Canada Law Journal.

VOL. XXXVII. JUNE 1, 1901. NO. 10.

Some persons seem to have a political or constitutional objection to the title of Emperor or Empress being assumed by an English monarch. When the late Lord Beaconsfield proposed the addition of the title of "Empress of India" to our late beloved Queen's title the proposition was regarded with some suspicion, and as being of doubtful propriety. Englishmen have a just and proper objection to absolutism in all its forms, and it is because the title of "Emperor" has been, and is to-day, associated with the worst forms of absolutism that it is, not unnaturally, regarded as a title inappropriate to a constitutional monarch. But it may be doubted whether the words Empire and Emperor have in truth any meaning inconsistent with the constitutional character of the English monarchy. May they not be regarded as indicating that the country and sovereign so styled is subject to no external paramount earthly power or authority whatever? That, at all events, seems to have been the opinion of our forefathers at a momentous period of English history, when the State was asserting its supremacy within its own domains, as it had done many times before, when it was solemnly declared by Parliament that "by dyvers sundrie olde autentike histories and cronicles it is manifestly declared and expressed that this realme of England is an impire, and so hath been accepted in the worlde governed by oon supreme heede and King, having the dignitie and royall estate of the imperiall crowne of the same, unto whome a body politike compacte of all sortes and degrees of people devided in termes and by names of spiritualtie and temporalitie, ben bounden Eowen to bere next to God a naturall and humble obedience; he beyng also institute and furnysshed by the goodnes and sufferaunce of Almyghtie God with plenarie, hoole and intiere power pemynence authoritie, progatyve and jurisdiccion to rendre and yelde justice and finall determynacion to all man of folke resieauntes or subjectes within this his realme in all causes maters debates and contencions happenying to occurr insurge or begyne within the limittes therof without restraynt or pvocacion to any foreyn princes or potentates of the world," etc.: see preamble 24 Hen. VIII. c. 12. See also 1 Eliz. c. 1, where the crown of England is styled "the imperiall crowne of this realme."

CANADIAN COPYRIGHT IN ITS CONSTITUTIONAL AND INTERNATIONAL ASPECTS.

I. THE SUBJECT OF THIS ENQUIRY.

Many years have elapsed since Lord Camden's eloquent argument in which he declared, with respect to copyright, that "Glory is the reward of science and those who deserve it scorn all meaner views." Since that time something more material than glory has fallen to the lot of the literati, and one of the great objects of the Canadian people is to secure the recognition of their right to the emoluments consequent upon their efforts in the wide field of literature. But far transcending in importance the mere financial aspect is the great principle involved in the determination of the enquiry whether the Canadian people have in fact accepted a constitution different from that which they were led to believe, and did believe, they were receiving. In this enquiry several other questions of prime importance suggest themselves for consideration, notably that indicated by the late Sir John S. D. Thompson, whether the colonies are to be preserved only for the benefit of the producers in the British Isles, and whether the inhabitants of those colonies have no rights of self-government or otherwise which are inconsistent with the interests of British producers (*a*).

The chief feature, however, to be dealt with here is one that should be approached with judicial poise, untinged by the Zeitgeist, which demands that Canada be allotted her place among the nations of the earth without further parley, as a "daughter in her mother's house," it may be, but in the full determination to be "mistress in her own." It is difficult to sever the legal from the national view, but, in so far as the severance can be made, the point for consideration, shortly stated, is, "Has Canada the right to pass copyright legislation for Canada irrespective of Imperial enactments upon the same subject?"

The correspondence between the Home Government and the Governor-General for Canada developed two phases of that question, viz.:

What was the effect of the British North America Act

1. Upon the powers of the Canadian Parliament with respect to existing imperial legislation in force in Canada; and

(*a*) See Hodgins' Dom. and Prov. Legislation, 1867-1895 (1896), at p. 1299.

2. Upon the powers of the Imperial Parliament concerning future legislation for Canada?

The discussion following will, therefore, be confined to these general heads, touching the question of copyright only incidentally, as the constitutional enquiry has to deal with the powers of the Dominion Parliament with respect to all the subjects enumerated in section 91 of the British North America Act.

Lord Carnarvon, Secretary of State for the Colonies, answered the first question by declaring that the Canadian Parliament never had, nor did the B.N.A. Act confer, the power to alter or repeal, without the assent of the Imperial Parliament, imperial enactments relating to Canada. And, in reply to the second, that the Imperial Parliament had not relinquished its power to pass legislation at any time that should extend to Canada. On the other hand, the contention herein made is that Canada may repeal or alter pre-Confederation imperial legislation relating to Canada; and that the power of the Imperial Parliament to deal with Canada with reference to the subjects enumerated in the B.N.A. Act is confined to the exercise of the power of disallowance mentioned in that Act.

