provinces, by the implications of the recent judgment of the Privy Council.

We may note, as a matter of interest, that the Legislature of Alberta has recently enacted (R. S. A. 1922, ch. 144) that the University of that province shall be the ultimate heir and next of kin of persons dying intestate in fact in respect of lands situate in the province, and of persons dying, domiciled in Alberta, intestate in respect of any moveable property or chose in action, provided no person or corporation is otherwise entitled to such property as heir or next of kin.

A. HAYWORTH.

Regina, Sask.

CANADIAN LAW BOOKS WRITTEN IN ENGLAND.

A very interesting article from the pen of J. E. G. de Montmorency, under the title of "An Imperial School of Law," appeared in the *Contemporary Review* for November, 1923, from which the writer has taken the following brief extract:—"Lord Russell of Killowen, in 1900, advocated the creation of a school or centre in London, where the Colonial laws could be taught and studied. That proposal met with no response, though it might have been anticipated that the Imperial Institute was a suitable centre for the teaching of laws that so vitally affect the economic unity of the Empire. Many things have happened since 1900, and to-day it is realized that the Empire is a unity, and that such a unity is something more than a sentimental attachment from various quarters, to the Mother Country and to an ancient dynasty. * * * At such a time, the great conception of Lord Russell of Killowen may well take practical shape. At the end of the nineteenth century, it was perhaps hardly practical to create and equip a central school of law, but the conception of such a school was a great one, and the time has come for it to take visible shape."

The resurrection of this proposal has brought to my mind one class of persons who would undoubtedly be benefited by the establishment of such a school. I refer to members of the English Bar who undertake to write books on the subject of "Colonial Law." In most of the English text-books in which an attempt has been made to deal with Canadian Law, this has been done by way of additions at the end of each chapter, with separate indexes and lists of cases. These have been prepared by members of the Canadian Bar, and bound up

with the original work. This course was adopted, amongst others, in the case of "Clerk and Lindsell's Law of Torts," the fourth edition of which was edited by Mr. Wyatt Paine of the London Bar, in 1906. In 1908 a special edition was issued, with Canadian notes on the decisions and Statutes of the English-speaking Provinces of the Dominion, by A. T. Hunter, LL.B., of Toronto. In his "Introduction to Canadian Notes," Mr. Hunter says:—"The general principles of the law are, as might be expected, the same in the English-speaking Provinces of Canada as in England. It is, however, not easy for the Canadian lawyer to be sure that the same general principle has been applied in any particular instance on this side, as on the other side of the Atlantic. It will not require much research to discover that there are considerable variations between the law as laid down by English and by Canadian Judges, and that the decisions of both are much affected by differing statutory conditions. The system of adding notes to the end of each chapter has, of course, its disadvantages, but is the system that best avoids the confusion of the English notes with the Canadian."

In 1914, Mr. Paine edited the 16th edition of "Chitty on Contracts," but instead of following the previous practice, he issued a companion volume, under the name of "Canadian Law of Contracts." The full title of the book is "A Commentary on the Canadian Law of Simple Contracts, with additional chapters on the Rules governing Canadian appeals to the Judicial Committee of the Privy Council and the Supreme Court of Canada." One does not see the connection between the "additional chapters" and the subject matter of the book, but Mr. Paine states in his preface that they "have been prepared with considerable care, and it is believed will be found accurate and reliable." The learned author has not actually limited his work to Simple Contracts, but has undertaken to discuss all kinds of contracts, including those under seal, so the writer feels justified, in dealing with his book, to treat it as a general work on contracts. Lest it should be said that there is a literary Statute of Limitations, which precludes the review of a book 10 years after it is published, it may be answered that one could not possibly get to know a book of this peculiar kind all at once, but must wait for the knowledge of it acquired by experience, which can be obtained only after numerous examinations of it from time to time, as the needs of a practising lawyer arise. It may be, too, that what Hazlitt said about books in general, lends some support to our present enterprise, namely, that any book we have not read, one that we are not familiar with, is a new book to us.

If, however, actual precedents in the world of letters for such a belated review, should be sought for, they may be found in the "Nineteenth Century" for February, 1924, which contains a scathing criticism of Trollope's "Orley Farm," by Sir Francis Newbolt, K.C., under the title of "Reg. v. Mason," and in the January and February numbers of the American "Bookman," which respectively contain a criticism of Dickens' "Tale of Two Cities" by Burton Roscoe, and a review of Hawthorne's "Scarlet Letter" by Llewellyn Jones.

