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CONFLICT OF CONTROL OF CORPORATIONS.

Centralization is the modern trend of affairs. In the United States the centralization of business in huge corporations is being followed by the same course in affairs of government. The Federal government is encroaching constantly on the jurisdiction of the states. This is being accomplished on the one hand by Congress, supported by the Supreme Court, and on the other by an aggressive executive.

At the outset the Federal government, in order to support its natural dignity and to detract from the importance of the government of the several states in the eyes of their respective citizens, followed the course of maintaining its own dignity to the utmost and insisting on a rigid enforcement of its laws. Federal aggression was slow at first. Its own place must be made. The civil war and the period of reconstruction in the South which followed, gave the opportunity which was seized and improved upon. The universal tendency of officials of all classes to magnify their positions for the purpose of magnifying themselves was evident amongst the Federal office-holders. The distant authority, the national embodiment, raised the Federal officials above those of the state and the persistence of the Federal government in maintaining its authority belittled the concurrent authority of the state. A very striking instance is shewn in the State of Maine where prohibition prevails and even the most disreputable drinking places are licensed under Federal law. The state law may be openly defied but not the Federal. No doubt in many states the local law is upheld with vigour, but in many it is not so. This weakness of the states which was caused by Federal aggression is again sized up for further aggression.

In a speech made at Harrisburg, October 4, 1906, President Roosevelt said: "In some cases this governmental action must

be exercised by the several states individually. In yet others it has become increasingly evident that no efficient state action is possible, and that we need, through executive action, through legislation and through judicial interpretation and construction of law, to increase the power of the Federal government. If we fail thus to increase it, we shew our impotence."

Mr. Root, on December 12, 1906, at New York, remarked upon the gradual passing of control into the hands of the national government and stated that there were other projects tending more and more to obliterate state lines, and that it may be that such control would better be exercised in particular instances by the government of the states, but the people will have the control they need either from the states or from the national government, and if the states fail to furnish it in due measure, sooner or later constructions of the constitution will be found to vest the power where it will be exercised—in the national government.

The clauses of the constitution relating to interstate commerce have been construed out of their original meaning to give supreme authority to Congress in matters not contemplated by the fathers of the constitution. This construction was first asserted in the *Lottery Case* (1903) 188 U.S. 321, arising out of the enforcement of the statute of 1895, which made it illegal to transport lottery tickets from one state to another. The statute was passed to cover police regulations where the states were too corrupt or too weak to preserve their own law and order. It has been extended by the pure food laws and seems to have exhausted itself in the statute regulating the liability of employers of labour on interstate railways which was declared unconstitutional.

In the recent message of the President to Congress of March 24, 1908, he recommends the measure again, subject to the changes required to bring it within the constitution. The limit to which it may go is indicated in a letter of April 2, 1907, from Judge Edward H. Farrer, of New Orleans, to the President, wherein he shewed that a complete control of the railway sys-

tem of the United States could be accomplished by a construction of a clause of the constitution which gives to Congress power to establish post offices and post roads. A corporation or commission could be created to acquire railroads, the modern post roads, and to lease them on terms to operating corporations. Thus the Federal government could obtain complete control of all the railway systems of the United States and subject them to such regulations as the executive might see fit. It is unnecessary to comment upon the power which could, in this way, be given to the Federal government. How such measures would be brought about and carried into effect may be gathered from the following criticism of a United States district judge in the President's message of December, 1906: "I have specifically in view a recent decision of a district judge, leaving railway employers without a remedy for violation of a certain so-called labour statute. It seems an absurdity to permit a single district judge against what may be the judgment of an immense majority of his colleagues on the bench to declare a law solemnly enacted by the Congress to be unconstitutional."

In January, 1907, there was introduced into the House of Representatives a bill which provides "that whenever in his judgment the public welfare will be promoted by the retirement of any judge of the United States, the President shall, by and with the advice and consent of the Senate, nominate and appoint a suitable person possessing the qualifications required by law to the office to be vacated by such retirement . . . The reason for retirements hereunder shall be stated in making nominations." It appears that the Supreme Court, which has world-wide respect, is in the glamour of centralization and imperialism. What can be the meaning of the statements of the President and his chief secretary that if the people desire it a construction of the constitution will be procured to meet their views? The sapping of local control leads to weakness in individual action. Centralization can never add to liberty. Bureaucracy and the constant turning for government support detract from rugged self reliance.

The question of centralization must be dealt with by Canadian statesmen. Our circumstances are very similar to those of the United States. Our Federal system was largely adopted from that of our neighbours.

The limitations of the Federal and Provincial jurisdictions have been before the Judicial Committee of the Privy Council in many cases: *L'Union St. Jacques* v. *Belisle* (1874) L.R. 6 P.C. 31; *Dow* v. *Black* (1875) 6 P.C. 272; *Cushing* v. *Dupuy* (1880) 5 A.C. 409; *Citizens* v. *Parsons* (1881) 7 A.C. 96; *Russell* v. *Regina* (1882) 7 A.C. 829; *Hodge's Case* (1883) 9 A.C. 117; *Lambe's Case* (1887) 12 A.C. 575; *Tennant* v. *Union Bank* (1894) A.C. 31; *Voluntary Assignment Case* (1894) A.C. 189; *Local Prohibition Case* (1896) A.C. 348; *Brewers' License Case* (1897) A.C. 231; *Fisheries Case* (1898) A.C. 700; *Union Colliery* v. *Bryden* (1899) A.C. 580; *Manitoba Liquor License Act Case* (1902) A.C. 73.

The final determination of these cases was made without regard to views of centralization or localism. The Judicial Committee is not swayed by aggression and we are preserved from the result of influences which seem to be prevalent in the United States.

A similar question of far-reaching importance was recently before the Supreme Court of Canada in *Canadian Pacific Railway* v. *Ottawa Fire Insurance Co.* (1908) 39 Can. S.C.R. 405. Four questions were propounded by the Court as follows:

"1. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

"2. Can an insurance company incorporated by letters patent issued under the authority of a Provincial Act, carry on extra-provincial or universal insurance business, i.e., make contracts and insure property outside of the province, or make contracts within to insure property situate beyond?

"3. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

"4. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

Mr. Justice Girouard declined under the circumstances to pass upon them. The opinions of a majority, Idington, Duff and Maclennan, JJ., were in favour of the provinces on the first two questions, and the Chief Justice and Sir Louis Davies contra. No opinion appears to have been expressed on the third question. On the fourth no opinion was expressed by the majority, although the minority opinion was that the Dominion Parliament has no jurisdiction over insurance companies incorporated under provincial law.

The question of the creation and control of corporations does not appear to be disposed of. It is rumoured that similar questions are to be submitted to the Supreme Court of Canada by Order in Council. The first question is raised in the *York County Loan Case*, now pending before the Ontario High Court of Justice. The attitude of the Province of Ontario may be gathered from the statute of Edward VII., which nullifies contracts made by municipalities with corporations declared to be for the general advantage of Canada or not under the control of the Provincial Legislature unless approved of by order of the Lieutenant-Governor in Council and that of the Dominion Parliament in the bill respecting co-operation, referred to hereafter, now before the Senate, having passed the House.

No doubt, by the process of litigation and final decisions of the Judicial Committee of the Privy Council, some definite settlement of these questions may be procured at the expense of private litigants, the Federal government and the provinces. This would be after the delay, uncertainty and the conflict which must be waged upon it. Notwithstanding the recent criticism in our public press of the Judicial Committee of the Privy Council, it is well for the Dominion and its provinces that there is such a body to stand between centralization and localism. Although this is so there appears to be no good reason why all these questions should not be arranged by conferences of the

Dominion and the provinces and disposed of by an amendment of the British North America Act.

Both the provinces and the Dominion must make concessions and recede from their present attitude. On the one hand the Dominion should not unnecessarily declare undertakings to be for the general advantage of Canada or authorize companies to carry on business through Canada and elsewhere, and on the other, the provinces should not restrict Dominion corporations which are clearly within Dominion authority.