Before approaching the particular matters involved herein a word may be said as to the position held by Canada in the British Empire in relation to the authority of the Imperial Parliament. The cases speak without hesitation or ambiguity upon the point: "In relation to the supreme authority of the British Parliament, Canada, in its composite character, forms a complete and separate subordinate government" (*b*). Again, there is the clear-cut expression of opinion by Mr. Justice Crease that the Imperial Parliament has "an absolute and complete sovereign power" (*c*). Case after case determines the same point, and, indeed, no expression of opinion can be found to the contrary. To be entirely consonant with its colonial status Canada must ever admit that the Imperial Parliament, except as restricted by its own act, has the power and the right to enact laws that shall obtain in the colonies, the only question to be entertained by the home government being entirely one of expediency.

(*b*) *Attorney-General for Canada* v. *Attorney-General for Ontario* (1890) 20 O.R. 245. See, also, per Lord Mansfield in *Campbell* v. *Hall*, 1 Cowp. 204.

(*c*) *The Thrasher Case* (1890), 1 B.C. (Irving) 214.

II. THE ENGLISH CONTENTION.

To return to our immediate enquiry. As stated above, the views entertained by the home government are given in Lord Carnarvon's despatch to the Governor-General, dated June 15th, 1874 (*d*).

They may be summarized as follows:

1. The 91st section of the British North America Act giving power to Canada to legislate upon the subject of copyright is one of several having reference (under the sixth general head of the Act) to "the distribution of legislative power," and provides that "copyright," amongst other subjects, is to be dealt with by the Parliament of Canada, while other subjects (under section 92) are to be dealt with by the Provincial Legislatures.

2. The effect of the Imperial Act is to enable the Parliament of Canada to deal with colonial copyright within the Dominion, but it is clear that it is not contemplated to interfere with existing Imperial legislation having force in Canada.

3. The Canadian legislation, in any event, is subject to the provisions of the Colonial Laws Validity Act, 28 & 29 Vict., c. 63.

4. It is further to be implied from Lord Carnarvon's despatch that it was his view that the B.N.A. Act merely divided up the powers that previously belonged to the Provinces.

The above despatch was concurred in sixteen years later by Lord Knutsford, then Secretary of State for the Colonies, who stated that "the powers of legislation conferred upon the Dominion Parliament by the B.N.A. Act, 1867, do not authorize that Parliament to amend or repeal, so far as relates to Canada, an Imperial Act conferring privileges within Canada" (*e*).

In support of the first and fourth contentions, attention is directed to the fact that, at the Quebec Conference, the parties interested in the proposed compact had before them all the subjects that were likely to come within the range of Government in the colony, and, in order to avoid disputes between the contracting parties, that is between the new Dominion, on the one hand, and the Provinces, on the other, a general division was made between these parties of the matters then before them, without any thought whatever that the Imperial Parliament was relinquishing any of its

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(*d*) See Hodgins at p. 12.

(*e*) See Hodgins, p. 40.

powers, one of which was that of legislating for the whole Empire(*f*). The scheme of the Act clearly points to this fact, for the two sections in question are to be found under the title "Distribution of Legislative Powers." It was not a division among Great Britain, the Dominion of Canada and the Provinces, but one entirely between the Dominion of Canada and the Provinces, the Imperial Parliament being a necessary party on account of its sovereignty, which made it essential that its assent should be given to the compact. Nothing was being conceded by the Imperial Parliament; it was simply assenting to an agreement between the two entities, the Dominion of Canada and the Provinces.

What the British North America Act "intended to effect was to place the right of dealing with colonial copyright"—this applies more particularly to copyright, but the principle is a general one—"under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with bankruptcy and insolvency, and other specified subjects, from the local Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion" (*g*).

On the second point Professor Dicey emphatically declares that "No colonial legislature can override Imperial legislation which is intended to apply to the colonies" (*h*). So, likewise, Moss, J. A., says: "It must be taken to be beyond all doubt that our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole Empire" (*i*). And in *Ex parte Worms* (*j*) speaking of the Imperial Extradition Act of 1870, Chief Justice Dorion says that, if there is any inconsistency between it and the British North America Act, the latter must give way to the former. In *Regina* v. *The College of Physicians & Surgeons of Ontario* (*l*) the Ontario Court of Queen's Bench held that the Imperial Medical Act, 1868, applied to Canada and overrode the provisions of the

(*f*) Cf. *Tai Sing* v. *Maguire* (1878) 1 B.C. (Irving) per Mr. Justice Gray, at p. 107.

(*g*) (1876) Burton, J. A., in *Smiles* v. *Belford*, 10 A.R. 436.

(*h*) Law of the Constitution, 3rd ed., 102. See Todd, 188-192, and Hare's Govt. in England (App.). Dicey's Law of the Constitution.

(*i*) *Smiles* v. *Belford*, supra, at pp. 447-8.

(*j*) 2 Cartwright (1876), p. 315.

(*l*) (1879) 44 U.C.R. 564

Provincial Act of 1874, although the subject of education is placed within the exclusive jurisdiction of the Province by the B.N.A. Act, section 93. Hagarty, C. J., delivering judgment, says: "The case on behalf of the defendants was argued by Mr. Crooks in a very fair and candid spirit, admitting, as, of course, was necessary, with the Federation Act before us, that, if the Imperial Parliament distinctly legislate for us, they can do so, notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject . . . . Where the Federation Act speaks of . . . . exclusive right, it means exclusive as opposed to any attempt to legislate by the Dominion Parliament."

