Britain adopted the theory of comparative negligence in the year 1945 when the British Government passed the Law Reform (Contributory Negligence Act). The English statute differs somewhat radically from the Canadian statutes in that section 1 provides that where any person suffers damages as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the Court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage. It would, therefore, appear that under the English Act in deciding the extent to which the plaintiff's damages are to be reduced, the Court is to have regard to the plaintiff's responsibility for the damage but is not obliged to reduce the damages in exact proportion to the degree in which the parties were at fault. In this respect the English Act differs from the Maritime Conventions Act, 1911, as well as from the various Canadian Statutes under which the apportionment of liability follows automatically from the different degrees of fault. It would seem that under the English Statute if the Court thought it just and equitable to do so in any particular case, the plaintiff might conceivably recover his damages in full without any reduction, even though he was partly responsible for the damage. It is not my intention to discuss the relative merits of these two enactments, but I shall be content with saying that after twenty-eight years' experience under our Statute we have found the method of assessing damages which it provides for extremely satisfactory.

At the present time all the provinces of Canada, except Quebec, have enacted contributory negligence statutes in terms substantially similar to those of the Ontario Act. In the Province of Quebec civil law is based upon the Code Napoleon and under that system of jurisprudence "faute commune", or common fault, has always been a partial defence to an action for damages in Quebec. The law of Quebec was stated thus by Fitzpatrick, C.J. in *Lefebvre* v. *Nichols Chemical Co.*, 42 S.C.R. 404:

> "Where the party who claims compensation for an injury caused by the fault of another has been also guilty of fault which contributed to the accident, he must share the responsibility and in that case the damages are not divided equally, but the Plaintiff is awarded only a proportion, varying according to the degree in which the respective parties were to blame."

The Honourable Mr. Justice Mignault, who was a distinguished Judge of the Supreme Court of Canada and a great authority on the civil law, gives a clear statement of the law of Quebec bearing upon this subject in *Laporte* v. *Canadian Pacific Railway Co.*, [1924]S.C.R. 278 at p. 287 as follows:

> "In the province of Quebec negligence of the plaintiff contributing to, but not being the sole cause of, the accident is not a bar to the right of recovery, but only a reason for reducing the damages that the negligent plaintiff has suffered by reason of his injury. It is for the jury to say whether the plaintiff's negligence was the sole cause of the accident or merely a cause contributing thereto with the negligence of the defendant, and the verdict will stand if there be evidence in support of it."

One may be moved to ask what has become of the old doctrine of "last chance" or "last opportunity" in the law of negligence in those jurisdictions which have adopted the comparative negligence theory. In a recent case in the Ontario Court of Appeal, namely, *Broderick et al* v. *Toronto Transportation Commission, et al*, [1949] O.R. 658, Laidlaw, J. A. writing the judgment of the Court, stated at p. 663:

> "It has been repeatedly pointed out that there is no doctrine of 'last chance' or 'last opportunity' in the law of negligence of this Province." But he goes on to say:
>
> "The real question to be decided is: What was the cause or what were the causes of the damage? In answering that question, it is essential to consider the facts of each particular case and the findings as made on the evidence."

In *Gives v. Canadian National Railways*, [1941] O.R. 341, Henderson, J. A. stated at p. 347—"I am unable to appreciate that the doctrine of ultimate negligence has survived the provisions of The Negligence Act." There have been other expressions to the same effect in various other judgments in the Courts of our Province.

I am quite satisfied, however, that the jurists who expressed this opinion did not mean to suggest that since the enactment of The Negligence Act all the learning which was developed through succeeding generations upon the subject of the last chance doctrine no longer had any application. In the case of *Gives* v. *Canadian National Railways* mentioned supra, the first four questions put to the jury were directed to ascertaining if there was negligence on the part of the plaintiff and on the part of the defendant and to obtaining a statement as to the particulars of such negligence, if any. The Honourable R. S. Robertson, Chief Justice of Ontario, stated at page 345:

> "When questions are put to the jury in terms similar to the first four questions here, no purpose can be served by submitting any question as to 'ultimate' negligence. No doubt the jury must be properly instructed as to what negligence comes within the description of 'negligence that caused or contributed to the accident.' . . .
>
> I am not to be understood as saying that it will, in all cases be sufficient to submit questions to the jury in the form of the first four questions submitted here. In the multitude of negligence cases, with their infinite variety of circumstances, there may well be cases where to determine the essential facts it will be necessary to put questions to the jury that are somewhat more refined than the broad questions as to whose negligence and what negligence 'caused or contributed to' the loss or damage. That must be left to the good judgment of the trial Judge to deal with when it arises."

This I believe to be a realistic approach to the problem because the vast majority of cases can be satisfactorily disposed of by the submission of the first four questions with, of course, the addition of questions directed to ascertaining the jury's assessment of damages and their opinion as to the degrees of fault in cases where they may find that the combined negligence of both parties produced the results which have given rise to the action. In a case, for example, in which both drivers may have been guilty of negligence and the situation resulting therefrom was such that either, by the exercise of reasonable care, could have avoided the collision, the attention of the jury can be directed to this state of affairs and they can be asked to consider whether or not the failure to exercise such care and thus prevent the collision was or was not the immediate or sole proximate cause thereof—to say, in other words, whether, in the circumstances, the negligence of the other party had any real effective part in it.

In my respectful opinion, ultimate negligence is still a part of our law in so far as it touches or concerns the question of causation. We may hesitate to submit specific questions to the jury directed to eliciting their view as to the existence or non-existence of ultimate negligence on the ground that such questions tend to create confusion in their minds, but that is not a ground for the broad declaration that the doctrine of ultimate negligence has not survived the negligence acts. As long as we retain the common law concept of causation as part of our law, that doctrine must be resorted to when the proper occasion arises. It is to be noted that in his reasons for judgment in *Broderick* v. *Toronto Transportation Commission*, Laidlaw, J. A., states, after referring to the two findings of the jury, namely, "(A) Did not apply brakes at time of first sounding warning whistle. (B) In our opinion he had sufficient time to stop street-car before impact."—

> "It is abundantly plain from that finding, read as a whole, as it should be, that the jury reached the conclusion that the operator of the street-car saw the dangerous state of affairs created by the truck standing on the crossing, and negligently failed to avoid the collision when with reasonable conduct on his part it could have been avoided. The principle in *Davies* v. *Mann*, (1842) 10 M. & W. 546, 152 E.R. 588, is plainly applicable to the situation."

This case was carried to the Supreme Court of Canada and its judgment is reported sub nomine *Toronto Transportation Commission and Taylor* v. *Rosemberg* in [1950] 4 D.L.R. 449. The Supreme Court reversed the judgment of the Ontario Court of Appeal and restored the judgment of the trial Judge, based on the jury's findings. As I read the latter judgment, the Supreme Court does not hold that the doctrine of ultimate negligence has been abrogated by the negligence statute. It turns rather upon the Court's view that the negligence of both parties to the action was, in the jury's opinion, too close together and that the jury was entitled so to find upon the evidence. I rather find in this case confirmation

of the view expressed by me that the doctrine of ultimate negligence is still part and parcel of our law, as it must be in relation to the question of the effective cause of an accident.

As you are aware, in the Common Law provinces of Canada we are strong believers in the merits of the special verdict as contrasted with the general verdict of the jury. By a special verdict, as you know, the jury's findings are educed through the submission of specific questions to them, of which I shall give an example later. These questions are directed to bringing out the jury's view as to whether or not there was negligence on the part of either or both parties to the accident; and particulars of their findings; further to ascertaining if it is practicable for the jury in such case to apportion the respective degrees of fault or negligence of the parties, and if so, to have them state in percentages such respective degrees of fault or negligence; lastly, to obtain the jury's assessment of the total damages of the parties to the action. If a general verdict is called for, the jury are simply asked to say whether they find for the plaintiff or the defendant and to state the damages. We prefer to take a special verdict from juries for the sound reason that litigants have a right to know what are the findings of negligence on the basis of which a jury saddles them with liability. In this connection I should like to refer to what has been very ably stated by a most eminent authority in the oft quoted case of *Metropolitan Railway Company* v. *Jackson,* (1877) 3 A.C. 196. Lord Cairns, who was then Lord Chancellor of England, in dealing with the distinctive functions of Judge and Jury, had this to say:

> "The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual ,and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the Court in banc, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial; and on a second trial, and even on subsequent trials, the same thing might happen again."

In *Andreas* v. *Canadian Pacific Railway Company,* 37 S.C.R. p. 1, it was held that where a jury makes a specific finding of fact, they must be held to have considered the other grounds of negligence charged as to which they were properly directed by the trial Judge and to have exonerated the defendants from liability thereon. If it was important to take a special verdict from a jury before the enactment of the amending negligence legislation a fortiori it was even more so after the coming into existence of the altered law, having particular regard to the necessity of

determining whether or not there was a true case of comparative negligence established by the evidence. The taking of a special verdict removes the danger of speculative verdicts being given and affords to the Courts a measure of control which they ought to possess and ought to exercise in order to ensure a proper administration of justice in the field of negligence law.

While the taking of a special or a general verdict is left to the discretion of the trial Judge, I am not aware of any negligence case—at least within the last quarter of a century—in which a general verdict has been taken. While under our system the Judge is the sole judge of the law and the jury are the sole judges of the facts and of the creditability of the witnesses, there is nothing to deter the trial Judge from commenting upon the facts or upon the credibility of the witnesses, even to the extent of expressing his opinion on that subject, which has been committed exclusively to the jury, provided that he tells them in the course of his charge that his views or opinions on the subject of fact or on the credibility of the witnesses are not binding upon them and that if they hold views or opinions which are at variance with those which he expresses, they not only may but they ought to reject his views or opinions and give full and free expression to their own. A trial Judge's charge is not only required to be an understandable exposition of the law applicable to the facts of the particular case, but it should also be a skilled analysis of the facts and a clear instruction to the members of the jury as to how to apply the law to the facts of the particular case. If a trial Judge is restricted to the field of law and is not allowed to travel into the field of fact, subject to the checks and safeguards which I have indicated, he is, as I see it, severely handicapped and cannot properly discharge his functions in relation to the trial. I can see no harm resulting to anyone from this method of trial procedure in our Courts but on the contrary, a great deal of good, ensuring as it does a fair measure of control of the trial by experienced and trained legal minds. That has always been the law of England as well as the law of Canada and as long as the administration of justice is in the hands of a competent, fearless and independent judiciary, the jury system, properly and expertly directed, can, like democracy, achieve the ends which it has been designed to achieve.

Perhaps I can illustrate what I mean by a measure of control which we deem it desirable to retain in a jury trial by giving you a typical example of the questions which are submitted to a jury in a negligence case. They run somewhat as follows:

1. Was there any negligence on the part of the plaintiff which caused or contributed to the cause of the accident? Answer "Yes" or "No".
2. If your answer to question No. 1 is "Yes", then state fully and clearly in what such negligence consisted.
3. Was there any negligence on the part of the defendant which caused or contributed to the cause of the accident? Answer "Yes" or "No".
4. If your answer to question No. 4 is "Yes", then state fully and clearly in what such negligence consisted.
5. If your answer to question No. 1 is "Yes" and your answer to question No. 3 is "Yes", do you find it practicable to determine the respective degrees of fault or negligence on the part of the plaintiff and the defendant? Answer "Yes" or "No".
6. If your answer to question No. 5 is "Yes", then state in percentages the degrees of fault or negligence on the part of the plaintiff and the defendant.
   (a) The Plaintiff ..... %
   (b) The Defendant ..... %
   100%
7. In any event and irrespectively of your answers to the foregoing questions, at what amount do you assess the total damages—
   (a) of the Plaintiff ..... $
   (b) of the Defendant ..... $

In charging the jury with respect to questions 2 and 4 the presiding Judge tells them that they must give specific answers from which it will appear clearly just why they say the plaintiff or the defendant was negligent. They are warned against bringing in such vague and indefinite answers as "He should have been more cautious" or "He should have used greater care". They are told that any such answer is meaningless and that their answer must be such that the Court examining it will have no doubt as to what was the precise ground of negligence which they found against either or both parties. They are also warned to state all the grounds of negligence which they may find because their silence as to other grounds of negligence alleged will be interpreted as a negativing of such allegations. If a jury brings in a vague and meaningless answer such as I have alluded to, a Judge should not hesitate to send them back and ask them to clarify their answer by making it more specific so as to enable the Court to determine just what they meant to say in answer to questions 2 and 4.