The largest question at present to be disposed of is that of rates of public utility companies. Such companies are first such as carry on business in more than one province. The right to incorporate and control them need not be discussed. This can be done only by the Federal Government. There is no means by which the Province of Ontario can control a freight rate from Toronto to Halifax. The provinces must concede very much which may, unquestionably, be within their jurisdiction in respect to such undertakings. An electric railway incorporated by a province and in many respects a purely local concern may exchange traffic with a railway which is without doubt beyond provincial control. For the advantage which would be gained by the people of the provinces in fixing rates, a large measure of control should be given to the Federal government. There are phases of control such as indicated which can be disposed to greater advantage to the public by Federal law, and there are others which, for what may be called Dominion undertakings, may be more readily disposed of by the provinces. Let it be conceded that in some respects and for some purposes provincial undertakings are better under Dominion supervision, and in others Dominion undertakings better under that of the provinces. The limits of concession on either hand may be readily determined when the principle of the decision of control is decided upon. Whether a railway runs to the frontier or whether it crosses a railway declared to be for the general advantage of Canada, should not decide the question. It is whether the undertaking is in its workings a part of one for the general advantage of Canada.

Public utility companies of the minor class wholly within the province should be subject to provincial control alone. What they are is a question of the general construction of their objects. The construction and operation of an electric railroad from Toronto to Hamilton or from Toronto to Newmarket may be without doubt for the general advantage of Canada, because on its line freight may be consigned to any place in another province. But it is difficult to see how a power line from Toronto to Niagara Falls can by any method of construction be held to be for the general advantage of Canada. By no possible means can it affect the interests of the inhabitants of another province, and it is difficult to see that because this line may transmit power to the State of New York it is so. For the purpose of control, electricity is a commodity of commerce and the product of the power plant could be treated as any other commodity. The limit of absurdity appears to have been reached when promoters suggested that the right to transmit power from Isle Royal should be included in the objects of a local concern at Port Arthur in order that the undertaking might be declared to be for the general advantage of Canada.

Similar disorder obtains in the creation and control of private corporations. In the case above referred to it was contended on behalf of the Minister of Justice that section 92(11) of the British North America Act, "The incorporation of companies with provincial objects," limited the objects of provincially incorporated companies to the incorporating province. Sir Louis Davies in his judgment does not go this far. At page 431, he says:—"It by no means follows from this, however, that everything the company does beyond the area of the province within which it is limited to do business in furtherance of or ancilliary or incidental to its main objects or purposes is necessarily ultra vires," and he instances a manufacturing company which may go beyond the province to purchase its raw material or machinery. It would be a most difficult question to determine in many cases what is the main and what are incidental objects. A judgment of the Court would, in many cases, be necessary. For

instance, one of the largest mercantile companies in Ontario has for its objects the following only:—"To manufacture, buy, sell and deal in goods, wares and merchandise." The manufacturing, buying and selling are main objects. If manufacturing is to be considered its chief main object, then, in the opinion of Sir Louis Davies, it may sell out of the province. If selling is its main object, then it may buy out of the province. Who can determine which may be ultra vires outside the province? The result of the judgment, however, is that a provincial company may do business out of the province. Idington and Maclennan, JJ., judgments are definite upon the question, but that of Duff, J., may be said to be limited to the subject in question in the case, and the greater question is not disposed of.

A short statement of the positions of the Dominion and the provinces may be of interest. The Dominion has no express authority in section 92 to incorporate commercial companies. It is construed within the "peace, order and good government" clause. (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 7 A.C. 96.) Apparently there is no discrimination in the classes of companies incorporated under the Dominion Act. The following are examples taken from *Canada Gazette*:—The Edmonton Cemetery Company, June 19, 1886; The Country Club, Limited, April 4, 1903; The Deseronto News Company, Limited, September 24, 1883; The publication of a newspaper or newspapers at the Village of Deseronto; The Hawkesbury Electric Light and Power Co., August 4, 1904; Lennoxville Waterworks Co., February 14, 1900; The Corona Hotel Co., August 7, 1902, and the Montreal Star Publishing Co., April 23, 1904.

However, in order to give an apparent reason for incorporation under the Dominion Act such companies are authorized "to carry on business throughout the Dominion of Canada and elsewhere."

The Companies Act, Canada, R.S.C. c. 79, s. 17, provides, "that any company incorporated under any general or special Act of any of the provinces of Canada . . . for any of the

purposes of objects for which letters patent may be issued under this Part and being at the time of application a subsisting and valid corporation, may apply for letters patent under this Part, and the Secretary of State . . . may issue letters patent incorporating the shareholders of the company so applying as a company under the Part, etc." The Insurance Act, R.S.O. c. 34, s. 4(3), provides similarly for the provincially incorporated insurance companies. In the judgment of Sir Louis Davies in *Canadian Pacific Railway v. Ottawa Fire Insurance Co.*, supra, these sections are inoperative.

The attitude of the Dominion, as indicated by Bill No. 5, an Act respecting Co-operation, now before the Senate of the Dominion of Canada having passed the House of Commons, should be considered. The following are some extracts from the Bill: The preamble, "Whereas it is desirable to provide for the creation and organization of industrial and co-operative societies among the farming and labouring classes of Canada."

The first clause of section 3: "A society which may be incorporated under this Act is a society for carrying on any industries, businesses or trades (except banking, as defined by the Bank Act, life or fire insurance) so specified in or authorized by its rules, whether wholesale or retail, including dealings of any description with land."

Section 8, sub-section 2: "A society carrying on the business of credit and savings shall not operate outside of the electoral division where it has its head office; provided, however, that when a co-operative society is organized in a city composed of more than one electoral division the minister may, in the acknowledgment of organization referred to in sub-section 5 or section 4 of this Act, or by a subsequent notice to be published in the *Canada Gazette*, authorize the society to operate beyond the limits of the electorial division where it has its head office, within the limits of the said city."

It is therefore apparent from the Bill that it provides for the creation of corporations, whether known as societies, associations or companies for the carrying on of industrial and mer-

cantile businesses or trades, and the operations of these corporations are to be confined to limited localities, not only of the various provinces, but also of the various counties of the provinces, and it must therefore be concluded that such corporations are local, provincial and private. The operation of this Bill must, undoubtedly, encroach upon the exclusive jurisdiction of the provinces, conferred by the British North America Act, section 92 (11) (16).

In the factums, argument and judgment in *Canada Pacific Railway Company* v. *Ottawa Fire Insurance Company*, it is nowhere suggested that the provinces have not the exclusive right to incorporate such companies. The Chief Justice, Sir Charles Kirkpatrick, in his judgment, at page 414, summed up the opinions of several Ministers of Justice reporting upon Acts of the Provincial Legislatures, in the following words:—"A careful examination of the reports made by the Ministers of Justice since Confederation shews that the unanimous opinion held, and many times expressed by them, was that a Provincial Legislature has no power to create a company with authority to do business outside of the limits of the incorporating provinces."

The converse of the above statement of the Chief Justice must be held as flowing from the statement of opinion made, namely, that the province has authority to create a company to do business inside the limits of the incorporating provinces, and, if this be so, the Federal Government has no jurisdiction to create such a company, the jurisdiction of the provinces being exclusive.

Sir Louis Davies in his judgment, at page 429, said: "If therefore my conclusion as to the meaning of the limitation "provincial objects" is correct, if the legislature could only incorporate companies to do insurance business within the province, it seems to me to follow as a consequence that any contract made by them insuring property out of the province was wholly void."

It is evident that the exclusive jurisdiction of the provinces will be invaded by the operations of the Bill, and the recent dis-

cussion of the subject make. it evident that the invasion is deliberate.

On the other hand the provinces similarly make no discrimination in such incorporations. The pretext set up by the provinces is as transparent as that of the Dominion. While companies incorporated under the Dominion Act are authorized to carry on business throughout Canada and elsewhere companies incorporated under the Provincial Act are not limited with respect to the place where their business may be carried on and consequently such business may be carried on in any jurisdiction subject to local laws. Moreover, there is no reciprocity between the Dominion and the provinces, and it has happened many times that companies have been incorporated under the Dominion and Provincial Acts with identical names.

The attitude of the Dominion and the provinces with respect to licenses to extra-provincial companies to do business within the province deserves consideration.

