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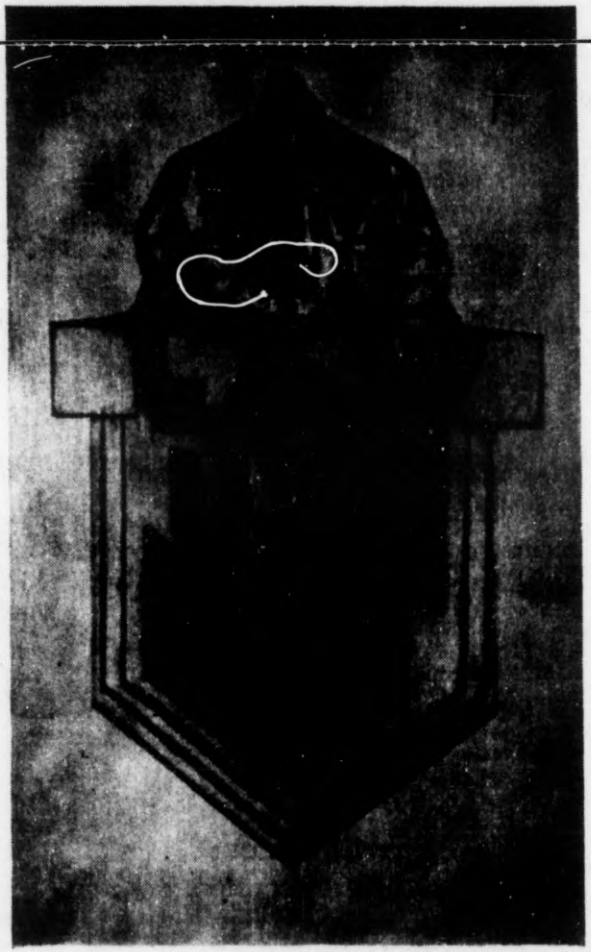

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STUDENT SECTION

Editorial Notes

The legal profession has been called the greatest of all the professions. Unfortunately today many lawyers think of law not as a profession but merely as a means of making money. Worse still they have grasped the idea of "making the most by doing the least,.' an idea which has infiltrated into our society to the detriment of the country. A profession should not be regarded merely as a means to make money but rather as a means of providing service to others.

In England today steps are being taken to provide free legal aid and advice to those who are unable to pay for it. Some Provinces in Canada have already taken such steps. Possibly New Brunswick could augment a system of having law clinics whereby lawyers would be on duty at certain times for the benefit of those who would otherwise be unable to have legal advice.

Too many people have a dread suspicion of the law. For too long a time the law has been held over people's heads as an unknown and threatening force to which only the rich have had recourse. The basic idea of law is to provide equal justice for all, an idea which must be upheld by all members of the legal profession. If steps were taken to provide some type of law clinics doubtless it would benefit the legal profession, and citizens as a whole.

* * * * *

Every Citizen of Saint John should be astounded to hear that anyone would consider changing the name of our City. Yet not only has it been considered but the Board of Trade has set up a special committee to investigate the possibility of a change of name. Of all the changes and improvements that are needed the Board of Trade has seen fit to consider the most ill-advised and unwanted one—a change of name.

The name Saint John City has been carried far and wide over the seven seas for almost two centuries; it is a **name** that has **won** a place in history; it is a name to be proud of. Yet there are citizens who have suggested that the City change its name for the vacant reason that there happens to be another City with a somewhat similar yet different name. This City is St. John's, Newfoundland. No doubt the esteemed advocates of the change have lost sight of the fact that for many years there have existed two cities of

EDITORIAL NOTES

(CONTINUED)

identical name, and neither of them have seen fit to change their name, namely, St. John's, Quebec, and St. John's, Newfoundland. Our own Saint John has continued to exist without any due inconvenience from confusion between the three cities. The Post Office officials have not all become gray-haired because of a faint similarity in the names. Indeed what great calamity brought about this sudden desire to become a City with a different name has yet to make itself known to our Citizenry. The whole Province of New Brunswick should be affronted at the suggestion that the Province holds such a lowly position in trade and commerce that one of the Provincial cities has to change its name because a new Province is being added to the Dominion.

The persons who entertain such thoughts and the Board of Trade should be highly censured for their poor judgement in suggesting such a change. Loyal Citizens of Saint John can only hope that the Special Committee that was set up, was set up only in jest and not as a result of serious thought, by the Board of Trade.

* * * * *

The new Saint John City Common Council has started its weekly sessions and once more has started to do its work behind "closed doors" using the phrase "legal session" as the reason.

Many citizens expressed their dissatisfaction at the so-called "legal sessions" during the term of office of the last Council but nevertheless the practice seems to be continuing. It should only be very rarely that business comes up which each and every citizen of Saint John is not entitled to listen to at the Council meetings.

The use of the phrase "legal session," to cover discussion of a variety of subjects which the Common Council does not wish to make public is a most unfair and unauthorized way to withhold from the public information which it is entitled to have.

ALBERT WILLIAM TRUEMAN
President University of New Brunswick

THE INAUGURATION ADDRESS

YOUR HONOUR, YOUR LORDSHIP, MR. PREMIER, MEMBERS OF THE SENATE, MEMBERS OF THE UNIVERSITY, LADIES AND GENTLEMEN:

The occasion upon which we are gathered here this afternoon has, of course, a momentous personal significance for me; but the significance of the occasion far transcends the personal, and is regarded as so doing, I feel confident, by the Senate of the University, under whose authority and by whose desire this ceremony now takes place. It is well, it is necessary that from time to time the University appear before the public in the splendour and dignity of Academic ritual. A pageant of this type serves to remind us all that the University is committed to an enterprise of great solemnity; it reminds us, by the forms of language it employs and by the academic garb in which it is dressed, that the solemn enterprise to which I have referred had its beginnings long ago, it should remind us also that these beginnings arose in man's desire to conquer his ignorance and bewilderment in a vast and complex universe, in his desire to elevate human existence above the brute level, in his desire to be able to look into the past and into the ever-changing present acutely enough to find the way in which he should walk. To help men towards the fulfillment of these desires must ever be the aim of this unique society.

It is well, I repeat, that from time to time the University make official appearance before the public for the purpose of representing, by ritual ceremony and by plain speaking, the permanence of these truths. The inauguration of the President of the University and of its Senate, provides an occasion which appropriately may be used for this purpose. And the enunciation of these truths and the affirmation of academic faith in them I deem my role in the ceremony.

You will not expect me, then, to talk about the University of New Brunswick, its present state, its needs, the policies which should be devised for it. It would be an error in judgment for me to attempt a task of this magnitude and importance so early in my experience of

the University, a few brief minutes, in fact, after my inauguration. No. I shall deal with other matters more appropriate to the nature of this occasion, as I have attempted to reveal it.

Anyone who has followed current thought about higher education will know familiarly the names of many books which have been written on the subject in recent years; and the names of their authors:—Sir Richard Livingstone's "On Education," The Harvard Report, Ortega Y. Gasset's "The Mission of the University," Nash's "The University and the Modern World," VanDorens "A Liberal Education," The University of Toronto Series "Education of Tomorrow," Jacques Barzun's "Teacher in America," Pamphlets of the Student Christian Movement in England, C. S. Lewis' "The Abolition of Man," and several others. Of most of these writers, I believe it may be said that they hold at least one opinion in common namely, that higher education today is either in a state of un-balance, or is tending toward a state of un-balance. The authors of the Harvard Report put the opinion succinctly in the following sentence:—

> The true task of education is therefore so to reconcile the sense of pattern and direction, deriving from heritage with the sense of experiment and innovation deriving from science that they may exist fruitfully together . . . .

The need for such reconciliation exists because there is a state of unbalance between heritage and science in the Universities of this continent. One end of the scale has been pulled down so heavily by science and technology that heritage has fairly kicked the beam. Professional education is everywhere prospering, with the painful exception of professional education for teaching. Here we have not yet been able to see our way so clearly or to secure adequate support from the general public. However casually study and research in the Humanities may have been supported in recent years, most Universities have been compelled to establish good laboratories and to provide good equipment and well-trained staff for the study of science. In other words the sense of experiment and innovation has scored a lusty triumph over the sense of pattern and direction which derives from heritage. Is it, in fact, too much to say, that the world of our time has little respect for inherited pattern, and only a confused knowledge of the direction in which it is going?

If what I have said is true, we must not be surprised to find that Universities are reflecting in their curricula and in their material equipment the value judgments of the society of which the University is a part and by which it must be sustained. Just as the astonishing discoveries of modern science and the slick efficiencies of modern technology press in upon individuals, and alter, with disturbing rapidity, the common usages of life, so they press in upon institutions of learning, immediate, urgent, inescapable. We are suffering then, not merely from change, but from the violently increased speed of change. Under these circumstances inherited patterns go unclaimed, the value of tradition is depreciated, and man's chief concern is to study, without the correctives which heritage can supply, how to meet the demands of the immediate. It is inevitable, I repeat, that Universities, as well as other institutions, reflect these value judgments. It is remarkable, too, with what rapidity these judgments or biases are being reflected. Part of the difficulty of coping with the situation is that it has emerged so suddenly.

On the other hand society has a right to look to Universities for intellectual leadership. The University must regard itself as a centre for the intellectual activity of the wide community it serves; and therefore it must guard zealously the privileges and qualities which alone

make possible the discharge of that function—its freedom of thought and utterance, its integrity, its moral courage, its enthusiasm for learning. But it must also have respect for and be responsive to the values of its community. Otherwise it cannot continue to live. It may attempt to lead the community in certain directions; it may,—yes, it must attempt to effect changes in the community's scheme of values. But it will be greatly unwise to get out of touch with its community, and only at its peril will it defy its community. It is evident, however, that to be weakly acquiescent to the whims of the community or to be afraid to exercise its role of intellectual and cultural leadership in the community for fear of giving offence or of losing some of its support, is the ultimate betrayal of the faith in which the great Universities of the world were born and reared.

I have sought thus far, then, to make plain the inter-relatedness and the inter-dependence of the University and the wide community which it serves. I would not be misunderstood. It is not my purpose to excuse Higher Education for its deficiencies by the plea that Universities can do only what the Community will let them do, and that the Community has foolishly refused to let them do what is needed. The Universities must also say "mea culpa." They have been guilty of sins of omission and commission. I seek only to make clear a fact which is often forgotten, a fact which constitutes a limitation upon the program of all our institutions, this fact of inter-relatedness and interdependence. Furthermore, although there has never been a time when this condition did not exist, at the present time the condition is of more serious import than it ever was before. It is of more significance now precisely because the speed with which change is taking place has been so violently increased, and because immemorial usages and ancient patterns, a consciousness of which gave stability and purpose to our institutions, are now part of a neglected inheritance. What is transmitted, then, from Community to University, is more uncertain, more confused, and more unpredictable than it used to be,—that is, with one unmistakable exception. The Community is making it quite clear that it requires the University to furnish a steadily increasing number of scientists and technicians; it is insisting on professional education and is willing to support, for the purpose of meeting this easily recognized need, great professional schools.

Again, I would not be misunderstood. I am perfectly willing that support be given to professional education and to science. The need for this support in the modern world is obvious. My point is not that we should try to rectify the state of unbalance by tearing down our professional schools; that would be folly. My point is that the Community and the University should examine their scheme of values, and discover that they may best correct the state of unbalance by becoming interested in and by giving support to those educational aims which are comprehended in the term "heritage"; by making the effort to lay hold on the inheritance which is ours, and which is becoming increasingly neglected; by looking at it in relation to modern science and by effecting, if possible, not merely a balance, but a marriage of the two. No one will believe this to be an easy feat. As a matter of fact it will be most difficult. But one feels in one's bones that if it cannot be done, the way is indeed dark before us. The problem, I repeat, is a problem of restoring and maintaining balance. If we place too many of our men and women in technical and professional schools; if we educate too many of them only for the immediate needs of commerce and industry; if we consistently refuse to make the aims of education, as Van Doren has put it, "sufficiently remote"; if we train too few men and women in the great Arts, in History, Philosophy, Literature and the Social Sciences; if in other words, we allow our state of un-balance to continue and get worse, there can be but one conclusion of the matter, in my opinion. We shall create a rootless society; a people uncon-

scious of its past; unaware of the value of tradition; ignorant of the everlasting continuity of things and of ideas indifferent to its inheritance; exclusively concerned with the material surfaces of life, skilful, efficient, and condemned to defeat in the battle of civilization. For the battle of civilization will be won, if won at all, not by technological efficiency, but by pertinent qualities in the minds and hearts of a sufficient number of people. It is not that technical, vocational and professional education are wrong. On the contrary, they are right and necessary, but they are not enough. (Let it be remembered here that I am talking about education in the University. Obviously efforts must be made in the public schools and high schools to meet the needs of those who do not plan to go to University. It is a matter for hope that the Province of New Brunswick is making such a determined attack on this problem in its Regional High School scheme). The effort which we have to make on behalf of higher education is to clear from our eyes the dust which has been raised by the frantic speed and violence of the changes in our modern world. There can be no thought of turning back the clock. We cannot restore some vanished Golden Age. Any Golden Age we may achieve will have to be a new one, probably a stream-lined, jet-propelled one; but it will have to be a harmony of Science and Heritage. In it, the Lion and Lamb will have to lie down together. We may not "liquidate" either the one or the other.

It devolves upon the Universities, therefore, to give what leadership they can in relation to these matters. As I have said, they will need to have courage, to cherish their integrity and their love of learning. They will need the active support and co-operation of the Communities they serve. The Communities cannot leave this matter in the sole care of the University. They will need to re-examine their values, and to give community support to activities and projects which enable men and women, boys and girls, to lay hold on their inheritance.

To go back for a moment to the University,—I venture to say that all institutions of high learning have experienced a two-fold difficulty arising from the state of un-balance between science and technology on the one hand, and heritage on the other. There is that aspect of the difficulty with which I have dealt; namely, the pressure of public concern for science and technology; but there is another aspect of the difficulty, no less important; when the Universities enroll students in the Humanities and in the Arts—and we still enroll some—it is found that many of them have been conditioned by Society against the appeal of these subjects. In illustration of this point, allow me to read a passage from "The Abolition of Man," by C. S. Lewis; in this passage, Lewis is engaged in refuting the educational philosophy of two schoolmasters whom he calls Gaius and Titius:—

> They see the world around them swayed by emotional propaganda—they have learned from tradition that youth is sentimental—and they conclude that the best thing they can do is to fortify the minds of young people against emotion. My own experience as a teacher (continues Mr. Lewis) tells an opposite tale. For every one pupil who needs to be guarded from a weak excess of sensibility there are those who need to be awakened from the slumber of cold vulgarity.
>
> The task of the modern educator is not to cut down jungles but to irrigate deserts. The right defence against false sentiments is to inculcate just sentiments. By starving the sensibility of our pupils we only make them easier prey to the propagandist when he comes. For famished nature will be avenged and a hard heart is not infallible protection against a soft head.

I believe that the Bishop of Carlisle, quoted in "Towards the Conversion of England," is saying much the same thing in these words: ". . . . . for a revival of religion there is needed a great rebirth of poetry and of the highest literature." The great Archbishop Temple warned us against a type of education which could create a generation "adept in dealing with things, indifferently qualified to deal with people, and incapable of dealing with ideas."

This then, is the simple point I wish to make: that we must fight side by side, the Community and the Universities, against those powerful influences of our times which are conditioning men and women against the appeal of heritage, against the appeal of Music, Art, Literature, History, Philosophy, and blinding them to their values. Therefore, everything which the Community does in support of activities related to the values enshrined in these subjects, is vastly more than a contribution to the elegant disposal of leisure time; it is a contribution to mental balance, to sanity, to security, to peace, to the only purposes which make human life worth perpetuating.

To the joint prosecution of this great task, the Universities and the Community should dedicate themselves; the University, certainly, must never forget that it is committed to an enterprise of great solemnity, man's effort to conquer his ignorance and bewilderment in a vast and complex universe, to raise human existence above the level of the brute, and to find the way in which he should walk.

