MARGINAL NOTES

DEPARTURE OF THEIR MAJESTIES.—The visit of King George VI and his Consort Elizabeth—"the sweetest woman in all the world"—has proved nothing short of a blessing to His Majesty's subjects resident on this side of the Atlantic. It has invigorated their faith in the sanity and vitality of the system of government under which they live, the Throne being the keystone of its structure. It has endued them with fresh courage to labour for the restoration of peace and liberty in a world that has been beguiled into rendering unto Caesar more things than are Caesar's, and has far too long closed its eyes on a happy past fashioned by men who were "honoured in their generations and were the glory of their times."

As we see it, Canada's most beneficial reaction to immediacy of contact with the Crown lies in the fact that the desire for complete national unity has been tremendously fostered by the appreciation of the beauty and natural resources of the country, and the quality and achievements of its people so, generally and so generously expressed by both of Their Majesties during their tour throughout the Dominion.

It is to the everlasting honour of the French-Canadians that the enthusiastic welcome extended by them to the royal visitors when they landed in Quebec manifested a loyalty unexcelled by those of British birth or descent resident there or elsewhere in the realm of Canada. As genuine loyalty only arises in the hearts of a people who are really united both in love of country and in reverence for their political institutions, the Crown should henceforth stand as a symbol of unity between the several provinces of the Canadian federation as it does between the several units of the British Commonwealth of Nations.

The short but charming and salutary sojourn of the King and Queen amongst their Canadian people has been brought to an end, but they have not left our shores without justifying the hope in our hearts that they will come to us again in the not distant future.

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CHIEF JUSTICE'S TENURE EXTENDED.—To the great satisfaction of the Canadian Bar a special Act was passed at the last session of Parliament extending Rt. Hon. Sir Lyman Duff's tenure of office as Chief Justice of Canada for the period of three years after his attainment of the age for retirement under the provisions of The Judges' Act.

Appreciation of the great public service rendered by Sir Lyman Duff during his long judicial career was freely expressed by the members of both Houses during the passage of the special Act through Parliament. What was then said of his judicial quality and achievements was wholly in accord with what had been publicly expressed concerning them on many previous occasions. Indeed the opinion is very generally entertained that he has had no peer among the distinguished judges who have hitherto presided over the Supreme Court of Canada. In February last Sir Lyman completed thirty-five years of service on the Bench. In 1904, at the early age of thirty-nine, he was made a member of the Bench of the Supreme Court of British Columbia. Two years afterwards he was appointed a puisne judge of the Supreme Court of Canada. In the year 1933 he became Chief Justice of the Court. At the session of the Court immediately following upon his promotion he was presented with an address of congratulation by Hon. Mr. Justice Rinfret on behalf of his colleagues on the Bench. There Sir Lyman's qualifications for the high office were referred to as follows :

> It is not too much to say that no one was more worthy of the position. He is learned; he is cultured; he is broad of mind and lofty of vision. He is familiar with both official languages, the use of which is authorized before this Court, and if I may be allowed to make a special reference to my own native Province, I may say that the judges and lawyers of the Province of Quebec are pleased to regard Mr. Justice Duff as a master of Civil Law, and receive with the greatest respect his pronouncements upon cases from that Province.

To the July number of *The Empire Review* for the year 1927, the late Lord Haldane contributed an article in which he discussed the functions and practice of the Judicial Committee of the Privy Council, and also mentioned some of the "impressive personalities" who sat there in the past and some who were accustomed to sit there at the time he wrote his article. In this connection he spoke as follows :

> A distinguished Canadian jurist, Mr. Justice Duff, of the Supreme Court of Canada, comes to Downing Street by the desire of the Dominion Government, and brings great experience and an acute and highly-furnished mind to bear upon all questions during his co-operation with his colleagues here.

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MISTAKE IN THE LAW OF CONTRACT.— In *Bell et al* v. *Lever Bros. Ltd. et al.* [1932] A.C. 161, the House of Lords were concerned with mistake of fact as a ground for the avoidance

of a contract. In the course of a luminous judgment Lord Atkin expressed the view that "the law relating to the effect of mistake on the formation of contract must be regarded as having reached the apex of its development," and pointed out the desirability of "establishing order in what has been a somewhat confused and difficult branch of the law." But unfortunately, owing to some differences in relation to the facts of the case occurring between the judges who heard the appeal, the case did not contribute to the clarification of the law to the extent it might, and for that reason it has been the subject of criticism. However, an examination of the report of the case discloses that it enunciates the following principles governing mistake of fact as a ground for avoiding the fulfillment of contractual obligation. First, the mistake must be common to both parties to the contract, that is to say bilateral and not unilateral; and secondly, that the mistake must go to the 'root of the contract,' must relate to some matter affecting the substance of the transaction between the parties. The case under comment so interpreted would justify Lord Wright's observation in *Norwich Union Fire Insurance Co.* v. *W. H. Price, Ltd.* [1934] A.C. 455 at p. 463, to the effect that the Judicial Committee in that case found in *Bell* v. *Lever Bros.* "nothing tending to contradict or overrule" the principles established by earlier decisions.