The Ontario statutes are most familiar to the writer, and a discussion of them may illustrate what has happened or is happening in the other provinces. The Ontario Act respecting the licensing of extra-provincial companies, 63 Vict. c. 24, expects certain classes of companies; those within the Loan Corporations Act, the Insurance Act and the Supplementary Revenue Act, and companies incorporated under the laws of the Province of Upper Canada, and companies not having gain for their object, and companies incorporated under the laws of the provinces of Canada not having their head office and doing business in Ontario at the time of passing of the Act. Companies incorporated under Dominion Acts and all other companies must take out licenses under the Act before doing business in Ontario. In cases of such companies incorporated under the laws of the provinces of Canada and of the Dominion there is no discretion in withholding the license, but there is such a discretion in the cases of other companies.

The despatches which passed between the Governments of Canada and Ontario may serve to shew their attitude on the subject: —

Extracts from a proposed report of the Minister of Justice submitted as a statement of objections to the Premier of Ontario (Hodgins, 1899-1900, page 14):—"It has been the policy of the Parliament and Government of Canada for many years, to incorporate companies for the purpose of doing business throughout the Dominion or in two or more provinces thereof, not only as to matters relating strictly to the enumerated subjects of Dominion jurisdiction, but also as to those matters which, if limited to the territory of any one province, would be within the exclusive legislative authority of that province. This jurisdiction in the Dominion arises, in the opinion of the undersigned, not only under the general authority of the Dominion relating to the peace, order and good government of Canada, but also as affecting the regulation of trade and commerce, a subject specially assigned to the exclusive legislative authority of Canada."

Page 16:—"For the foregoing reasons, the undersigned considers that this Act ought not to be allowed to remain as it stands, and he hopes that the Provincial Government, upon the matter being called to its attention, will promote legislation to amend the Act so as to repeal those provisions which require Dominion corporations and those of old Canada to procure provincial licenses and forbid them from doing business otherwise."

Page 23:—Letter from Hon. David Mills, Minister of Justice, to Hon. G. W. Ross, M.P.P., dated March 19, 1901.

"I have your letter of the 18th instant, with reference to extra-provincial corporations. I think that you have overlooked some of the objections to that Bill. What we contend is that the regulation of trade and commerce is with us, and that you undertake to treat the Dominion corporations which we have the right to create, for the purpose of trade, in a way different from that in which you treat the corporations called into existence by your own authority. The question is not, whether you have the power to tax Dominion corporations more than you do those of the local legislature created for a similar purpose, but whether we ought to permit the policy of the Dominion to be frustrated by unjust provincial legislation. You have only to

make the tax sufficiently discriminating in order to force Dominion corporations out of existence altogether, and I do not think we ought to permit you to interfere with our policy in a matter within our jurisdiction by such a use of your power of taxation.

"The Government of Canada is not a foreign Government; the corporations that it creates are not foreign corporations; they are as much at home in the Province of Ontario as are those called into existence by the local legislature, and violent hands ought not to be laid upon them. In my opinion all legislation, on the part of a province, of this kind, ought to be disallowed if persisted in. . . . I think you will see what my position is. The question of ultra vires in this matter is quite subordinate to the general question of public policy."

Report of the Premier of Ontario, May 14, 1901, (Hodgins, page 46) :—

"The undersigned has also the honour to state that he has received a report from the Minister of Justice with regard to the Acts respecting extra-provincial corporations in which the Minister of Justice states that he is prepared to suspend the right of disallowance of these Acts 'on receiving assurance that the Provincial Government will, at the earliest opportunity, promote further legislation to either exempt Dominion corporations from this statute or establish equality with regard to license fees and taxation as between Dominion and provincial companies.'

"As the Provincial Government has, undoubtedly, the right to impose taxation for the purposes of revenue on all corporations, no matter whence their authority is derived, the undersigned would not recommend that the province should waive this right. The undersigned, would, however, recommend that any Act of the legislature under which a discrimination may be exercised against corporations having authority from the Dominion Government should be so amended as to establish equality in regard to license fees and taxation between Dominion and provincial companies as suggested by the Minister of Justice,

and that legislation to that effect should be introduced and carried through at the next session of the legislature."

Extract from a report of the Minister of Justice, December 12, 1902 (Hodgins, 1901-1903, page 12):—

"The undersigned observes that a Provincial Legislature has exclusive authority with regard to the incorporation of companies with provincial objects, and it was, doubtless, in the execution of this power that the Royal Trust Company was incorporated as recited in the preamble of the Legislature of Quebec. If, therefore, the company exists for the provincial objects of Quebec, it is in the opinion of the undersigned questionable whether the Legislature of Quebec has any authority to extend these or confer powers extra-provincial as to Quebec, or in any wise interfere with the constitution of the company. It has been held by the highest authority that the Dominion Parliament alone has jurisdiction to incorporate a company with objects extending to more than one province, and it may therefore be that where an existing provincial company desires to extend its franchise to other provinces, it should come to Parliament for the necessary amendment of its constitution.

Hodgins, page 22:—

An order of the Lieutenant-Governor in Council was thereupon passed, May 14, 1901, and communicated to Your Excellency's Government approving of a report of the Prime Minister of the province in which, after referring to Mr. Mills's report, he recommended that an Act of the Legislature under which a discrimination may be exercised against corporations having authority from the Dominion Government should be so amended as to establish equality in regard to license fees and taxation between Dominion and provincial companies, as suggested by the minister, and that legislation to that effect should be introduced and carried through at the next session of the Legislature. No such legislation was passed at the next session of the Legislature, and now from the section above quoted from chapter 7 of the statutes of 1903, the Act is made much more open to the objection taken by Mr. Mills in his report of May 3, 1901. The

fees of $25 and $50 under the Act as it stood would probably be claimed by the province not to be unreasonably considered merely as a charge in connection with the application for the issue of the licenses, and they were, perhaps, not large enough to very grievously burden the companies liable to pay them. Under the amended provisions it is obvious that the fees may be made so large as to constitute a real grievance to companies which have or may obtain Dominion charters as well as a discrimination between Dominion and provincial companies highly objectionable on other grounds. For the reasons stated the undersigned would think it his duty to recommend the disallowance of chapter 7 aforesaid, unless the Government of the province should undertake to promote, at the next session of the Assembly, legislation of the character suggested in the report of his predecessor above referred to, that is to say, either exempting corporations created by Parliament from the requirement to procure licenses or providing that the obligation to take out licenses and pay the license fees prescribed shall be imposed equally upon Dominion and provincial corporations."

Extracts from report of the Hon. the Attorney-General of Ontario, August 2, 1904 (Hodgins, page 23) :—

"The sole section of this Act with which fault is found is section 53, which amends section 18 of the Act respecting the licensing of extra-provincial corporations by striking out the first three paragraphs thereof, and Schedules A. and B. thereto inserting in lieu thereof the following words:—'There shall be paid by every corporation requiring a license under this Act such fees as may, from time to time, be approved by the Lieutenant-Governor in Council.' Disallowance is suggested, unless the Government of the province shall undertake to promote at the next session of the Legislative Assembly, legislation either exempting corporations created by Parliament from the requirements to procure licenses, or providing that the obligation to take out licenses and pay the license fees prescribed shall be imposed equally upon the Dominion and provincial corporations. No discrimination has taken place under the sec-

tion objected to and there need be no apprehension that there will be any discrimination before the next session of the Legislature, when the undersigned is of the opinion that this section should be repealed and legislation substituted in the shape of an Act specially dealing with this subject and substantially complying with the terms of the despatch of May 14, 1901, and the undersigned recommends that an undertaking be given to this effect. The undersigned does not enter upon a discussion of the constitutional question. He dissents, however, from the view that the provinces may be controlled by the Dominion in regard to the exercise of the rights of raising revenue by imposition of taxes or exaction of license fees. He also points out that the Dominion companies constantly come to the Provincial Governments for authority to hold lands, an authority which under the decision of the Courts they do not possess. The undersigned also refrains from calling attention to the anomalies constantly observed in connection with the concurrent exercise of powers by the Dominion and provinces in granting charters.

"There should be some definition of companies chartered for Dominion as distinguished from provincial objects. It should not be left to the whim of the applicant who may say in his petition, no matter how entirely local or how strictly provincial his proposed company may be, that he seeks incorporation of a company with 'Dominion objects.' It is very much like the case of a short line of railway between two towns in the interior of the province being declared 'work for the general benefit of Canada.'"

The result of this correspondence appears in section 3 of 1 Edw. VII. c. 19, and section 53 of 3 Edw. VII. c. 7, above referred to. No further legislation on the lines indicated in the report of the Attorney-General of Ontario, August 2, 1904, has been passed by the Ontario Legislature, and the questions raised are not disposed of.