In conclusion, may I acknowledge my sense of the great honour which has been done me today by the Senate of the University of New Brunswick, and my great gratification at having received it from the hands of His Honour the Lieutenant-Governor, His Lordship the Chancellor, and the Premier of the Province. May I express, too, my high regard for the University and for its long record of most distinguished achievements. It has had a great past, and in keeping with the tenor of my remarks today, I venture to observe that a knowledge of that past will help us all to ensure for the University a great future.

I wish to make special reference to the presence here today of His Honour, Lieutenant-Governor MacLaren, Visitor to the University on behalf of His Majesty. It has meant a great deal to the Senate and to the University generally, and to me, to have His Honour in the Chair on this occasion. I desire therefore to extend to His Honour our grateful thanks for his having consented to take part in the programme.

It is an additional pleasure to acknowledge the presence of Monsignor Ferdinand Vandry, the distinguished Rector of the University of Laval, and Vice-President of the National Conference of Canadian Universities. Monsignor Vandry will bring greetings from the Conference on the conclusion of my address, which is imminent. I am sure that I speak for all when I express to him our thanks for the honour which his presence does to us.

May I also take the opportunity to express—and here again I speak on behalf of everyone—heartfelt appreciation to Lord Beaverbrook for his benefactions to the University and for his warm interest in the University's welfare. I had the honour of spending some time with His Lordship in England this summer, and from those meetings with him I came away profoundly impressed by his great interest in the University of New Brunswick, and by the wisdom and sympathy with which he analyzed her needs. It is a source of great satisfaction to us all that Lord Beaverbrook should be here again in Fredericton and in this University, where he discharges with so much distinction the duties of the high office of Chancellor.

CHIEF JUSTICE C. D. RICHARDS

The Rt. Hon. J. L. Ilsley announced the appointment on June 3rd, 1948, of Mr. Justice Charles Dow Richards of the King's Bench Division of the Supreme Court of New Brunswick to the position of Chief Justice of New Brunswick. By virtue of being the Chief Justice of New Brunswick he will also be the Chief Justice of the Court of Appeal and the Chancery Division.

Chief Justice Richards was born at Southampton, York County, in 1879. He attended the Provincial Normal School at Fredericton, and he received his teacher's license when he was seventeen.

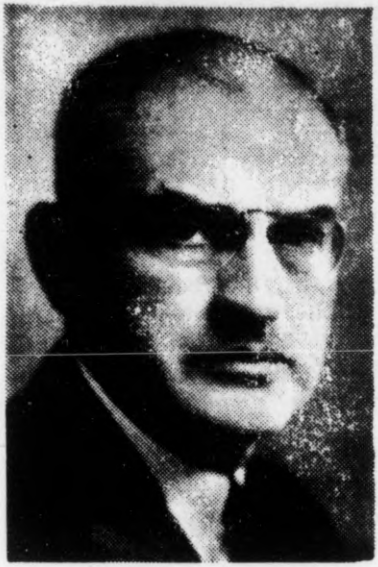
He taught school a few years and then entered the University of New Brunswick, during which time he was articled with the law firm of Phinney and Crocket. After graduating from there with honors in Philosophy and Economics in 1904, he returned to the teaching profession, as Principal of the Woodstock Grammar School.

While at Woodstock he read law with the late D. MacLeod Vince, K.C. He was admitted to the Bar in 1911 and a year later took up residence in Fredericton as a partner of the late Hon. O. S. Crocket. A keen scholar the new Chief Justice lectured on contracts and real property at the University of New Brunswick from 1915 to 1933.

Always keenly interested in politics he appeared on a public platform in his student days speaking in support of the Conservative Party. In 1920, a well established lawyer in Fredericton, he was elected to the New Brunswick Legislature as a Conservative member for York County, and became Premier and Attorney General in 1931.

In 1933 he resigned to become a Judge of the King's Bench Division of the Supreme Court. As a jurist, he has won a wide reputation for impartiality, his ability to analyze complex legal problems, and the soundness of his decisions.

Chief Justice Richards has long taken an active interest in the development of the University of New Brunswick and has for years been a member of the Senate of that institution. U. N. B. gave him the degree of LL.D. in recognition of his services.



NEW JUDGES OF THE SUPREME COURT OF N. B.

On June 22, 1948, the Rt. Hon. J. L. Ilsley announced the appointment of W. Arthur I. Anglin, K.C., Saint John, and G. F. G. Bridges, K.C., Moncton, as Judges of the King's Bench Division of the New Brunswick Supreme Court.

Mr. Justice Anglin has been prominent in legal, military and civic circles for many years. He was born and educated at Montreal, and later at McGill University, Harvard College and Harvard Law School.

For a time he practised architecture and engineering in Montreal, then he went overseas in the First World War receiving the Military Cross for gallantry at Amiens. In the Second World War he served with the rank of Brigadier being vice-judge advocate-general to the Canadian Army overseas. For his outstanding effort he was awarded the O. B. E. He was named a King's Counsel in 1942.

After the war he was appointed Judge of the Admiralty Court in the New Brunswick Admiralty District and also was appointed chairman of the New Brunswick Board of Public Utilities and the Motor Carrier Board. Mr. Justice Anglin is a member of Gray's Inn, one of the Inns of Court at London, England.

* * * * *

Mr. Justice Bridges is also prominently known in legal and military circles, and in civic affairs in Moncton.

He graduated in Arts from the University of New Brunswick in 1920 after a distinguished course. He was named Rhodes Scholar for 1919 and received an arts degree from Oxford in 1922 and a law degree in 1923. He was appointed a King's Counsel in 1943.

Mr. Justice Bridges was born in Fredericton and saw service overseas from 1917 to 1919 during the First World War. On his return to Canada he entered upon the practice of law in Moncton, and soon became a leading resident of that city, both in his profession and in civic affairs. He was a member of the Moncton City Council as alderman-at-large in 1936 and 1937, and served as the city's mayor for two terms starting in 1945.

DISCHARGE OF CONTRACT BY FRUSTRATION
1. THE ROMAN LAW

> "I therefore make no apology for going to the Roman Law, not as an authority (for such it is not), but as instructive as to how these matters may be dealt with and as suggestive . . . as to the true answer to the difficulties of the present case."

So said Lord Dunedin in the course of his judgment in Sinclair v Brougham [1]. The same purpose is in mind here.

So much reference has been made in the decisions (even in those of the highest authority) to the principles of Roman Law dealing with impossibility and frustration that it should be both interesting and instructive to compare the modes in which English and Roman Law would deal with these problems.

Sir James Stephen in his "History of the Criminal Law of England [2] wrote " I do not think that the Roman criminal law as stated in the authorities—contains anything which can justify the loose popular notion that Roman Law is peculiarly complete and scientific." This statement is just as true of the Private Law and an attempt will be made here to show that a strict application of the Roman principles to impossibility or frustration of contract would have been no more equitable than the results achieved by English Law.

In Roman Law contracts were divided under several heads, each characterized by its own "causa" or reason for enforcement. This essay is concerned chiefly with the stipulatio, the consensual contracts (e.g. partnership, sale, work and hire) and the quasi-contract—the condictio indebti and its procedural associates. The stipulatio (which was obsolete by the time of Justinian) was a unilateral contract formed by question and answer. An example is given by Blackburn, J in Taylor v Caldwell [3] in the following words from the Digest [4]: "Si sticnus certo die dari promissus, aute diem moriatur, non tenetur promissor."

The consensual contracts were bilateral and were made as soon as agreement was reached between the parties. They were four in number: Emptio venditio (sale), locatio conductio rei (hire), locatio conductio operis (work) and societas (partnership). The "condictio indebiti" was a quasi ex contractual remedy for money had and received.

The Digest of Justinian recites two main types of impossibility (or "casus" as it was called), initial and supervening impossibility which the authorities subdivided into legal and

(1)—83 L. J. Ch. 465 at p. 483.
(2)—Vol. 1 p. 50 (1883).
(3)—32 L. J. Q. B. at p. 166.
(4)—Digest 45. 1. 33.

physical. An example of initial impossibility would be a contract to sell something which, unknown to the parties, had ceased to exist. This was treated as a case of impossibility and not mistake as in English Law but the result was the same for the contract was void "ab initio." This rule was of universal application. The cases of supervening impossibility quoted in the Digest relate chiefly to the destruction of specific things (certa corpora). Initial impossibility nullified the contract but supervening impossibility avoided it only from the time of the impossibility.

The incidence of risk (or periculum) in Roman Law depended on the type of contract which was called into play. The example quoted by Blackburn, J. in Taylor v Caldwell [5] is a stipulatio and not a contract of sale (emptio venditio). There is no doubt that the promisor was not bound to give the slave if the slave died before the date of delivery. If the promisor could not give, the promisee (or stipulator) was not bound to perform and the contract was at an end. On the other hand if the slave had merely deteriorated or enhanced in value the promisee must pay the stipulated price and receive the detriment or benefit.

The stipulatio is foreign to English Law and since the facts of Taylor v Caldwell do not amount to a sale, the above example is of little help in determining the solution that Roman Law would have given.

Blackburn, J describes the transaction as one of license. It was not even a hiring. In Roman Law such a contract would have been one of hire (or locatio conductio rei). Here the maxim "res perit domino" did apply and the hirer's liability [6] would be extinguished on the destruction of the "res" and the owner would not have been bound to furnish another hall. Thus Roman Law avoided the difficulty encountered by English Law in applying frustration to leases. Whether the "res" was land or a moveable the lessee (or conductor) had a "ius in personam" merely. There was no estate.

The contract to do work was the "locatio conductio operis faciendi." One party agreed, as a contractor, to make or do something, such as build a bridge or house. He was the one on whom the risk fell. Death rarely operated to extinguish this contract unless it depended particularly on some special quality of the contractor.

Appleby v Myers [7] illustrates the difficulties encountered when attempting to apply Roman Law. In this case the plain-

[5] N [3] Supra page [1]
[6]—Buckland's Roman Private Law 2nd Ed at p 501.
[7] 36 L J C P 331.

tiff contracted with the defendant to erect and to maintain for two years certain machinery upon the premises of the latter for a specific sum. When the machinery was only partly erected a fire broke out in the defendant's buildings, without default of either party, and destroyed the building and machinery. The court held that the plaintiffs were not entitled to recover for any portion of the work done since the whole had not been completed. The solution of this problem would depend partly upon whether the employer or the contractor supplied the materials. (i) If the contractor supplied them then the transaction was a sale of the materials and a contract of hire for the services of construction and maintenance; (ii) if the machinery were to become affixed to the immoveable, the whole transaction was a hire (presumably because of the maxim "quod inaedificatur solo credit") without regard to the party who supplied the materials; (iii) if the employer supplied, the transaction was likewise hire. The liabilities of the parties would be as follows: (i) the risk of the material supplied would be on the employer and would be limited to the amount used in the construction up to the time of the fire. This he must pay for regardless of the destruction. As regards the contract of hire, the employer would only be bound to pay the contractor either if he had approved the work done or ought to have done so or if his approval was unnecessary. Otherwise the risk was on the contractor. Alternative (ii) would give the contractor a claim for his materials and services if the progress of the work had been approved or should have been approved by the employer or in the case where no approval was required by the contract. In case (iii) he could recover for his services only as in (ii) above. Thus as far as concerned the contractor's services the result might be the same as in English Law but as regards his materials the same result could only happen in case (ii).

The above were cases of total destruction of the subject matter of the contract and are the type of case contemplated by the Digest. What would be the solution of Roman Law to the case of Krell v Henry [8]. The apartment was still available on the day required and the owner had not undertaken to put on the coronation procession. It is submitted that in such a case the risk must be on the hirer for the Digest is firm that he must accept delivery and is excused only for "casus." In spite of the apparent rigidity of Roman Law, the Commentators and Neo-Civilians have been ingenious to strain its flexibility almost to the breaking point. But the real genius of Roman Law lay not so much in its flexibility as in its certainty. The parties would know at the time of the contract on whom the risk would fall in a particular transaction. It was always open

(8)—(72 L.J.K.B. 794).

to the parties to adjust or apportion the risk by agreement and this could be done with greater facility in Roman Law than in English Law simply because one knew where the risk would fall.

There is one extension of the principle of impossibility beyond the cases mentioned. The doctrine applied with the same incidence when the subject matter was seized by the State. Death of one of the parties put an end to the contract only if it were personal to the deceased party.

Now a few words about the quasi contractual remedies. The "condictio indebiti" lay where money or anything had been given in "error." It was very likely available in cases of initial impossibility but it was most certainly not available for supervening impossibility in consensual contracts. Nor for that matter were "condictio causa data causa non secuta" and "condictio sine causa" which were mentioned by Lord Birkenhead in Cantiere Shipbuilding Co v Clyde Shipbuilding Co [9]. In this case (which was decided on Scots Law) the respondents agreed to construct marine engines for the appellants, to be delivered in twelve months. Part of the price was to be paid on signing the contract. War broke out before the construction had begun after the respondents had done considerable preparatory work. It was held by the Privy Council that the first instalment was returnable subject to a set-off by the respondents in respect of the work they had done. This case is loudly quoted as a testimony to the triumph of Roman Jurisprudence and is contrasted favourably with Chandler v Webster [10] and the Fibrosa Case. [11] The solution of the Roman Law would have been the same as that suggested for Appleby v Myers [12] in the first part of (i) above. Thus the results of Scots and Roman Law might reasonably differ as regards the right of set-off. But the right of the contractor to claim for the materials used arose not by way of a "condictio" but out of the contract of sale itself. Chandler v Webster would have been decided as in English Law because the premises were still available and the suggested solution for the Cantiere case (1) would be applicable to the Fibrosa case.

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2. ENGLISH LAW

(a) Historical Development

The modern simple contract in English Law has existed as such only from the time of Lord Mansfield in the latter half of the eighteenth century and the rules relating to the sanctity of

(9)—93 L.J.P.C. 86.
(10)—73 L.J.K.B. 401.
(11)—111 L.J.K.B. 433.
(12)—N (3) Supra page 2.

contract are the result partly of the old form of covenant and the early forms of action. However critically they may be regarded the courts have always shown a reluctance to interfere with the express terms of the parties; they have held strictly that the parties must be regarded as having contemplated the whole agreement and that the only function of the court is to enforce that agreement if need be.

This is the general position and one into which inroads must necessarily be made. Terms which were implied by custom provided they were not inconsistent with the express stipulation of the parties were deemed to be part of the contract. Then the court set itself within limits to determine the meaning of the contract. In other words while holding that the words or conduct of the parties must always prevail the courts have acted on the maxim "ut res valeat quam pereat" in order to give effect to the contract.

This, however, is very different from implying into a contract a term which will dissolve it. Nevertheless in the wider application of giving effect to the intention of the parties the courts have realized that in certain circumstances the parties would have mutually discharged themselves.

Thus it is the general rule of English Law that pure hardship, or greater hardship than was expected, is no ground for a party to treat his obligation as at an end. There is no doubt that this is the underlying principle of Paradine v Jane [13].

> "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

This was a case on the action of debt, and the court held it was no answer that the lands on lease in respect of which the money was due had been overrun by the King's enemies. This case has often been quoted as authority for the rule that impossibility of performance by a party is no defence to an action of debt or breach of contract brought against him.

There was, however, one important exception to this general principle in the Common Law. Even before the time of Paradine v Jane [13] the executors of a deceased person were not liable when the performance in a contract was personal to the latter. This principle was cited in Hyde v The Dean and Canons of Windsor [14] and has been repeatedly approved by authority:

(13)—1647 Aleyn 26
(14)—(1597) 78 E.R. 710, 798.
(15)—32 L.J.Q.B. 164.

Taylor v Caldwell [15] made the first serious exception to the rule of Paradine v Jane. Here the parties contracted that a series of concerts should be given on specific dates at the defendants music-hall. After the contract was made but before the date of performance the music-hall was totally destroyed by fire. The plaintiff sued for breach of contract and the defendant pleaded discharge by impossibility of performance. Blackburn, J held that the contract had been terminated by the destruction of the music-hall. In the course of his celebrated judgment he said:

> "The principle seems to us to be that in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance."

This is a great step forward. The disappearance of the subject-matter may, in certain circumstances, excuse the parties from their obligations. Mr. Justice Blackburn was careful to point out that no term could be implied where there was a "positive contract to perform." In that case the parties would be held to their bargain, but a contract in terms positive might be construed as being determinable on some implied term not inconsistent with its express or other implied terms.