This has many advantages, chief of which is that the Court is enabled to say whether or not the particular ground for negligence found against

a party is negligence in law. If a general verdict is taken such an inquiry may be seriously circumvented. Then, too, if the case is carried to the Court of Appeal, the Judges of that forum, with the record before them, can determine whether or not there is any evidence to support the particular finding made by the jury. Of course, a Judge must tell the jury that questions 2 and 4 are concerned not with negligence in the abstract but with acts of negligence which were a real effective cause of the accident and this is best explained to the jury by giving them illustrations which they can easily understand.

Question 5 is put to the jury because of the provision in the Act that the parties shall be deemed to be equally at fault or negligent if it is not practicable to determine the respective degrees of fault or negligence as between them. Some of our Judges make it a point of telling the jury that that section was not inserted in the Act to justify a lazy jury or a lazy Judge in shirking the responsibility of earnestly trying to determine the respective degrees of fault or negligence as between the parties to the action but that if they, the jury, reach a true impasse and cannot do so, then the statute operates to declare the parties equally responsible.

As I stated earlier, our Act provides for the adoption of the doctrine of comparative negligence in the most complete sense. May I be permitted to illustrate. If A suffers a loss of $10,000.00 and is found to be 60% in fault for the accident and B suffers a loss of $6,000.00 for which he counterclaims and is found to be 40% in fault, in the net result A recovers from B the sum of $4,000.00 and B recovers from A the sum of $3600.00.

During the years following the introduction of the Contributory Negligence Act into our law, it was found necessary to make amendments from time to time to meet new problems as they arose. Under the common law there could not be contribution among joint tort feasors. In cases in which a plaintiff sued two or more defendants, power was given to the Court to determine the degree in which each of the defendants was at fault or negligent, although in a case where A recovered judgment for, say, $10,000.00 against B and C, he would still have his whole judgment against both B and C. An amendment was passed, however, to provide for the case of B and C raising the issue of liability *inter se* so that if B were found 60% to blame and C 40%, B would be entitled to a judgment indemnifying him against C to the extent that he was compelled to pay to A a sum in excess of $6,000.00 and C was entitled to a judgment against B indemnifying him to the extent that he was obliged to pay to A a sum in excess of $4,000.00. Thus by force of the statute there is now in Ontario contribution among joint tort feasors.

Then, too, our Highway Traffic Act deprives a gratuitous passenger of any right of action against his host or his host's servant or agent or the driver of his car, and a married person had not and still has not a right of action against his or her spouse arising out of a tort. In the case of a plaintiff who is a gratuitous passenger or a plaintiff who is the spouse of a negligent person, an amendment to the original statute declares that no damages or contributions or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of the owner or driver in the former case or by the fault or negligence of the spouse in the latter case, and the portion of loss or damage so caused is to be determined, although such owner or driver or such spouse is not a party to the action.

Very frequently practical difficulties arose where there were joint tort feasors and where a plaintiff was disposed to make a reasonable settlement of the action. It often occurred that one of the joint tort feasors was opposed to the making of a payment of any sum whatsoever to the plaintiff. Now, by an amendment made in 1948, a defendant who takes advantage of an offer of settlement may thereafter commence or continue an action against the other tort feasor

and if he can satisfy the Court that the amount of the settlement was reasonable, he can recover his proper proportion by way of indemnity, or, should the Court find that the amount of the settlement was excessive, it has power to fix the amount at which the claim should have been settled and may adjust the rights of the respective joint tort feasors accordingly. Thus a defendant can now make what appears to him to be a reasonable or advantageous settlement without losing his rights against another defendant who was, or may have been, partly responsible for the claimant's damages or losses. This was a most salutary reform and one which struck at the root of a real practical difficulty which had beset the path of harassed insurance adjusters and insurance lawyers.

Cases frequently arose where the plaintiff chose to sue only one party involved in the accident, and the party so sued might wish to claim indemnity from or relief over against the other party or parties involved in the accident. It is now provided that such other person or persons may be added as party defendants or may be made third parties to the action upon such terms as may be deemed just.

The Highway Traffic Act of the Province of Ontario creates a one-year limitation for the commencement of actions arising out of the operation of motor vehicles. To ensure that a delinquent tort feasor should not escape liability and thus take advantage of his own delinquency and to assist the honest tort feasor who is prepared to recognize a just obligation, the statute permits proceedings for contribution or indemnity to be brought by one joint tort feasor against another after the expiration of a year from the date of the accident, provided that such proceedings are commenced within one year of the date of the judgment in the action or the settlement made with the plaintiff, as the case may be, and that there has been compliance with any statute requiring notice of the claim against the irresponsible tort feasor.

These are substantially the practical changes which were effected in our law over the period of slightly more than a quarter of a century since the Contributory Negligence Act first came into being. I believe that they adequately meet the present needs but no doubt new problems not now anticipated are bound to arise and will have to be met by appropriate amendments. There has been a great deal of judicial interpretation of the various sections of the statute, particularly on the procedural side, but the law is now well settled and we can feel assured that we have a good workable statute.

Three distinguished Canadian jurists sitting on the Supreme Court of Canada pronounced their views on the desirability of changing the common law doctrine of contributory negligence in the year 1923 in the case of *Earl* v. *Grand Trunk Pacific Railway Co.*, (1923) S.C.R. 397. In that case the Honourable Mr. Justice Mignault, who had come from the Bar of Quebec Province, stated:

> "If I may say so, the doctrine of the Civil Law, in force in the Province of Quebec, and also adopted in Admiralty matters, is much more equitable, for, where there is common fault, the liability of each party is measured by his degree of culpability. This prevents the negligent Defendant from entirely escaping punishment because the Plaintiff, in a greater or lesser degree, may have contributed by his negligence to the accident."

The Honourable Mr. Justice Anglin, later Chief Justice of Canada, expressed it in this way:

> "The doctrine of the Civil Law that in such circumstances the damages should be divided in proportion to the degree of culpability commends itself to my judgment as much more equitable."

The Honourable Mr. Justice Duff, later Chief Justice of Canada, commented as follows:

> "This is one of those cases that sometimes causes one to turn a rather wistful eye to jurisdictions in which, where injury results from the combined negligence or misconduct of the Plaintiff and the Defendant, the burden of the loss can be equitably distributed."

Our experience since the passage of this remedial legislation has only served to confirm the views so ably expressed by such high and eminent authority before the new law was enacted.

I think that it may be asserted with confidence that there is not a progressive and socially conscious member of the judiciary or of the bar of our Province who would wish to repeal the legislation which I have reviewed and return to the discarded common law doctrine of contributory negligence. Man-made laws must, of course, always fall short of the ideal standard of perfection but the judges and lawyers of Ontario are, I believe, united in the firm opinion that our present law more nearly approximates to justice between litigants in negligence cases than did the former law. I feel safe in declaring that the general public and the insurers in Canada as a whole share the view of legal men as to the wholesomeness of the reforms brought about by our statute and that it has gone a long way to promote the contentment and happiness of the people.

I fear that I have already detained you much too long, but I cannot take leave of you without telling you an anecdote about the Honourable Mr. Justice William Renwick Riddell, who, to you,

(Continued on Page 38)

CARLILL vs. CARBOLIC SMOKE BALL CO.

(1893) Q. B. D. v. 1, P. 256

(From CRUSTULA JURIS)

Once upon a time, the British nation
Was filled with shivering Consternation,
Ten million sneezing folk or so
By influenza were laid low.

Their noses dripped, their eyes grew red,
Till half the country took to bed,
The sick groaned loud, the well ones too
In fear lest they should catch the Flu.

Now, on one morning in November
In ninety-one, if I remember—
Miss Carlill (her old father's pet)
Read in their favourite "Gazette"

An ad. so worded as to calm
All apprehension and alarm,
To wit: a hundred pound would be
Paid down to any he or she
Who should develop, after buying
And faithfully for the two-weeks' trying
Carbolic Smoke Balls, as prepared
And vouched for by the printed word,
A cold, or sniffles, or should slip
Into the clutches of La Grippe.

She read and ran, nor did she stop
Until she reached the Chemist's shop.
Ten shillings paid for this protection
Against the prevalent infecton.
And being delicate and scary,

From then till half through January
Three times a day the maid applied
Her little nose, as specified,
And sniffed the harsh fumes of carbolic,
Which, she averred, she found no frolic.

But, ah! alas! one morn in bed,
Miss Carlill woke with aching head,
Burning and dry, yet cold and freezing,
The very house shook with her sneezing,
The diagnosis swift and sure—
'Twas influenza! Drat the cure!

Spring came—Miss Carlill, frail and weak,
Her hundred sovereigns went to seek.
The brutes were deaf to every plea.
"Then will I go to law," says she.
To law she went and Hawkins, J.,
Declared that she should have her way.

Defendants cried, "Why, that's a joke,
A hundred quid go up in smoke!
Not by our halidom, we'll see
What wiser Judges shall decree."

But Lindley, L. J., said, "She'll get
The cash. I hold this was not bet,
It was an offer which the lady
By sniffs accepted, and 'tis shady
To argue otherwise—your factum
Sets out that this is nudum pactum,
But plaintiff sniffed the vile carbolic,
(She testifies it was no frolic),
Three times a day—this inhalation
To my mind forms consderation.

Bowen, L. J., 'tis known, a sage is,
His judgment flows o'er seven pages,
He says in brief, "I have no other
Opinion than my learned brother."

And Smith, L. J., "This Smoke Ball Co.
Have brought no single fact to show
Grounds for success—their gold must fill
The pocket of the fair Carlill.

* * *

Mr. Carlill and his daughter
Supped that night on prawns and porter.

W. S. GILBERT : Legal Rhymster

By

A. P. DILKS

(OSGOODE II)

One morning an elderly couple appeared before the magistrates of the Edgware Petty Sessions to obtain a separation order. In view of their age the magistrates tried pacification. Pleaded the old woman: "He is a nasty old man, he beats me, and he's got an abscess in his back." Murmured one of the magistrates to his colleague: "Clearly this is not a case of abscess makes the heart grow fonder." The punster on the Bench was none other than Sir William Schwenk Gilbert, who but twenty years before had condemned just such a practice in *The Mikado*:

And that Nisi Prius nuisance, who just now is rather rife, The Judicial humorist—I've got him on the list!

