THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editor, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

It is hoped that members of the profession will favour the Editor from time to time with notes of important cases determined by the Courts in which they practise.

☞Contributors' manuscripts must be typed before being sent to the Editor at the Exchequer Court Building, Ottawa.

TOPICS OF THE MONTH.

THE TEACHING OF LAW.

ENGLISH AND CANADIAN METHODS.—Professor H. A. Smith's letter to the London *Times*, reproduced in the May number of the REVIEW,[1] has met with some adverse criticism in this country by reason of the statement expressed therein that "the general educational level of the profession in Canada is far below that which prevails at the English Bar." This was taken as more or less of an implication that the systems of teaching prevailing in Canadian law schools—they being entrusted with the chief part of the work of training law students in this country—were inferior to the English law school methods. We must confess that this was our understanding of the drift of Professor Smith's statement above quoted when we expressed editorial concurrence with him; and we were led to do so by reason of the fact that the method of teaching prevailing at least in some of the English schools not only embraces instruction by means of lectures and what is known as the case-method[2]—both of these means being used in some of the Canadian schools—but adds to these features the tutorial system. We are aware that the tutorial system is quite beyond the financial resources of our own schools even if it were desired, but that is *nihil ad rem*; the point is that the English schools, having all that ours have in the way of imparting

[1] Ante, p. 322.
[2] See *Journal of Society of Public Teachers of Law*, 1925, p. 5.

instruction to students, have something more. Hence if this additional mode of instruction is of value, and one has only to read Dr. Holdsworth's Presidential Address to the Society of Public Teachers of Law at its annual meeting held at Oxford in 1924 to be convinced that it is, then the teaching of law in Canada is necessarily inferior to that of some of the English schools. The late Professor A. V. Dicey, writing in the *Harvard Law Review* in 1910, said that a first, or even a second, class obtained in the examination of the B.C.L. at Oxford "is a guarantee that the student knows more of the principles both of English law and Roman law than ninety-nine of every hundred young men when about to be called to the Bar." In support of his argument for the maintenance of the tutorial system as a feature of legal education, Dr. Holdsworth said in the course of the address above referred to: "I have just heard that last year at Columbia University, out of the seven Kent scholarships awarded to the seven men doing best in their last year's work in the law school, three went to scholars who had taken first classes here; and that several members of the Faculty of Law commented on the fact that their papers in point of style and form were in a class apart." But admitting all this does not displace the fact that our schools are doing excellent work. They show a maximum of efficiency as related to the facilities they now enjoy. With these facilities enlarged, as they deserve to be, Canadian law schools will become second to none.

THE CASE-METHOD.—While we are on the subject of legal education we should like to refer with some particularity to the case-method. It is interesting to recall that in the Report of the Legal Education Committee to the annual meeting of the Canadian Bar Association in 1923 some attention was given to this method of teaching law. The Committee entertained the view that better results are obtained by having the student extract for himself legal principles from the cases than by having them formulated for him by a preceptor, even if he used the cases for the purpose of illustrating the principles. However, in the opinion of the Committee, lectures might well be used "to assist the students in piecing together into a coherent system the principles which they have gleaned from their cases as well as in defining more certainly the limits of such principles." The Committee was careful to point out that in some subjects the use of the case-method by itself "seems clearly inadequate." The Committee proceeded to instance some of these subjects. We quote from the Report: "Thus in courses on Property the use of readings supplemented by lectures gives, in the opinion of

some teachers, better results than a strict case-method. Again it is doubtful whether the case-method can be used with any success in the teaching of Procedure. Also in historical subjects a teacher would have considerable difficulty if confined to cases for the materials for his instruction."

The case-method was introduced at Harvard by Professor Langdell some fifty years ago. It met with great opposition at the start; and tradition has it that so deep-seated was this opposition in the minds of Boston lawyers, who favoured the lecture system, that they started a rival institution practically next door to the Harvard Law School, namely, the Boston University Law School. Probably they were persuaded that the "lawless science of our law" could be better taught by deduction than by induction. But the case-method as developed by Ames, and other teachers at Harvard who followed Langdell, met with an astonishing measure of success, and to-day it is very generally employed in American law schools. It is a special course of training designed to introduce the student at once to forensic habits of reasoning. As Dr. Redlich[3] observes "it prepares the student in precisely the way which, in a country of case-law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the law cases, where the concepts, principles and rules of Anglo-American law are recorded." But it is only fair to Dr. Redlich to state that he qualified his approval of the system by recommending, in order to avoid confusion and obscurity in the mind of the student at the outset, that the use of the case-method should be preceded by a course of lectures expository of the nature of legal institutions and "the postulates, concepts and terminology of the law."