As to the power of the Canadian legislatures to alter or repeal pre-Confederation Imperial legislation in force in Canada, the B.N.A. Act is perfectly plain. Section 129 enacts that all laws in force at the date of Confederation shall so remain subject to alteration by the Canadian authorities, but no change can be made of laws that were enacted by the Imperial Parliament (*m*).

Mr. Lefroy formulates his opinion in the following proposition: "The powers of legislation conferred upon the Dominion Parliament and the Provincial Legislatures, respectively, by the B. N. A. Act, are conferred subject to the sovereign authority of the Imperial Parliament" (*n*). And keeping in mind the duty of the Home Government to watch over the interests of the whole Empire, it cannot be imagined for a moment that the Imperial Parliament, even if it could do so, would shackle itself for all time in regard to the subjects enumerated in the B.N.A. Act, for by such a course the welfare of the Empire might at any time be jeopardized by antagonistic legislation on the part of the colony.

On the third point it is urged that to deprive the Imperial Parliament of its acknowledged right to govern the Empire express words are required (*o*), and within the four corners of the B.N.A. Act nothing can be discovered to afford the slightest ground for the contention that the Imperial Parliament has in any way curtailed its powers in that regard. "There is nothing indicating any intention of the Imperial Parliament to abdicate its powers of

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(*m*) Munro "The Constn. of Canada" (1889), p. 266.

(*n*) Leg. Power in Canada, p. 208, Prop. 12.

(*o*) *Cushing* v. *Dupuy*, 1 Cart. 260.

legislating on matters of this kind (copyright)" (*p*). The spirit that animated Parliament in the passage of the Colonial Laws Validity Act is that which breathes through all its actions in connection with the B.N.A. Act. The 28th and 29th Victoria was passed but a year or two before the British North America Act, and its avowed object is to limit the powers of colonial parliaments. Such glaring inconsistency on the part of the British Parliament could scarcely be imagined as that in one year it would restrict colonial powers, and in the next sweep away all limitations. Continuity of purpose must be presumed (*q*) more particularly when, in the absence of restriction, the colonial legislatures might be placed in a position so to legislate as to injuriously affect the welfare of the whole Empire (*r*).

But even conceding that Canada has the power to repeal or alter pre-Confederation imperial enactments relating to Canada, the position taken by the home authorities is, that the B.N.A. Act is an Imperial Act, and that, in the omnipotence of the power that passed it, amendment may be made to it at any time. It requires no citation of authority for the statement that one parliament cannot bind its successors (*s*), and if the Imperial Parliament of 1867 assumed to speak for its successors to the effect that the B.N.A. Act would never be touched, it may well be urged that it exceeded its powers.

The late Sir John S. D. Thompson was disposed to confine his contention to supporting the right of the Canadian Parliament to amend or repeal Imperial enactments passed prior to the B.N.A. Act and relating to Canada, his view, apparently, being that the Imperial Parliament might control Canadian legislation by Imperial legislation subsequent to the B.N.A. Act and applicable to Canada (*t*). But he was careful to guard himself all though the corres-

(*p*) Proudfoot, V.-C., in *Smiles* v. *Belford*, 1 Cart. 589. Lefroy 229.

(*q*) Crooks, Q.C., arguendo in *Reg.* v. *Col. Phy. & Sur.*, supra.

(*r*) *Routledge* v. *Low* (1868) I R. 3 H.L. 100, is cited as authority for the proposition that British copyright, when once it exists, extends, under the 20th section of 5 & 6 Vict., c. 45, over every part of the British Dominions. That decision, however, was, practically (though the final decision was rendered in May, 1868), pronounced before the passage of the B.N.A. Act, the effect of which was not considered, as it had no bearing on the point involved in the case. Mellish, Q.C. (at p. 106), said: "It is not necessary to argue whether the English statute supersedes a Canadian Act." And see per Lord Chelmsford at p. 116.

(*s*) Dicey, p. 83.

(*t*) See his report of August 3rd, 1889.

pondence with the home authorities from seeming to admit that that was his matured view. The controversy led in another direction altogether, and Sir John intimated his desire to deal, at a later date, with the whole question of the competency of the Canadian Parliament herein and of the position of the British Parliament with regard to the B.N.A. Act (*u*).

III. THE CANADIAN CONTENTION.

It is submitted that the Canadian side of this question has been considered from the wrong standpoint, the views of some of the text-writers being particularly narrow and smacking of that insular conceit that lost to the British Empire the great republic to the south.