When Gilbert wrote in *Iolanthe*:

The Law is the true embodiment
Of everything that's excellent,

he was writing something that he certainly believed. Although the Law refused him a livelihood, it nevertheless remained his first love, and "when he went to the Bar as a very young man" he took a step destined to be fraught with definite and delightful consequences for the world. Of his early life Gilbert writes:

"I was educated privately at Great Ealing and at King's College, intending to finish up at Oxford. But in 1855, when I was nineteen years old, the Crimean War was at its height, and commissions in the Royal Artillery were thrown open to competitive examination. So I gave up all ideas of Oxford, took my B.A. degree at the University of London, and read for the examination for direct commissions, which was to be held at Christmas, 1856 . . . But the war came to a rather abrupt and unexpected end, and no more officers being required, the examination was indefinitely postponed . . . I had no taste for a line regiment, so I obtained, by competitive examination, an assistant clerkship in the Education Department of the Privy Council Office, in which ill-organized and ill-governed office I spent four uncomfortable years. Coming unexpectedly into possession of a capital of £300, I resolved to emancipate myself from the detestable thraldom of this baleful office; and on the happiest day of my life I sent in my resignation. With £100 I paid my call to the Bar (I had previously entered myself as a student at the Inner Temple), with another £100 I obtained access to a conveyancer's chambers, and with the third £100 I furnished a set of chambers of my own, and began life afresh as a barrister-at-law."

In 1886 he joined the Northern Circuit and attended as well Old Bailey. As a lawyer, however, Gilbert was anything but a success. He practised for four years, averaging only five clients a year and earning but £75 in his first two years at the Bar. His first brief was to defend a woman accused of picking pockets. The defence was not a success.

"No sooner had the learned judge pronounced this sentence than the poor soul stooped down and, taking off a heavy boot, flung it at my head, as a reward for my eloquence on her behalf, accompanying the assault with a torrent of invective against my abilities as a counsel, and my line of defence. The language in which her oration was couched was perfectly shocking. The boot missed me, but hit a reporter on the head, and to this fact I am much disposed to attribute the unfavourable light in which my search for the defence was placed in two or three of the leading daily papers next morning."

Gilbert explained his failure at the Bar by the fact that he was "a clumsy and inefficient speaker, suffering from an unconquerable nervousness," which prevented him from doing justice to his clients. Actually, at least in the latter eyars of his life, he was an extremely gifted speaker, and his services in that regard were much in demand.

Like many other briefless barristers, Gilbert turned to his pen as a means of livelihood, and proceeded to turn every incident of his short legal career to brilliant account both in his *Bab Ballads* and in the operettas which resulted from his famous partnership with Sir Arthur Sullivan.

The first success of this great collaboration was purely legal—*Trial by Jury*—first produced on March 23, 1875, at the Royalty Theatre. This delightful one-act satire on court procedure has remained one of the most popular in the Gilbert and Sullivan repertoire.

The original scene was copied from the Clerkenwell Sessions House, where Gilbert had himself practised. The case is one of breach of promise of marriage, and the Usher accordingly instructs the jury:

Now Jurymen, hear my advice—
All kinds of vulgar prejudice
I pray you set aside:
With stern judicial frame of mind,
From bias free of every kind
This trial must be tried.

Oh listen to the plaintiff's case:
Observe the features of her face—
The broken-hearted bride.
Condole with her distress of mind—
From bias free of every kind;
The trial must be tried.

And when amid the plaintiff's shrieks,
The ruffianly defendant speaks—
Upon the other side;
What he may say you needn't mind—
From bias free of every kind,
The trial must be tried.

The learned judge then enters the courtroom and immediately proceeds to disclose to all who may hear, the secret of his meteoric rise to the Bench:

When I, good friends, was called to the Bar,
I'd an appetite fresh and hearty,
But I was, as many young barristers are,
An impecunious party:
I'd a swallow-tail coat of a beautiful blue—
A brief which I bought of a booby—
A couple of shirts and a collar or two,
And a ring that looked like a ruby.

In Westminster Hall I danced a dance,
Like a semi-despondent fury;
For I thought I should never hit on a chance
Of addressing a British jury—

But I soon got tired of third-class journeys,
And dinner of bread and water;
So I fell in love with a rich Attorney's
elderly, ugly daughter.

The rich attorney he jumped with joy,
And replied to my fond professions:
'You shall reap the reward of your pluck,
my boy,
At the Bailey and Middlesex Sessions.
You'll soon get used to her looks, said he,
And a very nice girl you'll find her!
She may very well pass for forty-three
In the dusk with the light behind her!'

The rich attorney was good as his word:
The briefs came trooping gaily,
And every day my voice was heard
At the Sessions or Ancient Bailey.
All thieves who could my fees afford
Relied on my orations,
And many a burglar I've restored
To his friends and his relations.

At length I became as rich as the Gurneys
An incubus then I thought her,
So I threw over that rich attorney's
Elderly, ugly daughter.
The rich attorney my character high
Tried vainly to disparage—
And now, if you please, I'm ready to try
This breach of promise of marriage!

It is interesting to note that when Gilbert attended the old North London Sessions House at Clerkenwell, Dickens was still fulminating against legal abuses. The immortal Chancery suit of *Jarndyce* v. *Jarndyce* had only recently come to its tragic end, and Mr. Stryver, K.C.

and Sydney Carton had not long finished saving Charles Darnay from the gallows. It has been suggested that Gilbert had *Bardell* v. *Pickwick* in mind when he wrote *Trial by Jury*, and there is certainly more than just a hint of Serjeant Buzfuz in Counsel for the Plaintiff's opening address to the jury:

With a sense of deep emotion
I approach this painful case;
For I never had a notion
That a man could be so base,
Or deceive a girl confiding,
Vows, etcetera deriding.

See my interesting client,
Victim of a heartless wile!
See the traitor all defiant
Wears a supercilious smile!
Sweetly smiled my client on him
Coyly woo'd and gently won him.

Swiftly fled each honeyed hour
Spent with this unmanly male!
Camberwell became the bower,
Peckham an Arcadian Vale,
Breathing concentrated otto!—
An existence à la Watteau.

Picture, then, my client naming
And insisting on the day:
Picture him excuses framing—
Going from her far away;
Doubly criminal to do so,
For the maid had bought her trousseau!

The Plaintiff, Angelina, who not only wears her bridal dress, but is even accompanied by a corps of dewy-eyed bridesmaids, enters the witness-box and testifies:

I love him—I love him—with fervour
unceasing,
I worship and madly adore;
My blind adoration is always increasing,
My loss I shall ever deplore.
Oh, see what a blessing—what love and
caressing
I've lost, and remember it, pray,
When you I'm addressing are busy assessing
The damages Edwin must pay.

Edwin, the hapless Defendant, who has appeared in person, admits that his heart has turned to another, and then makes a rather startling offer:

But this I am ready to say,
If it will appease their sorrow,
I'll marry one lady to-day,
And I'll marry the other to-morrow.

To this, of course, Learned Counsel for the Plaintiff raises immediate objection:

But, I submit, my lord, with all submission,
To marry two at once Burglaree!

With his nose in the Year Books, he argues:

In the reign of James the Second,
It was generally reckoned
As a very serious crime
To marry two wives at one time.

The situation is saved, however, as it is in all the operettas, by a sudden turn of events, and here it is the Learned Judge who provides the solution:

Put your briefs upon the shelf,
I will marry her myself.

Trial by Jury captured a public faithful to it ever since, and it is somewhat amusing to find the only dissentient voice that of Mr. Justice Kekewich. In a letter written in 1906 Gilbert said: "I met Kekewich the other day. He says he likes all my plays except *Trial by Jury*. He seemed to think that in holding the proceedings up to ridicule I was trenching on his prerogative." Mr. Justice Kekewich, it will be remembered, was famous for having his judgments reversed by the Court of Appeal.

It is not unnatural for an operetta, in which the action is set in a court of law, to include many legal terms, but Gilbert did not confine his display of legal knowledge and his undying love for the Law to this one short piece. Both *Patience* and *The Sorcerer* have solicitors among the characters. In *Patience* it is the solicitor on whom devolves the task of raffling the poet Bunthorne among "twenty love-sick maidens." In *The Sorcerer*, the notary negotiates a contract of marriage between the two lovers, Aline and Alexis. Notice how Gilbert cleverly includes all the formal requirements of a deed:

All is prepared for sealing and for signing,
The contract has been drafted as agreed;
Approach the table, oh ye lovers pining,
With hand and seal now execute the deed!

ALEXIS: I deliver it—I deliver it
As my Act and Deed!
ALINE: I deliver it—I deliver it
As my Act and Deed!

See they sign, without a quiver, it—
Then to seal proceed.
They deliver it—they deliver it
As their Act and Deed!

We can only draw the rather reluctant inference from these proceedings that neither Alexis nor Aline believed that there existed sufficient consideration for a simple contract.

Shortly before the first production of *H.M.S. Pinafore* on May 25, 1878, Disraeli had appointed W. H. Smith, head of the well-known firm of publishers, First Lord of the Admiralty. The appointment of a man with no sea experience to such a post became a topical joke, and Gilbert did not miss the opportunity of satirizing it in what has become the most popular song of the opera. Nor could he, in the same breath, resist describing the life of a law student serving under Articles:

When I was a lad I served a term
As office boy to an Attorney's firm.
I cleaned the windows and I swept the floor,
And I polished up the handle of the big front door.
I polished up that handle so carefullee,
That now I am the Ruler of the Queen's Navee!

As office boy I made such a mark
That they gave me the post of a junior clerk.
I served the writs with a smile so bland,
And I copied all the letters in a big round hand—
I copied all the letters in a hand so free,
That now I am the Ruler of the Queen's Navee!

In serving writs I made such a name
That an articled clerk I soon became;
I wore clean collars and a brand new suit
For the pass examination at the Institute.
That pass examination did so well for me,
That now I am the Ruler of the Queen's Navee!
Of legal knowledge I acquired such a grip
That they took me into the partnership.
And that junior partnership, I ween,
Was the only ship I ever had seen.
But that kind of ship so suited me,
That now I am the Ruler of the Queen's Navee!

Later in the opera Sir Joseph gives what appears to be a judgment on a question of statutory interpretation when he sings:

For I hold that on the seas
The expression 'If you please',
A particularly gentlemanly tone implants.

In creating the Lord Chancellor in *Iolanthe*, Gilbert used all his knowledge of Equity, and his jibes at Bench and Bar follow one another in rapid succession throughout the whole piece.

The Lord Chancellor has, unfortunately, fallen in love with Phylis, a ward of his own Court. He describes his predicament:

> The feelings of a Lord Chancellor who is in love with a Ward of Court are not to be envied. What is his position? Can he give his own consent to his own marriage with his own Ward? Can he marry his own Ward without his own consent? And if he marries his own Ward without his own consent, can he commit himself for contempt of his own Court? And if he commit himself for contempt of his own Court, can he appear by counsel before himself, to move for arrest of his own judgment?

Stephon, an Arcadian shepherd, is also in love with Phyllis, and the two are resolved to be married consent or no. A discourse on evidence is the result:

LORD CH: Now, Sir, What excuse have you to offer for having disobeyed an Order of the Court of Chancery?

STEPHON: My Lord, I know no Courts of Chancery; I go by Nature's Act of Parliament. The bees—the breeze—the seas—the fountains the brooks—the gales—the vales—the fountains and the mountains cry, "You love this maiden—take her, we command you!" 'Tis writ in heaven by the bright barbed dart that leaps forth into lurid light from each grim thundercloud. The very rain pours forth her sad and sodden sympathy! When Chorussed Nature bids me take my love, shall I reply, "Nay, but a certain Chancellor forbids it?" Sir, you are England's Lord High Chancellor, but are you Chancellor of birds and trees, King of the Winds and Prince of Thunderclouds?

LORD CH: No, It's a nice point—I don't know that I ever met it before. But my difficulty is that at present there's no evidence before the Court that Chorussed Nature has interested herself in the matter.

STEPHON: No evidence! You have my word for it. I tell you that she bade me take my love.

LORD CH: Ah! but, my good Sir, You mustn't tell us what she told YOU—it's not evidence. Now an affidavit from a thunderstorm, or a few words on oath from a heavy shower would meet with all the attention they deserve.