Although the parties in Taylor v Caldwell [16] had not expressly mentioned that the destruction of the music-hall would end the agreement, they had apparently gone into detail as to arrangements for the preparation of the music-hall in such a way as to show that the existence of the music-hall in the Surrey Gardens in a state fit for a concert was essential for the fulfillment of the contract [17].

The next development emerged with the famous "Coronation Cases" in 1903. Whatever their differences none of them were impossible or incapable of performance. The subject matter was still in existence and therefore there could be no impossibility in the sense of Taylor v Caldwell. In the latter, Blackburn, J. spoke of the "continued existence of the foundation of the contract." One is required to seek the foundation of the contract, be it some project, material object or person. In Krell v Henry [18] the defendant was to have "the entire use of certain rooms during the days of the 26th and 27th of June." The coronation processions were to pass these premises on the dates named and although it had not been expressly mentioned that the rooms were required for that purpose the court took the view that, having regard to all the circumstances, the parties had contemplated the processions as the foundation of their contract.

(15)—See (3) Supra.
(16)—See (3).
(17)—at p. 166 of the Report.
(18)7p L.J.K.B. 794.

Herne Bay Co v Hutton [19] illustrates the limits of the rule in the previous case. The defendant agreed to charter the steamship of the plaintiff Company for the 28th and 29th of June "for the purpose of the Naval Review, a day's cruise around the fleet and for other similar purposes." Because of the King's illness the review, like the coronation, was cancelled. Romer, L.J., said of this case:—

> "I need scarcely point out that it cannot be said that by reason of the failure of the Review there was a total failure of consideration not anything like a total destruction of the subject matter of the contract." [20]

The expression "total failure of consideration" is introduced. The choice of these words is an unhappy one because frustration may operate where there has been only a partial failure of consideration, as in Krell v Henry [21]. However there was not that loss of the "foundation" of the contract which was held to occur in the latter case.

Such is the difficulty when the frustration of an adventure and not the total destruction of the subject matter is involved. What must happen when there is a partial destruction or a temporary but undetermined incapacity? Lord Sumner in Bank line Ltd v Capel [22] approved the following rule. He said that:

> "The main thing to be considered is the probable length of the total deprivation or use of the chartered ship compared with the unexpired duration of the chartered party—the probabilities as to the length of the deprivation and not the certainty arrived at after the event, are also material."

Reference to a charter party does not restrict this rule. It has been repeatedly affirmed in other types of cases. The test in determining frustration is the probable length of total deprivation and secondly the court must view the matter as the parties would have done when the event happened. A third element is required in such cases.

Three years earlier Tamplin S.S. Co v Anglo-Mexican Petroleum Co [23] was decided in the House of Lords. The defendants took a time charter for five years starting in 1912. In 1914 the Government requisitioned the ship and the House of Lords found, not unanimously, that the interruption was not such as would excuse the parties from further performance. Any interruption is bound to cause some damage to the parties. In the course of Lord Loreburn's speech (1) he posed the following question:

(19)—72 L.J.K.B. 879.
(20)—at p. 882.
(21)—72 L.J.K.B. 794.
(22)—88 L.J.K.B. 211 at p. 218.
(23)—85 L.J.K.B. 1389.

> "Were the altered circumstances such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course it is all over between us'? What, in fact, was the true meaning of the contract?

This is the third element. One must ascertain from the terms of the contract that **both** parties would have decided not to enter into their contract if the subsequent events (and which they did not contemplate at the time) had been brought to their notice. The foregoing must be read together with the two quoted above from Lord Sumner. In the Bank Line Case [24] the charter was only for twelve months and was made in February, 1915 after the start of the war. We may well ask whether, here, the parties had not contemplated an interruption, such as the requisition by the Government and had in consequence taken the risk and stipulated for a short charter. However, the House of Lords held that the contract had been frustrated. It is not easy to reconcile these two cases. Cheshire [25] explains the apparent anomoly by arguing that there was really no adventure in the Tamplin Case to be frustrated. But on the other hand if the parties in the Bank Line Case had had an interruption in contemplation, then the doctrine of frustration should not have been applied.

(b) Leases

The most interesting problem and the most speculative one is whether the doctrine of frustration applies to a lease. The recent case of Cricklewood Pty v Leighton Trust [26] shows the division of legal opinion on this subject. In this case A had taken a lease of lots of land for 99 years and had undertaken to build shops thereon. After the declaration of War in 1939 the Government imposed severe restrictions on building which amounted to a prohibition. Nor were materials and labour available for the building of shops which was the undertaking in this case. The only question to be decided was whether, on the facts, frustration could be deemed to have occurred (assuming that the doctrine did apply to a lease). The House of Lords unanimously held that there was no frustration but it was evenly divided on the preliminary "obiter" question of applying the doctrine of frustration to a lease, Lord Porter declined to commit himself.

English Law has always distinguished contract and conveyance. It is a corollary of the traditional reluctance of the courts to disturb completed transactions. But on the other hand it seems unjust that a hard and fast line should be drawn and that the vesting of a determinable estate in land should bar

(24)—85 L.J.K.B. 1389 at p. 1394.
(25)—Cheshire and Fifoot, Law of Contracts.
(26)—(1945) 1 All E.R. 252.

the relief open to the parties of a mere contract. Viscount Simon, L.C. in the Cricklewood Case [27] considered the whole problem as "res integra." He felt that he was not bound by authority and distinguished Matthey v Curling [28] as a case where, on the construction of the document, the relevant covenants still bound the lessee. Mr. Justice Blackburn in Taylor v Caldwell [29] stated that it was immaterial that the particular transaction was not a "letting." In Krell v Henry [30] Their Lordships spoke of a "letting" of the premises, although, as in Taylor v Caldwell, the transaction would not operate as a lease because of the limited hours of user.

Paradine v Jane [31] was a claim for a debt (a matter which was emphasized by Lord Simon, L.C. in the Cricklewood Case [32]) and the judgment does not mention tenure and may be taken to state the general rule to which the operation of frustration is the exception. Lord Atkinson in Matthey v Curling [33] approves the statement of Law in Paradine v Jane and Lord Buckmaster in the same case cites Paradine v Jane as an authority that even unlawful entry by a third party will not relieve the lessee of liability under the covenant.

The difficulty is typified by the Cricklewood Case [34]. The mere fact that a particular object cannot be performed for a limited time cannot be considered to frustrate any adventure. But as Atkin, L.J. observed in Matthey v Curling [35].

> ". . . it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease in addition to containing contractual terms grants a term of years. Seeing that the instrument, as a rule, expressly provides for the lease being determined at the option of the lessor on the happening of certain specified events. I see no absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration."

In Bailey v De Crespigny [36] Hannen, J. says:

> "But where an event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular event which afterwards happens."

(27)—(1945) 1 All E.R. 252 at p. 255.
(28)—91 L.J.K.B. 593.
(29)—32 L.J.Q.B. 164 at p. 165.
(30)—72 L.J.K.B. 794.
(31)—1647 Aleyn 26.
(32)—See (1) Supra.
(33)—91 L.J.K.B. 593 at p. 616 and p. 613.
(34)—(1945) 1 All E.R. 252.
(35)—91 L.J.K.B. 593 at p. 603.
(36)—38 L.J.Q.B. 98 at p. 102.

In this case land had been compulsorily acquired by a Railway Company which built on the land so acquired thus contravening an express covenant in a lease in favour of the lessee. In an action on the covenant by the lessee against the lessor it was held that the doctrine of frustration applied to relieve the latter.

In view of the fact that leases usually make provision for insurance and have covenants to repair, it seems difficult to imagine a case where frustration could apply. It is commonplace in frustration that the express terms of the parties must govern and that a positive promise must be fulfilled no matter how onerous. Therefore the cases where the doctrine of frustration might apply in modern leases must be rare indeed.

Were frustration to be allowed to operate, gross injustice might occur, as for example, improvements would cede to the landlord and any premium which had been paid would be forfeited to the lessor since the rights of the parties accruing before frustration would not be disturbed.

In the Cricklewood Case, Lord Russell of Killowen said a lease as a venture could never be frustrated. He was of opinion that the difficulty or impossibility of performing some covenant could not divest the estate. But surely when the parties can say that the estate shall cease on the occurrence of a certain event it cannot be illogical for the court to imply a term which will determine the estate. If a case did arise where the adventure collapsed "owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement" then surely there is a case for frustration. The mere rarity of the possible application of the doctrine is confused with the belief that it cannot apply. It is contended that there is ample scope in a proper case where the doctrine may apply and the essence is not so much the distinction between the impossibility of performing a covenant and the divesting of the estate; it is the application of a rule such as that stated by Atkin, L.J. in Matthey v Curling [37] quoted above.

Lord Buckmaster in Matthey v Curling [38] observed "There is no question here of performance having become impossible—although enjoyment of the premises has been interfered with by legal powers." It is true enough that neither the covenant to pay rent nor the covenant to repair had become impossible, but it is just as certain that the foundation of the transaction, namely quiet enjoyment and occupation had been

(37)—See N (9) page 9.
(38)—91 L.J.K.B. 593 at p. 614.

completely disturbed. Parties do not enter into a lease merely to acquire a legal estate but in order that they may enjoy it. A man enters into a contract not merely to acquire legal rights but to acquire the undertaking of the transaction. If he cannot have that undertaking fulfilled in an ordinary contract, frustration may operate (although independently of the will of the parties). How then is it logical to deny a similar discharge where the parties have transferred a determinable legal estate and where the object for which such transfer was made has become "defunctus"? Nor is it altogether an answer that the Government will indemnify for the interruption. Frustration has been awarded in cases of charter-parties notwithstanding that compensation might be payable by the requisitioning authority. Examples could be multiplied. "The Doctrine of Frustration" observes Lord Wright in the Cricklewood Case [39] "is modern and flexible and is not subject to being constricted to an arbitrary formula".

(c) Burden of Proof of Default

It is axiomatic that a party cannot benefit from his own wrongful act or default. So then default will bar the seeking relief on the ground of frustration. Lord Simon, L.C. in Constantine Line v Imp. Smelting Corpn [40] approves the above rule and sets out to decide on whom lies the burden of proving such default. If default will negative the plea of frustration, is it necessary that the party setting up frustration should show that he had not been guilty of default or neglect? The House of Lords in the above case answered unanimously in the negative. The obvious hardships of any other rule are pointed out in the speeches of Their Lordships. The rule is that once frustration has been established a case is made out for the prima facie discharge of the contract. The party alleging the default must prove it.

But what default will deprive frustration of its effect? What happens in cases of personal performance? Lord Simon [41] quotes the case of a prima donna who has caught a cold because she was careless in not changing her wet clothes after being in the rain. His Lordship enquires whether her plea of frustration of an executory contract to sing would fail on this ground. It is not intended to answer this question but it is worth while to point out that the self-induced frustration is not coextensive with "default," and to note that default may include negligence as well as wilful default. The precise limits of these terms is yet to be judicially defined.

(39)—(1945) 1 All E.R. 252 at p. 263.
(40)—(1941) 2 All E.R. 165.
(41)—(1941) 2 All E.R. 165 at p. 173.

(d) The Effects of Frustration

The rule in Chandler v Webster [42] that, in cases of frustration "the loss lies where it falls" has been a blot on English jurisprudence since it was laid down in 1904. But even in spite of the Fibrosa Case [43] the rule may be valid even today. Their Lordships, in the latter case, held that if the rule was intended to refer to a payment made out and out then the rule was correct. Where the consideration was divisible and payment had been made or been appropriated in satisfaction of some executed part of the agreement then that money must be irrecoverable. The rule in the Fibrosa Case [44], under which money paid is recoverable, will apply only when the consideration is entire and there has been a total failure of consideration.

Lord Simon argued that this was an action "quasi ex contractu" for the recovery of money paid for a consideration that has totally failed. The law implies a promise to repay notwithstanding the firm rule that frustration does not disturb the rights of the parties acquired before frustration. It would appear that one party would have a right to sue for money due while the other would have an action "ex contractu" to recover it back. This seems to be the result of this case. Their Lordships take refuge in the venerable maxim "Nemo debit locupletari aliena jactura," and Lord MacMillan attempts to resolve the problem by stating: [45] "on the other hand the law may endeavour to effect an equitable adjustment between the parties". It can hardly be said that the Fibrosa solution was an equitable adjustment between the parties. The respondents who had been put to considerable expense were not permitted to retain a "quantum meruit" for the fruitless work they had done. Later on, His Lordship explains [46] the harshness of the rule and says that English Law takes the course "that the law implies for the parties what it assumes they would have agreed upon—when they entered the contract." One must accept this decision as an example of the court in its role of the reasonable man, adopting a course which it is inconceivable that any reasonable business man would adopt.

The maxim "the loss lies where it falls" cannot apply where money is paid for a consideration that has failed. It applies, however, in other respects.

(42)—73 L.J.K.B. 401.
(43)—111 J.J.K.B. 433.
(44)—See (2) above.
(45)—111 L.J.K.B. 433 at p. 446.
(46)—See (4) Supra.

The Fibrosa Case must be taken to have laid down the law applicable in the Common Law Provinces of Canada. England now has the Law Reform (Frustrated Contracts) Act 1943 to remedy the defect. It is possible under this Act to achieve the results that were achieved for the Law of Scotland twenty years ago by the Cantiere Case [47]

A term was implied by custom in voyage charters making freight paid in advance irrecoverable. The Act has made no provision against this.

CONCLUSION

The difficulties of English Law have been twofold: to determine (a) when the events could be said to constitute frustration and (b) how the risk involved should be distributed.

In case (b) the course of the Roman Law has much to recommend it. The parties knew exactly where the risk would fall in any particular transaction and it was, therefore, easy for them to apportion it by agreement. It was no hardship to the buyer to be responsible for the risk after the contract because he could contract against it. The Sale of Goods Act 1893 makes a simple provision for the incidence of risk in agreements to sell specific goods. The English formula (which still remains and more particularly in Canada) that the "loss lies where it falls" is unscientific in that one can never foretell just where it will fall. In Chandler v Webster [48] for instance the loss might easily have been the other way. How far the incidence of this rule has been removed by the Law Reform (Frustrated Contracts) Act 1943 remains to be seen. One must hope that its salutary provisions will not be too strictly construed. At any rate it represents a break from English Tradition and recognizes the principles of Roman Jurisprudence insofar as they have been altered and accepted by Scots Law in the Cantiere Case [49].

In case (a) the problem is to find a definition of the principle which will apply to cases of destruction of the subject matter and frustration of the adventure alike. But before a general rule can be stated it is necessary first to dispose of certain cases which will not come within the frustration rule whatever it may be. Where the parties contemplate the existence of something which, at the time of making the contract is non-existent, the purported contract is void "ab initio" for mistake. There is no contract and no question of frustration arises. But where the event occurs after the contract is made,

(47)—93 L.J. P.C. 86.
(48)—73 L.J.K.B. 401.
(49)—See (1) above.

frustration does not "ipso facto" arise. A consideration of the above cases shows that the event must be of a definite character and the contract is good until this is successfully proved. The general rule relating to contracts appears still to be governed by Paradine v Jane [50].

The event which has brought about impossibility may be the result of the act of one of the parties and if this is so, the courts will not allow him nor, apparently, the other party to take advantage of frustration as a ground of discharge. This is called self-induced frustration and was defined and approved by Lord Sumner in Bank Line Ltd v Capel [51]. Here His Lordship remarked, "I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side [52].

In Maritime National Fish Co v Ocean Trawlers [53] a vessel had been chartered but remained subject to the granting of licenses by the Dominion Government. Some licenses were issued but not sufficient to cover all the respondent's vessels and the latter appropriated the licenses to their other ones, thus leaving the one chartered to the appellants without any. The former pleaded frustration but it was held by the Privy Council that, since they had caused the frustrating act, they could not set it up to discharge the contract. The parties may contemplate the happening of the event which caused frustration. The weight of authority excludes this type of agreement from the doctrine. However there are two cases in which this does not appear to have been the case. In the Tatem v Gamboa [54] a boat was chartered during the Spanish Civil War to work on behalf of the Republican Government, a matter which would naturally involve the risk of confiscation by the Nationalist forces. This event did occur but the court held that the contract had been frustrated. Goddard J. found as a matter of construction that such an event was not in the contemplation of the parties at the time of the contract. The same decision was reached in the Bank Line Case [55] and the same objection may be taken.