The case-method has been described as one of "conversation classes based upon the student's previous study of legal cases systematically arranged in case-books." The late Professor Dicey epigrammatically called it "catechetical teaching." Professor J. T. Hébert, in the course of a most instructive article on legal education in Canada published in the *Canadian Law Times*[4] succinctly states its essential features as follows: "The study of law by the Case-Method may be resolved into four parts: first, the study and abstracting by the students before class of reported cases; second, the discussion and criticism of these cases in class; third, the taking of notes during the discussion and the later synopsizing of these notes; and, fourth, the

[3] Carnegie Foundation: *Bulletin No. 8.*
[4] Vol. 41, p. 593.

examinations." The advocates of the system contend that in branches of the law which readily adapt themselves to this mode of teaching there is no necessity to supplement the class discussions by formal lectures. There is no doubt that a dialectic carried on between teacher and student would disclose to the mind of the latter the principle upon which any particular case is decided in a much more luminous and vivid way than by listening to an abstract statement of the same principle by a lecturer who, so long as he has the ear of his class, is content to let its understanding fend for itself. But, of course, there are lecturers and lecturers. And he is an unhappy student who has never known "the enthusiasm of the lecture-room." On the other hand there are branches of legal study outside the domain of case-law which seem to demand the lecture system as the proper one for the purpose of instruction concerning the principles which govern them. This, as we have shown, was the opinion of the Legal Education Committee of the Canadian Bar Association in 1923, and it has much support from critics of the case-method viewed as the sole mode of law school education.

CASE-BOOKS.—There is much to justify the satirical fling of the poet at the "myriad of precedent" in our system of law; and our legal history is strewn with the wrecks of overruled cases. To attempt to read the law reports in the mass would be to enter upon a course of "tumultuary reading," which Lord Coke says "doth ever make a confused memory, a troubled utterance, and an uncertain judgment." Lord Kenyon declared [5] that "the use of cases is to establish principles; if the cases decide different from the principles, I must follow the principles, not the decisions." Hale, C.J., in *King* v. *Melling*,[6] criticized an authority cited before him as "a little too rank;" and Alderson, B., in *Mearing* v. *Hellings*,[7] said of a certain precedent: "It does not convince me; it overcomes me." Lord Esher, M.R.,[8] complained of decisions "in which technical rules have been formulated which were not true—that is, were not in accordance with the facts of the case." Hence it is important that the student be not left to himself in selecting cases for study in any particular branch of the law. The average beginner would probably lose himself in the "wilderness of single instances." Added to this would be the slowness of the student's progress in knowledge. Professor Langdell was prompt to recognize these untoward facts; and when he entered upon his work as Dane Professor of Law in Har-

[5] 2 Brown's Rep. 339.
[6] 1 Ventr. 229.
[7] 14 M. & W. 7127.
[8] *In re North* (1895), 2 Q.B.D. at p. 269.

vard he prepared for the use of his students in the law of contracts—the first subject which he undertook to teach—a selection of such cases as in his opinion "had contributed in any important degree to the growth, development or establishment of any of its essential doctrines." So that while the student would have his labour of research eased for him, yet he would be compelled to discover for himself the precise *ratio decidendi* of any precedent to be found in the case-book, because he would have no reporter's headnote to assist him. In this way the student is obliged to undertake for himself, to use Dr. Redlich's words, "the analytical decomposition of the case and the distillation of the legal principle contained in it." Whether he does this successfully will be revealed in the class discussion under the guidance of a teacher who is a master of the art and technique of the case-method.