Professor Dicey, with an assurance not quite justified under the circumstances, stated that the Fathers of Confederation were guilty of "official mendacity" in declaring that Canada is federally united with a constitution similar in principle to that of the United Kingdom. His lack of knowledge in this respect may, perhaps, furnish ground for suspecting that, in the interpretation he seeks to place upon the Canadian Magna Charta, his mind is again perverted by the absence of that broad-minded conception, the possession of which is necessary to enable the fact to be grasped that Canada is not a Divine provision for the reward of English producers, but is a Nation breathing the freedom that haunts her hills and invests her valleys. The Almighty fashioned this country on a majestic scale—the rivers, the mountains, the forests and prairies, all bespeak the lavish hand of the Creator, and is it to be conceived that, having done so much, He should mar the symmetry of His work by instilling into the Canadian people a spirit so little in consonance with its surroundings as to hesitate to assert the supreme right of freedom? No, it cannot be, and it is on account of not recognizing and giving full weight to this spirit of liberty that Professor Dicey fails to give proper value to the important events that culminated in the passage of the British North America Act. The Confederation was something new; it was a step far in advance of anything that had yet been attempted in the British Empire (*v*) and as well might disregard be had for

(*u*) Hodgins, p. 1306, par. 47.

(*v*) "No enactment has been passed in modern times of such gravity as the B.N.A. Act."—Crooks, Q.C., arguendo in *Reg.* v. *College of Physicians and Surgeons*, 1 Cart. at p. 767.

the spirit of the times, in looking for the meaning of the B.N.A. Act, as for the events that led to the great charter to be overlooked in seeking to understand the supreme intent and import of that document (*w*).

The British North America Act must not be approached with the ordinary measure of statute construction. It is no puny act that permits of that course (*x*). It is the charter of a nation loyal but free (*y*). It is the gift of one free nation to another—a gift destined and intended to weaken the visible bond of union, but having for its object the cementing together in an irrefragable union, of two peoples having common interests, common laws, common language, common blood, and, above all, a common desire to be free (*z*). When that great Canadian, the late Sir John Thompson, urged the claims of his country, it was not his voice, but the voice of five millions of people that was heard, pleading, not to an ordinary court of law, but to the great court of the Empire. Behind that mighty voice was the indomitable spirit of the Canadian people. Behind it was their implicit confidence that they had not been deceived in accepting the B.N.A. Act as the palladium of their liberties. And when Sir John declared that "the people of Canada would hold him culpable if he failed to assert what was the only interpretation under which they received the constitution, and under which they were willing to be content with that constitution" (*a*), he gave public utterance to the firm resolve of a people willing and desiring to be loyal, but determined to be free.

The mind of the Canadian people was open and known to the enacters of the B.N.A. Act (*b*). For years the former had been in the full and free enjoyment of the blessings resulting from the exercise of responsible government. Their progress had been as phenominal as their capacity for self-government was indisputable

(*w*) Existing conditions at Confederation may be consulted: C. J. Richards in *Severn* v. *The Queen*, 1 Cart. 430-31; and see, also, *Corporation of Three Rivers* v. *Suite*, 2 Cart. 280; *Reg.* v. *Taylor*, 36 U.C.R. at 212.

(*x*) In construing an instrument of government such as the B.N.A. Act, a wide construction should be given to the powers of the Local Legislature. Cf. Vattel, Bk. 2, c. 17, secs. 285-286.

(*y*) It confers a constitution: Spragge, C.J., in *Hodge* v. *The Queen*, 7 A.R. 246.

(*z*) Cf. Lewis' Govt. of Dependencies, Introduction by Lucas, p. lxiii.

(*a*) Sir John Thompson—Hodgins, p 33.

(*b*) Lord Selborne in *Reg. v. Burah*, 3 Cart. at 431.

and illimitable. In the forefront of the colonies, each advance in liberty of government had been marked by a corresponding increase in material wealth, intellectual development and moral elevation. Every extension of the area of government received from the motherland had been returned a hundredfold in love and loyalty and gratitude. Nothing had been denied them, and now they approached their mother full of a new project—the confederation of the British North American Provinces. Here, they said, is the perfection of political wisdom, the ultima Thule of attachment and fidelity to our mother. In the success of this confederation lies the future of the British Empire. If ever the sceptre shall pass out of the British Isles, here is the home where refuge remains. Grant us the powers we request. See with the foresight, the prescience of true statesmanship, the value to the British Empire of the gratitude of a free people. Your confidence in us has never been misplaced ; trust us yet again with this greater boon, the unrestricted right to govern ourselves. To avoid all possible chance of the interests of the Empire being jeopardized, retain the power of disallowance, "which, it is submitted, is sufficient to secure every reasonable requirement for the security of imperial interests" (*c*) but, in other respects, leave us free.

The response to this appeal was a declaration of the unbounded confidence of the motherland in her young colony, and a gift to the people of that colony of the free and unrestricted right to govern themselves. In accordance with the express wish and desire of the Canadian people, the power of disallowance found place in the charter. The haggling tone of the Colonial Laws Validity Act, founded, as it was, on the false idea that "the colonies were to be preserved only for the benefit of the producers in the British Islands, and that the inhabitants of those colonies had no rights of self-government or otherwise, which were inconsistent with the interests of British producers" (*d*), disappeared in shame before the generous spirit now prompting the Imperial Parliament (*e*). Canada, the new impulse said, is no longer a child to be guided and gov-

(*c*) Per Sir John Thompson—Hodgins, p. 1311. Sir J. G. Bourinot says: "The general power preserved by the Imperial Government of disallowing any measure within two years from its receipt is considered as a sufficient check, as a rule, upon colonial legislation."

(*d*) Sir J.S.D.T.—Hodgins p. 1299.