Total failure of consideration has been mentioned (Herne Bay S.S. Co) [56]. But there are too many cases where this had not been so. Total failure of consideration is not enough. Taylor v Caldwell and Krell v Henry suggest that one condition must be performance within the terms of the contract. This may or may not involve total failure of consideration.

(50)—1647 Aleyn 26.
(51)—88 L.J.K.B. 211 at p. 217.
(52)—See (2) Supra.
(53)—104 L.J. P.C. 88.
(54)—(1938) 3 All E.R. 135.
(55)—See (2) Supra.
56—72 L.J.K.B. 879.

If a person enters into an absolute positive contract it is no defence to say that it has become burdensome or even impossible. He is bound to perform. However terms, in themselves positive, may be so framed that they can be held to assume the continuance of some person, material-object or state of affairs, and it is a question of construction in each case where such an implication can validly be made. Lord Wright in the Constantine Case [57] in referring to an opinion of Lord Sumner said:

> "It is true that a contract absolute in terms may be absolute also in effect. The contractor if he cannot perform, must pay damages . . . . However a contract absolute in terms is not necessarily absolute in effect."

The Learned Law Lord was referring to Lord Sumner's dictum in Hirji Mulji v Cheong Yue Steamship Co [58] "it is really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands." Lord Sumner was referring indirectly to a question of construction, and distinguishing the doctrine of frustration from rescission which operates at the will of the party aggrieved. One must look at the contract at the time the parties entered into it to determine whether the existence or continuance of any special circumstances was to be vital to the contract.

When the event brings about temporary deprivation the test must be that laid down by Lord Sumner in the Bank Line Case [59] as follows:

> "The main thing to be considered is the probable length of the total deprivation of the use of the charatered ship compared with the unexpired duration of the charter party."

The doctrine of frustration will operate as a condition, implied by law into the contract provided, such condition was:

(i) not contemplated by the parties at the making of the contract and they made no provision for it;

(ii) the event was of such a nature that had the parties thought of it they would never have entered the contract;

(iii) the event destroys the foundation of the contract as **both** parties understood it when they entered into it;

(iv) the event was not brought about by the default of either party.

(57)—(1941) 2 All E.R. 165 at p. 185.
(58)—95 L.J.P.C. 121 at p. 129.
(59)—88 L.J.K.B. 211.

All of this is to some extent a far cry from the original rules of Roman Law which have been extended and distorted to give English Law its modern doctrine of frustration. Although Roman Law did not arrive at a generalization of the principles as they are known today yet a study of that heritage has brought great and fruitful results to both English and other systems of Jurisprudence.

THE THIRTIETH MEETING OF THE CANADIAN BAR ASSOCIATION

Although the Thirtieth meeting of the Canadian Bar Association began on Monday, August 30, with registration taking place all day, the meetings were confined to the Executive Committee of the Canadian Bar Association, the Conference of the Governing Bodies of the Legal Profession in Canada and the Council of the Canadian Bar Association. Not until Tuesday, August 31, was the official opening held, with the President of the Association, John T. Hacker, K.C., M.P., presiding. At this opening session Prime Minister Maurice Duplessis of Quebec spoke. His speech was both interesting and novel especially in the manner in which he presented Quebec's case for judgment in connection with the much-talked about and famous Quebec Padlock Law.

The Presidential Address was given by John T. Hackett and the annual reports of the various committees were then given. At noon there was a luncheon given by the Bar of Montreal in the Normandie Room at the Mount Royal Hotel. The Hon. A. T. Vanderbuilt, Chief Justice of the State of New Jersey, gave a most interesting address.

The afternoon was taken up by meetings of various sections of the Bar Association; a somewhat unique situation occurred in that all sections met at the same time, a fact which was to receive some criticism by the close of the conference.

Dinner was given by the Government of the Province of Quebec in the Windsor at which Maitre Maurice Ribet, Batonnier de l'Ordre des Advocats a la Cour de Paris, was the speaker.

Wednesday started with sectional meetings till noon when a luncheon was given by the General Council of the Bar of Quebec. The address was given by the Hon. John A. Costello, Prime Minister of Eire. His address centered around the independence of Eire which he termed Ireland and he stressed the lead

which Eire has shown in showing her independence from the British Commonwealth, advocating that the other Dominions should follow this lead, a point which was received with dubious enthusiasm by the assembly.

Eventually the luncheon was ended and the sectional meetings were again undertaken for a short period before everyone went off to the University of Montreal to witness a special convocation to confer Degrees upon certain distinguished persons gathered at the Bar Convention. All remarked on the newness of the University of Montreal, which stands out on the back of Mount Royal, an imposing collection of buildings situated on a spacious campus with a magnificnet view to the north.

Wednesday evening was most enjoyably spent at an informal buffet dinner given by the Mayor and Municipality of Montreal, followed by music and dancing. This was held at the Chalet, on the top of Mount Royal, and for the first time automobiles were allowed to drive to the top of the mountain to the Chalet for the convenience of the legal profession, an event unprecedented.

Thursday opened with more sectional meetings and the first and only meeting of the Junior Bar section. In the afternoon there was a special convocation at McGill University and a garden party was given on the McGill Campus afterwards.

The annual Association dinner was held Thursday evening under the patronage of Their Excellencies the Governor General and the Viscountess Alexander of Tunis. After a lengthy introduction by the chairman, the address was given by Mr. Godfrey Russell Vick, President of the General Council of the Bar of Great Britain. His address was the climax of after-dinner speeches, full of humour and with heartening remarks on the soundness of Great Britain in spite of rumours to the contrary.

The final day of the Convention was spent in hearing reports of the various sections and a luncheon at noon at which the inauguration of the new president of the Association, Stanley H. McCuaig, took place.

Thus the meeting came to a close, a meeting noteworthy for the hospitality shown by the citizens of Montreal and members of the Quebec Bar. A meeting which will long be remembered for its social functions and also remembered for the amount of time spent on real work at the sectional meetings.

However, from an impartial viewpoint, it is to be recommended that all who can attend, do attend the meetings of the Bar Association whenever and wherever they can.

N. B. BARRISTERS

Mr. J. H. Drummie, K.C., Saint John, was re-elected president of the New Brunswick Barristers Society at its annual meeting held in St. Andrews on June 21 and 22. Others elected were A. B. Gilbert, K.C., Saint John, vice-president, and A. McF. Limerick, Fredericton, secretary-treasurer and librarian. Also elected to the Council were G. T. Mitton, Moncton; D. R. Bishop, K.C., Woodstock; M. Gerald Teed, Saint John; A. M. Robichaud, K.C., Bathurst; G. H. Nicholson, St. Stephen; J. A. Pichete, Edmundston, and J. E. Friel, Moncton.

The 1949 convention of the Society will again be held at the Algonquin Hotel, St. Andrews, it was decided.

J. H. Drummie, K.C., presided at the meeting. He expressed regret on behalf of the Society, at the death last year of E. Allison MacKay, secretary-treasurer of the Society for many years.

The Council for this year will study the possibilities of tightening regulations regarding admission of students-at-law. Personal interviews of all candidates for admission as students-at-daw, followed by investigation by a committee of barristers practising in the applicant's residential area was recommended by several speakers. Closer check on the candidate's scholastic record, integrity and general character was also suggested.

The Society will continue to press the Provincial Government for changes in legislation to prevent unqualified persons carrying on conveyancing and other work for which barristers and solicitors alone have adequate training. The Society's bill to bar justices of the peace from executing deeds and such instruments was killed by the Legislature's Corporations Committee at this year's Session.

Another matter considered by the meeting was the granting of Supreme Court practising certificates to barristers who have been active in the profession for some years, but who have never received such documents because of a situation prevailing at the time of their admission to the Bar. This matter also will be studied by the new Council.

A decline in the number of students-at-law during the last year was attributed to the fact that the majority of veterans who contemplated following the legal profession had already completed their courses and the number taking law had passed the peak.

A committee was appointed by the Council to consider the advisability of introducing the so-called Manitoba plan of finan-

cial responsibility of motor vehicle operation in the Province. Introduction of the plan would, in effect, make vehicular insurance compulsory and would provide for impounding of vehicles involved in accidents where their owners do not have their vehicles insured for such cases.

The first day of the two-day convention was highlighted by Sir James Dunn, internationally-known industrialist, who was the guest speaker at the convention luncheon.

A resolution calling for adoption in New Brunswick of Highway Safety legislation similar to that enacted in Manitoba in 1945 was passed at the closing meeting of the Society's convention. Also endorsed in principle at this last meeting was the right of New Brunswick citizens to take action against the Crown in the right of the Province in torts and in contracts. The Provincial Government will be urged to enact legislation to provide for exercising these rights, it was decided. Speakers stressed that federal laws make provision for action against the Crown by petitions of right, and a movement is underway to amend the regulations in the interest of the citizens, both in the Dominion and in the Province of Ontario.

The whole legal situation regarding suits against the Crown is based on the principle that the King can do no wrong. The Royal prerogative, formerly a personal prerogative of the Crown, has been extended to cover many phases of government activity, speakers stressed, and the position should be qualified in view of the fact that the government program now effects many phases of community life.

PROBATE . . . FILING OF WILLS

The cutting and filing of a piece of tractor fender illustrates the extent to which the courts will carry the 'letter of the law'.

This is discussed in 26 C.B.R. 1242 and concerns a recent Saskatchewan case. In Saskatchewan holograph wills may be valid. The deceased was working on his farm and got caught between the rear of his tractor and a disc it was towing. He **scratched his will on the rear fender** of the tractor and later died as a result of injuries sustained in the accident.

The judge directed the original will be left on file and accordingly the piece of fender containing the writing was cut off and filed.

TWO GRADUATES ADMITTED TO BAR

The two graduates of the University of New Brunswick Law School for the year 1948—Asied John Debly and Mendle M. Meltzer—have both been admitted to the Bar of the Province of New Brunswick.

John Debly received from the University at the May graduation not only his degree of B. C. L., but also his B. A. In his second year of Law School "Deb" was the chairman of the Debating Committee and in his final year he served as President of the Students' Society. He was admitted to the Bar in June, 1948, and is at present practicing in Saint John.

Mendle Meltzer received his B. A. from Mount Allison University in 1945. Starting Law School in the fall of '45 he was a consistent leader, winning the Butterworth Prize for highest standing upon graduation, the Law Faculty Award for highest third-year standing and the New Brunswick Barristers Society Prize for Essay Competition. He was admitted to the Bar in September, 1948, and is practicing in Saint John.

LAW STUDENTS' SOCIETY

EXECUTIVE COUNCIL

EXECUTIVE

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GORDON FAIRWEATHER ..... Treasurer

BRUCE HICKS ..... President

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Back row, left to right

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GERARD La FOREST ..... Moot Court

HAL McLAUGHLIN ..... Social

PERCY SMITH ..... Athletics

ERIC TEED ..... Press

CANADIAN FOREIGN POLICY

The object of any Canadian Minister of External Affairs is to protect the security of the country through diplomatic endeavors. While most departments of government may pursue purely partisan policies the Foreign Affairs Department is bound, no matter who the particular minister may be, to follow a policy which will obtain the widest possible support amongst our diverse electorate; otherwise, he and his colleagues would not long remain in office. This means that the conduct of our foreign policy is largely above the controversial level of partisan politics; in Canada, there is no violent disagreement among the major political parties about what our foreign policy should be. The main criticism of the policy of Messrs. King, St. Laurent and Pearson comes from the Labour Progressive Party. However, as that party is only a subversive colonizing agent of Russia its criticism of the Government's foreign policy does not receive much support either in Parliament or in the country. As far as the Conservative Party is concerned, we find that there is no basic difference of opinion between Mr. Drew and Mr. Pearson. Even a Secretary of State for External Affairs appointed by Mr. Coldwell would be unable to break with History and Geopolitics and pursue a simon-pure socialist foreign policy for the simple reason that the policy of any Canadian External Affairs Secretary must contain the same fundamental ingredients. The basic factors which mould and shape the foreign policy of His Majesty's Government in right of the Dominion of Canada remain the same, regardless of which of the major political parties controls the parliamentary majority. What then are the foundation stones on which Canada has built and will build its external policy?

Pre-eminent among the cardinal aims of Canadian foreign policy is the desire to co-operate, freely and without loss of autonomy, with the member-nations of the Commonwealth. Our attachment to the Commonwealth is based on tradition, sentiment and self-interest. Canada does not want the Commonwealth to be an exclusive league or to be directed against any state or any group of states. Canadians conceive of the Commonwealth as being bound together "by ties as light as air and as strong as links of iron." In peace, the peculiar ad hoc arrangements between Great Britain and the Dominions have been found to be of inestimable value; for instance, the Ottawa system of preferential tariffs helped to cushion all Commonwealth countries against the depressing impacts of the world-wide slump of the "thirties." In war, it is to the credit of the

member-states of the Commonwealth that they stood together and alone, during the blackest days of the late war, and bore the shock of the fascist gangsters. Most Canadians treasure the principle of co-operation with Great Britain and the other Dominions. Even the French-speaking Canadians, always lukewarm about the country's British connections, now see the value of informal co-operation on equal terms with the other members of the Commonwealth. But, to say all this is not to admit that any closer association with Great Britain or the other Dominions is desired. As far as Canada was concerned, Bevin's proposal for a Commonwealth Customs Union fell on uninterested ears. Moreover, the political co-operation of Canada and Great Britain will, no doubt, be lessened if Britain entangles herself with any bloc of western European states. Economically, there is no reason why the formation of a Western Union containing Great Britain should prevent the making of bilateral trade agreements, like the wheat contract of 1947, which help to stabilize the commodity markets of each economy. Indeed, economic integration, in so far as the complemental exchange of commodities like wheat, pulp and paper products, metal products and consumers' goods, between Canada, on the one hand, and the countries of western Europe, on the other hand, could be greatly increased.

During the first quarter of the twentieth century, Canada grew from colonial status to Dominion status. During the second quarter of this century, Canada has become a middle power, that is to say, the gap that has to be closed before Canada can count herself as a great power, like the U.S.A., is smaller than the gap which exists between her and the small powers, like Poland or Chile. To express our country's rise in stature in another way:—the Colonial Laws Validity Act was invalidated by the Statute of Westminister which was, in turn, superseded by the post-war Canadian loan to Britain. Her newfound importance is shown by the following statistics: there were one million Canadians under arms during the last war out of a total population of about 12 millions; between 1943 and 1945, Canada "lent" over two billion dollars to her allies; during the war she achieved the position of being fourth in productive capacity among the United Nations; in the year 1945 she contributed 101 million dollars to U.N.R.R.A. Moreover, Canada fronts on the Pacific as well as on the Atlantic Ocean; she could be classed as one of the Pacific powers. Although Canada is vitally interested in European conditions she is not Europe-centric and is becoming more and more concerned with what takes place in the Pacific region and in the Far East. In view of her position as a middle power possessing a creditor,

surplus-economy vis-a-vis Europe, Canada has the right to ask for a voice in world affairs equivalent to its position as a near-great power.

In more ways than one, the existence on the North American continent of the colossus-state, the U.S.A., has hampered and frustrated Canadian development. In the past there has been a steady drainage of population to the United States. At the present time, Canada is suffering, but not to the same extent as the United Kingdom, a famine of American dollars. As the United States has drifted towards war with Russia she has considered Canada as one of her principal allies. Inevitably, as much as one would dislike to chose, Canada would be at the side of its powerful southern neighbor in the event of a major conflict. Notwithstanding the fact that Canadians and Americans are good friends and close acquaintances we have often checked American designs on the territory north of the 49th parallel; the development of our transcontinental transportation system is evidence of this fact. Furthermore, American financiers and industrialists have more capital invested in Canada than in all of the European countries combined. Undoubtedly, the forces of Canadian nationalism will contrive to expel from Canada this form of Dollar-Imperialism because Canada did not shake off the control of Downing Street in order to fall under the domination of Wall Street.

All in all, the sometimes hysterical influence of American newspapers, magazines, film and radio, of taftian politicians, of the American-brand of trade unionism and of materialistic babbitry, make it most difficult for Canada to pursue an independent line in the field of foreign affairs. To say the least, the impact of external socio-political ideas makes it almost impossible for our foreign policy to be independent in content and application. If Canadians do in fact desire full autonomy they will remain on the watch to ensure that our votes in U. N. O. do not lie at the disposal of the American State Department.