Whereupon the Lord Chancellor proceeds to lecture Stephon on the ethics of the profession:

When I went to the Bar as a very young man,
(Said I to myself—said I)
I'll work on a new and original plan,
I'll never assume that a rogue or a thief
Is a gentleman worthy implicit belief,
Because his Attorney has sent me a brief.

E're I go into Court I will read my brief through,
And I'll never take work I'm unable to do,
My learned profession I'll never disgrace,
By taking a fee with a grin on my face,
When I haven't been there to attend the case.

I'll never throw dust in a juryman's eyes,
Or hoodwink a judge who is not overwise,
Or assume that the witnesses summoned in force,
In Exchequer, Queen's Bench, Common Pleas, or Divorce,
Have perjured themselves as a matter of course.

In other words professions in which men engage,
The Army, the Navy, the Church and the Stage,
Professional licence, if carried too far,
Your chance of promotion will certainly mar—
And I fancy the rule might apply to the Bar.

One of the least-performed operettas written by Gilbert and Sullivan, *Utopia, Ltd.*, is, in the writer's submission, one of the best results of Gilbert's legal genius. In it Princess Zara returns from England, bringing with her six examples of English progress. She introduces one of them, Sir Bailey-Barre, Q.C., M.P., and, in doing so, summarizes what are, in Gilbert's opinion at any rate, the qualities of the perfect lawyer:

A complicated gentleman allow me to present,
Of all the Arts and Sciences the terse embodiment.
He's a great arithmetician who can demonstrate with ease,
That two and two are three or five or anything you please;
An eminent logician who can make it clear for you
That black is white when looked at from the proper point of view;
A marvellous philologist who'll undertake to show
That 'Yes' is but another and a neater form of 'No'.

Also accompanying the Princess is her true love, Capt. Fitzbattleaxe. They find much to their consternation that Scaphio and Phantis (Judges of the Utopian Supreme Court) have also fallen in love with her. The Gilbertian solution to the problem is a rather unusual example of the appointment of a receiver;

FITZ: It's very simple. In England when two gentlemen are in love with the same lady, and until it is settled which gentleman is to blow out the brains of the other, it is provided, by the Rival Admirers' Clauses Consolidation Act, that the lady shall be entrusted to an officer of the Household Cavalry, as stakeholder, who is bound to hand her over to the survivor (on the Toutine Principle) in a good condition of substantial and decorative repair.

SCAPHIO: Reasonable wear and tear, and damages by fire excepted?

FITZ: Exactly.

Utopia, Ltd. was written at a time when the incorporation of limited companies was the rage in England. Accordingly, Gilbert, through the lips

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Twenty-three Brothers of the Bench fete retired Chief Justice Robertson

Gathered at the Toronto Club for Testimonial Dinner to honour the former Chief Justice of Ontario, R. S. Robertson (seated fourth from the left) are twenty-three of the Judges of the Supreme Court of Ontario.

Left to right, Front: J. Keiller Mackay, J.A.; W. D. Roach, J.A.; Chief Justice J. W. Pickup, C.J.O.; Mr. Robertson; Chief Justice J. C. McRuer, C.J.H.C.; D. P. J. Kelly, J. Back: J. M. King, J.; D. C. Wells, J.; G. MacKay, J.A.; G. A. Gale, J.; Wilfred Judson, J.; W. F. Schroeder, J.; J. L. McLennan, J.; F. H. Barlow, J.; J. A. Hope, J.A.; C. W. Gibson, J.A.; J. B. Aylesworth, J.A.; J. L. Wilson, J.; R. W. Treleaven, J.; W. F. Spence, J.; R. E. Laidlaw, J.A.; R. I. Ferguson, J.; A. M. LeBel, J.; P. E. F. Smily, J.

Those unavoidably absent were W. T. Henderson and F. D. Hogg, JJ.A.; and E. R. E. Chevrier, H. A. Aylen, H. D. Anger and R. A. Danis, JJ.

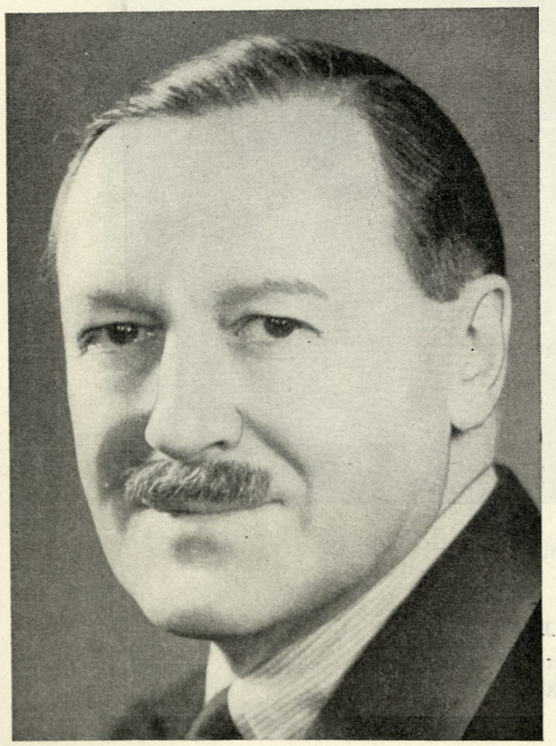
The BENCH and the BAR

COLIN William George Gibson was born in Hamilton, Ontario, on February sixteenth, 1891. He was the son of Sir John Gibson, the then Lieutenant Governor of Ontario. Perhaps his youthful aspirations to the law might well be attributed to the influence of his illustrious father and also to his grandfather who was Judge Malloch of the County of Hastings.

After his early education at Hillfield School in Hamilton, Mr. Justice Gibson attended Royal Military College at Kingston, graduating with the class of 1911.

Upon graduation from R.M.C., His Lordship was articled to the firm of Speight and Van Nostrand, Surveyors. After a year of links, chains, levels and transits, he qualified as an Ontario Land Surveyor.

The problems of geometry and calculus were superceded the following year, giving way to Crimes, Tort and Real Property as Mr. Justice Gibson began studies at Osgoode Hall. His Lordship attended the first and second year at the Hall, and was in England with the Canadian Bisley Team in the summer of 1914 when war broke out. He immediately joined the British Army (14th Royal Fusiliers) and left for the front.



C.W.G. GIBSON JA.

This did not halt the scholastic progress of the law-student-turned-soldier, as he was wounded in 1915, and while on leave in Canada he was called to the bar with his former class mates of '15. The Law Society files show that His Lordship had the honour of being presented to the bar by His Worship R. M. Meredith, Chief Justice of Ontario.

Mr. Justice Gibson returned to France where he was again wounded and also decorated by the Belgian Government.

After the Armistice, His Lordship began practicing with the firm of Gibson, Levy and Gibson in Hamilton. Litigation was his chief interest and he acted as counsel for the Dominion Power and Transmission Co. which operated, with sometimes tortious results, the Hamilton Street Railway.

His interest in things Military did not stop as his practice of law began. In the period between the two great wars he played an active part in the Reserve Army. From 1924 to 1934 he commanded the Royal Hamilton Light Infantry, and from 1935 to 1938, the Fourth Infantry Brigade.

The outbreak of war found His Lordship in command of the Hamilton Garrison and he remained so until 1940.

In that year Mr. Justice Gibson entered the political field and was successful as Liberal candidate for the riding of Hamilton West. He relates with pleasure that he was the first Liberal to occupy that seat since 1904. His ability was soon recognized in Ottawa and he was appointed Minister of Revenue in 1940. He was re-elected in 1945 and assumed the duties of Minister of National Defence for Air in that year. The following year Mr. Justice Gibson was appointed Secretary of State. With re-election in 1949 he

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GEORGE Theopholius Walsh, Queen's Counsel, is a rather imposing title for a renowned gentleman who disdains pretention and affectation. He would much rather be known as "George Walsh, the friend of the law student"—a trademark he has registered and earned through his conspicuous affiliation with Osgoode students since his own graduation in 1913.

Paradoxically, members of the legal profession differ widely with members of the fourth estate in assessing Mr. Walsh; the first group constantly awed with admiration by his brilliant knowledge of the law, the second group equally reverent of his pungent wit. For example, Hon. Dana Porter was quoted as saying:

"Our department has the greatest admiration for Mr. Walsh. We consider him as a general counsel of the greatest ability and that is why we chose him to head the Royal Investigation inquiry into conditions at the Don jail. He did us a most excellent service"

Meanwhile, newspapermen who always revel in personalities with "color" are always more than pleased to report a day in court with George Walsh, especially if the staid proceedings are infected with his contagious humour. On one occasion a learned Justice, obviously a bit peeved, said:

"Mr. Walsh, what do you want for your client?"

Mr. Walsh didn't bat an eyelash in replying, "Justice, My Lord—with costs."

"Walshian" stories have long been favored fare at bar meetings and conventions, and a great store of them have been saved up and retold by Mr. Walsh's long-time friend, A. A. MacDonald, Q.C. Anecdotes about George Walsh in court are legend—and perhaps even legendary. However, they are told as an indication of the affection and admiration the colleagues of Mr. Walsh have for him.

Mr. Walsh was born in Millbrook, Ontario, in 1890, and there received his early schooling. It was in Millbrook also that he began his life-long friendship with John W. Pickup who was destined for the appointment as Chief Justice of Ontario in 1952. Early Division Court and police cases intrigued young George and he soon gave up a potential career as a druggist to enter his articles of law with the late A. A. Smith of Millbrook.

"I have never regretted my choice of the law," recounts Mr. Walsh. "A druggist fills prescriptions day after day. Or for that matter most trades or professions are monotonous. But a lawyer . . . ah, a lawyer . . . he always entertains a different case with different people involved. My lifetime of law has been my love, for it offers a real service to humanity, I believe, ahead of any other works."

In 1910 Mr. Walsh entered Osgoode Hall, and for his three years ranked near the top of nis class. The graduates of 1913 certainly must rate as one of the most brilliant to have left Osgoode's sacred halls. Chief Justices Pickup and McRuer, Mr. Justice Treleaven, Mr. Percy E. Wilson, Official Guardian, and many Magistrates and Judges

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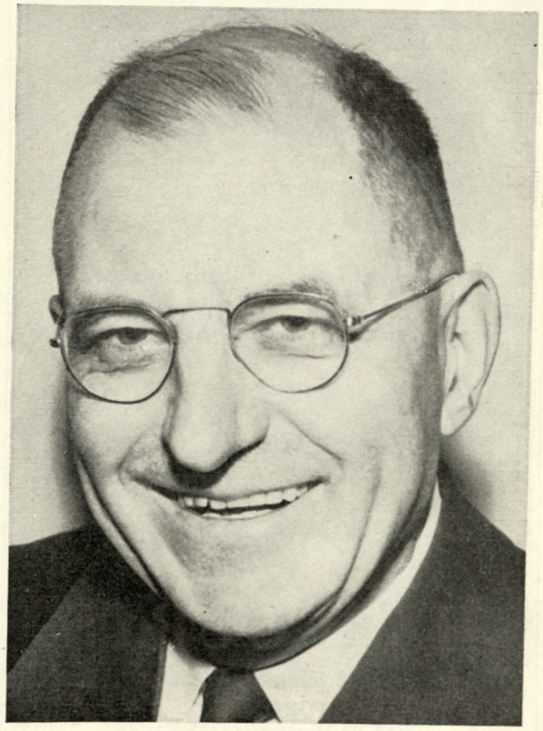


G. T. WALSH, Q. C.

(Continued on Page 26)

took the portfolio of Minister of Mines and Resources.

January of 1950 marked his appointment to the bench as a Justice of the Court of Appeal of Ontario. One of his more recent duties was to sit in the Suchan-Jackson Appeal tribunal.