It is submitted that the province should have based its case on higher grounds. The question of taxation is not the largest involved. That of control is much greater. There seems to be

no justification for the statement that there is discrimination against Dominion companies. In fact the statute discriminated in favour of Dominion companies. The license fee for a Quebec company with capital of $1,000,000 is $385, while for a Dominion company with the same capital it is only $50.

However, as the statutes stand, every Dominion company is entitled as of right to a license under the Act which also confers a license in mortmain. That there should be a discretion in granting licenses, follows, I submit from a dictum in *Citizens* v. *Parsons* (1881) 7 A.C. 96, page 117, which has never been questioned:—"Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in Mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province') that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

Since the right of escheat is without doubt in the provinces (*Attorney-General* v. *Mercer*, 8 A.C. 767) it must follow that the provinces should have a discretion in granting the license. That there should be a discretion is also shewn by an application under the Ontario Act. The Toronto Junction Recreation Club became a public nuisance, and an action was brought by the Attorney-General of Ontario to declare its charter forfeited (*Attorney-General of Ontario* v. *Toronto Junction Recreation Club*, 8 O.L.R. 440) and subsequently the charter was declared forfeited under R.S.O. c. 191, s. 99. Immediately afterwards the persons interested in the Club procured incorporation under the Dominion Companies Act, and demanded a license under the

Ontario Extra-Provincial Corporations Act as a matter of right, under the name of the Canadian Fishing and Sporting Association, Limited. (*Ontario Gazette*, April 1, 1905.)

Moreover, there should be provincial control of Dominion companies, if merely for the purpose of effecting service of process. The difficulty of effecting service on a foreign company is notorious. The numerous reported cases on the subject are convincing as to this.

This surely shews a state of affairs needing legislative action. If such legislation is not constitutional within the British North America Act, that Act should be amended after a settlement of all questions by the Dominion and Provincial Governments. The following is suggested as a basis.

All companies may be sub-divided as follows:—

1. Public utility companies for the general advantage of Canada. These companies need no discussion. They are fully within federal jurisdiction, and the exclusive jurisdiction of the provinces may be trenched upon in controlling them: *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (1907) A.C. 65. But it should not be left to the applicant for incorporation to ask for wider powers than are necessary merely for the purpose of putting the undertaking under Dominion control. Neither should Parliament arbitrarily declare undertakings for the general advantage of Canada when the mere description of them shew that they are not so.

2. Public utility companies of a local character. In the same way these are fully in provincial control.

3. Private corporations to implement the exclusive jurisdiction of the Dominion. The Bankers' Association, Board of Trade, Harbour Boards, Marine Hospitals, etc.

4. Private companies to implement jurisdiction of the provinces; educational and municipal corporations, etc.

5. Private companies of a commercial character which from their objects are intended to do business throughout the Dominion.

6. Private companies of a commercial character and of a local nature.

There is difficulty in dealing with the last two classes. Applicants may desire to take advantage of or avoid some special provisions of the Dominion or Provincial Acts, and there must necessarily be an overlapping of the jurisdiction in such cases. The only rule for guidance should be from a fair construction of the objects of the company. Is it intended or not at the time of incorporation that it should do business in more than one province? With respect to licensing, the first and third class should have a provincial statutory license and in all other cases the provinces should have discretion in licensing.

As in most cases, there are two sides to the question discussed in the above article. It is from the pen of an occasional contributor, than whom there is no one better qualified to discuss the subject. His leanings are in favour of more power being vested in provincial governments in reference to the incorporation of companies and their jurisdiction and control. We are not at present prepared to express an opinion on the subject; and would like to hear what may be said by those who would prefer that the federal government should have more ample control in the premises.

BREACH OF PROMISE OF MARRIAGE.

Mr. Justice Bigham, in charging the jury in an action for breach of promise of marriage, very tersely stated the law which nearly thirty years ago was subjected to the philosophic criticisms of Sir Henry James (Lord James of Hereford) in debate in the House of Commons. "This young man," said Mr. Justice Bigham, "has changed his mind. In the affairs of love it is often so, but according to our law the girl is entitled to damages." Speaking in debate on a motion proposed by Mr. Herschell (Lord Chancellor Herschell) in the House of Commons on the 6th May, 1879, in favour of the abolition of the action for breach of promise of marriage, Lord James said:—"The learned Solicitor-General (Sir H. Giffard, Lord Chancellor Halsbury)

said the damages were given for the loss that the woman sustained in consequence of not being allowed to enter into the married state—that was to say, they were to give damages to a woman for not being allowed to marry a man who was unwilling to be married. That could form no ground of damage to a woman if she had proper feelings—that she was not to be allowed to spend her life in the society of a man who had no feelings of affection towards her. The action was a punishment on the man, who refused to make two wives miserable. They were punishing a man because he had the courage to say: 'I think it better, in the interests of both of us, that our lives should not be spent in misery.'" Lord Herschell's motion was carried by a majority of forty-one, but the law of breach of promise of marriage has in no respect been altered from that time to the present hour.—*Law Times.*

ADMINISTRATION OF JUSTICE TO FOREIGNERS.

We like the thoughts expressed by Chief Justice Howell when opening the Assize Court at Winnipeg on 2nd inst. In referring to the calendar he said:—

"It will appear to you when the names are shown you that a number of the most serious charges are laid against foreigners. Therefore, you may come to the conclusion that we are better off without these foreigners, that they are a menace to our country. Gentlemen, I have been a long time in the law, perhaps before some of you were born. A large number of these people are from the Carpathian Mountains, a very considerable portion of them have Slavonic blood in their veins. Shall we say, 'Am I my brother's keeper?' Well, they are here, gentlemen; shall we drive them out of the country or hang them or teach them? They have not had a fair chance, it seems to me, in the race of life. In the country they came from the sidewalks of the town were not made for them; the roads were good enough for them, amongst the horses and swine. If the landlord came along they got down on their knees and bowed their

faces to the ground. They could not go from their native village to another without a passport without being arrested. They come to this country and here the sidewalks are for them. They can go as they please, and liberty, too often, becomes license. By all means punish them when they do wrong, but punish them justly and kindly."

It is sentiments such as these, honestly carried out, that have made the Greater Britain what she is to-day, the greatest and freest as well as the greatest colonising nation in the world.

Whilst we deprecate the bringing to this country of undesirable immigrants, we applaud the spirit of Christian charity and empire-building wisdom that breathes through the words of the Chief Justice of Manitoba.

LORD CROMER AND MODERN EGYPT.

One of the greatest of the books of history is Lord Cromer's "Modern Egypt" just published. The *Times* in its review of it says:—"Since Caesar wrote 'De bello Gallico,' we can recall no instance of a great captain of the state telling so fully and unreservedly and with such lucidity and candour, whilst still fresh in the memory of living men, the story of great events quorum pars maxima fuit." We feel a certain added interest in the story of Egypt and the Sudan as many Canadians, and notably a member of the Bar of Ontario, Col. Frederick Denison, C.M.G., formed part of the expedition for the relief of General Gordon; Col. Denison being in command of our Voyageurs. It needs not to be told that owing to Gladstone's "shameful and famous hesitation and delay" they came too late to save England's hero; but the record of the former's responsibility for the death of the latter is told by Lord Cromer in these weighty words:—"In a word, the Nile expedition was sanctioned too late, and the reason why it was sanctioned too late was that Mr. Gladstone would not accept simple evidence of a plain fact, which was patent to much less powerful intellects than his own. Posterity has yet to decide on the services which Mr. Gladstone,

during his long and brilliant career, rendered in other directions to the British nation; but it is improbable that the verdict of his contemporaries in respect to his conduct of the affairs of the Sudan will ever be reversed. That verdict has been distinctly unfavourable. 'Les fautes de l'homme puissant,' said an eminent Frenchman, 'sont des malheurs publics.' Mr. Gladstone's error of judgment in delaying too long the despatch of the Nile expedition left a stain on the reputation of England which it will be beyond the power of either the impartial historian or the partial apologist to efface."