Prior to World War II, Canada was protected from overseas invasion by the British fleet. Moreover, our pre-war security arrangements were made in the sure knowledge that we could also count on the U.S. Navy. Canadians did not worry about defence: they thought in terms of an offensive on the Rhine and the maintenance of a European balance of power favorable to Great Britain. The unfortified frontier between Canada and the United States—stretching as it does from the Atlantic to the Pacific over a length of 3,898 miles—besides being a great triumph of voluntary reciprocal disarmament on

the part of two nations with a common land frontier, was standing evidence that Canada feared no attack from the south. Before the last war Canada was one of the best secured countries in the world. In 1924, in a world in which moral responsibility did not much matter, the Canadian delegate to the League of Nations could say, with some truth, that Canadians "lived in a fire-proof house" protected by the broad Atlantic from the danger of a European conflagration. This security has utterly vanished. Today, the transcendental factor for Canada, as for the world, is the airborne atomic bomb. Moreover, we see the U.S.A. and the U.S.S.R. fighting a future war in the wide stretches of the Canadian north and west; Canada would be the Belgium of another war. This is the spectre which is now haunting the minds of the more serious Canadian politicians.

Suspicion and mistrust have gone far to evaporate the goodwill and mutual respect which was established during the last world war between Canada and its northern neighbor, the U.S.S.R. Many leading Canadians have tried, in vain, to cement Canadian-Soviet friendship. However, the Russian policy of multiplying spies, misery and terror has frustrated all of these efforts. Now, there seems to be no limit to the greedy appetite of communist conquest and of Russian imperialism. It was not so very long ago that many Canadian leaders were advising that successive Canadian Governments should devote themselves to the conciliation of Soviet-American differences. Canada, they said, should attempt the role of mediator as between Washington and Moscow. Undoubtedly, if Russia's post-war intentions had been peaceful Canada might have achieved considerable success in building a bridge of understanding and tolerance between the Soviet Union and the West. However, this hope has come to nothing. The great tragedy of our time is that Russian aggression has aborted all attempts to unite the western democracies with the diverse nationalities of the Soviet Union for the purpose of world reconstruction; in many parts of the world the freedom in men's souls is being snuffed out, ruthlessly and relentlessly, by communist tyranny. The materialistic menace of communism—so closely allied to fascism—is on the march. Again are we faced with that grim and hateful question—"Will there be war?"

While it is beyond the power of any one individual to give a correct answer to that direct and awful query, we all must recognize the fact that the danger of a war, which would directly and immediately involve our country, has never been greater. While the present Government of Canada may refuse to take part in the gigantic gamble that is being played out in Berlin, no Canadian Government could stand aloof from an

actual "hot" war in which Russia and the United States would be opposing each other; if the Americans didn't help to defend Canada, then the Russians would invade because our northern territory is regarded by both sides as a potential base of operations—a most unpleasant prospect for Canadians. In view of the possibility of war, we Canadians would be well advised to follow General Crerar's advice and "to gather our strength." It is doubtful whether the Conservative Party or the Co-operative Commonwealth Federation are disposed to criticize the Government's decision to participate in the North Atlantic Defence Pact, even though the exact method of Canada's support of that security system may be criticized. But above all else, Canada must send her surplus food to Europe, for, as a German friend of mine has written, the will and the desire of the Europeans to defend themselves and to resist communism will last only so long as their democratic systems give them not only greater personal freedom but a standard of living which is above subsistence; in other words, the people of western Europe want freedom but they want bread too. Canada is challenged to use a part of its great wealth to help bolster the European economy.

Today, the nations of Western Europe stand at the threshold of a tremendous opportunity. By their economic union, and by that alone, the countries west of the "iron curtain" can create a viable European economy. The establishment of a sound economic system in Western Europe will be the very basis of defence against Russo-Communist aggression. Western Union is the only way by which the democratic nations can redress the world balance of power which has shifted so sharply in Russia's favour since the ending of World War II. The immediate and urgent task of Canadian foreign policy is, then, to guarantee and underwrite Western Union so that Democracy can confront Totalitarianism with a preponderant force of armed might. It is bitterly disappointing to contemplate the outbreak of another conflict. Nevertheless, the time has come to meet the challenge to our way of life and to prevent war by being prepared for it.

U. N. B. Law School Debaters scored a win over the U. N. B. "Hillmen" in the first debate of this season, held in November. Douglas Rice and Vernon Copp of the Law School successfully opposed the resolution: "Resolved that Canada embark on a large scale programme of controlled immigration," against Ed. McKinnie and Bob Stevenson of Up The Hill.

ARE CANADIAN COURTS BOUND BY ENGLISH DECISIONS

"A Provincial trial court in Canada is not bound by the decisions of any other court except one to which its judgment may be appealed either directly or subsequently."

This statement may seem startling to some at first but on subsequent investigation it seems to be the now accepted rule.

In the recent case of Safeway Stores Ltd. v. Harris, 1948 4 DLR 187, the Manitoba Court of Appeal brought out once more the fact that decisions of the English Court of Appeal are not binding on a Canadian trial judge. One wonders why Williams CJKB in view of past authorities made the statement in his decision, in reference to Rook v. Fairrie, 1941 1 KB 507, "that decision is binding upon me." The appeal court dealt with a number of cases showing the relationship between English Courts and Canadian Courts and properly held that decisions of Appeal Courts of England are not binding on Provincial courts.

Possibly one of the earlier cases on the point was Trimble v. Hill 5 AC 342 (1879) in which the Judicial Committee of the Privy Council laid down that Colonial Courts **ought** to follow the decisions of Courts of Appeal in England. This received much criticism as being too absolute a statement and in Jacobs v. Beaver 1909 17 OLR 496 the Ontario Appeal Court decided not to follow it. When one considers that Canada does not have colonial courts the statements in Trimble v. Hill have no direct effect. This is pointed out in Pacific Lumber Co. v. Imperial Timber & Trading Co. 31 OLR 748, where we read, "The observations of their Lordships of the Judicial Committee of the Privy Council in Trimble v. Hill as the duty of the colonial courts in general and Supreme Court of New Zealand in particular have no application to the three great Dominions . . . which are composed of a Federation of self-governing colonies with a federal Supreme Court."

Later in Re Western Canada Fire Insurance 1915 22 DLR 1100 we come across the short but potent statement given by the Alberta Court of Appeal in reference to a decision of the English Court of Appeal, "and that as we are not bound by decisions of English Courts of Appeal we should not follow the latter decision."

To go a step further past Appeal Courts. Canadian Courts are not bound by decisions of the House of Lords although admittedly they have the greatest weight. Some persons place reliance on Robbins v. National Trust 1927 2 DLR 97 as authori-

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EDITORIAL

(CONTINUED)

The official publication of the Canadian Bar Association, the "Canadian Bar Review," has a difficult time to solicit enough articles from Canadian lawyers. New Brunswick lawyers especially, in the past, have taken little interest in contributing to the "Bar Review." Yet in the "Bar Review" there is a great need for contributions of every type. It is the duty of the active lawyer to find time to contribute to or assist in the publication of that publication.

New Brunswick should set up a Publication or Editorial Board which would supervise or assist in the publication of all legal articles in the Province. In other parts of Canada there are Publication Boards which supervise legal journalism in the Province concerned. This Board could be most useful in advising and assisting the younger lawyers who may be entering the field of legal journalism.

One most important factor to be taken into consideration is that many lawyers do not know how to write legal articles for publication. Too often they are told to write and then their efforts are not criticised in a helpful way, so that they are little better off than if they had never written at all. It seems that Canadian law students do not receive the training necessary to enable them to write articles suitable for publication, a fact which indeed is a disgrace to legal education and training and one which is not entirely the fault of the student. It calls for a revision of the curriculum of law schools to include a course in critical legal writing or some such type of study. Writing is becoming ever more important and the student-at-law must receive adequate instruction in preparing legal articles. At the University of New Brunswick Law School there are signs that the instruction is tending toward a course in legal research, writing and criticism. However as yet, it is manifested only by occasional brief comments from the students, at the whim of the lecturer concerned. This, useful as it is, is not sufficient to produce a trained lawyer or even one with a background sufficient for endeavours in the field of legal literature.

Thus it appears that to correct the present undesired state of affairs three steps must be taken.

Law students must be given adequate instruction on how to criticize and write legal articles.

Lawyers must be impressed with the need for legal writing and their duty to spend some effort in this field.

New Brunswick must have a Publication or Editorial Board to supervise and assist in the first two mentioned steps.

EDITORIAL

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FOUNDERS' DAY ADDRESS

University of New Brunswick, Fredericton, N. B., February 14th, 1949

INNOVATIONS AND THE MARITIME ECONOMY

After expressing his deep pleasure at being back home in Fredericton, and his appreciation of the honour U. N. B. had done him in inviting him to deliver the Founders' Day Address, Professor Keirstead said:—

The Founders, whose wisdom and foresight we celebrate today, established this institution to play a two-fold role in the life of the Province. It was designed to maintain the aristocratic tradition and cultural inheritance of humane learning, and it was to serve to make available to the people of the Province knowledge of the useful arts to alleviate their life and to increase their welfare. The University still serves, loyally these two purposes. It has remained true to its dedication. The Founders knew what they wanted. They knew, too, some of the problems and difficulties which the Loyalist people had to face, and the virtues and strength they brought to face these difficulties.

They had come to a new country. It was one which possessed some wealth, but it was uncleared ,its resources were unknown, and it was competing for existence, so to speak, against communities which had long since been cleared, developed and settled, and which had already established lucrative trade connections and achieved wealth and prosperity. The Founders realized that the new colony, under these conditions, would have a long hard struggle, that there would be hardship and disappointment. They believed, however, that the men and women who had come to New Brunswick brought with them the courage, skills, knowledge and determination necessary to overcome these difficulties and to build up a flourishing and prosperous British community in this land. I will draw your attention, if I may, to the emphasis the Founders put upon knowledge and skill. It was not in the unknown and problematic natural wealth of the land in which they put their trust, but, as they would say, "under God," in the capacity and knowledge of the people. The handicaps of history and geography were to be overcome by the determination and knowledge of men.

The subsequent history of the Province showed the wisdom of the Founders. The Province proved not to be rich in good agricultural land, but it possessed one invaluable resource,— great stands of white pine, which an ingenious and adaptable people were quick to exploit. On this single resource the great

wood and wind economy was established, and New Brunswick ships sailed all the oceans and carried a significant proportion of the commerce of the world. The prosperity of the days of the clipper ship has not, however, endured, and, in the words of a former Premier of Nova Scotia, many Maritime communities of these later days, have found themselves "left behind, derelict, so to speak, in the march of progress."

It is into the causes of this, shall I say failure of development, that I wish now to inquire. There are two popular schools of thought which claim to explain this failure of the Maritime ecenomy, and I doubt if either of them has the true explanation. One point of view is that of people who fix their gaze on political history and political developments, and who seem to exclude any other considerations. They find that New Brunswick, and the Maritimes generally, were prosperous in the days before Confederation, and that since the formation of the Union these Atlantic Provinces have never enjoyed a prosperity comparable to that of the rest of the Dominion. They conclude by a natural, if fallacious, process of thought, that Confederation has been the cause of our discontents, and that, but for this political event, the Maritimes would have continued to flourish and to prosper. In their language, the Martimes got a raw deal. This school of thought is, unfortunately, only too common among our people. I can remember when a certain newspaper of this Province was so convinced of the truth of this fallacy that anyone who would not subscribe to it was regarded as the agent of a foreign power, the foreign power being, in this case, not Russia or Germany, but an equally hostile land called Canada.

The other school of thought, to which I referred, was based on what was believed to be hard-headed, down-to-earth economic thinking. According to this school, the Maritime Provinces were poor in resources, and were inevitably doomed to sink into relative poverty and decay, as the greater wealth of the Dominion was discovered, and the news lands opened up. Reciprocity with the United States offered the Maritimes some benefits between 1854 and 1866, when the American States were enjoying a great boom, and it was the end of reciprocity, not Confederation, which brought Maritime prosperity to an end. Since then, these people point out, the history of the Maritimes has been like the history of the New England States, the history of an area poor in resources, gradually declining in wealth and importance, as the great resources of the new lands to the west were opened up. In an extreme form this theory is set out by an American historian who said, "had the Pilgrim fathers landed in California instead of Massachusetts Bay, the Atlantic coast would not yet have been discovered."

This point of view is widely held, I discover, among the business men of the Central Provinces. I have repeatedly run across it, frequently accompanied by the corollary that the sensible thing for people of the Maritimes to do is to leave these wretched Provinces and come up to Central Canada to form a cheap supply of labour for the industrialists there. "Nobody will invest capital in the Maritimes," they say.

Well, I haven't a great respect for this view either, though it is the view taken in certain provincial political circles in Canada. I hope you will not feel there's any duplicity in the language in which I drew up this criticism. According to them, if the Maritimes are poor, it is their own fault, and no federal government should attempt to distribute to the poorer Provinces services supported by taxes levied against the richer. That is what these politicians mean when they say they stand for provincial rights. They mean that they stand for the rights of Quebec and Ontario to disregard the problems and conditions existing in the Maritimes and the Prairies. Intellectually this is an understandable point of view, as long as we think in purely provincial terms and refuse to think of Canada as a nation whose people share a common lot.

Now I believe this latter view of Maritime economic history is about as fallacious as the former one. It is shallow, superficial, and one-sided. As the political view, so popular in the Maritimes neglected certain economic facts, so the economic view, so popular in St. James Street, Quebec and Queen's Park, neglects certain political facts, and, for that matter, certain economic facts as well.

Of recent times economists have been attempting to make a new approach to the interpretation of economic history. We have been trying to understand the process of economic change. I want to try to look at the problems of Maritime economic history in the light of some of the things we have been finding out.

We believe now that the location of industry depends in large measure on what we call innovations. By an innovation we mean the application to production of some new invention or some new process. It may be an engineering invention, such as the steam engine. It may be a chemical invention such as the Bessemer process. It may be a management invention such as the dictaphone. Or it may be an organizational invention, such as the conveyor belt, which is basic to mass production. Practically all these innovations have had the result of making more possible and more profitable large scale plant units. And this has meant that industry gravitates towards the market, rather than towards the source of raw materials. Indeed inno-

vations in transportation have so reduced the cost of moving raw materials, together with preferential rail rates which favor bulk freight, that proximity to populous markets has come to be one of the prime considerations in determining the location of manufacture. Availability of power, not,—I emphasize this because it will be important in what I have to say later on,—cost of power, is a further important consideration, because the innovations making for large-scale plants require inevitably great power consumption.

If we apply this theory of industrial location to the problem of interpreting Maritime economic history, we are soon able to understand some of the developments which have taken place, and we can fit political events, such as Confederation, into an intelligible pattern.

Steam power, and the steel ship, were both known before the great days of the wood and wind economy in the Maritimes. But they were in an experimental stage. New Brunswick and Nova Scotia shipwrights made reply to the new inventions, by developing the clipper ship, which could outsail any steamer afloat. The sailing ship remained master of speed, and this gave the Maritime builders and masters a temporary advantage. For a brief period, innovations in the sailing ship kept competitive pace with innovations in steam-powered ships. Indeed for many years after the introduction of the steamer, the sailing ship remained superior in speed, but not, alas, in cost. The steamer required less labour. The clipper could outsail her, but that was not important, because, for perishable goods, neither clipper nor steamer had refrigeration, and so the articles of ocean transport consisted entirely of non-perishables. On non-perishable staples, the important competitive factor was not speed, but cost. And though the clipper masters drove their ships as ships had never been driven before, and established passage records which steam could not match, the cheaper cost of the new vessels gradually won the battle. The tall ships gradually left the seas for lack of cargo, and the dauntless spirit of the sailing man yielded to the steam-shrouded calculations of the company accountant.