This, then, was the starting-point of the special form of literature appertaining to the case-method of legal instruction. To-day this literature has grown in the United States to a very considerable bulk. Containing, as they do, many English cases, the American case-books are not without value in the law schools of Canada; but it has been felt for some time that our schools should have case-books of their own, presenting the important cases decided in the Canadian courts interpretative of the rules of the common law as they obtain in this country. We are glad to be able to say that a promising start has already been made in this direction. The preliminary venture was made a year or so ago by Mr. John E. Read, K.C., Dean of the Dalhousie Law School, who compiled a case-book of Constitutional Law. This was followed by one on Trusts by Mr. Sidney Smith, of the staff of the Osgoode Hall Law School. Recently Mr. J. D. Falconbridge, Dean of the law school last mentioned, has brought the number of Canadian case-books up to four by compiling one on the Sale of Goods and another on the Conflict of Laws. All of these books have been issued in mimeographed form merely, so that they may be revised by their compilers should some experience in use indicate that improvements might be made in them before being printed. Hence anything in the way of an extended review of them is not in order until the public is in a position to obtain them in the usual form. Mr. Falconbridge's experience as the author of practical law-books of recognized authority would lead us to expect of him capable work in the field of legal pedagogics. We have been privileged to examine his case-book on the Conflict of Laws recently. In the logical arrangement of the work, its apt selection of precedents embodying the principles appertaining to the several branches of his

subject, coupled with the inclusion of certain statutes pertinent thereto, Mr. Falconbridge has justified our expectation. Owing to limitation of space he explains that he was obliged to omit all cases decided in the United States. Considering the essential features of this branch of law, one pauses for a moment to reflect upon the use that American decisions have confessedly been to some great English judges; but in this omission Mr. Falconbridge has the countenance of Professor Dicey, who is the second edition of his work on the Conflict of Laws felt himself justified in leaving out American cases for two reasons.—first, because such cases are comparatively little used by English lawyers, and secondly, because Beale's "Selection of Cases on the Conflict of Laws" supplies an account of every leading American case. We fancy Professor Beale's book is in every law school library in this Dominion, and we think that Mr. Falconbridge, under all the circumstances, has not impaired the usefulness of his work by the omission mentioned.

In an address recently delivered at the dedication of the Alphonso Taft Hall College of Law, University of Cincinnati, Chief Justice Taft said: "The system by which knowledge of the law comes to one through a study of original sources, known as the Case-System needs a broad educational basis." What he meant by that was that the student should come to the law school furnished with a good preliminary education. The requirements of Canadian law schools in this respect now warrant the opinion that the case-method is being taught in this country to students whose minds are sufficiently trained to receive such instruction with advantage; granted this, with the efficient teaching staffs these schools possess, the method in question must attain the very best results.

C.M.

CANADIAN BAR ASSOCIATION.—Owing to the fact that we have been obliged by circumstances not under our control to go to press early this month, it was impossible for us to give any account of the proceedings at the Annual Meeting of the Canadian Bar Association in the present number. We hope to publish a full report of the meeting next month.

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THE JUDICIAL COMMITTEE.—In moving the second reading in the House of Lords of the Judicial Committee Bill, on June 8th, the Lord Chancellor explained that the object of the Bill was to authorize the appointment of two members of the Committee with experience of Indian law. As reported by *The Times*, the Lord Chancellor observed

that the business of the Privy Council in respect of Indian appeals had increased very rapidly during the last five years. In order that the work of the Committee in hearing these appeals should be facilitated, he said that "it was absolutely necessary to have two members of the Privy Council with special experience of the diverse systems of Indian law, able and willing to give the whole of their time to judicial work when that tribunal was sitting." Continuing, he said: "Last year the Government proposed to the Government of India that two new members of the Judicial Committee should be appointed, at a salary of £4,000 a year each, one-half of which should be paid by this country and one-half by India. The Indian Legislature rejected that proposal, although he was told it was possible that a different view might be taken by them at some future time. The matter could not wait, however, and the Government now proposed that the King should have authority to appoint two Judicial Members of the Privy Council, with special Indian experience, at a remuneration of £2,000 a year. If, hereafter, India should desire to contribute a further sum to their salary, it would go to the members appointed. In the meantime, the Government thought that a remuneration of £2,000, together with such pensions as the members might have, would be sufficient. This would not interfere with the appointment of the surviving member under the Act of 1887, but as soon as he vacated his office, no further appointments would be made under that Act."