I have seen only three reviews of the book, but probably there have been others. The *Law Quarterly Review* deals with it in the following curt manner:—"The Canadian Law of Simple Contracts. By W. Wyatt Paine, Toronto: Carswell & Co., Lim.; London: Sweet & Maxwell, Lim. 1914. La. 8vo. xxxvi and 462 pp. (30s. net).—Intended as a Canadian supplement to Chitty on Contracts, and made up to the same size by reprinting statutes at full length in the text. The law peculiar to the Province of Quebec is not included." The *Law Magazine and Review* (since deceased), deals more generously with the author and his work, even at the expense of our native talent, as follows:—"To those unacquainted with Canadian legal literature, it will no doubt appear strange to find a work of this description written by an English practising barrister. It appears, however, that not only are there few legal text-books by Canadian lawyers in existence, but such as do exist are usually of inferior merit and not kept up to date. Thus the way was clear for a treatise dealing scientifically and exhaustively on the Canadian Law of Simple Contract, upon the lines and conforming to the high standard of excellence attained by the leading English text-books." The *Canadian Law Times,* which was then published by The Carswell Co., Ltd., who were also the Canadian publishers of Mr. Paine's book, contained the following laudatory remarks, in volume 34 at page 495:—"This very valuable companion work to 'Chitty on Contracts' by the same author, will undoubtedly be greatly appreciated by the members of the Canadian Bar, as the volume relates to that form of contract which is of most common occurrence in the business world, and upon which the advice of a solicitor is most commonly sought. Dealing as the volume does, with the subject from a purely Canadian standpoint, being the first of its kind in Canada, and giving the decisions on the various points at issue, as laid down by the Privy Council, the book will undoubtedly be greatly in demand by the profession, and not only will it save a great deal of labour, but it presents the law in a succinct form free from all verbiage."

This latter seemed so eulogistic that the writer inquired from

Mr. A. H. F. Lefroy, K.C., a member of the English Bar, who was then the Editor of the *Canadian Law Times,* as to whether he had examined the book sufficiently to enable him to speak so pronouncedly about it. He replied as follows:—"You should treat what I say about Mr. Paine's book in the C. L. T. rather as a notice than as a review. It would be impossible for me to apply to a book of that size, as a review, the critical examination which you give it in your correspondence with the Carswell Company. If you read my notice again, you will see that it is pretty carefully worded, and states from the preface what the object of the author has been, rather than guarantees in any way how he fulfils his purposes in it."

I shall now attempt to deal with the principal omissions, so far as the Dominion and Ontario laws are concerned, which 10 years' use of Mr. Paine's book has brought to my notice. In doing so, I shall not attempt to deal with cases where the decisions of the Canadian Courts here have been simply illustrations of the law as already laid down in England, nor with cases on minor points due only to differences of viewpoint. I might mention here that the decisions referred to in Mr. Paine's book are not by any means confined to Canadian ones, and English decisions are frequently cited in support of statements of law, while Canadian decisions on the same lines are omitted. Neither shall I discuss any of the differences of opinion which have arisen between the English and Canadian Courts since 1914, with regard to the law of contracts, nor the statutory changes which have taken place since that time, but one may expect that these will all be duly noted in the second edition of Mr. Paine's book.

Mr. Paine's first serious oversight occurs with regard to a section which was enacted in Ontario in 1885, as an amendment to The Judicature Act, but which was transferred in 1911, to The Mercantile Law Amendment Act, and which is as follows:—

"Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

I cannot state the effect of this section more concisely than is done by Messrs. Holmested & Langton, in the third edition of their annotations to the Judicature Act:—

"This clause changes the law as settled by the decision of the House of Lords in *Foakes* v. *Beer,* 9 App. 605. Since the old case of *Cumber* v. *Wane,* 1 Str. 426, it had been held that a debtor being under a legal obligation to pay the whole of his creditor's demand, an agreement upon payment of part to discharge the whole was nudum

pactum, unless there was some new consideration. Many subsequent cases exemplified circumstances under which *Cumber* v. *Wane* might be distinguished, such as where some dispute existed as to the exact amount due, or the money was to be paid in advance, or there was the acceptance of some new consideration however slight, or a negotiable instrument was given for the smaller sum: 1 Smith, L. C., 10th ed., 325; *Bidder* v. *Bridges,* 37 Ch. D. 406. In *Foakes* v. *Beer,* the House of Lords was asked to overrule *Cumber* v. *Wane,* but held that legislation was requisite for that purpose, the doctrine of that case having been part of the law of England for 280 years."