His chief interest apart from the law and politics has been target shooting. He has been on the Canadian Bisley team five times as a shooting member and in the 1933 shoot he won two competitions—the 1,000 yard and the Long Range Aggregate. Perhaps his greatest thrill came in 1951 when he commanded Canada's Bisley team, and a team member, Captain Gilbert Boa, won the honours for his team and country. His Lordship has been active in an executive capacity as regards this sport, being the president of the Dominion of Canada Rifle Association and vice-president of the National Rifle Association of Great Britain.

In the past few years his marksmanship has been turned towards curling at the Victoria Club, and also at the partridge population in the Huntsville area.

Mr. Gibson has two sons, graduates of Osgoode Hall, who have been spared, as yet, the pleasure of appearing in their father's court.

The walls of his chambers at the Hall reflect his widely diversified and highly interesting life. As you gaze about the room, you see a myriad of mementos ranging in subject matter from autographed pictures of the Royal Family to newspaper cartoons picturing His Lordship in various past political predicaments. To the left of the fireplace is to be seen a menu from a banquet given in honour of the Right Honourable Winston Churchill—complete with notes from the speech made by the honoured guest and also his cigar band (a Belinda).

To the right of the fireplace is a copy of the Citizenship certificate, issued by the Dominion of Canada through His Lordship while he was Secretary of State, entitling all Newfoundlanders to Canadian citizenship.

These pictures and mementos provide tangible evidence of His Lordship's achievements, and give mute testimony in support of the fact that here is a man well qualified for the onerous task that is his.

In a treatise entitled "Eulogy on Judges", Piero Calamandrei states that "the best judge is one in whom a ready humanity prevails over cautious intellectualism". When we inspect the record of Mr. Justice Gibson in the light of this criterion we see that, due to his many achievements, legal, military and political, he is very close to the mark, and a man truly worthy of a seat in the Court of Appeal of Ontario.

G. R. HOULDING II.

FEBRUARY, 1953

Legal and Literary Luncheon

Address by Chief Justice J. W. PICKUP

I consider it a privilege and pleasure to be your guest at luncheon today—and to have this opportunity of speaking for a short time to the Student Body. Upon your shoulders and those of your generation who are students of the law will soon rest the great responsibility of maintaining the traditions of the legal profession—a profession which is both ancient and honourable and the profession upon which the Public depends for the maintenance of law and order in this Province. As I think of the Osgoode Legal and Literary Society I like to think that it is what its name implies—a legal society—and a literary society. I have always regarded it as important that students of the law and lawyers should combine literary attainments with their legal pursuits. That is my belief but I do not claim to be an example of it.

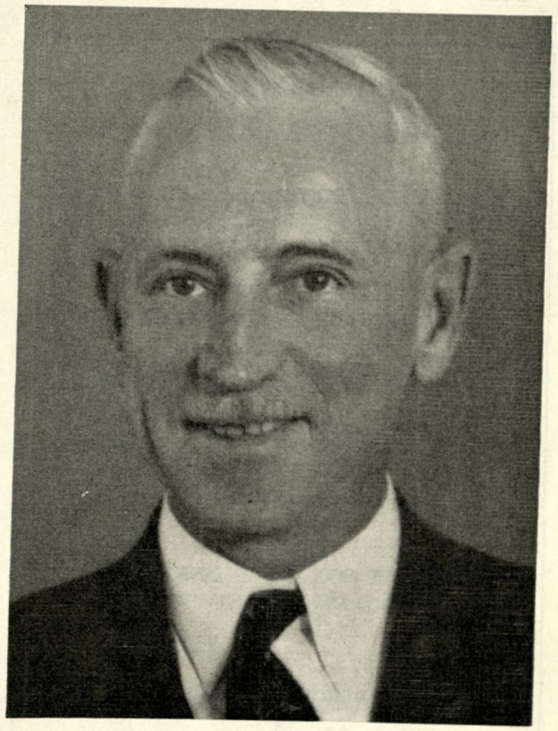
In the first place a lawyer must know his law but he must also be able to express himself in a convincing way—not only to the Courts but to his clients. Manner and courtesy go a long way and will always assure you a patient hearing and inspire confidence in your sincerity. But that is not enough if your words fail to express fully your thoughts or to convince your listeners of the merits of your cause—sincerity is essential and simple words I always think are best. The Bible is expressed in simple language and is most expressive and convincing.

I would have you always remember that it is your right and at times it may be your duty to borrow from those of the past, who possessed literary ability, their words—you will often find that by doing so you express more freely and more convincingly your own idea. There is a vast storehouse to borrow from. I, therefore, urge you to continue to lay emphasis upon the literary side of your Society.

I am not suggesting that you need write a book or become poets.

I am not one to advocate the use of wit or humour in presenting your cases. That has its place and when properly applied is very helpful, but it is not easy to use. One must have a natural sense of humour to use wit in an acceptable manner. A feigned or forced sense of humour never helps one's cause. Few of us have the natural wit or humour which wins the acquiescence of a court in a serious matter. Mr. Tilley had—others at the Bar today have but they are few. I recall the story which is told of Mr. Tilley, which, no doubt, you have all heard but it illustrate's my point.

He was in the Court of Appeal and it was important to his argument that he read a good deal from the evidence. There were five judges and the C.J.O. tried to stop the reading of the evidence by saying that the Court would read the evidence. Mr. Tilley asked each of the judges, in turn, if he was going to read the evidence and got the answer "Yes". Then Mr. Tilley said, "as we are all going to read the evidence we might as well read it together." I contrast



JOHN WELLINGTON PICKUP
Chief Justice of Ontario

that with an attempt I once made in the Court of Appeal to read the judge's charge to the jury. The Court refused to let me—one judge said—speaking for himself he would not sit there and listen—not having the quick wit of Mr. Tilley all I could see to do was to tell the Court that there was in my view only one way I could properly present the appeal and if the Court would not listen to me then I had no alternative but to sit down. I was told to proceed—the Court did not hold it against me and after letting me read the charge allowed my appeal but I thought how much nicer it would have been if I could have accomplished the same result without practically defying the Court.

I mentioned a moment or so ago that I was not suggesting that you write poetry—but I have observed that some lawyers in the past have even done that at times. I have in mind a poem which I recently came across which shows that the writer understood the ratio decidendi of some decided cases. You have to understand a decision to record it in verse. It was written at a time, many years ago, when judges and lawyers were troubled with the law as to the position of married women who purport to bind themselves by contract. Time was as Dickens records that the law presumed that married women did what they did because they were directed so to do by their husbands. That brought forth Dickens' comment that the law was an ass. In later years the Married Women's Property Act was passed. It was that statute and decisions under it which prompted the poetic effort to which I have referred. One decided case had held that a married woman could not bind herself by contract even if she had property of her own, if in respect of such property she was restrained from alienation. Then came the case of Leake v. Duffield which you will find reported in prose in 6 Times Law Reports but if you will bear with me I will give you a lawyer's interpretation of that decision as I find it written in verse:

There is a hope held out to tradesmen by a
memorable Act
That a wife is, like her husband, liable if she
contract;
But, on studying the statute as expounded by
decision
You will find that hope of payment fades away as
doth a vision.
If you sue a wife in contract, as has previously
been shown,
You must prove that when she bargained, she had
something of her own;
And her bargain is not sanctioned by a legal
obligation
If you prove she had an income with restraint
on alienation.

(Now we come to the facts of the case of Mrs. Duffield).

Mrs. D. has no effects except her wardrobe when
she bought
Goods of Leake, who promptly sued her for the
price in County Court;
Judgment went against the lady spite of reasons
nor a few
Ably set forth by her counsel, for the judge
expressed this view
She had separate estate within the meaning of
the Act,
In respect of her apparel she was able to contract.
To a contrary opinion does a woman ever yield?
Does a wife brook oppsition? Mrs. D. at once
appealed.
Said the judges—it afflicts us with unutterable
woe
To reverse our little brother in the County Court
below;
But, as judges, we are bound to give decision
independent
Of our feelings, and we here must enter judgment
for defendant;
It's a notion common sense abhors, judicial reason
loathes,
That a wife should make a contract on the credit
of her clothes;
We have heard that if a gambler coin of legal
tender lack,
He will bet his boots or lay the very shirt upon
his back;
But we cannot think that any wife would pledge
her "combination"
As security that just demands shall meet with
liquidation;
So we hold that married women who have nothing
but their raiment,
If they purport to contract can never be compelled
to payment.

The lawyer who wrote that verse seems to have fully understood the decision of the court.

I said a few minutes ago that the law students of your generation would soon take over the responsibility of maintaining the traditions of the legal profession to which the Public looks for the maintenance of law and order in this province. I should add to that the maintenance of Freedom.

Of old sat Freedom on the heights
The thunders rolling at her feet.
She heard the torrents well
Then stepped she down through time and space
To mingle with the human race;
And part by part to men revealed
The beauty of her face.

Freedom and law go together. Law, in one of its simplest definitions, is a rule for individual action enforced by a sovereign political authority.

You cannot have Freedom without law but you can have law without Freedom. I am not speaking about God's law or the moral law but law as it is enforced by a sovereign political authority. I have no doubt that if there were some way of enforcing by political authority the teachings of the New Testament we would have Freedom in its perfect sense.

An autocratic law or one which has not the sanction of the people can be enforced by sovereign political authority but Freedom does not go with it. If, however, the law emanates from the people and has the sanction of the people then all that is necessary in order to have Freedom is due enforcement of the law—or, to put it in another way, due administration of justice according to law.

This is where the responsibility of the legal profession comes in. Let us consider the part played by the legal profession.

1. In your offices, from day to day, you will be

servants of the people who are your clients—advising them what their rights are and taking steps to protect those rights. To a great extent you must be judges as to your client's rights because it is no part of your duty to obtain for your client something to which he is not entitled. That can never be done without taking from someone else what he is entitled to. To do that is to defeat the cause of justice.

2. The legal profession must also supply the Attorneys General, Crown Attorneys, Law officers and Judges.

3. It must supply the advocates in the Courts—to assist the courts in the proper interpretation of the law and the application of it to each individual case.

4. Then as to the enactment of Statute Law the profession has a large part. A layman cannot write a statute. To write any statute requires a knowledge of both statute and common law. There again the Legislator must look to the lawyer.

In short, directly or indirectly, the whole responsibility for enforcement of law and order is upon the shoulders of the legal profession. If we fail the law fails. In a few short years this responsibility will be yours. In part it becomes yours upon your admission to the Bar.

First, of course, you must know the law but do not fool yourselves into thinking that you will know the law when you graduate from any Law School—be it Osgoode Hall Law School. The University of Toronto Law School or any other Law School on earth. After all the years which may be allotted to you have passed all that you will be able to truly say is that I know more of the law than I did before.

It should therefore be with a feeling of awe and great humility and consciousness of responsibility that you enter upon the ancient and honourable profession which you have chosen. It is an ancient profession going back over the centuries into the dawn of memory—along with the prophets, priests and healers of old there were the lawyers and judges and it is an honourable profession.

But I would have you always remember that the greatness of any profession is measured by its service to mankind, true and faithful service to your fellow men. Speaking to you, individually, may I say to you that he who would be great among you must truly serve. Conversely, he who serves is great—no matter how humble the service. You will also find it true that the more you serve the wider your field of service will become—more clients will require your services.

We hear considerable these days about the legal profession being a monopoly. Of necessity it must be, but it is a monopoly on legal service—a monopoly founded upon the trust and confidence of the people in the legal profession and a monopoly which will only cease when the profession fails to retain the trust and confidence of the people of Ontario and will last until it loses that trust and confidence. To retain that trust and confidence we must keep our house in order. If in these circumstances there are those who call the legal profession a monopoly it merely shows that we still have the trust and confidence of those who held legal assistance and that, at one time or another, embraces about everybody—even lawyers.