(*e*) See argument of Hon. Edward Blake, *Thomas* v. *Fielding*, 5 Cart. 503.

erned by us ; she has reached maturity and stands by our side the support and mainstay of our reign, pulsating with the courage that rescued the liberties of the people from an unworthy monarch at Runnymede, and animated by the firmness that inspired the Petition of Rights. Addressing Canada it exclaimed, "Our government henceforth shall be confined to ourselves ;

"The law that ye make shall be law and I do not press my will
"Because ye are Sons of the Blood, and call me Mother still."

This young giant, it said, shall legislate for herself, subject only to the bar she willingly imposes, the power of disallowance left to us. And so it was enacted.

That this is no vision, but that the British people and Government were fully seized of the growth of the spirit of independence in the colonies, and were prepared and anxious to encourage that growth, appears on every side.

So early as 1775 Adam Smith declared : "In everything except their foreign trade, the liberty of the English colonists to manage their own affairs their own way is complete"(*f*). Lord Abingdon stated in the debate in the House of Lords on the Constitutional Act of 1791 : "That by this Bill this country was restored to its right, not of internal legislation over the colonies, for that right it never had, notwithstanding the pretended omnipotence of the Declaratory Act (18 Geo. III, c. 12), but to its undoubted external right of regulating the commerce of all its dependencies for the sake of navigation and insomuch for the safety and general benefit of the whole British Empire" (*g*). And Sir Cornwall Lewis admits that "The early English colonies were in practice nearly independent of the Mother Country except as to their external commercial relations. . . . . And there was scarcely any interference on the part of England with the ordinary management of their internal affairs" (*h*).

But this early restriction has been swept away, for it is conceded that the difference between self-government in the past and in the present consists in the fact that the colonies now within limits

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(*f*) Chapter vii, Part II.—"Causes of the Prosperity of New Colonies."

(*g*) Hansard's Parly. History, vol. 29, pp. 658, 659.

(*h*) Government of Dependencies, pp. 159, 160.

manage their own commercial policy (*i*). Lucas remarks (*j*) that Great Britain has now abandoned control over trade and public lands in the case of self-governing colonies. That leaves under control the constitution of the form of government and the regulation of foreign relations. Where is there any claim to regulate the internal affairs of Canada? Did Lord Durham, when pleading for the gift of self-government to the colonies, urge a tightening of the reins of control? On the contrary, he enumerated "the constitution of the form of government, the regulation of foreign relations and of trade with the Mother Country, the other British colonies, and the disposal of the public lands," as the only points on which the Mother Country required control (*k*).

That was the enlightened spirit that led to the Union Act. Is it to be urged that the independence of the colonies had retrograded, had become less verile in 1867 than it had been when Durham wrote?—that Canada required more control then than in 1841? The whole trend of events is against any such contention. There had arisen after Durham's report a new school of thought in the Mother Country that had before it the experiences of the past in colonial management, and the influence of this new school gave us the present colonial system which is the "result of facing an old difficulty in an old way. . . . . Fifty years ago (that is, in 1840-1841), English statesmen were confronted with the question how to govern their great dependency, Canada. At a much longer distance from home they saw the Australasian settlements beginning to shew the restiveness of manhood, and declining to be considered any longer as a place of deposit for the refuse of Great Britain. They had two great facts before them: That the places of settlement were far removed from the Mother Country, and, therefore, could not be governed directly; and that these distant countries were settled by Europeans, in Australia entirely by Englishmen. They turned, as Englishmen fortunately do turn, to past experiences; they found in so doing that the old English colonies had thriven under self-government and that the

(*i*) Ibid., Introduction by Lucas, p. xxxi. "In regard to Canada, one may venture to say that its practical commercial independence has been recognized" —Boyd, C., in *Anglo-Canadian Music Publishing Co.* v. *Suckling* (1889), 17 O.R. 244.

(*j*) Page xliii.

(*k*) Report and Despatches of the Earl of Durham, published by Ridgways, 1839, 207.

greatest of them were lost forever by the action of the Mother Country in imposing taxes on the colonists instead of leaving them to tax themselves. They were themselves, year by year, more imbued with the free, self-reliant doctrines of the so-called Manchester school; and they determined, in following the old course, to apply these new doctrines. They saw that they must incur one of two dangers: either, by giving self-government, they must take the risk of peaceful separation; or, by refusing it or giving it in a half-hearted way, they must run the risk of a second war of colonial independence. They wisely chose the former alternative; they cut away questions of taxation and commercial restriction as having been fatal in the past. They allowed the colonies to form habits of practical independence, leaving time to decide whether the good-will born of their policy would counteract the tendency to absolute separation" (*l*).