As we learn from the *Law Times* a motion is shortly to be discussed in the Imperial House of Commons with reference to the definition and limitation of the jurisdiction of judges dealing with contempt of court. Over twenty years ago Lord Selborne introduced in the House of Lords a measure of reform in reference to this matter. Some years afterwards another bill dealing with the subject was brought in by other eminent legal men in the House of Commons, but nothing has been done up to the present time. The result of the discussion of the bill before the House will be looked for with interest.

The sale of a manuscript to a publisher authorizes its publication under the author's name, but this authority would seem to be limited to the precise matter written by the author, and to change it materially is to represent him as saying something that he did not in fact say, and he might thus be held up to the public as an object of ridicule or obloquy. There is a very perceptible difference between withholding the name of an author and exploiting him as the author of that which is not his. Literary property is probably to be governed by much the same rules as property of other kinds, and if authors wish to enjoy special rights and privileges in respect to productions which they have sold, they will doubtless find it necessary to provide therefor in their contracts.—*Law Notes.*

REVIEW OF CURRENT ENGLISH CASES.

FOREIGN JUDGMENT—JURISDICTION OF FOREIGN COURT—PARTNERSHIP ASSETS IN FOREIGN COUNTRY—PARTNER RESIDENT IN ENGLAND—ACTION TO WIND UP PARTNERSHIP—FOREIGN JUDGMENT BY DEFAULT.

In *Emanuel* v. *Symon* (1908) 1 K.B. 302 the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have failed to agree with the judgment of Channell, J. (1907) 1 K.B. 235 (noted ante, vol. 43, p. 282). The case is an important one on the question of enforcing foreign judgments. The facts were that the plaintiffs and defendants were partners in a gold mine and other property in Australia. The defendant was domiciled in England. The plaintiff, while he was so domiciled, brought an action in an Australian court to wind up the partnership. The writ was personally served on the defendant in England, but he did not appear in the action, and the result of the proceedings in the Australian court was that judgment went against him by default, and a reference was directed to take the partnership accounts, and the partnership was found indebted in a sum of over £7,000, which, under the final order of the court, was ordered to be paid by the partners. The plaintiff paid the amount, and then sued the defendant in the present action to recover his proportion of the liability. The defendant denied that he was bound by the adjudication of the colonial court. Channell, J., held that he was, but the Court of Appeal have now reversed that decision. It was, on the part of the plaintiffs, claimed that the possession of property within the jurisdiction of the colonial court gave that court jurisdiction over the defendant in personam. But Lord Alverstone, C.J., though conceding that that fact gives the colonial court jurisdiction to deal with the property, yet held that it does not give jurisdiction over an absent defendant in personam, who is domiciled in another country. As Buckley, L.J., points out, the plaintiff was attempting to add to the five cases enumerated by Fry, J., in which the court will enforce a foreign judgment, a sixth case, viz., when a defendant has property within the foreign forum; but the Court of Appeal was unanimous that that was not admissible. It may be useful here to recall the five cases

stated by Fry, J. 1. Where the defendant is a subject of the foreign country in which the judgment has been obtained. 2. Where the defendant was resident in the foreign country at the time the action was begun. 3. Where the defendant in the character of plaintiff has himself selected the forum in which he is afterwards sued. 4. Where he voluntarily appeared. 5. Where he has contracted to submit himself to the forum in which the judgment was obtained.

DEBTOR AND CREDITOR—ACCEPTANCE OF BILL OR PROMISSORY NOTE FOR DEBT—AGREEMENT NOT TO SUE.

In re A Debtor (1908) 1 K.B. 344, though a bankruptcy case, deserves attention. The question was whether a creditor was in a position to give a bankruptcy notice. He was a judgment creditor of the debtor, but had received a bill of exchange for the debt, this bill he had indorsed to a third party for value, in whose hands it still was, but it had been dishonoured. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) held that the acceptance of the bill by the creditor amounted to an agreement not to enforce the debt during the currency of the bill, and afterwards, so long as it was outstanding in the hands of the third party to whom it had been indorsed for value, and therefore, the creditor was not in a position to give a bankruptcy notice.

CORPORATION—DISSOLUTION OF COMPANY—BONA VACANTIA—CHATTELS REAL—LANDLORD AND TENANT—SURETIES FOR RENT.

Hastings v. *Letton* (1908) 1 K.B. 378 deals with a point which does not appear to have been previously decided, and one that seems unlikely often to have occurred. A corporation when it is dissolved, as a rule, as a preliminary step, disposes of all its property. The English Companies Act, ss. 142 and 143, seems to require that it should do so. In this case, however, a limited company were lessees of premises, and there were sureties for the payment of the rent. The company was dissolved and no disposition had been previously made of the leasehold, and the question arose, what effect had the dissolution on the leasehold. Did the term pass to the Crown as bona vacantia, and were the sureties still liable for the rent, notwithstanding the dissolution, or was the term at an end? The action was by

the lessors against the sureties for rent accrued after the dissolution, and the judge of the County Court gave judgment in favour of the plaintiffs, but the Divisional Court (Darling and Phillimore, JJ.) reversed the judgment on the ground that on the dissolution of the company the lease came to an end, and the reversionary estate in the lessors was accelerated, and the lease being at an end, the sureties for the rent were consequently discharged. Darling, J., lays it down that as to all lands which are vested in a corporation at the time of its dissolution, they revert to the original grantors thereof, as laid down in Blackstone's Commentaries, and, consequently, there is no escheat to the Crown in such a case, unless the Crown happened to be the grantor.

MORTGAGE—TRADE FIXTURES—HIRE AND PURCHASE AGREEMENT—RIGHT OF MORTGAGEES TO FIXTURES—MORTGAGOR IN POSSESSION.

Ellis v. *Glover* (1908) 1 K.B. 388 is the case to which we referred ante, p. 196, in our note of the case of *Crossley* v. *Lee*. In this case freehold premises on which a laundry was carried on, were, in November, 1902, mortgaged to the plaintiff. The mortgagor consenting not to remove any fixtures then or thereafter placed on the premises, without the mortgagor's consent. In June, 1903, the mortgagor being in possession, procured machinery for the purpose of his business under a hire and purchase agreement, which was duly fixed up in the premises and attached to the freehold. The agreement provided that in default of payment of the instalments of the price, as they became due, the vendor might enter and remove the machinery. Default was made and the vendor accordingly entered and removed the machinery, the present action was by the mortgagee claiming damages for such removal. Phillimore, J., who tried the action dismissed it. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) reversed his decision, and in doing so distinguished the case from *Gough* v. *Wood* (1894) 1 Q.B. 713, but without impugning the rule there laid down, viz., that, in the absence of any agreement to the contrary, a mortgagor in possession has the implied right to permit trade fixtures to be affixed to, and removed from, the mortgaged premises, at any time before the mortgagee takes possession. In the present case, the covenant by the mortgagor, not to remove any fixtures without the mortgagee's consent, was held to be a stipulation which

prevented the mortgagor having any implied power to exercise such a right of removal, and therefore the fixtures, being affixed to the freehold, passed to the mortgagee who was entitled to damages for their removal.

SOLICITOR AND CLIENT—LIEN OF SOLICITOR ON PAPERS—ACCEPTANCE OF SECURITY BY SOLICITOR—WAIVER OF LIEN.

In re Morris (1908) 1 K.B. 473 was an application by a client against his solicitors to compel the delivery up of papers on which they claimed a lien, on the ground that he had given the solicitors security for payment of their costs, the acceptance of which had operated as a waiver of any lien on his papers. The evidence was conflicting, but the court accepted the solicitor's version that the security was not given or accepted as security for costs generally, but merely for those in one particular action, and therefore it was held there had been no waiver of the lien. The Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) lay it down, that where a solicitor receives security for his general costs from his client it is his duty to inform his client expressly if he still intends to retain a lien, otherwise the lien will be waived.

SHIP—CHARTER-PARTY—DEMURRAGE—LAY DAYS—ARRIVAL AT PLACE OF LOADING—OBLIGATION OF MASTER TO GO TO BERTH NAMED BY CHARTERER.