With a knowledge of law all you need in the responsibility you are about to assume is to render diligent and faithful service. Let service be your motto. Blackstone said that the law is a jealous mistress and brooks no opposition. The Law certainly demands of the legal profession, to which has been entrusted the enforcement of law and order, true and faithful service. I hope therefore you will always remember your great opportunity for service and that you will constantly have in mind that there are wrongs that you can righten, that there are hearts that you can brighten and that there are burdens which you can lighten. Do not worry about material success. If you measure your success by service you will find that all materials things will be added unto you. Success and service are inseparable.

May I leave with you the words of Howard Arnold Walters:

I would be true for there are those who trust me.
I would be pure for there are those who care.
I would be strong for there is much to suffer.
I would be brave for there is much to dare.

Comments On Complaints

by

Vera L. Parsons, Q.C.

The illuminating judgment of the Hon. Mr. Justice Cartwright in Regina v. Thomas (a) defines in clear and lucid terms the ground upon which evidence of the making of a complaint is admitted in cases where a sexual offence is charged and the limited purpose for which such evidence can be legitimately used and that is to enable the jury to judge for themselves whether the conduct of the woman in making the complaint and her verbal expressions at the time were *consistent with* her testimony on oath given in the witness box. The approval of the phrase 'consistent with' and the condemnation of the word 'corroborative' as applied to this type of evidence is the outstanding contribution of this judgment to a matter which has been the subject of somewhat contradictory judicial decisions.

The accuracy of the phrase 'consistent with' will be readily appreciated if one recalls that the acceptance of the complaint as evidence is not only a survival of the traditional 'hue and cry' but also of the rule of evidence prevalent in the seventeenth century, which for the purpose of showing consistency enabled all witnesses to support their evidence under oath by giving evidence of the making of a similar statement out of Court.

In the case of Lutterell v. Reynell, 1680 (b) there is the following passage:

'Several witnesses were received, and allowed, to prove, That William Maynard did at several times discourse and declare the same things, and to the like purpose, that he testified now and the Lord Chief Baron said, though a hearsay was not to be allowed as a direct evidence, yet it might be made use of to this purpose, viz. to prove that William Maynard was constant to himself.'

In Phipson on Evidence (c) the Lutterell case is cited in support of the following statement: 'Thus, formerly, the fact that a witness had made a previous statement similar to his testimony in Court could always be proved to confirm his testimony.'

By 1780 the rule with two exceptions had been reversed. In the case of Rex v. Parker (d) evidence of this type having been submitted, Mr. Justice Buller stated that it was now settled, that what a witness said not upon oath would not be admitted to confirm what he said upon oath; and that the case of Lutterell v. Reynell and a passage cited by counsel from Hawkins were not now law.

In the more recent case of Rex v. Williams (e) the Court of Appeal for Ontario quashed the conviction of the appellant mainly on the ground that a witness called by counsel for the Crown on being asked if he had told the same story implicating the accused to the Winnipeg police on an earlier occasion replied that he had and it was held that the evidence had been admitted for no other purpose than to support the credibility of the witness and was inadmissible.

But the early rule permitting evidence to be given of similar statements made out of Court survived in (1) the acceptance of the 'complaint' as evidence where sexual offences were charged and (2) in cases where the witness was accused of having recently fabricated his evidence, under which circumstances evidence could be given by the witness himself or the persons to whom he had previously made a similar statement that he had made such a statement on another occasion, not to prove the truth of the facts asserted but merely to show that the witness was consistent with himself. Wigmore on Evidence (f), Phipson on Evidence (g).

An example of the second exception is the case of Rex v. Benjamin (h). This was an application for leave to appeal against conviction on the ground that a statement written in a note-book as to the condition of a chimney by the witness (a police officer) was wrongly admitted in evidence. Being a statement not made in the presence of the accused it was in the first instance clearly inadmissible in evidence. Counsel for the accused, however, having suggested that the evidence of the police officer was untrue and an afterthought, on the ground that the witness had said nothing about the chimney in his depositions before the magistrate, the note-book was allowed to be produced to verify the fact that the officer had mentioned the chimney to his inspector before the proceedings in the police court had taken place.

The Lord Chief Justice cited with approval the following passage from Taylor on Evidence: 'If upon cross-examination of a witness, counsel, by referring to what such witness had deposed when on a previous occasion giving an account or no account of a transaction, suggests as a reason for disbelieving the witness's present evidence that on the previous occasion he omitted the name of the prisoner at present on his trial, the witness thus impeached may, without the deposition taken on the previous occasion being put in, state that when giving evidence on the previous occasion just referred to, he did give the same account of the transaction as he has just given, and did mention the name of the prisoner at present upon his trial.'

The motion for leave to appeal was therefore dismissed.

A more recent application of the principle appears in Rex v. St. Lawrence (i). In this case, a trial for murder, the witness P. swore that he had seen the accused at the scene of the crime about the time it was committed. In cross-examination the witness admitted that in a statement made to the police on the day after the murder, he had denied all knowledge of the murder and that he did not disclose to them his information about the presence of the accused until after the appearance of a story in the newspapers which indicated that P. himself might be suspected of complicity. The Crown then tendered the evidence of one M. to prove that P. on the night of the murder, had told M. that he had seen the accused running away from the scene. It was held that M.'s evidence was admissible, not as proof of the facts told by P. to him but to show the *consistency* of P.'s story and to rebut the suggestion that his evidence was a fabrication, invented for the purpose of diverting suspicion from himself.

It seems probable that if the relationship between the two exceptions to the general rule as to similar statements made out of Court had been emphasized, the complaint would have preserved its true character of evidence admissible to show consistency and as such would not have suffered the qualifications which have been attached to it in the leading cases. For example, in Rex v. Osborne (j): 'It (the complaint) must not be elicited by questions of a leading and inducing or intimidating character' and is only admissible 'when it is made at the first opportunity after the offence which reasonably offers itself,' and in Rex v. Lebrun (k): 'A complaint made subsequent to a first complaint so long as it is separate and distinct from the first complaint is not admissible.'

The requirement that the complaint be recent and not subsequent to a first complaint appears to be a matter of weight rather than admissibility. Wigmore on Evidence (1) states: 'But if it be considered that the purpose of the evidence is merely to negative the supposed silence of the woman, it is perceived that the fact of complaint at any time should be received. After a long delay, to be sure, the fact is of trifling weight, but it negatives silence, nevertheless, and the accompanying circumstances must determine how far the delay has been successfully explained away.'

(i) 1949 O.R. p. 215. (j) 1905-1 K.B. p. 551 at p. 561. (l) 1940 3rd ed. s. 1135, p. 222. (k) 1951 O.R. p. 387 at p. 399.

(a) 1953 S.C.R. p. 344. (b) 1 Mod. Rep. p. 283 at 284. (c) 1952 9th ed. p. 512.

(d) 3 Doug. pp. 242-3. (e) 1945 O.W.N. p. 133. (f) 1940 3rd ed. s. 1134 p. 219. (g) 1952 9th ed. p. 512-513. (h) 8 Cr. A.R. p. 146.

Comments On The Creditors Relief Act

by

J. D. Conover, *Sheriff, County of York*

The Creditors' Relief Act, R.S.O. 1950, Chap. 78, would seem to be fairly clear legislation with the exception of Secs. 3, 4 and 5. Section 3, provides that "subject to the provisions hereinafter contained, there shall be no priority among creditors by execution from the Supreme Court or from a County Court." In my opinion this simply means that an execution from the Supreme Court being a superior Court has no priority over an execution from a County Court.

It is apparently well established common law that the Crown in the right of the Dominion has a prerogative right to be paid in advance of its subjects. This would, therefore, apply not only to Income Tax, but also to Sales Tax. Sec. Re F. E. West & Co., 50 O.L.R. 631 and D. Moore and Co. (1928) 1 D.L.R.

By the Interpretation Act R.S.O. 1950, Chap. 184, Sec. 11, "No Act shall affect the rights of His Majesty, His Heirs or Successors unless it is expressly stated therein that His Majesty shall be bound thereby".

In neither the Execution Act or The Creditors' Relief Act is there anything to indicate that the Crown either in the right of the Province or the right of the Dominion is bound by these Acts. Therefore it may be taken that they are not. In the case of Gauthier vs. The King, 56 S.C.R. 176, it was decided that a Provincial Law could not be binding on the Crown in the right of the Dominion. The rights of the Crown in the right of the Dominion can only be taken away by the Dominion Parliament itself.

See also The King vs. Star Kosher Sausage Manufacturing Co. 1940 4 D.L.R. 365. This was a Manitoba case, but the Judgment of Mr. Justice Adamson was based on a similar section in the Interpretation Act of Manitoba to that of Ontario.

Unfortunately for clarity's sake priorities do not end with the settlement of the Dominions rights.

The Wages Act, R.S.O. 1950, Chap. 415, Sec. 3, provides "All persons who at the time of the seizure by The Sheriff or who within one month prior thereto were in the employment of the execution debtor and who become entitled to share in the distribution of money levied out of the property of a debtor within the meaning of The Creditors' Relief Act, shall be entitled to be paid out of such money the wages due to them by the execution debtor; not exceeding three months wages in priority to the claims of the other creditors of the execution debtor and shall be entitled to share pro rata with such other creditors as to the residue, if any, of their claims".

The Corporations Tax Act, R.S.O. 1950, Chap. 72, Sec. 36 (1) "Every tax and penalty imposed under this Act shall be a first lien and charge upon the property in Ontario of the Company liable to pay such tax or penalty or both".

The Assessment Act, R.S.O. 1950, Chap. 24, Sec. 114, Sub. Sec. 11. "Where personal property liable to seizure for taxes . . . is under seizure or attachment or has been seized by the Sheriff . . . it shall be sufficient for the tax collector to give to the Sheriff . . . notice of the amount due for taxes and in such case the Sheriff . . . shall pay the amount to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever."

The Landlord and Tenant Act R.S.O. 1950, Chap. 199 Sec. 55 provides that "goods taken in execution not to be removed without payment of rent if arrears of rent do not amount to more than one year's rent."

A lien on goods under the provisions of the Conditional Sales Act, R.S.O. 1950, Chap. 61, would, of course, be a first preference as the title in the goods has never passed. Under Sec. 10 a landlord distraining for arrears of rent has the right to pay off the vendors lien. Although it is not specifically mentioned in this Act, it would seem to be normal for a Sheriff seizing under an execution to be in the same position as a landlord distraining and in practice this right has not been questioned.

Sub. Sec. 6 of Sec. 4 of the Creditors' Relief Act provides that "an attaching creditor shall be entitled to share in respect of his claim against the debtor in any distribution made under this Act, but his share shall not exceed the amount recovered by his garnishee proceedings unless he has in due time placed an execution or a certificate given under this Act in the Sheriff's hands. Sub.

Sec. 2 of Sec. 15 provides for distribution, but is subject to Sec. 4, Sub. Sec. 6 above. Sub. Sec. 11 of Sec. 5 provides that only those with executions or certificates shall share subject to Sub. Sec. 6 of Sec. 4. It would seem, therefore, that a garnisheeing creditor does not need to obtain an execution or certificate under the Act to share in the distribution, but presumably would be obliged to file his attaching order which is usually drawn to provide for payment out to the Solicitor of his costs of such proceedings prior to turning the money over to the Sheriff for distribution.