If, as is said further on, "the grant of self-government means the grant of virtual independence," is it not pertinent to enquire whether the grant of self-government to Canada was delusive, and whether the old policy of commercial restriction—of holding the colonies "for the benefit of the English producer"—was intended to be again resorted to instead of applying the "free, self-reliant" doctrines above alluded to? See the interpretation placed by Lucas on the action of the Home Government in passing the Union Act: "The gift of responsible government was, except in matters of foreign policy, full and unfettered, and moving still in the same direction. British statesmen and the British people have welcomed and furthered the Confederation movement, which is the outcome of free institutions and the coping-stone of the system of self-governing colonies" (*m*). Was it "moving in the same direction" to restrict the right of self-government by clogging its exercise for no other reason than for the "benefit of the English producer?" Was this not imposing a tax on the colony that might lead to "a second war of colonial independence?" Surely there is no merit in the contention that the statesmen who gave vitality to our wishes for confederation were desirous of pursuing a retrograde policy instead of leaving us "free and unfettered."

(*l*) Lucas, pp. xxxi. and xxxii.

(*m*) P. xxxiv. See, also, Bryan Edward's History of the British Colonies in the West Indies, vol. ii. pp. 520, 430, 435, 436; and Haliburton's Historical and Statistical Account of Nova Scotia, vol. ii., p. 346.

Gladstone voiced the recognition of the change of policy when he said in the House of Commons seven days before the passage of the B.N.A. Act, "We have for a full quarter of a century acknowledged absolutely the right of self-government in the colonies" (*n*). Surely these words were evoked by his sense of the meaning of the British North America Act, but then on the eve of passage in the same chamber in which Gladstone's voice was heard.

Assuming, then, this to be the spirit animating the British Parliament, what language did they use to give effect to their intention? "Exclusive" was a word not unfamiliar to the ears of English statesmen. They had already made use of it in their dealings relating to the legislative independence of Ireland. A resolution unanimously passed on 22nd January, 1783, in the English House of Commons, dealing with the "exclusive" rights of the new Irish Parliament, was interpreted by the great Edmund Burke, on the 19th May, 1785, to signify that "To Ireland independence of legislature had been given; she was now a co-ordinate though less powerful state."

It must not be thought that the word was used in our Act carelessly and without consideration. It is well known that all its provisions were as carefully discussed and considered as if it had been a compact between independent nationalities (*o*). Nor can it be said that a less degree of independence was to be granted to Canada. Is it conceivable that less was to be conceded to the loyalty of Canada than to the aggressiveness of Ireland? Was a less generous spirit actuating the British Parliament when driven by expediency than when moved by the loyal aspirations of the first colony in the Empire? It has been asserted frequently, and with a great deal of truth, that England never grants any reform unless forced by expediency; but if ever there was a time when she deferred to the dictates of her heart, it was in the grant of a Constitution to her great self-governing colony, Canada.

The right asserted by the English authorities in copyright matters is a right to deal with the internal legislation of a colony —a right that was declared by Lord Abingdon to be one that England never had; but, in the face of this declaration; in the face

(*n*) March 22nd, 1867—Hansard, vol. 186, p. 753.

(*o*) Crooks, Q.C., arguendo, in *Reg.* v. *Col. P. & S.* 1 Cart. at p. 767.

of the accepted policy pursued from 1791 to 1841, and, by the authoritative declaration of Gladstone, still in force in 1867; in defiance of the assertion that the policy of England was "still moving in the same direction," we hear the contention that England belied its declarations and its actions by resorting to the old short-sighted policy of restriction and interference.

Before referring to the cases on the subject, let us glance at the constitutional documents relating to Canada and see how a perusal of their contents leads to exactly the same conclusion, that greater liberty was being given by the B. N. A. Act than had before been granted. By the Constitutional Act, 1791, (Imp. Act, 31 Geo. III, c. 31) the Imperial Parliament, in order to safeguard its interests, specified in what respect it should have power over the Canadian Legislature: Section 46 reads: And be it therefore enacted....that nothing in this Act contained shall extend, or be construed to extend, to prevent or affect the execution of any law which hath been or shall at any time be made by His Majesty ....and the Parliament of Great Britain, for establishing regulations, or for imposing, levying, or collecting duties for the regulation of navigation, or for the regulation of the commerce to be carried on between the said two provinces, or between either....or for appointing and directing the payment of such duties so imposed ....or to give to His Majesty....any power or authority, by and with the advice and consent of such Legislative Councils and Assemblies respectively, to vary or repeal any such law or laws, or any part thereof, or in any manner to prevent or obstruct the execution thereof. "Sec. 33 enacted that all laws (including imperial laws having force in Canada, no doubt,) in force at the commencement of the Act should continue so, except repealed or varied by it "or in so far as the same shall or may hereafter....be repealed or varied by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Councils and Assemblies of the said Provinces respectiveiy...."—recognizing the right to repeal or vary pre-existing imperial laws applying to Canada.

In 1840, by the Union Act, (Imp. Act, 3 & 4 Vict., c. 35) the Canadian Parliament was denied the power to affect English Acts then or thereafter to be made and applicable to Canada (*p*).

(*p*) Section 3.

Thus, each time we see the careful reservation of Imperial rights. Express mention is made in each case of the will of the Imperial authorities, and it may be taken for granted that what was not reserved in the Acts above mentioned was not intended to be reserved but to be released. On the passage of the B. N. A. Act the same course is pursued—the English Parliament reserves all that it intends to reserve, and that is the power of disallowance. What could indicate more clearly the intention of the Imperial body to "acknowledge absolutely the right of self-government in the colonies" (*q*)?