In *Leonis SS. Co.* v. *Rank* (1908) 1 K.B. 499, the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) have reversed the judgment of Channell, J. (1907) 1 K.B. 244 (noted ante, vol. 43, p. 364). The action was by shipowners for demurrage. The charter-party provided that the charterers should ship a cargo and that the time for loading should commence to count twelve hours after they received written notice from the master of the ship that it was in readiness to receive a cargo. The ship arrived at the port of lading and anchored in the river within the port a few ship's length from the pier, and a written notice was given to the charterers of its readiness to receive cargo. The charterers required the ship to be brought alongside the pier but owing to the crowded state of the port she was delayed in getting a berth. The place where the ship anchored was not a usual but a possible loading place. Channell, J., held that the time did not begin to run till the vessel got a berth alongside the pier. The Court of Appeal,

on the other hand, held that the time began to run from the delivery of the notice, and the delay occasioned by the vessel not being able to approach the pier must fall on the charterers and not on the shipowners.

WEIGHTS AND MEASURES—FALSE OR UNJUST MEASURE—POSSESSION OF FALSE MEASURE BY SERVANT FOR HIS OWN FRAUDULENT PURPOSE—EMPLOYER.

Anglo-American Oil Co. v. *Manning* (1908) 1 K.B. 536. This was a case stated by magistrates. The appellants were prosecuted for having a false measure. The facts disclosed that the appellants, who were hawkers of coal oil, had furnished their servant with a proper lawful measure, but for his own fraudulent purposes carried with him when hawking the plaintiff's goods, a measure with a quantity of soap in it, which had the effect of rendering the measure false to the extent of three and a half pints. It was not proved that the appellants were cognizant of or sanctioned or approved of the conduct of their servant, or derived any benefit from his fraud. In these circumstances, Channell, Bray and Sutton, JJ., held that the appellants could not be convicted of a breach of the Weights and Measures Act.

LIFE INSURANCE—FRAUD OF INSURANCE AGENT—DECEIT—AVOIDANCE OF POLICY—RECOVERY BACK OF PREMIUMS.

Kettlewell v. *Refuge Assurance Co.* (1908) 1 K.B. 545. In this case, it may be remembered, the plaintiff had taken out a policy of insurance with the defendant company. After it had been in force for a year the plaintiff proposed to let it lapse, whereupon the defendants' agent represented that if she continued to pay the premiums for four years more, the policy would remain in force and she would have no more premiums to pay. Relying on this representation she paid the four years' premiums, but on the expiration of that period the defendants refused to give her a paid-up policy. The plaintiff sued to recover back the four years' premiums. Phillimore and Bray, JJ. (1907) 2 K.B. 242 (noted ante, vol. 43, p. 619) held that the plaintiff was entitled to recover, and the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Buckley, L.J. have affirmed that decision, though they were not altogether agreed as to the basis on which the plaintiff was entitled to recover. Lord Alverstone, C.J., was of the opinion that the money could

be recovered either by way of damages for deceit, or as money had and received to the plaintiffs' use, with which Barnes, P.P.D., agreed, but Buckley, L.J., thought that the contract being only voidable at the option of the plaintiff until she had exercised that option, the defendants had incurred liability and she was, therefore, not in a position to say she had received no consideration, and, therefore, could not recover the premiums as money had and received, but that the defendants could not retain a profit derived through the fraud of their agent, and on that ground, were liable to refund the premiums.

HIGHWAY—OBSTRUCTION—NUISANCE.

The King v. *Bartholomew* (1908) 1 K.B. 554. The defendant was indicted for nuisance in obstructing a public highway. The obstruction consisted of a coffee stall erected in the middle of a public highway. The stall was a permanent character and gas and water were laid on, and it was assessed for taxes. The jury found that the coffee stall was an obstruction, but that it did not appreciably interfere with the traffic of the street. On a case stated, the court (Lord Alverstone, C.J., and Lawrance, Ridley, Darling and Channell, JJ.) held that on that finding the defendant must be acquitted.

WATERWORKS—EXPROPRIATION OF LAND—SPECIAL VALUE OF LAND EXPROPRIATED.

In re Lucas and Chesterfield (1908) 1 K.B. 571. Land had been expropriated by virtue of statutory powers for the purpose of a reservoir, and the question was submitted by arbitrators, whether the special value of the land for the purposes of a reservoir could be taken into account in fixing the compensation to be paid, notwithstanding that the property could not have been used for a reservoir unless statutory power for the compulsory purchase of other land were first obtained. Bray, J., answered this question in the affirmative.

DEFAMATION—LIBEL — ABSOLUTE PRIVILEGE — STATEMENTS OF PROVINCIAL OFFICERS—REPORT OF OFFICIAL RECEIVER UNDER WINDING-UP ACT.

Bottomley v. *Brougham* (1908) 1 K.B. 584 was an action brought against the defendant who was an official receiver for an alleged libel contained in a report made by him in the course

of his duty in certain winding-up proceedings. The defendant applied to dismiss the action as being frivolous and vexatious and an abuse of the process of the court, and the application was granted by Channell, J.

SOLICITOR—BILL OF COSTS—FORM OF BILL OF COSTS—SOLICITORS ACT, 1843 (6-7 VICT. C. 73) S. 37—(R.S.O. C. 174, S. 34).

Cobbett v. *Wood* (1908) 1 K.B. 590 was an action by solicitors to recover costs incurred by them on behalf of the defendant's wife. The plaintiffs had acted in a suit in the Probate and Divorce Court in which the wife had sued unsuccessfully for a judicial separation and in which the defendant had been ordered to pay costs as between party and party, which he had paid. They had also acted for the wife in proceedings before justices in which she was successful and the defendant had been ordered to pay £3 3s. for costs which the defendant had paid. The bill delivered was entitled in the Probate and Divorce Division of the High Court of Justice and included solicitor and client costs, which had not been allowed in the party and party taxation in the judicial separation proceedings, but did not include the costs allowed on the party and party taxation. The bill also included extra solicitor and client costs of the proceedings before the justices, over and above the £3 3s. which had been paid. It was objected on the part of the defendant, that no proper bill had been delivered, because the bill did not include the party and party costs of the judicial separation proceedings, and because it included costs of proceedings before justices, which were not in the Divorce Court. These objections were overruled by Pickford, J., but on the authority of *Cale* v. *Jarvis* (1897) 1 Q.B. 418, he held that the solicitors could recover no more costs of the proceedings before the justices than the justices had awarded.

PROBATE—WILL—INCORPORATION IN WILL OF UNEXECUTED MEMORANDUM.

The University College of N. Wales v. *Taylor* (1908) P. 140. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have been unable to agree with the decision of the president of the Probate Division (1907) P. 228 (noted ante, vol. 43, p. 614). Probate had been granted in common

form of a will dated June 27, 1905, of a testator who died July 15, 1905, and of an unattested document dated March 12, 1905, which was claimed to be incorporated in the will. By his will the testator gave a legacy of £10,000 to the University of Wales "upon such terms and conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto." Amongst the testator's papers was a memorandum in his own handwriting dated March 12, 1905, addressed to the executors of a former will in which he specified two conditions of a theological nature as to the individuals to be benefitted by similar bequests, and also a condition that they should be of Welsh birth, and other matters. This was the paper incorporated with the will. The application to the President was to revoke the probate and to exclude this document. There was evidence that it had been produced at interviews between the testator and his solicitor, when instructions were given for the last will, and that the will was prepared on the footing that this was the document referred to therein, and the President refused the application, holding it to have been incorporated in the will. The Court of Appeal, on the other hand, held that in order that an unattested document may be incorporated, it is necessary that it should be in existence when the will is executed and be distinctly and specifically referred to therein. Here they considered that the use of the words "any document" precluded the supposition that the memorandum of March 12, 1905, was intended, because that related to the disposition made by the former will and there was nothing in the will to shew that the testator intended that document to be the one referred to in the last will.

SALE OF GOODS—SPECIAL CONDITIONS OF SALE—FIXED PRICES—AGREEMENT NOT TO SELL TO SPECIFIED CLASS—INDUCING DEALERS TO COMMIT BREACH OF CONTRACT—FRAUD—INTERFERENCE WITH CONTRACTUAL RELATION—LEGAL RIGHT—DAMAGE.