I am not aware whether any such legislation has since been adopted in any of the other Dominions or Provinces, but in any case, no book professing to deal with the Canadian Law of Simple Contracts should have overlooked or ignored such an important change in the law.

Section 56 of the English Bills of Exchange Act, 1882, reads as follows:—"Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of the endorser to a holder in due course." It had been held by the House of Lords in *Steele* v. *McKinlay,* 5 App. Cas. 754, that a person who had put his name on the back of a bill was not liable on the bill to the drawer, and it is said that this section of the Imperial Act was framed in accordance with the doctrine laid down in that case. In 1890, the above Act was adopted in Canada, but the following words were added to section 56:—"and is subject to all the provisions of this Act respecting endorsers." This amendment was held by the Supreme Court of Canada, in *Robinson* v. *Mann,*[1] to have effected a radical change in the law, and to have rendered a person who endorsed a bill or note, which had not been endorsed by the payee, liable to the latter. This decision has since been followed in several cases in the Provincial Courts and also by the Supreme Court of Canada in the recent case of *Grant* v. *Scott.*[2] Mr. Paine quotes the Canadian Act in full in his book, including the above amendment, and refers to a Manitoba case decided in 1910, under this section, which has now become section 133 of the latter Act. It was held in that case that the directors of a company endorsing a note made by the company, were liable therefor, but his only reference to the Supreme Court decision is:—"See also *Robinson* v. *Mann,* (1901) XXXI. S. C. R. 484." I do not think that any reader would learn from this of the present difference between the law here and in England in this respect.

As I have pointed out above, Mr. Paine's book deals with contracts

[1] (1901) 31 S. C. R. 484.
[2] (1920) 59 S. C. R. 227.

under seal as well as with simple contracts, so I consider that he should have discussed an important decision of the Ontario Court of Appeal in the case of *Nelson Coke and Gas Company* v. *Pellat.*[3] In that case it was held, reversing the judgment of Lount, J.,[4] that the defendant's undertaking to accept shares in the plaintiff company, when issued and allotted, was not revocable, because it was by deed, and was delivered to an agent of the company. This decision has been followed in the Ontario Courts in *Re Provincial Grocers,*[5] *Canadian Druggists* v. *Thompson,*[6] *Port Hope* v. *Cavanagh,*[7] and *Gowganda Mines* v. *Smith.*[8] I have not been able to find any similar decision in the English Courts, nor any statement in any English text-book, distinguishing between such an application under seal and one not under seal, as regards the right of the applicant to withdraw before acceptance.

There is an important series of decisions of our Courts, including the Supreme Court of Canada, distinguishing between gratuitous services and implied contracts for payment of wages, where one relative has worked for another under an unenforceable agreement to provide for the former by will. The following cases have been reported, but none of them are to be found in Mr. Paine's book:—*Peckham* v. *Depotty,*[9] *McGugan* v. *Smith,*[10] *Murdoch* v. *West,*[11] *Walker* v. *Boughner,*[12] *Cross* v. *Cleary,*[13] *Wakefield* v. *Laird,*[14] *Mooney* v. *Grant,*[15] *Bradley* v. *Bradley,*[16] *Smith* v. *Hopper,*[17] and *Johnston* v. *Brown.*[18] These cases do not purport to be based on any English decisions, and they carry the principle a good deal further than any English authorities had done. In the decision lastly above mentioned, Mr. Justice Riddell says:—"I have read the cases cited by counsel and those mentioned in *Walker* v. *Boughner,*[19] 15 Am. and Eng. Encyc. of Law, 2nd ed., p. 1079, and many others, and I nowhere else find the law more accurately stated than by the former Chief Justice of the Queen's Bench in *Walker* v. *Boughner,* thus:—'Where a party renders services to another in