Sub. Sec. 7 of Sec. 4 provides "The Sheriff shall be entitled to poundage upon money received and distributed by him under this section at the rate of one and a quarter per cent and no more". As Section 4 deals entirely with attachment and garnishee proceedings it would naturally follow that a Sheriff who obtains moneys by levy or means other than attachment would be entitled to poundage and expenses in accordance with the Execution Act and Supreme Court Rules of Procedure and that only in respect of money paid in under a garnishee would he be limited to 1¼%. Sec. 5 provides "where a Sheriff levies money under an execution against the property of a debtor etc. . . . he shall make an entry in a book to be kept in his office.

Wharton's Law Lexicon defines "levy" as the act of raising money or men". Mather on Sheriff and Execution Law, "the word levy in legal meaning is where goods are seized and money obtained by compulsion. It does not necessarily comprise sale". It does not appear that very strong circumstances are required to constitute a levy. In Bissicks vs. Bath Colliery Co. Ltd. (1878) L.R. 3 Exch. 174, a Sheriff's Officer in the execution of a warrant of fi. fa went with another man to the debtor's house, showed him the warrant and demanded payment, and told him that in default of payment the man must remain in possession, and further proceedings would be taken. The debtor then paid the sum demanded in the warant which included poundage and Officer's fee. It was held that there had been a seizure upon the fi fa and the Sheriff was entitled to poundage.

Sub. Sec. 2 of Section 5 provides for the distribution of the costs of the creditor under whose execution the amount was made and to the creditor who obtained the attaching order of his costs of such proceedings.

The attaching creditor is not entitled to two sets of preferred costs. If he obtains costs on his attachment proceedings then he is not entitled to preferred costs on his execution, Dales vs. Byrne 35 O.L.R. 495 27 D.L.R. 453.

Section 5 is perhaps the most controversial section in the whole act in view of the fact that there is no degree of priority set up, neither are certain special creditors mentioned although in their own acts it is set out that they have priority over all other creditors. I do not think that there can be any doubt but that a vendor under The Conditional Sales Act and a mortgagee under The Bills of Sale and Chattel Mortgages Act have first priority as the title to the goods has not passed and all that the Sheriff can seize is the purchasers or mortgagors right to redeem. The Landlord and Tenant Act would seem to bear this out as it provides that the Landlord may pay off the lien in the event of distraining for rent. Following the lien holder comes the Landlord who can compel the Sheriff to pay arrears of rent up to one year before permitting the Sheriff to remove goods from his premises. Next after the Landlord would come the Sheriff for his fees and expenses and the Solicitors preferred costs as there would be no money to distribute if instructions had not been received from the Solicitor and the seizure made by the Sheriff.

Under Section 19 of the Sheriff's Act the Sheriff can demand his fees and expenses before proceeding if there was any doubt as to his entitlement. I do not think the Assessment Act when it says "in preference and priority to any other and all other fees, charges, liens or claims whatsoever" can mean in preference to the Sheriff.

It is well settled law that the Crown in the right of the Dominion cannot be bound by Provincial legislation and should come next in order of priority and this would apply to Income Tax and Sales Tax with equal priority. It normally would follow that the Crown in the right of the Province in respect of Corporation Tax would follow the Dominion in view of Section 36 (1). I would be inclined to place taxes next in priority as there does not seem to be any doubt of the Crown's priority and in all the cases that have been before the Courts most of them unreported has there ever been any question of the right of the Sheriff to his fees and expenses coming first.

Wage earners would come last in priority for three months' back wages.

The order of priority would, therefore, be as follows::

1. Conditional Sale Lien holder or Chattel Mortgagee.
2. Landlord for rent.
3. Sheriff's fees and expenses.
4. Solicitors preferred costs.
5. Income Tax and Sales Tax with equal rights.
6. Corporation Tax.
7. Taxes.
8. Wages.

A further section in the Act is important as it permits the Sheriff to dispense with entries in the Creditors Relief Book and that is set out in Sec. 20, Sub. Sec. 1.

"Where the debtor without a sale by the Sheriff, pays the full amount owing in respect of the executions and claims in the Sheriff's hands at the time of such payment and no other claim has been filed, or where all executions and certificates in the Sheriff's hands are withdrawn and any claims filed are paid or withdrawn, notice shall not be entered under Sec. 5 and no further proceedings shall be taken under Sec. 6."

"Where a debtor without a sale by the Sheriff pays to him part of the amount owing in respect of an execution or certificate in his hands, and there is at the time no other execution or certificate in his hands, he shall apply the same on the execution or certificate and Section 5 shall not apply to the money so paid".

The Sections dealing with contestation in the event of the creditor being dissatisfied with the distribution or the amount of any creditors claim would seem to be quite straight forward and a complete safeguard to the Sheriff for any incorrect distribution. The method of proving a claim under The Creditors Relief Act is of more interest to the Solicitor for the creditor and to the County Court Clerk except that a certificate cannot be obtained until there are funds in the Sheriff's hands for distribution and a letter is produced from the Sheriff addressed to the County Court Clerk setting out this fact. All the necessary forms to prove a claim, form an appendix to the Act and do not require any explanation.

A small Scotch boy was summoned to give evidence against his father, who was accused of making disturbances in the streets. Said the bailie to him: "Come, my wee mon, speak the truth, and let us know all ye ken about this affair."

"Weel, sir," said the lad, "D'ye ken Inverness Street?"

"I do, laddie," replied His Worship.

"Weel, ye gang along it, and turn into the square, and cross the square—"

"Yes, yes," said the bailie, encouragingly.

"An' when ye gang across the square, ye turn to the right, and up into High Street, and keep on up High Street till ye come to a pump."

"Quite right, my lad; proceed," said His Worship. "I know the old pump well."

"Well," said the boy, with the most infantile simplicity, "ye may gang and pump it, for ye'll no pump me."

"They've raked in a pretty-tough looking lot this morning, haven't they?" observed the stranger who had dropped in at the police court.

"You are looking at the wrong gang," said the reporter to whom he had spoken. "Those are not the prisoners; those are the lawyers."

In a Western city there dwelt a lawyer, crafty and subtle as a fox. An Indian of the Sioux tribe, named Simon, owed him some money. The poor redman brought the money to his creditor and waited, expecting the lawyer to write out a receipt.

"What are you waiting for?" said the lawyer.

"Receipt," said the Indian.

"A receipt," said the lawyer, "receipt! What do you know about a receipt? Can you understand the nature of a receipt? Tell me the use of one and I will give it to you."

The Indian looked at him a moment and then said: "S'pose maybe me die; me go to heben; me find gate locked; me see 'Postle Peter. He say, 'Simon, what you want?' 'Me want to get in.' He say, 'You pay Mr. J. that money?' What me do? Hab no receipt; hab to hunt all ober hell to find you."

(He got a receipt.)

Poem

When one talks of hereditaments, misprisions, and indentures,
Of chattels and of mortgages, of choses and debentures,
Of assumpsit, debt, and covenant, of trespass and attainders,
Of writs of habeas corpus, of reversions and remainders,
Of attaching and conveyancing, of signing and endorsing,
Of femes, both sole and covert, separating and divorcing,
Of words of twenty letters, which you'd think would break his jaw,
You will then know that the fellow has just begun to study law.

(Continued from Page 17)

is now only a legendary figure. In my final year at Osgoode Hall Mr. Justice Riddell provided a rare intellectual treat for us when he was good enough to deliver one of his special lectures which were greatly appreciated by the students. In the course of his lecture he used the word quandáry. This was greeted by a general snigger, because we felt certain that His Lordship, who was known as quite a stickler in such matters, was mispronouncing the word. He turned a stern gaze upon us and said with pretended severity—"Young men, I think that I suspect the cause of this rather unwarranted reaction on your part. Let me say to you, however, (and he pointed his finger at us for emphasis) that if any one of you should appear in my Court, and pronounce the word quándary, he will find himself in a quandáry indeed".

It will not be long before you will be playing your important role as barristers and assisting the Courts in the administration of justice. I hope that you will have learned your lessons so well, and will have developed those habits of industry which are so conducive to adequate preparation of a trial, that whenever I am honoured by your appearance in my Court, you will never find yourselves in a quandáry. I look forward with real pleasure to seeing you soon, and often, and wish you a rich measure of success in your studies.

A LAWYER'S VALENTINE

This year of 1892, Saint Valentine's the date.
Now this indenture witnesseth:
That of my whole estate,
To her I love the best I give, to have and hold forever
In full fee simple absolute, the true love of the giver.
But lest the grantee in this deed should ever wish to alienate
To others, from herself, the whole or any part of this estate,
Unless she first shall have obtained from the said grantor his permission,
And do the same with his consent, now, therefore, This express condition
Is unto this said gift attached, That if she any part of this
Conveyed estate, however small shall, give away, she owes a kiss
To the said grantor in this deed, unless the said grantor relents;
But if he does not, he may claim the penalty for each offence.
And the said grantor herein named, in testimony of his love,
Has set hereto his hand and seal, the day and year first named above.

JAMES G. BURNETT, in Puck.

LETTERS TO THE EDITOR

February 6th, 1953.

The Editors,
Obiter Dicta,
Osgoode Hall,
Toronto, Ontario.

Gentlemen:

Once again I have had the pleasure of reading my own superlative commentary on legal educators as I knew them. It was a charming tribute and as the Edgar Guest of Osgoode Hall, I am touched.

I think, however, that you might have informed me of your action for, as I am not a subscriber to the magazine, I learned of my re-appearance in print through a class-mate, whom I met at the Canadian Bar Association.

My friends tell me, for I am not an expert in the matter, that you have infringed the Law of Copyright, notwithstanding the fact that I originally contributed the verses to the magazine. It is a point you might look up if you are considering re-publishing the literary efforts of others less susceptible to flattery than I.

Herewith, however, I transfer my rights of publication to you, for I really was both pleased and surprised to find them not forgotten.

Might I suggest, however, that you attach a note to the "Epilogue", line 5, which reads both in your edition and in the original, as "Tough Writs". As it flowed from the author's pen, it appeared as "Though Writs". You understand, of course, that the note is for posterity and I do not expect you to insert an erratum in your next edition.

Please send me a copy of the edition and add me to the list of your devoted subscribers.

I have the honour to be, gentlemen,
Your obedient servant,
D. A. FLOCK.

P.S.—I looked it up myself and attach a small note on the law.—D. A. F.

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Broadly speaking, in Canada copyright subsists in published literary works, if the author was at the date of publication, a British subject, or a subject of a State adhering to the Berne Convention 1908 and Protocol of 1914; or resident within Her Majesty's Dominions, or the adhering State, and the work was published here or in such State. (1).

"Publication" is defined as the "issue of copies of a work to the public". (2).

The remedies, subject to the Act, include injunction, damages, account, etc., as provided for the infringement of a right. (3).

(1) The Copyright Act R.S.C. 1927 c. 32, section 4
(1) Gribble vs. Man. Free Press 1931 3 W.W.R. 570.
(2) Ibid. Section 3 (2).
(3) Ibid. Section 20 (1).

February 2, 1953.

OBITER DICTA,
Osgoode Hall Law School,
130 Queen St. West,
Toronto.

Dear Sir:

I hope you will pardon my tardiness in thanking you for the copy of Obiter Dicta, which you very kindly sent me a couple of weeks ago. On looking through it, and reading several of the articles, I could not but be impressed by the rather high standard of excellence which you have achieved.

Once more may I thank you for your courtesy in sending me a copy of your very interesting magazine.

Sincerely,
THE TORONTO STAR,
K. A. McMillan,
Circulation Manager.

Osgoode News

MOOT COURTS

This year a revised interest has been shown in the Moot Courts. This has been largely due to the cooperation of the Dean and the lecturers in emphasizing their importance to the students.