During the debate, Viscount Haldane took occasion to emphasize the importance of the Judicial Committee as one of "the real living links of Empire." He pointed out that six years ago the Committee was able to do its work sitting in one division; now it had two divisions, requiring the services of fifteen Judges. Yet they had but ten Judges on the list, and it was only by the voluntary aid of such Judges as Lord Phillimore and Lord Darling that the Committee was able to carry on.

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MORTGAGE AS A FLOATING CHARGE.—At another place in this issue the case of *Gordon Mackay & Co.* v. *J. A. Larocque Co. Ltd.*, on appeal from the decision of Fisher, J., is referred to at some length by one of our contributors.[1] The case turns upon the validity of an unregistered mortgage, purporting to create a "floating charge" on chattels, as against a Trustee in Bankruptcy. Fisher, J., in the court of first instance, had held that the instrument was in fact a chattel mortgage, and was invalid as against the Trustee for want of regis-

[1] See *post*, p. 508.

tration under the provincial law relating to chattel mortgages. It appears that Magee and Ferguson, JJ.A., agreed with him on the appeal, while Mulock, C.J.O., and Hodgins and Smith, JJ.A., held that the instrument, inasmuch as it was a "floating charge" did not come within the provisions of the Chattel Mortgage Act. Magee and Ferguson, JJ.A., considered that the question of registration depends on the form of the instrument, and that if it actually operates immediately, or on the happening of any specified event, as a transfer of the property, then the instrument is a mortgage and as such must be registered. On the other hand, if the instrument does not in any event operate as a transfer of the property, but merely creates an equitable interest by way of charge, that then it is merely a charge and does not, according to the decision of the Court in *Johnston* v. *Wade*[2] require to be registered. The majority of the Court, however, hold that the form of the instrument is wholly immaterial so far as conveyancing terms used therein are concerned, and that if it sufficiently appears from the instrument that it was intended by the parties to be a "floating charge" it must be so regarded, and, as such, it will be governed by the decision in *Johnston* v. *Wade* (*supra*).

It may be noted that the instrument in question also covered certain book debts, and that the majority of the Court on appeal held that although the instrument was exonerated from the provincial law requiring registration as a chattel mortgage, it was not exonerated from the requirements of that law as regards the book debts. With all deference we point out an inconsistency in this; for if a chattel mortgage is not a chattel mortgage if it purports to be "a floating charge," why should an assignment of book debts be held to be an "assignment" when on its face it also purports to be a "floating charge," something which, in the view of the majority of the Court, is to be registered as an instrument, *sui generis*, no matter what may be the legal terms in which it is expressed?

A reference to the case of *Brunton* v. *Electrical Engineering Corporation*[3] is useful in this connection. There the term, "floating security" is described as follows by Kekewich, J.:—"What is a floating security? I should hesitate to attempt to define it, because definitions are dangerous; but, fortunately, I have a definition already provided: I have it, in the first instance, in the case of *In re Florence Land and Public Works Company*.[4] The late Master of the Rolls, in his judgment in that case,[5] calls it 'a security'—he does not use

[2] 17 O.L.R. 372.
[3] [1892] 1 Ch. D. 434, at p. 439.
[4] 10 Ch. D. 530.
[5] 10 Ch. D. 540.

the world 'floating'—'on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course.' And further, I have a definition in the judgment of Lord Justice James in the same case, which I quote because it has been quoted in other cases. He says,[6] it is a charge on 'the assets for the time being' of the company, and does not prevent the company carrying on its business; and so it was held in the case before Mr. Justice North of *Wheatley* v. *Silkstone and Haigh Moor Coal Company*,[7] the result of the decision in that case being, it appears, that a special form has been invented to meet the difficulties which that decision gave rise to, and I have that special form before me for construction now. The form is this: 'The charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures.'"