[3] (1902) 4 O. L. R. 481.
[4] 2 O. L. R. 390.
[5] 10 O. L. R. 705.
[6] 24 O. L R. 108.
[7] 8 O. W. R. 987.
[8] 16 O. W. R. 709.
[9] 17 Ont. A. R. 273.
[10] 21 S. C. R. 263.
[11] 24 S. C. R. 305.
[12] 18 O. R 448.
[13] 29 O. R. 542.
[14] 2 O. W. R. 1093.
[15] 6 O. L. R. 521.
[16] 10 O. L. R. 525.
[17] 3 O. W. N. 1039.
[18] 13 O. W. R. 1212.
[19] 18 O. R. 448, at page 457.

the expectation of a legacy and in sole reliance on the testator's generosity, without any contract, express or implied, that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies; but where from the circumstances of the case it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services.' I do not think it helpful to discuss the cases such as *Osborn* v. *Governors of Guy's Hospital,*[20] *Baxter* v. *Gray,*[21] and the like, having in the cases in our own Court, the law so happily and accurately expressed."

Finally, I shall deal with the decisions on the vexed question of the "substantial performance" of building contracts. This doctrine has been frankly adopted in the American Courts, and it has obviated the necessity for a lot of the old fine-drawn distinctions: See an article by F. C. McKinney of the New York Bar, in volume 32 *Canadian Law Times,* page 441. The following quotation from "Addison on Contracts," which appeared at least as long ago as the 8th edition (1885) and which was repeated in the 11th edition (1911), pages 880-1, shows that it had even at that time made considerable progress in England:—

"When a contract has been entered into for the building of a house for a certain sum of money, to be paid on the completion of the building, in accordance with certain plans and specifications, it is not essential to the maintenance of an action upon the contract, that there should be an exact performance of the contract in every minute particular; for, wherever divers acts and things of different degrees of importance are to be done on one side in return for a stipulated remuneration on the other, the performance of all the things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it, the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract. In every contract for work there is a condition implied by law that the work shall be done in a proper and workmanlike manner, but this is not a condition going to the essence of the contract."

In 1899 the Ontario Court of Appeal decided the case of *Sherlock* v. *Powell.*[22] In that action, the doctrine of "substantial perform-

[20] 2 Str. 728,
[21] 3 M. & Gr. 771.
[22] 26 A. R. 407.

ance," which had been discussed in previous cases in Ontario, was pressed by the plaintiff, but without success. The head note of the case is as follows:—

"Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts equal to eighty per cent. of this fixed sum, as the work is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed, there is no right to recover for the portion done as upon a quantum meruit." This decision was followed in 1909 in *Cole* v. *Smith*,[23] and in 1911 in *Simpson* v. *Rubeck*.[24] In the latter case Meredith, C.J., delivering the judgment of the Court said:—"The doctrine that Mr. Plaxton has attempted, by his argument, to set up again of substantial performance, as far as this Court is concerned, is concluded by the decision in *Sherlock* v. Powell."[25] Mr. Paine's book contains no reference to any of these three cases, but the edition of "Chitty on Contracts" above referred to contains the following statement of the law, at page 771:—

"We have seen, however, that although a partial remuneration for the part performance of an entire contract cannot, in general, be recovered, yet a claim may sometimes arise upon a quantum meruit, by reason of the party who is to make the payment accepting and retaining the benefit of the partial performance, after the time for completing the contract has elapsed."

In 1915 the question again came before the Ontario Appellate Division, in the case of *Deldo* v. *Gough*.[26] That decision distinguished the decision in *Sherlock* v. *Powell*, and applied the decision in *Terry* v. *Duntze*,[27] in which it was held that where, by the terms of the contract, two several sums of money were to be paid before the work was completed, the plaintiffs were clearly entitled to succeed in an action for the whole price, without averring performance, leaving the defendant to his remedy on the covenants. A somewhat similar distinction was also laid down in the English Courts in 1915, in *Dakin* v. *Lee*.[28] See also *Mackay* v. *Seigel*,[29] and *Lichty* v. *Erb*[30] in the Ontario Courts.

Ottawa. M. J. GORMAN.

[23] 13 O. W. R. 774.
[24] 3 O. W. N. 577.
[25] 26 A. R. 407.
[26] 34 O. L. R. 274.
[27] (1795) 2 H. Bl. 389.
[28] 84 L. J. K. B. 894; affirmed page 2031.
[29] 25 O. W. N. 673.
[30] 24 O. W. N. 218. Affirmed 26 O. W. N. 154.