Mistake as a ground for avoiding the performance of a contract presents more difficulty in adjudication when the mistake, instead of being distinctively one of law or of fact, is one where the two interpenetrate each other and disclose that the mistake of fact was induced by ignorance of legal rights or misapprehension of some rule of law relating to the subject-matter of the contract.

In *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149) the parties were mutually in ignorance of the existence of a legal right vested in one of them. It was shown that A entered into an agreement with B to lease a salmon fishery which in fact belonged to A as tenant in tail, although he did not know it. On discovering his mistake, A took action to have the agreement set aside. The House of Lords held that as the agreement for lease had been made between the parties under a mutual mistake of their respective legal rights, notwithstanding the absence of fraud on the part of the lessor the agreement should be set aside. The case derives additional importance from Lord Westbury's gloss upon the maxim "Ignorantia juris haud

excusat." At page 170 of the report as cited he speaks of the maxim as follows :

> "The word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law."

In *Eaglesfield* v. *Marquis of Londonderry*, (1876) 4 Ch. D. 693, Jessel, M.R. pointed out that many statements of fact may involve an erroneous understanding of the law, but expressed the view that such statements are not therefore to be deemed statements of law. At p. 702 he said: "The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law."

In *Denys* v. *Shuckburg*, (1840) 4 Y. and C. Ex. 42, it was held that mistake as to rights under a deed not arising out of a misconstruction of the terms of the deed itself, is a mistake in fact in respect of which relief will be granted in equity. And see *Huddersfield Banking Co.* v. *Lister*, (1895) 2 Ch. 273.

* * In respect of unilateral mistake and its effect in preventing mutuality of assent to the same thing in the same sense between the parties to the contract, the cases disclose some difference of opinion as to the right to relief by the party in error.

The general rule deducible from the authorities is that where the party seeking to enforce the contract is in no way responsible for the mistake of the other party and was unaware of it at the time the contract was entered into, specific performance will be decreed. But there are cases to be found showing a departure from this rule where, in the opinion of the court, to enforce the performance of the contract would result in hardship amounting to injustice. (Cf. per James, L.J. in *Tamplin* v. *James* (1880) 15 Ch. D. 215 at p. 221). On the other hand one whose mistake is due to a wilful lack of knowledge, or the failure to exercise such diligence as is to be expected of a reasonable and careful person, will be denied relief. *Tamplin* v. *James, supra; Van Praagh* v. *Everidge* (1902) 2 Ch. 266). Again, the courts will not avoid a contract on the ground of mistake by one party where *restitutio in integrum* cannot take place. (*Strickland* v. *Turner* (1852) 7 Exch. 208).

Dealing with the question of reality of consent in contract as affected by mistake, Buckland and McNair in their "Roman Law and Common Law" (1936) p. 160 say: "The rubric of mistake as an element in the law of formation of contract came into Roman law only rather late. In our law it seems a very late comer indeed, at least on the common law side. . . . The essence of mistake, that is to say fundamental, material mistake, the kind which precludes the formation of a contract, is that the error must be such as to negative consent. . . . Modern writers both on the Roman and on the English law are endeavouring to arrive at a solution. . . . The Roman law was, and the English law has been, content to deal rather empirically with the cases as they arose. Thus though it may be possible to enumerate the cases in the two systems in which error has been held to vitiate the contract, it is a mistake to regard these as fixed categories in either system. To a great extent they follow the same lines."

Kerr on "Fraud and Mistake" (6th ed. p. 587) characterizes the method pursued by the English courts in much the same way. We quote the following comment:

> What is the nature or degree of mistake which is relievable in equity, as distinguished from mistake which is due to negligence and therefore not relievable, cannot well be defined so as to establish a general rule, and must, in a great measure, depend on the discretion of the Court under all the circumstances of the case. Though the Court will relieve against mistake, it will not assist a man whose condition is attributable only to that want of due diligence which may fairly be expected from a reasonable person.

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COKE AND HIS PERFECT DAY.—Sir Edward Coke's scholarship has been attacked and his authority as an expounder of legal history seriously impugned by modern critics, yet he enjoys imperishable fame as the founder of modern English law. Without him our law would have cut but a small figure in an age when the English mind opened its wings to the bold winds of the Renaissance, and the national spirit of England learned somewhat of its freedom from the Reformation.

We were prompted to speak of him at the moment by casually turning over the pages of a work where his counsel for a well-spent day swims into the reader's ken:

> Sex horas somno totidem des legibus aequis,
> Quatuor orabis, des epulisque duas;
> Quod superest ultra sacris largire Camoenis.

His lines are not wholly original, but whether he sings in a manner that would have made Quintilian stare and gasp is beyond our question here. It is the essence and not the embodiment of his counsel that gives us pause. We are loath to think that a nap of six hours in twenty-four is sufficient ease from the fardels that Chief Justices of Coke's type are called upon to bear. (In saying this we are not unmindful of the legend that Lord Reading never needed more than five hour's sleep). Nor do we believe that a busy layman should have been adjured to pray four hours per diem even in the religious storm and stress of Tudor and Stuart times. Then, again, two hours were more than scant to allot to the daily consumption of meat and drink in the spacious days of good Queen Bess, when the expert swordsman was tireless in his exploits with the knife of the trencherman. And so we have to regard the lines quoted above as Sir Edward Coke's contribution to the list of precepts that are more honoured in the breach than in observance.

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