A very good response came from first year, where 172 students placed their names on the list. Only 12 of these had second thoughts and withdrew before the courts began. Due to the large number of entrants it was necessary to use second year students as judges. This worked with considerable success, and although some of the judgments may have been a little shaky, a great deal of care was used in selecting those who were to go on into the second round.

Most of the judges managed to maintain their dignity, for it was soon discovered that a handy knowledge of agency, together with a few well chosen equitable principles, could work wonders in a tight corner with a contracts case. Many a carefully phrased remark concerning 'Rous Actus' has intervened to cause eager counsel to falter, and it has been rumoured that the remark, Que' facit id quad plus est, facit id, quod minus est rel nan couvertileur, oncve silenced all four counsel and caused a 5-minute recess.

There were 75 people eligible for the record round but 25 of these retired at that stage. The winners of this round will move to the semi-finals, and it appears as if the choice of finalists this year is going to be difficult.

Only 16 people entered for the second-year Moots though a low figure was to be expected as a great many of those interested have been acting as judges and so have been unable to participate. The winners of second year will be matched against the first year winner and it is to be hoped everyone will come to watch this final case even thought the yhave not sat on any of the others.

STUDENT PARLIAMENT, JANUARY 21, 1953

Government Supports Progressive Conservative Amendment to Win by Three Votes

The Annual Osgoode Hall Student Parliament meeting again at the Ontario Legislative Chambers at Queen's Park saw a Government Motion succeed for the first time in its post-war history.

Under a rotation plan started three years ago the Osgoode Hall C.C.F. Club formed the Government with the Right Honourable Bing Davis as Prime Minister. The Government motion called for the endorsement of a programme of aid to underprivileged countries".

The Osgoode Hall Liberal Club with John Medcof as Leader of Her Majesty's Loyal Opposition opposed the motion "because it was a mere reflection of Ottawa's present policy".

Some of the members from the large loquacious Independent Section objecting to any form of foreign aid, voted along with the Liberals.

After the defeat of an Independent Sub-amendment calling for a "political watch-dog organization" in South East Asia, Don Scroggie, President of the Osgoode Hall Progressive Conservative Association presented an amendment to the main motion calling for "immediate priority to substantially increasing Canada's contribution under the Colombo Plan".

The vote on the Progressive Conservative Amendment was 26 for and 23 against, with five of the C.C.F. government members joining the Prime Minister in supporting the amendment.

Under the rules of the Osgoode Hall Student Parliament a successful amendment which merely adds to the main motion, carries the motion with it and so there was no vote necessary on the Government motion.

In keeping with the policy of having a distinguished visitor act as Speaker of the House, the Committee was fortunate in securing Roderick G. Lewis, Assistant Clerk of the Legislative Assembly of Ontario, to act in this capacity.

Master-at-Arms was Miss Rainey Hunter and Bill Whiteacre, Chairman of the Student Parliament Committee, doubled as Clerk of the House.

BASKETBALL

Dear Sir:

As a means of relaxation one often finds that a card game is as effective as a long rest—and with this in mind a small group of students formed a team (1951-52). With little practice they played several exhibition games, winning a few and losing some, but the idea stuck and this season blossomed forth into a fast-moving, hard-fighting unit.

There was some question as to whether the team should enter a league and whether any outsiders should be accepted. Along with five other teams Osgoode entered the Metropolitan Intermediate A League and carried Bobbie Love and Jack Garbutt, two non-students to ensure a full team turning out at each game. This idea proved sound, since Jack has become high scorer for the club and Bob a spark plug on offense and defense.

Coach and captain Claude Fitzgibbon (II) runs the team, usually from the floor while playing; Jimmy Torrance, our only third-year man is a guard whose hard checking has proved invaluable; Bernie Brinston (II) is one of the most improved players on the team; together with the first year men, high-scoring Jimmy Kelleher, Johnny Krizmockka, Joe Macabias and Jack Shirer, we have a team that's hard to beat.

At the moment Osgoode has won the fifteen games it has played including victories over Hamilton Y Mountaineers, West End Y Seniors, and Varsity Intermediates. If they are successful against the Monarch Knit team in the Toronto and District Intermediate A semi-finals they will advance to meet the winners of the Church and the Playground Intermediate loops for the city championship. After that the Southern Ontario Championship, the Globe Trotters and Hollywood—who knows?

I manage the team.

MORLEY WOLFE.

P.S.—There was more to the idea of basketball at Osgoode Hall than just the players angle; it was felt that students who desired a bit of relaxation could speid a couple of hours once a week watching their team, but such has not been the case for the club has had no student support.

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of Mr. Goldbury, a company promoter, gives his rather cynical interpretation of the principles of limited liability:

Some seven men form an association
(If possible all Peers and Baronets),
They start off with a public declaration
To what extent they mean to pay their debts.
That's called their capital: if they are wary
They will not quote it at a sum immense.
The figure's immaterial—it may vary
From eighteen million down to eighteen pence.
I should put it rather low
The good sense of doing so
Will be evident at once to any debtor,
When it's left to you to say
What amount you mean to pay,
Why the lower you can put it at, the better.

They then proceed to trade with all who'll trust 'em,
Quite irrespective of their capital
(It's shady, but it's sanctified by custom);
Bank, Railway, Loan, or Panama Canal.

You can't embark on trading too tremendous—
It's strictly fair, and based on common sense—
If you succeed, your profits are stupendous—
And if you fail, pop goes your eighteen pence.
Make the money-spinner spin!
For you only stand to win,
And you'll never with dishonesty be twitted.
For nobody can know
To a million or so
To what extent your capital's committed!

If you come to grief, and creditors are craving,
(For nothing that is planned by mortal head
Is certain in this vale of sorrow-saving
That one's liability is limited)
Do you suppose that signifies perdition?
If so you're but a monetary dunce—
You merely file a Winding-up Petition,
And start another Company at once!
Though a Rothschild you may be
In your own capacity,
As a Company you've come to utter sorrow—
But the liquidators say,
'Never mind—you needn't pay',
So you start another company tomorrow.

Lord Haldane may shudder but King Paramount of Utopia does not. On the contrary he immediately changes his limited Monarchy into a Monarchy, Limited!

No discussion of Gilbert would be complete without at least some reference to his *Bab Ballads.* These humorous little verses, of which the most have provided ideas from which sprang many of popular is probably *The Yarn of the Nancy Bell.* the operettas. Here too Gilbert talks of things legal, usually of incidents in his own brief career at the Bar. For example, in a poem entitled, *To My Bride (Whoever she may be),* he describes his struggling years:

You'll find him working mildly at the Bar,
After a touch at two or three professions,
From easy affluence extremely far,
A brief or two on Circuit—'Soup' at Sessions;
A pound or two from whist and backing horses,
And, say three hundred from his own resources.

As a squire, Gilbert spent a large part of his leisure time sitting as Magistrate at Edgware Petty Sessions. Assiduous in his work, he would make full notes of the evidence and would even ornament his notes with clever pen-and-ink drawings. Although he had a sharp tongue, he nevertheless had sympathy and kind understanding for the unfortunate, as is shown by the following letter written to the Clerk of the Court:

Dear Mr. Tootal,—
I can't bear to thing of that poor devil going to prison for a month on *nulla bona,* so I enclose a cheque for the amount owing by him.
Yours,
W. S. Gilbert.

Where Dickens' lawyers are often villains, Gilbert's are generally wags, and it is sometimes suggested that Gilbert over-caricatured the profession. But it must be remembered that he practised in a less refined age, and, if I may be so bold to suggest, Buzfuz is, even now, the all too frequent recipient of a brief.

(Continued from Page 27)

of County Courts were classmates. James Murdock, who became president of Noranda Mines and one of the world's most successful businessmen, was another member of this most distinguished group, of which many reached the top in the commercial world as well.

From his early practicing days, Mr. Walsh has always specialized in contract and tort cases. However, students are forever noting his name in the reports covering practically every other phase of the law. His own requisites for a successful lawyer might be prohibitive, for they include character, knowledge, initiative, preparation, energy and courage. It was perhaps this last mentioned attribute which Mr. Walsh needed most after one interesting case which went to the Supreme Court of Canada. It was the famous *In Re Miller*,—wherein the late Charles Miller left $25,000 in his will to be given to the Toronto woman who gave birth to the greatest number of children in a ten-year period after his death which occurred in 1926.

"I acted for one of the Mothers of Legitimate Children", chuckles Mr. Walsh. "My client was ruled ineligible for all the money, because the courts had ruled that her three stillborn children couldn't qualify.

"The appellants were unsuccessful in their attempt to prove that the clause of the bill was contrary to public policy or that the will would tend to encourage the birth of illegitimate children in Toronto. But it must have encouraged women to start breeding".

Mr. Walsh tells a story with much precision. His speech is rapid—not unlike his walking gait. Words pour forth staccato-like, with the soft trace of an Irish burr. He told us another story which involved custody of children, but the case shall remain nameless because the heroine is still living.

"I was acting for the wife and we didn't want the husband to get custody of the only youngster. The husband tried to prove that she had consorted with a few men in an extremely unconventional manner. Every time he found evidence of an alleged lover, the court labelled the man as "A" and then "B" and so on. Well, by the time the case was finally completed, we had run out of the alphabet and young lady's paramours continued. They were then listed as "AA", "BB", "CC". It was quite a case. Quite a woman".

It might be noted that Mr. Walsh served in the first World War, enlisting as a private and achieving his officer's rank in the 216th Battalion. It was known as "The Bantam Battalion" because no member (including Mr. Walsh) was over five feet, six inches tall. Mr. Walsh in no small way, probably contributed to the hasty defeat of the Boche, for he spent his early army days recruiting men from Windsor to Halifax for his famous battalion. In cinemas, on street corners, wherever men were gathered, George Walsh would give his fiery pep talk ending with the famous *Rally to Battle* words: "Men, take my hand and come with me . . ." It might be said that this gave Mr. Walsh his early training for leading juries by the hand down the merry trail.

George Walsh has achieved his own success through prodigious work. George Jr., a member of his father's firm, claims Walsh the elder works up to twelve hours a day, six days a week. His vocation, his recreation, his life—is the law. As a matter of fact, the tremendous number of his cases which are heard in the Court of Appeal prompted one Justice to remark: "Mr. Walsh, do you appeal every case?"

Walsh replied with the characteristic twinkle in his eye: "No, My Lord, only the ones I lose".

Mr. Walsh received his K.C. in 1929 and became a Life Bencher of the Law Society in 1951. In the past few years he has not slowed down perceptibly and he exhibits amazing energy for a gentleman of 62 years. Perhaps he keeps young because of his happy philosophy, of love for people and profession. He injects humour into the law along with sound argument because he believes the Court and Justices appreciate the tempering of cold legal proceedings with welcomed relief.

As a lawyer pleading before juries he has few peers. The Bench respect his judgment and argument as well as his wit. We can well imagine the feeling of one Judge in a case for separation and maintenance who thought that Mr. Walsh's client, the husband, should pay more than twenty-five dollars a month maintenance to his wife. (It was during the depression.)

"Mr. Walsh,' 'said the Judge, "would you ask your wife to accept twenty-five dollars a month?"

"No, My Lord," replied George Walsh. "I'd prefer that your Lordship ask her for me".

Yes, George Theopholius Walsh, Queen's Counsel, has achieved success. He has always looked for the best in others and given the best he has. He himself has always maintained with pride: "My greatest satisfaction in life has been my duty as a Bencher and working on behalf of the students. My door is always open to them".

These are words indicative of a man whose life is an inspiration to younger members of our great profession and a subject of admiration for the older.

BOB. R. HALL, II.

"What side is the gentleman on?" asked the stranger who had been listening for two hours to a lawyer arguing a case in the Supreme Court.

"I don't know," replied the gentlemanly doorkeeper; "he hasn't committed himself yet."

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