National Phonograph Co. v. *Edison Bell Co.* (1908) 1 Ch. 335, is one of those cases arising out of the special conditions under which trade is carried on in the present day. Plaintiffs were manufacturers and defendants were dealers in phonographs and phonographic records. The sale of the machine necessarily draws with it the sale of the records which appears to

be the most profitable part of the trade, and in order to protect and further their trade, the plaintiffs made special agreements with factors for the sale of their goods, whereby the factors bound themselves not to sell to persons on what the plaintiffs called their "suspended list" nor to dealers who did not enter into an agreement not to sell below a specified price, nor to persons whose names were on the plaintiffs' "suspended list." The defendants were on this "suspended list," but in order to procure the plaintiff's goods, they induced a dealer named Ell, who had signed the above mentioned agreement, to sell goods purchased from the plaintiffs' factors in his own name, to the defendants' agent for less than the price specified in the agreement, Ell not knowing that the defendants were on the suspended list. The defendants also induced two other persons named Leach and Hughes, falsely to represent themselves as independent dealers, and as such to purchase, nominally for themselves, but really for the defendants, from the plaintiffs' factors goods of the plaintiff. The present action was brought to restrain both of these proceedings and for damages. Joyce, J., who tried the action dismissed it, holding that neither of the alleged grounds of complaint gave the plaintiffs any right of action. The Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) although agreeing with Joyce, J., as to the Ell transaction, differed from him in regard to the Leach and Hughes transaction, and held that the defendants having induced those two persons to procure goods by means of misrepresentations were guilty of a fraud on the plaintiffs for which they were liable to an action, and the plaintiffs were entitled to an injunction restraining the defendants from inducing by means of fraudulent and improper means, the plaintiffs' factors from breaking their agreements with the plaintiff.

WILL—CONSTRUCTION—GIFT OF RESIDUE TO A. AND "SIX CHILDREN NOW LIVING" OF C.—ALL BUT ONE OF A CLASS DEAD AT DATE OF WILL—PRESUMPTION OF MISTAKE—REJECTION OF SPECIFIED NUMBER.

In re Sharp, Maddison v. *Gill* (1908) 1 Ch. 372. In this case a testator had given the residue of his estate to trustees upon trust for certain named persons and the six children of the late S. F. Okey in equal shares as tenants in common. By a codicil the testator stated that by the six children of the said S. F. Okey

he meant to benefit the six children now living of the said S. F. Okey, by his first wife and no others. At the date of the will five of the six children were dead, the last of the five to die being referred to by the testator in his will as "my late niece, S.M." The survivor was still alive and the question was whether he was entitled to the share bequeathed to the "six children," and Joyce, J., held that he was, because he held that the children referred to by the will and codicil were the living children of S. F. Okey and his first wife, and the court might properly reject the number "six" on the presumption of a mistake on the part of the testator, as to the number actually living.

LEGACY—BEQUEST SUBJECT TO OBLIGATION TO MAINTAIN INFANTS —INTEREST ON LEGACY.

In re Crane, Adams v. *Crane* (1908) 1 Ch. 379. A testator bequeathed the income of a legacy to his daughter-in-law during her widowhood, subject to the obligation of maintaining her deceased husband's children. The legacy was paid over by the trustees of the will within a year from the testator's death without interest, but the trustees of the legacy claimed that as an obligation of maintenance of the children had been imposed on the daughter-in-law, interest should be paid on the legacy from the testator's death, but Eady, J., held that the case was distinguishable from the cases where a testator gives a legacy to infants, as to whom he stands in loco parentis, with a direction that the income is to be applied for their maintenance, and that the present being a gift to an adult, it did not bear interest from the death until paid over to the trustee.

WILL—CONDITION—FORFEITURE—CONDITION NOT TO ENTER NAVAL OR MILITARY SERVICE—PUBLIC POLICY.

In re Beard, Reversionary and General Securities Company, Limited, v. *Hull* (1908) 1 Ch. 383. Eady, J., decided that it is contrary to public policy to impose any condition divesting the interest of a devisee or legatee if he enters the naval or military service of the country, and that such a condition is therefore void.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Feb. 22.

KEEWATIN POWER CO. *v.* TOWN OF KENORA.

Rivers and streams—Non-tidal rivers—Grant of lands bordering on—Title to bed of river ad medium filum aquæ—Common law doctrine—R.S.O. 1897, *c.* 3, *s.* 1.

The common law of England relative to property and civil rights—as introduced into this province in 1792, now enacted in the R.S.O. 1897, c. 3, s. 1—except in so far as repealed by Imperial legislation having force in this province, or by provincial enactments, is the rule for the decision thereof: so where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas if non-tidal, whether navigable or not, the title in the said bed ad medium filum aquæ is presumed to be in the riparian proprietor.

Where, therefore, lands were granted by the Crown bounded by the Winnipeg River, a non-tidal river, the title to the bed of the river ad medium filum aquæ was held to have passed to the riparian owner by virtue of the grant to him.

Judgment of ANGLIN, J., at the trial reversed.

Wallace Nesbitt, K.C., *Jennings*, *L. G. McCarthy*, *C. A. Moss*, *Rowell*, K.C., and *Wilkie*, for various parties.

Full Court.] [March 24.

LONDON AND WESTERN TRUSTS CO. *v.* CANADIAN FIRE INS. CO.

Fire insurance—Lease—Change in nature of risk—Absence of notice or knowledge by landlord—"Control" of landlord—Omission to notify insurers.

The judgment of a Divisional Court in favour of the plaintiffs was affirmed by the Court of Appeal, substantially for the same reasons as those appearing in the opinion of the Divisional

Court, delivered by BOYD, C., 13 O.L.R. 540. MEREDITH, J.A., dissenting.

Wallace Nesbitt, K.C., and *N. W. Rowell*, K.C., for defendants. *Gibbons*, K.C., for plaintiffs.

HIGH COURT OF JUSTICE.

Clute, J.] RE WILKIN. [Feb. 24.

Will—Gift to two named daughters—Subsequent provision in case of dying without issue—Death in testator's lifetime.

A testator, after leaving the residue of his estate to be equally divided amongst his four daughters, C., M., A. and H., directed that if C. and M. should "die without leaving a child or children" his executors should pay annually the interest accruing on the money bequeathed to them to his son B. during his lifetime, and after his son's death the principal should be equally divided amongst all the living children of his two other daughters, M. and H., or attaining their majority.

Held, that the words "die without leaving a child or children" meant in the testator's lifetime; and that therefore, the said two daughters C. and M., who survived the testator, took the shares bequeathed to them absolutely.

Swabey, for executors. *M. C. Cameron*, for official guardian.

Falconbridge, C.J.K.B.] [March 23.

RE VICTOR VARNISH CO.
CLARE'S CLAIM.

Banks—Security on stock of trading company—Guarantor paying company's debt—Assignment of security to him by bank—Rights of assignee—Winding-up.

Winding-up application. Appeal by the liquidator from the finding of the Master in Ordinary. The company was indebted to the Bank of Hamilton and as security for this debt held a guarantee executed by Clare and others. Subsequently the company gave to the bank a demand note for the debt which was secured by an assignment of the company's stock in trade, under section 74 of the Bank Act, 1890 (now R.S.C. 1906, c. 29, s. 28). Clare paid the bank the amount of the debt and the bank

executed an assignment of the security to him. Clare filed his claim as a creditor and claiming also a lien for the amount of his claim upon the stock in trade of the company. The liquidator admitted Clare to be a creditor, but disputed the validity of the lien. The Master in Ordinary gave judgment declaring Clare to be entitled to rank as a creditor for the amount paid, and to a lien on the stock in trade of the company, holding that he was entitled to all the rights and remedies against the assets that would have been open to the bank before the bank assigned to Clare.

Held, 1. The act does not expressly provide that the security may be assigned, and as the assignment had not been perfected under the Judicature Act, or by notice given prior to the winding-up order, and as there was no right of subrogation which would render the assignment unnecessary, the lien could not be allowed.

2. As the provisions of section 88 of the Bank Act infringe upon the policy of the provincial law which requires registration, the language of the Act must not be strained so as to confer a priority which is not reasonably necessary to the carrying out of the policy of the Act.

3. To construe the Act, as if it provided for the assignment of the security of a third party would open the door to a fraudulent use of the Act, and so it should not be construed as impliedly authorizing that which it does not expressly authorize, or which is not reasonably necessary to the working of the Act.

4. The special security conferred by the Act is at an end when the document is assigned by the bank to a third party, and such assignment does not, therefore, carry with it any special priority. The securities referred to are only those which are legally assignable. See *In re Russell, Russell* v. *Shoolbred*, 29 Ch.D. pp. 265 and 266.

The appeal allowed but without costs.