Confederation was intended as an answer to the menace of the Fenians and of America jingoistic tariffs. British North America would build a transcontinental economy which would be secure against American attacks, and which would create a manufacturing economy which would give a comparable prosperity to that of the agressive republicans. Such was the conception. Unfortunately for the Maritimes the National Policy created an economy which paid Britain for the capital necessary for the railways with staple exports from the west-

ern lands. This programme, of course, took full advantage of British free trade theory and practice, but did not reciprocate, because, behind the protection of Canadian tariffs, a mixed manufacturing was developed to supply the domestic markets for consumers' goods. Such an economy meant an end to the entrepôt trading economy of the Maritimes. Instead it emphasized the development (a) of western land with new people, and (b)) the development of light mixed manufactures in the great centres of population. This policy coupled with innovations in manufacturing techniques proved disastrous for Maritime industry. It would be a mistake to suppose that the people of the Maritimes were unaware of what was going on. One of the Maritime spokesmen in the post-Confederation Parliament said that he believed that the establishment of a great transcontinental economy would mean that the Maritimes, containing the most skilled and adaptable artisan population of British North America, would soon become the manufacturing centre for the continental economy. This view was perfectly understandable at the time, and was held to justify the sacrifices the Maritimes made in entering the new tariff-bound Union, and in sacrificing the advantages of a commercial economy at the very centre of the West Indies-North American-British trade.

Alas for these hopes! The innovations which had destroyed the supremacy of the clipper ship continued, and, in this period following the adoption of the National Policy (1879), developed only too rapidly the superiority of the large-scale manufacturing unit. A further innovation, about this time, say at the turn of the century, also reacted unfavourably on the Maritimes. This was electricity. Just as steam, the first great innovation in prime movers, destroyed the Maritime wood and wind economy, so electricity affected the second attempt to found a strong Maritime industry on steam. For the Maritimes had no sooner realized that in the romantic struggle of the sea-lanes sail had to yield to steam, than they sought for the sources of steam in their own territories. Iron was discovered and worked in Pictou County, coal in Inverness and then in Cape Breton. Later, sources of supply of cheap iron ore were discovered in Newfoundland. This development took place in time for the Maritime steel industry to participate in the benefits of Canadian railroad building. But no sooner had heavy commitments been made to the development of Maritime heavy industry than electricity was introduced as a power innovation depending on water power. Again the Maritimes found themselves outmatched by the march of technical progress. Mass production methods in industry also were introduced, favouring those plants which were close to the greater

centres of population. Immigration to the western lands had not only deprived the Maritime Provinces of their natural increase in rural areas, it had also built up, as trading and supplying centres, the cities of the Central Provinces, and created there urban markets for the newly expanding industries of Canada. The statistical records of the period 1901-1921 are the chronicle of Maritime industrial decline. The number of industrial establishments declined everywhere because of the rapid increase in the size of the more succsssful firms. While the decline in the Maritimes, however, was the decline of bankruptcy and merger, comparatively unmitigated by the growth of new and larger plants, the process in the Central Provinces was simply the assimilation by the larger and stronger businesses of the smaller and weaker ones, a process which reduced the number of plants, but increased the quantity of employment and production. This trend towards concentration of industry was not peculiar to Canada. It happened in England, in France, in Germany and in the United States. It was part of a technical process in modern industry, now well understood by economists. It was not the process which was peculiar to Canada, it was the results. Germany, France and England were unitary countries. If depressed areas resulted from an industrial process, this was the responsibility and the problem for the whole country, and must be solved by national action. Even in the federal United States, the tendency has been to increase the sense of national responsibility and with this the federal power to deal with regional problems which arise from a national development. Only in Canada has the full impact of this process of industrial concentration, which redounds to the benefit of the whole nation but which involves certain costs or sacrifices, been permitted to fall without adequate protection upon a certain section of the population. Unquestionably the attitudes which today are expressed in the political circles to which I've referred are the attitudes of regional groups who hope to enjoy all the gains of technical progress, and hope to impose all the sacrifices of such progress on others. If Canada is to become a nation, it cannot be by such methods.

Well, Mr. Chancellor, the tide of technical progress has been set against the Maritimes, as it has against the New England textile industry, and against the heavy industries of Wales and North England. But economists have also been looking towards new trends. Industry has surprisingly begun to decentralize itself. In the United States the automotive and engineering industries have started a process of decentralization. In England, too, this process has begun.

What does it mean? I doubt if we are very sure of this. Some have suggested the rising marginal cost of management, —that there is a limit to the size of the concentrated firm set by the capacity of a single plant manager to take within his compass the multiple problems of managing a single enormous manufacturing unit. Whatever the cause, there does definitely appear to be some trend towards the breaking down of concentrated manufacturing capacity, if not of concentrated ownership. Industry is decentralizing. The advantages of concentrating maufacturing capacity near the populous markets are being offset by the high cost of industrial elephantiasis. Plants have got too big altogether.

I have myself studied this question of the optimum size of plants and I discover that my conclusions match with those of economists in both England and the United States who have made similar studies. The evidence seems to be that in all three countries,—Canada, Great Britain and the United States, a medium scale of plant is the most efficient. And when I say most efficient I do not beg any questions. For, luckily for the economist who has to choose between alternative definitions of such terms, it works out that the medium-size plant is most efficient both in the sense that it is most profiable and most efficient in the social sense of producing at least unit cost.

Already this most recent trend has begun to show itself in Canada. While concentration continues, for this is the firmly established process of modern industry, the future makes itself known in the present, by some movements towards decentralization. But it is as yet a weak counter tide, not the full ebb of Fundy Bay.

In Great Britain, these trends of modern industry have been carefully studied, and a new point of view has been brought to bear on them. Men have been asking, are these trends inevitable, and must people simply submit to them, and adapt to them as best they can at whatever cost to themselves, their family connections, and their desired way of life? Must men always choose between living in their established home, among their own people and their traditional way of life, and between enjoying, if afar among strangers and a foreign and hostile culture, the kind of material advantages to which their education and skills entitle them?

In Great Britain they have been asking, are the most recent technical developments in industry such that we can begin to decentralize industry, and provide a diversified and profitable industry in all parts of the country, and with it a happy and prosperous life for all regions and sections of the

population? The study of the concentration and location of industry has developed rapidly under the stimulus of this kind of thinking in Great Britain. I am not referring to the ideas of any particular political party. I am afraid we in Canada have become so far behind the times in our economic thinking, and have been so infested with the prevalent hysteria, which calls itself "the preservation of the American Way of Life" that we do not really know what is going on in the rest of the world. Actually there have been in the United States themselves several examples of the kind of policy I am talking about, perhaps the most notable the development of the great area served by the Tennessee Valley Authority. And in the United Kingdom, the planning of the location of industry has been shown to be possible. It was begun, indeed, under the Coalition Government headed by Mr. Churchill and has been continued by the present Socialist Government under Mr. Attlee. What the British have established is this. That with the advantages of modern technology, any region may enjoy the advantages of a diversified development. The advantages of large-scale formation and industrial concentration are offset, or more than offset, by the disadvantages. Diversified, well-engineered plants of medium scale can be dispersed about the country without the loss of efficiency. As long as the capital-labour team is big enough to achieve the full advantage of technical progress, further increases in size by multiplying the number of such teams brings no additional advantages. One economist studying the boot and shoe industry has found that there are economies from size up to the point where an optimum team of capital and labour is combined. After such a moderate scale has been achieved, further increases in size bring no additional advantages. I have made similar studies myself of a typical Canadian industry, the newsprint paper industry, and I have found that after a scale of 300 tons daily capacity, further increases in scale bring no additional advantages in productive efficiency. Thus if further concentration to enhance size of plant brings no additional advantages, what factors may determine the location of industry today?

There are two answers. One is that clearly distinct regional markets, with long transport hauls between, favour the devolution of plant. This has been clearly demonstrated in the United States. The other is, that the planned and scientific development of natural resources so as to make these resources available and accessible to industry is important in location. In Britain this has been an important factor in the planned location, to which I referred, of new industry. Instead of insisting that the people from the distressed areas migrate, at great costs, to new industrial sites, the British Governments of recent

times have studied the natural potentialities of the distressed areas, developed the resources in those areas which might attract industry, and so directed the devolution of industry, that the machines and factories have been brought to the communities of the people instead of forcing these communities to uproot themselves and move their people to the machines and factories.

We may say then, that whereas in the past, the technical developments and innovations of modern industry have all played a hostile part towards the Maritimes and have been primarily responsible for the disabilities under which the Martimes have laboured within Canadian Confederation, the most recent trend is much more favourable for regions such as the Maritimes. British practice has shown us the possibility of decentralizing industry in regional groups, and the advantages of a planned use of special regional resources. The new Keynesian economics places great stress on the wise use of public investment to improve the productive capacity of undeveloped or inaccessible natural resources.

The present Government of the Province of New Brunswick has shown its awareness of these trends. The Government has undertaken to study the likely potential resources of the Province and the possible development of these resources. This is sound practice, in accord with the most recent developments of economic thought. More, however, is required. New Brunswick is no island unto itself, it is a part of the main, a Province of our national community, and the full advantage of industrial decentralization can come only as a result of federal policy. It is for this reason that the people of New Brunswick should look for their future advantage to those people in the rest of Canada who think in national and not in petty provincial terms. Only if we all try to think of the mutual advantage of the whole Dominion can we hope for remedy of the disadvantages under which special regions labour.

There are certain specific things which can be done. Forest road development can make good stands accessible for cutting, and enable the forest-using industries to adopt more desirable long-term cutting policies. Power can be developed. On this question of power there has been, I suspect, some careless thinking. People have thought and written about power costs, as though these costs were important determinants of industrial location. For most industries power cost is so small a proportion of total cost that it is unlikely that small variations in power cost have an effect at all on location decisions. Even in the industries where power cost is an important ele-

ment of total cost, industries such as newsprint, the differentials are frequently less important (as, for example, between the Maritimes and Quebec) than such items as labour and wood costs. The important thing about power, as the unfortunate people of Ontario are now learning, is its availability. One of the weaknesses of the Maritimes in attracting industry is the lack of power. It is not that steam power costs more here, or that water power is expensive. Our weakness is that we lack power. We need more power developed, and we could develop it from steam, using Minto and Nova Scotia coal. The cost differential would not be important.

But I want to turn from these practical examples to a more important general observation. What I am really trying to say is that human will, the determination of a people to work out solutions to their own problems, is a causal factor in social development. We have had too much, in Canada, of the geographic determinism which says, in effect, that geographic factors, natural resources, rivers and natural channels of communication determine the whole course of economic progress and development. These and other objective factors do, it is true, act in a way so as to limit what can be achieved. They define what we might call the areas of free decision. You can't for example decide to have a citrus fruit industry in New Brunswick, or a herring industry in Saskatchewan. But within these limitations human beings enjoy a freedom of will. We can decide between alternative courses of action. Our policies do not affect what happens. Let me choose an example from the work of a scholar of the last century. He speaks of the course of a sailing vessel. If the wind is from the west the men who sail the ship cannot decide to sail due west. Their freedom is limited by the wind. Yet if they want to reach a western destination they may do so. By using their knowledge of wind and sail they can tack southwest and northwest and finally gain their port. It is the knowledge of men which informs their purpose, and the planned policy, which expresses this purpose and this knowledge, which ultimately determine social movements.

Nor would I want you to think I had only technical knowledge in mind. For our needs we must combine the skills of the technician with the knowledge of the social scientist and the wisdom of the humane scholar.

This, after all was the faith of our Founders. They did not place their trust in some easy nature-given advantage. They foresaw the probable inferiority of the soil. Their faith was in the human element. So must ours remain. The people of the Maritimes must seek their fortune, and the solution

of their difficulties, not in the hand-outs of a paternalistic Quebec or Ontario, but in the human achievements of a superior people, who can take the lead, afford the initiative, in those technical developments which will enrich their natural resources and make possible the devolution to these Provinces of the industries which already have become over-centralized and require only intelligent planning and direction to be drawn in this direction. In this task, once more, the University of New Brunswick has its traditional role. As the Founders, whom tonight we praise, had faith, so still must we. A citizenry, rich in the traditional culture of the humanities, resistant to the yahooism of a commercial continent, and imbued with the empirical sense, served by a great institution dedicated to this tradition and determined to provide the exeprimental knowledge necessary to the development of the skilled arts and the intelligent uses of the resources of our land, such a citizenry is our greatest resource, worth, as our Founders knew, far more than all the wealth of the pre-Cambrian shield. We have a great people, and a great tradition. The times are on our side. The luck of modern technology, which so long was set against us, has shifted. Perhaps the shift is not great, but it was the faith of our Founders that we should develop and use the skills of modern science and the wisdom of the ancients to win our place on this continent. To that task, this University is dedicated. Today, as much as ever in the long past, the demand upon the men and women of this University is urgent. It is not to the luck or good fortune of geography, nor the paternalistic charity of others, that our Founders bade us look for aid, but to the resources within ourselves, to the skill, the knowledge and the wisdom, that disciplined learning alone can bring.

REVISION OF THE STATUTES

It was with joy that the legal profession heard that the Attorney-General was taking steps to have a consolidation and revision of the New Brunswick Statutes.

The last revision, which was completed in 1927 under the chairmanship of the late Wendell P. Jones, K.C., came into force on the 16th day of February, 1928. That revision consisted of 209 Chapters or Acts, and since then over elven hundred Public Acts have been passed by the Legislature. Of course, many of these Acts are temporary in their nature, such as those authorizing borrowing. A great many of them are Acts amending former statutes, but not a few deal with absolutely new material, particularly in the way of social legislation and in the matter of standardization of certain industries, labour relations, marketing, etc.

It is not the intention this time to issue a Royal Commission for the purpose of consolidation, but the work will be done by the Attorney-General's Department, which now has

added to it Mr. Horace A. Porter, K.C., to supervise the work. Mr. Porter, in addition to having been in active legal practice since 1911, has, for the last twelve years, been one of New Brunswick's representatives on the Conference of Commissioners on Uniformity of Legislation, and, consequently, has had experience that will be valuable in the work of revision.

The work of revising may be roughly grouped under three headings:—

(1) To consolidate the many amendments which have been made to the various Acts.

(2) To modernize the language used and bring it into line with the rules of drafting which have been adopted by the Commissioners on Uniformity of Legislation, and have been generally approved by the profession.

(3) While there is no power in the committee to amend the present law or to create new law, it is of course open to them to draw the attention of the Government to existing legislation and to suggest changes of policy. Whether these suggestions are adopted or not must remain with the Government.

Of particular interest to the profession will be the issue of the Statutes as revised. The Commissioners on Uniformity, in addition to formulating rules of drafting, have also had under consideration the preparation of Statute books, and, doubtless, some of their recommendations will be followed in the printing of the new Statutes. One recommendation is that the Statutes be arranged in alphabetical order, according to the main subject matter of the Act. This practice permits the use of a running head at the top of each page and makes reference to the Statute books somewhat easier. One does not have to refer to the index to find a particular Statute, but has simply to look for it in its alphabetical order. While the need of an index by which to find any particular Act will thus be lessened, we are assured that the index to the new Statutes will be more complete than the one in the 1927 Statutes. It is intended to thoroughly cross-index, and thus to meet the criticisms which have been made of the 1927 index.

Both the revision of 1903 and the revision of 1927 took approximately three years to complete. It is hoped the present revision will be in shape to submit to the Legislature when it meets in 1951. After approval by the Legislature of the suggested revision it will then be necessary to print the Statutes as revised and that will have to be accomplished between 1951 and 1952. The practice in former years was for the Legislature to repeal all former Acts and enact the new Statutes as printed, one copy being signed by the Lituenant-Governor and the Provincial Secretary-Treasurer and being included among the rolls of that Session.

HENDERSON vs. STEVENSON, L. R. 2 H. L. (Sc.), 470

Come, all ye students of the law,
And I will tell to ye,
All how Lieutenant Stevenson
Sailed out upon the sea.

It seems he dwelt in Dublin town,
But said, "I will be lavin'
This Emerald Isle for one short while,
And hie me to Whitehaven."

He bid farewell to all his friends,
And just before the start he
Packt up his hats and shoes and spats,
And ate a supper hearty.

Fain was the man to go by rail,
By sea he grew so sick, it
Made him to quail and grow green-pale
To buy the steamboat ticket.

And yet a ticket he did buy,
A brave man and no craven—
Upon the face of it he read,
"From Dublin to Whitehaven."