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EXPEDITING APPEALS.—The following editorial remarks in the *Law Times* of July 24th may be regarded as a short homily upon the old saw *Festinare nocet* as related to litigation. They are full of meaning for the profession in Canada:—"Last week a probably unique application was made to the Court of Appeal to expedite an appeal from a judgment which had not then been delivered. The reason given being that it was desired to obtain the decision of the House of Lords as soon as possible, the case being one of some importance. As the application was made with the knowledge and approval of Mr. Justice Astbury, the judge who had reserved his judgment, no charge of discourtesy to that learned judge could be maintained, but the Court of Appeal rightly declined to entertain the application. Quite apart from the question as to whether the Court of Appeal would have any jurisdiction to deal with the matter before the decision of the court below had been given, an attempt to rush a case through the preliminary hearings in order to obtain a speedy determination by the highest tribunal is to be strongly deprecated. As Lord Hanworth fitly pointed out, it is the duty of each court to hear and determine cases before it with due and careful consideration, so that, if an appeal is taken, each court in sequel may be fully apprised of the reasons which have led to the previous conclusion. None of the steps should be treated as unimportant, still less as perfunctory."

[6] 10 Ch. D. 547.
[7] 29 Ch. D. 715.

THE LAW TEACHERS AND THE REVIEW.—Four of the five special articles published in the present number of the REVIEW are contributed by professional teachers of law in Canada. The Canadian Bar Association has been abundantly assisted by the professors since its inception, and the REVIEW is pleased to acknowledge the very practical support it is receiving at their hands.

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ADVANCED SCHOOL OF LAW.—The foundation of a School of Advanced Legal Studies, a matter already mentioned in the REVIEW,[1] was discussed at the third Congress of the Universities of the Empire held at Cambridge in July last. So far as we have been able to learn the discussion did not result in giving the scheme any practical shape. However, we hope to be able next month to present to our readers a report touching the matter by one of the Canadian delegates who was present at the Congress. According to press notices, the view that we have expressed that the suggested school would be a valuable link of Empire was shared by Professor J. E. G. de Montmorency. Dr. R. W. Lee, formerly of McGill University and now Professor of Roman-Dutch Law at Oxford, thought that it would be a mistake to contemplate a large undergraduate school. In that view he differs from Mr. J. D. Falconbridge, the Dean of Osgoode Hall Law School, who wrote a letter to the *Times* on the subject. Lord Justice Atkin suggested the formation of a small committee, with representatives from the Dominions, to bring forward a concrete scheme.

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FAIR EXCHANGE NO ROBBERY.—We suppose it is only fair that the literary press should take to the discussion of pure questions of law when professional publications of late show no scruple about admitting to their columns articles concerned little with law but a great deal with history and *belles-lettres*. In the *New Statesman* for July 17th, Sir Henry Slesser, K.C., presents a formal brief against the correctness of the judgment of Mr. Justice Astbury in *The National Sailor's and Firemen's Union v. Reed*[2] and of the opinion of Sir John Simon as expressed in the House of Commons in May last, concerning the legality of the General Strike. While it is not to our purpose to discuss Sir Henry's brief, we are wondering if professional ethics justifies an ex-Solicitor-General using the public press as a medium for characterizing the conclusions of a

[1] *Ante* pp. 322, 323, 328.
[2] Noted in 4 C.B. Rev. 395.

Judge, in a case where the issues were fraught with great national moment, as "based upon wholly confused and confusing reasoning?"

This much to show the prevailing invasion by literary periodicals of the domain of the law. As to the converse case, the current number of the *Juridical Review* is a sufficient example. Out of a total of one hundred and twenty-five pages, just seven and a half are allotted to an article on the "Liability of Common Carriers," while four and a half pages are found sufficient in which to treat of leading Scots cases. The remaining pages are devoted to literary and historical contributions and notices of books. Mr. Roughead's historical account of the fifth Earl of Bothwell—most interesting as it is—has no practical value to the professional reader, yet it alone comprises over forty pages of the contents of the number.

This interchange of subject-matter between the professional and lay periodicals is not mentioned here in the way of criticism, but rather to indicate the broadening of intellectual interests which is a characteristic of our time.