J. M. Clark, for liquidator. *J. E. Jones*, for claimant.

Anglin, J.—Trial.] [March 27.

WHITTING *v.* FLEMING.

Slander imputing unchastity—Interlocutory judgment for default of defence—Assessment of damages—Necessity for setting case down for assessment—Costs.

Action for a slander imputing unchastity to plaintiff brought

under R.S.O. 1897, c. 68, s. 5, tried with a jury at Walkerton. There was no averment or proof of special damage and interlocutory judgment was signed in default of defence, and the case was entered for assessment of damages merely. It was contended on behalf of the defendant that section 5, which says that "the plaintiff may recover nominal damages without the averment or proof of special damage," in the absence of such averment and proof, restricts the plaintiff to nominal damages. For the plaintiff it was contended that the effect of the statute is to entitle the plaintiff absolutely to nominal damages, and that the jury may in their discretion also enable her to recover substantial damages.

Held, 1. The purpose of the legislation, was, in cases in which the plaintiff could not prove special damage, to permit her to rehabilitate her character by the verdict of a jury which would be fully accomplished by a verdict for nominal damages, and that this was the full measure of the right intended to be conferred by the statute.

2. That as the plaintiff could not obtain final judgment for the nominal damages to which she was entitled and for her costs without bringing the case down for an assessment of damages by a court for the trial of actions (Rule 589) she is entitled as part of the costs of the action necessarily incurred by her, to the costs incurred in connection with the assessment of damages.

D. Robertson, K.C., for plaintiff. *O. E. Klein*, for defendant.

Riddell, J.—Trial.] [March 28.

VACCARO *v.* KINGSTON & PEMBROKE RY. CO.

Railway—Hand-car—Train.

Held, that a hand-car is not a "locomotive, engine, machine, or train" within the meaning of the Railway Act, and this is not affected by the definition given in R.S.C. 1906, c. 37, s. 2(32).

Flock, for plaintiff. *T. J. Meredith*, K.C., for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Feb. 29.

MORDEN WOOLLEN MILLS CO. *v.* HECKELS.

Company—Liability for calls on stock—Allotment—Validity of acts of directors when some disqualified—Election of directors without ballot—Certificate of indebtedness as prima facie evidence.

Appeals heard together from decision of a County Court judge dismissing five actions to recover calls on shares held by the several defendants in the plaintiff company, incorporated under the Manitoba Joint Stock Companies Act. The defendants had all paid the first call of 20 per cent. made by the provisional directors. The latter had also made a second call of 25 per cent. which was paid by three out of the five defendants. At the first annual meeting of the shareholders held in January, 1905, a board of nine directors was elected by unanimous vote and without balloting. The board made a third call of 20 per cent. in September, 1905, but none of the defendants paid this call. At the second annual meeting nine directors were again elected by unanimous vote, but three of them were in arrears for unpaid calls on their stock and so were not qualified to be directors according to the Act. This board afterwards made a fourth call of twenty per cent. At the trial the plaintiffs produced certificates of indebtedness in accordance with section 53 of the Act, which makes them prima facie evidence of the debts. The defendants who had not paid the second call contended that the stock had not been allotted when that call was made. As to the third call the defence was that there was no evidence that notice of it was given and, as to the last call, they claimed that it had been made by an unqualified board of directors and was therefore illegal.

Held, 1. Subscribers who pay a call cannot be heard to deny the allotment of their shares.

2. The production of the certificates was prima facie evidence of notice of the calls.

3. The presence on the board of three unqualified directors was not sufficient to invalidate the acts of the board, since the

remaining six were more than the quorum required by the by-laws. *Scadding* v. *Lorant*, 3 H.L.C. 443; *Bank of Liverpool* v. *Bigelow*, 12 N.S.R. 236, and *Munster* v. *Cammell Co.*, 21 Ch.D. 183, followed.

4. It was not necessary that a ballot should be taken for the election of directors when no more than the necessary number were nominated.

Appeals allowed with costs.

McLeod, for plaintiffs. *Hoskin*, for defendants.

KING'S BENCH.

Mathers, J.] IN RE IDEAL FURNISHING CO. [Feb. 27.

Winding-up Act—Lien under writ of execution placed in sheriff's hands after commencement of the winding-up.

The claimants' writ of execution was placed in the sheriff's hands after the service of the notice of the presentation of the petition for a winding-up order, but before the order was made, and there was no doubt that, if section 66 of the R.S.C. c. 129, were still in force, they would have had no lien; but they contended that the law had been changed in the revision of 1906, and that, under section 84 of R.S.C. 1906, c. 144, they had a right to proceed under their execution to realize their judgment.

Held, that sub-section 1 of the new section 84, is so far as applicable to the facts of this case, is not different in effect from the former section 66. Standing alone and taken literally it would mean that a writ of execution could never become a lien on the goods of a company, whether the company was being wound up or not. It must therefore be read in connection with section 5, which defines when the winding up shall be deemed to commence, and must be construed as relating only to a company in process of being wound up.

Quære, what would be the result in a case where the sheriff had sold the goods and had the proceeds of the sale in his hands when notice of petition was served? Under the old section, the money would have gone to the liquidator, but to obtain that result under section 84 as it now stands, sub-section 2 would have to be read into sub-section 1.

The execution creditor's claim was disallowed, but in view of the uncertainty caused by the change in the form of the Act, without costs.

Phillips, for execution creditors. *Dennistoun* for liquidator. *Hoskin*, for other creditors.

Cameron, J.] HANNAH *v.* GRAHAM. [Feb. 24.

Specific performance—Misrepresentation as to quality of land purchased—Caveat emptor—Fraud—Rescission of contract.

Defendant resisted the plaintiff's claim for specific performance of a contract for the sale of a farm to him by the plaintiff, alleging that he had wholly relied on the plaintiff's representations that the land consisted of a black sandy loam of a certain thickness with clay bottom, free from white sand and worth $15 per acre; and that those representations were all untrue. The defendant did not inspect the land before purchasing, but consulted parties other than the plaintiff as to the quality, location and value of the property.

Held, that apart altogether from the conflict of testimony as to the making of the alleged misrepresentations and as to the quality of the soil, the defendant could not succeed in having the contract rescinded on the grounds set up, as public policy requires that persons shall be required to exercise ordinary prudence in their business dealings instead of calling on the courts to relieve them from the consequences of their own inattention and negligence. The doctrine laid down in *Attwood* v. *Small*, 6 C. & F. 232, as follows, "If a person, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him, he cannot be heard to say that he was deceived by the vendor's misrepresentations, the rule being caveat emptor," should be applied in this case. See also, Fry on Specific Performance, p. 295, and *Slaughter* v. *Garson*, 13 Wall (U.S.) 379.

McLaws and *Robinson*, for plaintiff. *Robertson* and *Locke*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] REX *v.* NARAIN. [March 14.

Immigration—Habeas corpus—Detention under British Columbia Immigration Act, 1908—*Provincial law ultra vires.*

Application for habeas corpus on behalf of several Hindus

who had complied with the requirements of the Dominion Immigration Act, but, who being unable to stand the test, set out in the British Columbia Immigration Act, 1908, were arrested by the provincial authorities and sentenced for its infraction.

Held, quoting section 95 British North America Act and section 30 of the Dominion Immigration Act and referring to other sections of the latter Act and the cases of *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (1907) A.C. 68 and *Toronto* v. *Canadian Pacific Ry. Co.* (1908) A.C. 54, that the British Columbia Immigration Act, 1908, is ultra vires of the legislature inasmuch as it is repugnant to the Dominion Immigration Act.

Woods, for applicants. *Taylor*, K.C., for Provincial Government.

Flotsam and Jetsam.

HIGHLY SUSPICIOUS.—One of the agents in a Midland Revision Court objected to a person whose name was on the register, on the ground that he was dead. The revision attorney declined to accept the assurance, however, and demanded conclusive testimony on the point.

The agent on the other side arose and gave corroborative evidence as to the decease of the man in question.

"But, sir, how do you know the man's dead?" demanded the barrister.

"Well," was the reply, "I don't know. It's very difficult to prove."

"As I suspected," returned the barrister. "You don't know whether he's dead or not."

Whereupon the witness continued: "I was saying, sir, that I don't know whether he is dead or not; but I do know this: they buried him about a month ago on suspicion."—*Harper's Weekly*.