He went on board with all his gear,
Behind he left not any,
Clothes overlaid with rich gold braid
Had cost a pretty penny.

But sirs, the captain of that barque,
By drink was stupid driven,
And sad to say ere dawn of day,
His ship was wrecked and riven.

Her spars broke off like sealing-wax,
The sails were carried over,
The crew was drowned, our hero found
Himself in such a smother.

Of surf and weed he could not swim,
Hill high the breakers ran,
He clutched a mast and so was cast
Upon the Isle of Man.

He in a kindly peasant's hut
Was fed and warmed and dried,
Yet from the shock and wounding rock
Was like unto have died.

Anon, we find in June he brought
And action to recover
What he had lost when wrecked and tost
From that steam packet over.

Defendants, on high horses, cried,
"We'll not pay that indeed, sir,
'Tis you must lose, did you not choose
Our notice plain to read, sir?

"On back of every ticket, sir,
You'll find our firm does not incur
The smallest liability
For loss, or injury, or delay

"To travellers upon the way,
Thro' lack of due ability
On part of captain or of crew,
'Tis writ full plain, and we maintain
No damages are due."

"Not so," the good Lord Chancellor cried,
"You cannot thus find grace,
The words you quote were never wrote
Upon the ticket's face.

" 'Tis plain Respondent never knew
Of any such agreement,
Nor did contract, by word or act,
'Ere he upon the sea went."

Lord Chelmsford said, "My Lords, I can
Have little hesitation,
'Tis plain as day they must convey
Safe to his destination

"This passenger whose cash they took,
For service to be rendered,
Who never heard or read a word,
Of what to us is tendered."

Lord Hatherly, " 'Tis shown to us,
The clerk who kept the wicket
Beyond a doubt, did not point out
The words upon the ticket.

"And they were printed on the back,
Unlikely to be seen,
There's naught to show the Court below
In error to have been."

And Lord O'Hagan, from the Isle
That's green and has no frosts,
Sir, "Sirs, I feel that this appeal,
Should be dismissed with costs."

M. E. F. from Crustula Juris.

LES AVOCATS BILINGUES & LE CODE CIVIL

ERIC L. TEED

Aujourd'hui il est certainement d'un grand intérêt, d'attirer notre attention, sur l'augmentation du nombre des étudiants bilingues au Nouveau Brunswick. En effet, le Canada est un pays dans lequel l'Anglais et le Français sont considérées comme deux langues officielles, et il ne faut pas oublier que la loi prend une position de très grande importance dan la vie de tous nos citoyens canadiens. Aussi, ne serait-il pas très satisfaisant et encourageant de pouvoir constater que nos futurs avocats pourraient enfin comprendre et même parler nos deux langues, et l'Anglais, et le Français?

Au Nouveau Brunswick, comme à Québec, le Français est la langue maternelle de beaucoup de citoyens. Il est alors tout à fait normal que les personnes désirant étudier le Droit, aient une connaissance assez avancée des deux langues, afin qu'elles puissent s'en servir continuellement dans l'exercice de leur profession. En effet, depuis trop longtemps déja, existe-t-il une rareté assez prononcée d'avocats bilingues non seulement dans la Province, mais aussi dans le Dominion.

La loi canadienne ayant été écrite dans les deux langues, établit comme fait certain que les Cours ont donné leurs décisions et rendu leur jugments dans chacune des deux, et encore aujourd'hui, rien n'y est changé. Il s'en suit donc, que les avocats pouvant pratiquer et exercer leur profession et en Français et en Anglais, ont beaucoup plus d'avantages sur leurs confrères, qui ne peuvent professer que dans l'une ou dans l'autre.

Sans doute plusieurs années passeront avant que l'objectif final d'une profession légale bilingue arrive à son but, cependant le grand nombre actuel d'étudiants connaissant les deux langues, est un facteur significatif pour assurer la réalisation de cet objectif.

On penserait que les corps dirigeants de la Profession Légale, considérerait une connaissance avancée des deux langues, comme essentielle à cette étude, et bientôt le Français deviendrait matière obligatoire, et aussi importante que toutes autres matières considérées comme telles, dans les études préliminaires, spéciales à cette profession.

Cependant admettant la réalisation de l'objectif des avocats bilingues est atteinte, une autre obligation s'impose pour atteindre une plus grande perfection en ce qui concerne la profession légale, et cette autre tâche se rapporte à l'harmonie intégrale qui devrait régner entre les lois canadiennes et les lois provinciales en général, est l'étude du Code Civil par tous les avocats des Provinces Canadiennes qui ont des lois communes.

Malheureusement, il est reconnu que les avocats provinciaux se contentent d'étudier seulement les lois de leur province respective, sans porter aucune attention aux lois des autres provinces. . . . Ne pensez-vous pas qu'une connaissance assez avancée du Code Civil, serait certainement un grand pas vers la compréhension de la différence et de la ressemblance entre les lois de la grande Province de Québec, et les lois communes? Et sans doute, cette compréhension nous mènerait sûrement, d'une manière ou d'une autre, à la réalisation du but mentionné plus haut, qui est l'harmonie intégrale entre les lois canadiennes et provinciales.

L'Association du Barreau Canadien, est composé d'avocats qui pratiquent selon les deux systèmes légaux, et il s'en suit qu'une étude comparative et ces lois, prouve être d'une immense valeur pour créer une meilleure relation, et une plus grande compréhension entre les avocats de ces deux systèmes légaux.

Peut-être qu'un jour, les différentes Facultés de Droit à travers le Canada, comprendront et réaliseront les nombreux avantages provenant d'une étude comparative et intense ces deux systèmes de lois, et introduiront enfin le Code Civil, dans toutes les Ecoles de Droit.

Jusqu'à ce jour, malheureusement, la grande majorité des avocats et même des étudiants en droit, qui n'ont pas eu, ou qui n'auront pas le chance d'étudier le Code Civil, auront des difficultés quelquefois marquées, qui s'augmenteront certainement avec l'expansion et le perfectionnement du Canada.

Mais, il ne faut pas oublier, qu'avant la réalisation des deux grands buts cités dans cet entretien; Les Avocats Bilingues, et le Code Civil, il y aura beaucoup d'effort à surmonter, et heureusement, on peut constater qu'en ce qui concerne la réalisation des avocats bilingues, un premier grand pas est déjà fait, tel que prouvé par le nombre, assez considérable d'étudiants bilingues qui se présentent pour l'Etude du Droit.

Alors tous ensemble, mettons nous à l'oeuvre, et faisons notre possible pour obtenir encore une plus grande perfection en tout ce qui peut concerner la belle profession, qu'est la Profession Légale.

"Not until English-speaking Canadains show their willingness to meet their French-speaking fellow-citizens half-way by learning the language, and familiarizing themselves with the problems of the race which comprises one-third of the population of this Dominion, will true confederation be realized."—John Basset.

THE COURT REPORTER

J. IRVING O'DONNELL

The recording of language by the substitution of letters and combinations of letters for sounds so that words may be silently conveyed to the mind through the eye as distinctly as by the voice through the ear is truly a wonderful invention. For the acquiring, preserving and communication of knowledge, it is almost as valuable as the gift of speech.

So much mechanical labour is required to form the letters, however, to record language as rapidly as it is spoken, common writing is inadequate. Many systems of shortland have, therefore, been devised.

One author on the subject tells us that among the earliest systems of shorthand were the Greek signs. From these came into being Cicero's Roman notes, consisting of little marks that were sufficiently expressive to enable writers to record the Senate speeches of that age. Cicero's secretary, by the name of Tyro, became a very skillful recorder, his writings in shorthand being known as Tyro's Notes. Seneca improved upon these recordings and introduced them into the schools as a branch of education.

One of the poet Martial's epigrams of 1800 years ago tells us a Notary could then record speech as well as the reporters of today:

Notarius

Currant verba licet, manus est velocior illis;
Nordum lingua suum, dextra peregit opus.

The excellent methods of teaching used by present-day textbook writers have hastened considerably the progress and success of shorthand throughout the world. World Shorthand Champion records now are close to 300 words a minute—five words a second.

The court reporter's job is one most interesting. The interest which fed his enthusiasm at the commencement of his career is never lacking throughout his career. Its presence is oftimes doubted by the reporter when his record to be transcribed is in front of him, its pages having been ascertained to run into the hundreds, and his next few days and evenings predetermined to be spent in the sole company of his typewriter, which will bear the brunt of at least a few violent reprimands for not reproducing results desired by its operator whose weary fingers have been the cause of its going astray. However, the job will be finished. Perhaps the next half-hour the reporter may have all to himself to admire the fruits of his

efforts. As the admiration for his accomplishments grows so also does his interest for the career he has set for himself. At the end of his half-hour vacation most likely he is ready to tackle the next case in his books with its thousands of shorthand outlines, its hours of wearisome labour, and its conclusion wreathed in thankfulness.

Why had he reprimanded his typewriter? In all probability as he read his notes a vague outline appeared before his eyes, the vagueness proceeded from his mind to his fingers and to the paper before he stopped. And he looked at his book again. He remembered then the speaker whose words he had outlined. He remembered that that speaker spoke—as he thought at the time—with his mouth full of marbles, or cotton wool. The wool and the marbles, with the gargled word reached the reporter's ears at the same instant and was transferred in one quick movement to his record. Though the sound was accepted by the judge and the counsels as having a meaning, its translation to typewritten English fell to the reporter. His patience in turn fell a few degrees. His expressions fell upon the typewriter—which had no part in the fault. The witness on the stand was the curprit, and he was gone. Surely, it was a witness. A judge would speak most clearly? A counsel would speak most clearly? They above all desire the record to be correct so that they might rely upon it to consist of the accurate proceedings of the court. And surely they would take the care to speak distinctly, slowly and loudly so that all would hear, and the record they wished to be accurate would in fact be just that.

By far the majority of those who are court reporters became such as the result of some accident by which as shorthand writers they found they had the ability to record rapid speech and automatically drifted into the business of reporting, a profession they found to be one of opportunity and advantage for those adequately qualified. The reporter has spent many hours of practice, first on the fundamental outlines and brief forms for common words, then fusing the two or three words into one outline for a phrase. He has tried to record speech delivered at a very moderate rate, and has transcribed it with the typewriter. As months went by the reward for his efforts appeared in the form of ability to write ten or twenty words a minute faster than he could before. He has learned that while he could write his outlines rapidly he had also to write his outlines clearly and proportionately so that his transcribing period would not be lengthened because he could not decipher what he had succeeded in writing. As he advanced, he found that but one pen was his favourite for its balance and its dependable ink flow, its rather fine nib. And he found he must not

lend it frequently, as the proper care to maintain its perfect condition would innocently not be taken by the borrowers. He learned that a specially-ruled book must be used, having columns in which the words of the prosecuting counsel were recorded in one, the defending counsel in another, the judge and the witness in the others, and that there was no time to indicate a speaker by name, and that he must be identified by the column into which he was put when he spoke. He found also that he must be able to locate in his books and read back to the court, when so instructed, notes he had taken hours or days before, and, though he might decipher them by himself at typing speed with ease, it was sometimes more difficult to do so in the atmosphere of the courtroom. The ability to trail a speaker by a half-dozen sentences was one to be desired. The speaker must sooner or later stop for breath and his hestitation enables the writer to get down in his record the sentences which had gotten ahead of him. He found there were many shortcuts he might take and in fact had to take to get down on paper the exact expressions of the speaker.

The regulations for examination and appointment of Supleme Court Official Stenographers for the Province of New Brunswick, and their responsibilities, are set out fully in the Revised Statutes, c. 117, and c. 188 deals with County Court Stenographers. The statute respecting the Court of Divorce, c. 115 outlines the duties of Official Stenographers at all trials and hearings concerning divorce and matrimonial causes. Stenographers who are not Official Stenographers must before they undertake their duties be sworn to discharge such duties to the best of their skill and ability.

Case law is not in abundance on the subject of court stenographers' shorthand records. A few cases, however, bring out some points. In the event of a discrepancy between the judge's notes and those of the shorthand reporter, the former will generally be preferred. This by the case Re James Beauchamp, 1909 2 C.A.R. 40. The reason for this is expressed in Sergeant v. Chafey, 1836 5 L.J. K.B. 228 by Lord Denman, C.J.— "We ought not to omit this opportunity of saying at once that the notes of the Judge who tried the case must be those which the Court will abide by. Although a shorthand writer's note may be very accurate, yet there may be some peculiar mode of expression taken literally by a shorthand writer which will not convey the meaning which the learned Judge himself attached to it. It may be very useful to refer to the shorthand writer's notes to ascertain some particular observations made at the trial, but they cannot be taken in contradiction of the Judge's notes."

Any incident affecting the trial during its course should be recorded, e.g., a statement interjected by someone not a witness, in court and heard by the jury. T. Austin, 1916, 12 C.A.R. 171.

Where a solicitor employs a shorthand writer to take shorthand notes of a case in which the solicitor is acting for a client, in the absence of special arrangement (that the client was to pay for them) the solicitor is personally liable to the shorthand writer for the costs of the notes. Cocks v. Bruce, Searl & Good, 21 TLR 62.

The shorthand note of a proceeding, though sworn to be correct by affidavit, was not admitted in evidence, the shorthand writer being dead. This in DeMora v. Concha, 1886, 32 Ch. D. 133. The affidavit of a live one was admitted as evidence in Houston v. Marquis of Sligo, 1885 29 Ch. 457.

A brief history of the use of shorthand in the Courts is contained in R. v. Dupis, 1940 74 CCC at P. 91.

The court reporter today is an essential person in the administration of law and justice. Although in the past, they have not been fully appreciated, there is a growing tendency for the other persons connected with the law to realize the problems affronting the court reporter. All of this has the effect of making the task of reporting easier and thus enabling him to do a better piece of work, which in the end benefits all concerned.

+ + +

CARLILL vs. CARBOLIC SMOKE BALL CO.

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

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 snuffles, 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 infection.
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 consideration.

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.

M. E. F.
From Crustula Juris.

TREATISE ON SIGNATURES ON WILLS

CEDRIC T. GILBERT

The Wills Act (1) provides by S. 4, "that no will shall be valid unless it is signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator, and in the presence of each other; but any will, although not signed at the foot or end thereof, shall be valid if it be apparent from the will and position of the signature, or from the evidence of the witnesses thereto, that the same was intended by the testator to be his last will; but no form of attestation shall be necessary."

One may see from the above section that one necessary condition for the validity of a will is that it should be signed. This signing does not exclude the act being done in pencil. This article considers what amounts to "a signing." It has been decided that a mark is sufficient; but such "mark" must leave a trace; it is not sufficient to point to or touch the paper with a dry pen. (2) A writing read to the testator, who makes an oral declaration before witness that he accepts it as an expression of his last wishes, but is unable to sign it owing to the injuries received, cannot be treated as a will made according to the form derived from the law of England nor be proved as such. (3) There must be a mark of some kind which must be acknowledged by the testator as his mark, and such mark will suffice even if the testator is able to write. (4) (It is of significance that the testator's name need not appear anywhere on the will). (5) If a mark is sufficient, it follows that the testator's initials would also suffice. (If the signature is a wrong or assumed name, or that against the mark was written a wrong name, it may still be a valid will). In the case where a will purporting in the commencement and testimonium clause to be that of Susannah Clarke, was executed by a mark, against which was written the name Susannah Barrel, and was handed by Susannah Clarke, as her will to one of here executors, shortly before her death. (Barrel had been the maiden name of Susannah Clarke). It was held that as there was sufficient evidence that the mark was that of Susannah Clarke, the execution of the will by her was not vitiated by another name having

(1)—Chapt. 173, R.S.N.B., 1927.
(2)—Kevil v. Lynch, Ir. R. 8 Eq. 244.
(3)—Ex p. Sampson, 18 Que. P.R. 368.
(4)—Taylor v. Dening, 3 Nev. & P. 228.
(5)—In b. Bryce, 2 Curt. 325.

been written against her mark. (6) It also has been decided that where the testator's hand was guided in making the mark, this satisfies the statute, (7) even if the witness is not told that it is a will. (8) Where a testatrix has executed a will by making her mark and the evidence fails to show that she was in full possession of her faculties, it will not be admitted. (9)

"Sealing alone will not as a general rule satisfy the statutory requirement that a will must be signed by the testator. But it is conceived that a distinctive seal, if shown to have been impressed by the testator with the design of authenticating the instrument would be good as a signature by mark." (10) In Re Wilson Estate, 19 D.L.R. 698, it was held the impress of the testator's natorial seal upon the will was a sufficient signature upon which to grant proof in common form.