LEGAL AND EQUITABLE JUSTICE.—When one or other of two honest men have to suffer in consequence of the fraud of some rogue it is often a very difficult thing for a judge to say on whom the loss should fall—usually the one who has enabled the rogue to deceive the other is the one whom the law considers should bear the loss; but although that principle seems to have governed the Appellate Court in the case of *Jones* v. *Waring*,[1] we are rather inclined to prefer, as a matter of abstract justice, what we believe would be the equitable view of the matter. Lord Darling, who tried the case, gave judgment for the plaintiff and founded himself on a quotation from Romeo and Juliet—what the particular quotation was, unfortunately, does not appear in the report,[2] but according to the view of the Appellate Court, whatever it may have been, it was not considered appo-

[1] [1925] 2 K.B. 612.

[2] The case at first instance was reported in the *Times* newspaper of December 12th, 1924, as follows:—

Lord Darling:—

It seemed to him (his Lordship) that there was no consideration as between the plaintiffs and the defendants for the giving of this cheque. There was no kind of contract between them. The first submission of Mr. Hills (counsel for plaintiffs) was a simple and narrow one. It was not so deep as a well nor as wide as a church door, but it would serve—and Mr. Thorn Drury's (counsel for defendants) position was that of Mercutio:—It was fatal to him.

(Romeo and Juliet. Act 3. Scene 1.—"'Tis not so deep as a well nor as wide as a church door; but 'tis enough.")

site, and in their opinion, in the words of Mr. Gilbert, " it had nothing to do with the case."

In order that the reader may form an independent judgment in the matter it is necessary to give a short summary of the facts.

The knave in the drama was a man named Bodenham, who represented himself to the plaintiffs as the agent of a concern which he called " International Motors," which he alleged manufactured " Roma " motor cars, and which he alleged was desirous of appointing the plaintiffs its agents for the sale of its goods in certain parts of England and Wales. He also falsely averred that this concern had the defendant company or their directors " behind it." The plaintiffs agreed to accept the agency, and also agreed to buy 500 of the " Roma " cars, and gave Bodenham cheques for £5,000 as a deposit of £10 on each car. Whether there was in fact any " International Motors " or any " Roma " cars does not appear. It is rather suggested that they were mythical.

Bodenham at this time was indebted to the defendant company in £10,000 for furniture supplied; and in part discharge of his liability to them, he tendered the cheques for the £5,000, but they on their face appearing not to be signed by all necessary parties, the defendants communicated the fact to the plaintiffs, and they agreed to remedy the defect. Bodenham, from the defendants' office, and on their writing paper, wrote to the plaintiffs, returning the cheques for correction, and the plaintiffs returned one cheque for the amount duly signed and payable to the defendants. At this time the defendants, in consequence of Bodenham's default, had seized some of the furniture which he had purchased from them under a hire purchase agreement and took it as far as the railway station, but on his tendering them the £5,000 cheques they had returned these goods, and on payment of the £5,000, had sold him more goods to the amount of £3,000. There was no evidence of the value of the goods seized and returned. The Appellate Court held in these circumstances that the defendants were entitled to the whole £5,000, and that the plaintiffs were not entitled to recover any part of it.

But in England as in Canada, where law and equity conflict the latter is to prevail, and if equitable principles had been applied in this case we think the result would, or ought to have been different.

We have, first of all, the fact that the £5,000 was the plaintiff's money, out of which they had been defrauded by Bodenham.

Then we have the fact that the plaintiffs had enabled Bodenham to deal with the money as if it were his own, and that in so doing

the defendants were induced to do things and alter their position which they otherwise would not have done and for all of which the defendants were reasonably and equitably entitled to be indemnified; therefore to the value of the property seized and surrendered, and for the £3,000 of additional goods sold to Bodenham in consequence of the apparent rehabilitation of his credit, the defendants seem to be entitled to be reimbursed, but to any surplus that might remain after satisfying these claims, we fail to see that they have any equitable right to profit by the fraud of Bodenham.

Lord Darling, who tried the case, seems to have dealt with it simply on the footing that the defendants gave the plaintiffs no consideration for the cheque; but, as Scrutton, L.J., points out, a want of consideration is no ground for recovering money paid, unless there was some obligation on the part of the payee to give consideration, and here there was none. LEX.

EDITOR'S NOTE.—See a note of the case before the House of Lords, *post* p. 497.