Approaching, then, the British North America Act, informed by the foregoing, how much larger is the intent to be attributed to that enactment. How full of meaning is the word "exclusive" used therein, and how redolent of the spirit I have noted above are the remarks of Chief Justice Draper in *Regina* v. *Taylor* (*r*)

(*q*) As to the effect of sec. 129 of the B.N.A. Act, it cannot have the force assigned to it by Munro, because that would be too plainly repugnant to the grant of legislative authority given by the Act (see article, 11 C.L.T. 123-4). The writer of the article referred to suggests that it must, therefore, apply to those Imperial Acts which are intended to apply throughout the Empire, such as the Merchants' Shipping Act and the Copyright Laws. But we have an express decision shewing that that idea cannot prevail as to the Merchants' Shipping Act: (See "The Eliza Keith" and "The Royal"—cases dealt with later on); and there appears no more reason why it should apply to copyright. I submit that the exception in sec. 129 has reference to the provisions of the Constitutional Act of 1791 and of the Union Act of 1840, that were still in force at the date of the passage of the B.N.A. Act. And, in any event, that the section is controlled by the opening words, "Except as otherwise provided by this Act." It is "otherwise provided" by secs. 91 and 92, for these give plenary powers in regard to all matters therein enumerated, whether Imperial laws theretofore dealt with those subjects or not, and, consequently, the exception is narrowed to Imperial enactments dealing with subjects not specifically mentioned in secs. 91 and 92.

(*r*) (1875) 36 U.C.R. 220. In *Smiles* v. *Belford*, supra, Mr. Justice Burton endeavours to disparage the remarks of Chief Justice Draper in *Regina* v. *Taylor*, by saying that they were not concurred in by other members of the court. But it is notable that Strong, J., has never since sought to withdraw from his concurrence, and his words at the time were, not only that he concurred, but that he "entirely" concurred. Nor did Patterson, J., ever demur. Moss, J.A., in *Smiles* v. *Belford*, is very emphatic in his declaration that "our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole Empire;" but this statement must be read with the fact that the question as to the meaning of the word "exclusive" was not argued (1 Cart. 521), and the learned Judge seems to have been more concerned with the "main" question (see p. 586), which was as to the Act of 1875. Then, too, something was, no doubt, based on the statement made by Proudfoot, V.-C., that Canadian legislation had recognized previous Imperial legislation on the subject of copyright as still in force in Canada. Sir John Thompson expressly reserved his contention that Canada could repeal or vary Imperial legislation in force in Canada, and the Canadian legislation was passed on that understanding —that it should not be used as an argument in the way it had been used, and there can be no doubt that was the policy of the Government at the time of the passage of the Acts referred to. (See Debate on Copyright Bill, No. 167 (1900), in the House of Commons, Ottawa.)

when, speaking of the 91st section of the Act and the use of the word "exclusive," he says: "Exclusive of what? Surely not of the subordinate Provincial Legislatures whose powers had yet to be conferred, and who would have no absolute powers until they were in some form defined and granted. Would not this declaration seem rather intended as a more definite and extended renunciation on the part of the Parliament of Great Britain of its power over the internal affairs of the new Dominion than was contained in the Imperial statute of 18 Geo. III, c. 12, and 28-29 Vict., c. 63, ss. 3, 4 and 5?" Mr. Justice Strong "entirely" concurs, and Burton and Patterson, JJ., also agree.

Haliburton says that while there is some doubt upon the question of the relations subsisting between the Imperial Parliament and the Colonial Assembly, "the true distinction appears to be, that Parliament is supreme in all external, and the Colonial Assembly in all internal matters. But even in matters of a local nature the regal control is well secured by the negative of the Governor; by his standing instructions not to give his assent to any law of a doubtful nature without a clause suspending its operation until Her Majesty's pleasure be known, and by the power assumed and exercised of disagreeing to any law within three years after it has passed the Colonial Legislature. With these provisions it is absurd to suppose, whatever may be said to the contrary, that the local assemblies are not supreme within their own jurisdiction; or that a people can be subject to two different legislatures; exercising at the same time equal powers, yet not communicating with each other, nor, from their situation, capable of being privy to each other's proceedings" (*s*).

The British Parliament, it is acknowledged, is supreme and, unless restrained by its own act, can legislate for the whole empire. That restraint, it is submitted, has been imposed upon its powers by restricting its right to interfere with the exercise of self-

(*s*) Lewis, in his work on the Government of Dependencies, endeavours to sweep away this and a similar statement by Bryan Edwards by a stroke of the pen, but Lewis is so notoriously out of touch with the new order of things that even his editor, Mr. Lucas, is constrained to admit that Lewis' views, in some respects, require modification as regards the self-governing colonies (see p. 155, note 2; and, again, p. 159, note 1). Lewis also states that "The subordinate Government of every British dependency must be considered as deriving its existence and its powers from the delegation of Parliament, either express or tacit." This theory has been completely exploded. See *Queen* v. *Burah*, 3 A.C. 889, 914; *Powell* v. *Apollo Candle Co.*, 3 Cart. 43.

government in the colony to the power of disallowance mentioned in the B. N. A. Act. If it was not intended to release its powers in all other directions, why was the power of disallowance referred to at all? Was it not included in the sovereignty of the British Parliament? Suppose it had not been mentioned, had the British Parliament not the power in any event to prevent the passage into law of any Canadian legislation opposed to the will of the Imperial Parliament?