The testator's name signed to the will by another person at the testator's direction, done in his presence and in the presence of two witnesses who so attested the instrument, was held to be a will executed in accordance with the requirements of the Wills Act. (11) That "other person" may, it seems, be one of the witnesses, as in Smith v. Harris. (12). It has been decided that he may sign his own name instead of the testator. (13) And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been. (14) One might also hold that the testator's name typewritten on the will by his direction would also be valid.

It is quite sufficient that a will contained in several sheets of paper, have one signature; (15) and the sheets need not be in order nor fastened together as long as the Court is satisfied that when the will was signed and attested the other sheets were in the room, and that the testator treated the whole as his will. (16) However there must be a dispositive part of the

(6)—In b. Clarke, 27 L.J.P. 18.

(7)—Wilson v. Beddard, 12 Sim. 28.

(8)—In Goods of Moo.e, 1901.

(9)—Thuot v. Berger, 77 Que. S.C. 211; Leger v. Poirier, 1944, 3 D.L.R. 1; Peden v. Abraham, 1912, 3 W.W.R. 265.

(10)—Jarman on Wills, 7th Ed. Vol. 1, Page 96.

(11)—Banks v. Goodfellow, L.R., 50 Q B. 549 and Re Gibson, N.S.C.A. 1939, 1 D.L.R. 591.

(12)—1 Rob., 262.

(13)—In b. Clark. 2 Curt. 329.

(14)—Jenkins v. Gaisford. 3 S.W. & Tr. 93.

(15)—Lewis v. Lewis, 1908. P. 1.

(16) Gregory v. Her Majesty's Proctor, 4 N. of C. 620.

will contained on the sheet which bears the signature and attestation. The signature may indeed be on a separate piece of paper containing nothing but the signature and attestation, but such piece of paper must be "attached" to the will itself, and proved to have been so attached before execution. (17) The degree of attachment required is a discretionary matter for the Court.

With regard to the preceding paragraph it might be well to refer to several conflicting cases. In the Goods of Mann, 1942, P. 146 was a case where a testatrix wrote out her will on a sheet of paper. One of the attesting witness was present during the whole of the time while the testatrix was so engaged and the other attesting witness was present during the writing of the latter part of the paper. After completing the paper the testatrix wrote on an envelope the words: "the last will and testament of Jane Catherine Mann." She then pointed out to the two witnesses that the documents which she had written were her will, and requested the two witnesses to sign their names as witnesses thereto. Thereupon the two witnesses, in the presence of the testator and in the presence of one another, subscribed the paper. After the witnesses had signed the document, the testatrix placed it in an envelope but she did not sign it. The paper and envelope were deposited with the bankers of the testatrix for some six months, at the end of which time she took the will to her home. Soon afterwards she was admitted to hospital and took her will with her. There she had the document in its envelope placed in a further envelope and sealed the covering envelope with sealing wax. This whole thing was handed to her executrix. It was held that probate would be decreed of the two documents, the signature on the envelope being accepted as the signature of the will, since (a) the circumstances were so well ascertained as to preclude all possibility of fraud, (b) the envelope had a far closer relationship to the document which it enclosed than a second or wholly discontinued piece of paper would have had, (c) both the envelope and the paper were holograph documents written on the same occasion and, (d) both documents were written in the presence of the attesting witnesses, (e) the history of the documents clearly showed the genuine nature of the transaction.

However, in the Estate of Bean (1944) 2 A.E.R. 348, where the circumstances were that the testator used a printed form of will but did not sign this in the space provided for, but rather wrote his name on the back of it, and also filled in spaces on the envelope on which were printed, "The last will

(17)—In b West, 32 L.J. 182.

and testament of ..... of ..... To ..... Executor. Date." The attesting witnesses then signed their names and added their addresses in the space provided in the document for the purpose. It was held that the document and envelope could not be admitted to probate and the name "George Bean" written on the envelope was not the signature to the will.

In Re De Gruchy, 56 B.C.R. 271, the testator signed a printed form of will on the back under the words "Will of ....." and then had two witnesses sign their names in the usual place under the testimonium. The decision of the Court was that the will was executed in compliance with S.7 of the Wills Act, R.S.B.C. 1936.

This treatise is by no means complete regarding the problems of the testator's signature. Our treatise leads us now into an inquiry as to why should such problems arise. If the testator knows S.4 of the New Brunswick Wills Act there should be no difficulty, providing he follows it to the letter. One of the difficulties is that most people feel that making a will denotes a weakness, and persist in leaving such a duty until near death. Another is the idea that the printed Will forms sold commercially are better than solicitor's advice. The obvious conclusion to eradicate the disputes over signatures, would be to make your Will while you are in full possession of your faculties, and under the advice of a solicitor who should supervise such signatures.

DEBATING COMMITTEE

In an active term of debating the Law School Debating Society scored two wins and two losses. On January 21, the Dalhousie team, composed of Neil McKelvey and Don Cross, defeated the negative arguments of the Law School team of Gordon Fairweather and James Lunney, on the resolution: "Resolved, that Members of Parliament should be allowed to vote freely and not according to party caucus."

In the Co-ed Radio Debate, Beatrice Sharp and Elizabeth Hoyt of the Law School successfully contended that "Comics are no laughing matter," against a team from the University of New Brunswick.

At Fredericton on February 25, John Gray and Margaret Warner of the Law School defeated the "Hillmen" Bob Horner and Tom Gibbs, who were affirming "Labour unions should be and remain non-political."

On the same night and on the same resolution an Acadian team scored a win over the Law School team of Gordon Harrigan and Vernon Copp in a debate held at Acadia.

COMMENTARY ON THE RULES OF CONVERSION OF TRUST FUNDS

It is of interest to study the effect of non-conversion of trust funds from unauthorized securities to authorized securities and the rules of trusts which apply to these circumstances.

On studying In Re Beach (1) we find that it was a simple application of the so called rule in Howe-v-Earl of Dartmouth (2). The rule simply stated is that

"the tenants for life are not entitled to the whole income coming in from unauthorized investments and that the same ought to be valued as at the date of the testators death, and interest on the amount of the valuation so ascertained . . . at some rate be paid the tenants for life."

The case concerned the application of the principle and the determining of the rate at which the tenant for life would be allowed the interest. The effect was that the Court would take into consideration the then prevailing financial position of the country and allow the proper rate upon the then existing conditions.

However the seemingly plain rule is actually much more involved than appears from that judgement and it bears investigation.

The case of In Re Wareham (3) held that the rule of Howe-v-Earl of Dartmouth must be applied unless it appears upon the particular construction of the particular will that the testator had shewn an intention the rule should not apply.

However on looking at the case of Howe-v-Lord Dartmouth (2) we find that the rule as laid down there has been greatly extended and possibly misquoted. The headnote of that case reads as follows:

"General rule, that, where personal property is bequeathed for life with remainders over, and not specifically, it is to be converted in the 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is only entitled upon that principle."

It is very hard to find the ratio decided out of the judgement of Lord Eldon and the whole principle seems to be based upon the small line in the judgement

". . . . . and the advantage, if any, ought not to accrue to the tenant for life."

From this single clause the courts have developed a great and far-reaching rule which must be carefully analyzed to find its true meaning.

Howe-v-Earl of Dartmouth was a case concerning a WILL and annuities which could not be called proper investments. The case seemed to be based upon the principle that where there is a WASTING ASSET, the court will hold that conversion must be deemed to have taken place at the proper time and accordingly the tenant for life would only be allowed the rate of interest that would be allowed on proper investments. There was considerable doubt in the mind of Lord Eldon as to what would be the result where there was a SAFE security but he took the stand that all securities must be taken to have been converted. This did not apply to real estate.

(1)—1920 1 ch 40
(2)—7 Ves 137a
(3)—1912 2 Ch 321

It would seem that the subsequent courts have taken the rule and tried to extend it far beyond its rightful use.

Happily the case of Slade-v-Chaine (4) clarifies the point to a large degree. Cozens-Hardy in his judgement makes the assumption that the rule of Howe-v-Lord Dartmouth applies only to funds left under a will and not to trust funds established under a deed.

The case explains the rule by saying "Howe-v-Lord Dartmouth rests on the principel that where a testator leaves property which is WEARING OUT, ... that property must be realized, and that the tenant for life can only have interest on the amount thus realized."

At the time when the case was decided every investment which was not in Consols was considered as an investment which was wearing out. Today there has been a radical change in financial matters and this idea has no foundation on present conditions.

The case was based to a large degree upon that of Stroud-v-Gwyer (5). This case held that where there had been an unauthorized investment, the trustees have discharged their liability in favour of the cestui que trust who are entitled to the capital in remainder when they have made good the capital and any increase that capital has received. It went on further that no case had held that the increased profit made by the unauthorized investment was to be divided partly between the capital and partly between the income, and the excess to be turned into capital for the benefit of the person entitled in remainder.

Romilly M. R. went on to say that the rule of Howe-v-Lord Dartmouth applied where property was found in a particular state of investment at the death of the testator. This was supported by the Court of Appeal in the Slade case.

Thus the conclusion seems to be that where there are INVESTMENTS AT THE DEATH of the testator, and a trust is created by will, the tenant for life is only entitled to the proper rate of interest as determined on the sum which would have been realized if the investments had been converted into proper investments. Any extra goes to the remainderman.

This rule does not apply in the case of a trust created by deed or settlement.

If at any time there is a subsequent UNAUTHORIZED INVESTMENT, the tenant for life is entitled to the FULL INTEREST on such investment PROVIDED that the capital or corpus IS NOT DIMINISHED.

Thus it appears that the RULE so glibly stated is actually not as all embracing as it first appears, and is much more qualified and restricted than one might think on first considering it.

(4)—1908 1 Ch 522
(5)—28 Beav 130.

GROSS negligence is simply negligence with the addition of a vituperative epithet . . . . Rolfe, B. 1843 11 M & W 113.

"There shall be no felony if a lunatic kill a man, or the like, because felony must be done animus felonieo. Yet in trespass, which tends only to give damages according to hurt or loss, it is not so, and, therefore, if a lunatic hurt a man he shall be answerable in trespass." —Weaver v Ward 1616 Hob 134.

CHARITABLE TRUSTS

MARIE L. McLAUGHLIN

(IN RE SCOWCROFT 1898 2 CHANCERY 638).

The question in this case was whether a will purporting to set up a trust "for the furtherance of conservative principles and religious and mental improvement" does in fact create a good charitable gift.

Rev. James Hamer Scrowcroft by his will left to the Vicar for the time being, and his successors, a building, known as the Conservative Club and Village Reading-room, to be maintained "for the furtherance of conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing." He also devised certain freehold land, half of the income from which was to be used for the maintenance of the aforesaid Club.

The case was decided by a single judge, Stirling J., who held that there was a good charitable gift. He construed the clause in question conjunctively, that is, he said that the gift was essentially for religious and mental improvement, good charitable purposes, but to be applied in accordance with conservative principles, which limitation was not sufficient to prevent the gifts being good. He also considered the gift from another point of view, namely, that being a gift of a building for the public benefit, it was charitable. It is certain, however, that had the gift been only for the furtherance of conservative principles, it would not have been upheld. (Hanbury, Modern Equity, 4th, p. 221).

It would appear in the light of later cases that this was a correct decision. Bennet, J. followed the same reasoning in In re Hood, and put the principle this way, that where the main object of the gift is out one of the means by which, in his opinion, that object could best charitable, the gift is none the less valid because the testator pointed be attained, and which in itself might not have been charitable had it stood alone.

The Court of Appeal in the same case also followed the Scowcroft judgement. Lord Hanworth, Master of the Rolls, said that there was a plain intention indicated for the advancement of a certain charitable cause, here Christian principles, and it is allowable for a testator to indicate a particular method by which this advancement was to take place.

This Hood case was decided in 1931, and since that time, the principles of the Scowcroft decision have been applied, mentioned or affirmed, supporting my contention that it was correctly decided. Lord Davey particularly affirmed the principle, though without mentioning the case, in Hunter v. Attorney-General, 1899 A. C. 309.

RHODES SCHOLARSHIP

For the second time in three years the Rhodes Scholarship has been awarded to a member of the Law School. From a group of nine applicants—two from the Law School, four from the University of New Brunswick, one from Mount Allison University, one from McGill and one from Laval University—the committee selected Gerard Vincent La Forest, a third-year student of the School.

He is the son of Mr. and the late Mrs. J. Alfred La Forest. of Grand Falls, N. B. He graduated from Grand Falls High School, Sacred Heart Business College, and attended St. Francis Xavier University for two years before his admission to the Law School. In each of these institutions his academic record has been of a remarkably high standard. At St. F. X. he placed second in his class for two consecutive years. At the Law School he finished third highest in his first year and first in his second year. His mastery of both English and French has given him facile expression in either tongue.

In accord with the all-round ability and activity required of a Rhodes Scholar "Gerry" has been very active extra-curricularly, both at St. Francis Xavier and at the Law School. At the former he was assosiated with athletic, co-operative and dramatic societies, pre-law and music appreciation groups. He was also active on the Xaverian Weekly and represented the College in the M. I. D. L. on the championship debating team.

At the Law School he has been particularly active in debating and was instrumental in having the Law School admitted to the M. I. D. L. in his second year. This year he acted as chairman of the Moot Court Committee. In an informal capacity he has submitted articles to the Law School Journal and has served on the Social Committee.

MOOT COURT

Three sittings of the Supreme Moot Court of the University of New Brunswick Law School have been held this term. In the first of these Gibbon C.J.M.C., Michaud J.M.C., Atkinson J.M.C. (dissenting) upheld an appeal from the Supreme Court of Nova Scotia. The Court declared that a Provincial Legislature can delegate power, exclusively conferred upon it by the B. N. A. Act, to the Dominion Government. Leonard Fournier and Irving O'Brien supported the appeal: Perley Tracy Gould and Vince Whelton represented the respondents.

In the case of Lonesome Polecat v. Lynx, Minx, and Sphynx Co. the Court, Marie McLaughlin C.J.M.C., Arthur Cooper J.M.C. and Harold McLaughlin J.M.C. (dissenting) dismissed an appeal from the Supreme Court of Lower Slobbovia, deciding that an alleged contract did not exist for want of consideration. Douglas Rice and John McSweeney were the appellant's solicitors; Vernon Copp and Cedric Gilbert, the respondents'. The clerk was John Gillis.

In the third and final sitting Douglas French and Cedric Gilbert were heard on appeal dealing with the liabilities of landowners to trespassers, licensees, and invitees. The case was decided by Andrew Harrigan C.J.M.C., Harper J.M.C., and Dube J.M.C., in favor of the respondents, represented by Irving O'Donnell and James Harper.

At the February meeting the Students' Society declared its intention of continuing the holding of Moot Courts in their present form in accepting the rules and regulations for their management presented by the Moot Court Committee.

LEGALLY SPEAKING

A recent and valuable innovation in the program of the Debating Committee of the Law School has been the introduction of the Law School discussion program heard over Radio Station CFBC every Sunday afternoon, entitled "Legally Speaking." The program is presented by the students of the School by way of airing views of the students as to present-day problems from a legal point of view. As such they assume the status of informal debate.

The value of the programs is in their ability to provoke thought on current legal affairs, not only amongst the members of the profession, but also amongst the public generally. To an enthusiastic listening public the legal side of the following problems have been presented:—

"Why a Canadian Bill of Rights," by Gerard La Forest, Eleanor Baxter, Roy McIntyre.

"The Contribution of French Culture to New Brunswick," by John Michaud, Paul Dube, Gordon Fairweather and Carlisle Hanson.

"Appeals to the Privy Council," by John Gillis, Eric Teed and Eric Young.

"The Right To Sue the Crown in the Right of the Province," by Douglas Rice, John McSweeney and Francis Atkinson.

"Fundamental Human Rights," by Bill Gibbon, Ian Mackin and Bob McAulay.

"Legal Aid in New Brunswick," by Percy Smith, Jim Crocco and Ted Gilbert.