It was essential, in defining the respective rights of the Dominion and the Provinces to mention the power of disallowance to be exercised by the Dominion, because there was no already-existing political entity in Canada having supreme legislative powers. But the case was entirely different as regards the Dominion and the Imperial Parliament. The latter was in existence when the breath of life first animated the former. It kept its powers intact unless it agreed to restrict itself in their exercise. It is not to be assumed that the power to disallow was inserted ex abundanti cautela, else why was not the greater right—that of external control—mentioned? The only fair presumption is that the power of the Imperial Parliament was to be confined to disallowance, and, once having bound itself, the principle of *Campbell* v. *Hall* (*t*) applies to prevent its acting otherwise than in the manner agreed upon. If, having bound itself by an act so sacred and inviolable, it can still regulate the internal affairs of Canada, then what is to prevent its interfering with Canadian legislation after the expiry of the two years allowed in the B. N.A. Act for disallowance? It is submitted that it is as much bound in the one case as in the other.

Sec. 91 provides, inter alia, that the Dominion shall have the power to raise money by any mode or system of taxation. Are we to understand that the British Parliament intended to reserve to itself the right to interfere with taxation in Canada? If so, what is the meaning of the Declaratory Act, 18 Geo. III, c. 12? And, if no such reservation is to be implied as to taxation, where is the authority for saying that in any of the cases under sec. 91 such reservation exists? It is no more required in one case than in the other, and, in view of the deplorable and humiliating consequences that followed the attempt to tax the New England colonies, is it reasonable

(*t*) 1 Cowp. 204.

to suppose that the English Government had in mind a renewal of the attempt, or is it more in keeping with the nature of things that no such intention was harbored in their minds, but that they were inclined "still to move in the . . . direction" of leaving the colonies free and unfettered? If it be conceded as to one of the sub-sections of s. 91, it must be granted as to all, for there is nothing to indicate an intention to treat one differently from another.

It is submitted that the foregoing considerations maintain the contention that the British North America Act is a treaty—a charter—requiring for its interpretation the most comprehensive and statesmanlike view of the position of the British Parliament at the time that body passed the enactment in question. We are not without case law to support that contention.

In *Powell* v. *Apollo Candle Company* it is expressly declared that a colonial legislature, though restricted in its area of power, is unrestricted within that area (*u*). And so in *Hodge* v. *The Queen* (*v*), decided by the Judicial Committee of the Privy Council in 1883, it is declared that the provincial legislatures, within the subjects enumerated in s. 92 of the B. N. A. Act, have "authority as plenary and as ample within the limits prescribed by that section, as the Imperial Parliament in the plenitude of its power possessed and could bestow." The Lord Chancellor, in *Queen* v. *Burah* (*w*), lays down the general law in these terms: "The Indian legislature possesses powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But when acting within those limits . . . it was intended to have plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

These cases shew beyond question that it was never intended that, when acting or legislating upon the subjects enumerated in the Act, the Canadian Parliament should be open to be thwarted by interference from across the water. If, then, it enacts copyright legislation (say) and thus deals with a subject mentioned, where is the justice of contending that that legislation may be counteracted

(*u*) (1885) 3 Cart. 432.

(*v*) (1883) 9 A.C. 117.

(*w*) 3 A.C. 889.

by Imperial enactments upon the same subject? Is that leaving us unrestricted within the area prescribed? Is that giving us powers as plenary as those of the Imperial Parliament? The latter body, when it enacts a law, is open to interference from no other power. Canada, when enacting upon the subjects enumerated —within its "area"— must, according to the decisions of the Judicial Committee of the Privy Council, be as free from interference as the Imperial Parliament, and that freedom it cannot have if its legislation is subject to be rendered nugatory by outside interference in any way except that to which Canada has consented, that is by disallowance. "If the 91st section of the Act has not conferred on the Parliament of Canada all the power of the Parliament of the United Kingdom in respect of the subjects there enumerated, the gift of powers made by that Act is delusive, in respect to the Canadian Parliament, and is less than the gift of powers which the Provincial Legislatures previously enjoyed regarding the same subjects" (*x*). And in case of interference by the British Parliament "the B.N.A. Act would cease to be regarded as possessing the fundamental qualities of a constitution or system of government" (*y*).

Lord Carnarvon seemed inclined "to the opinion that the 91st section, on which all the powers of Canada depend, is intended to withdraw the powers from the Provincial Legislature and not to confer any substantial authority on the Parliament of Canada. If that view were correct, the B.N.A. Act would simply have been a withdrawal from the Legislatures of the various Provinces which were thereby united of a large portion of the authority which they had possessed ever since representative institutions were conferred upon them, and it is difficult to see that any authority is conferred upon the Parliament of Canada or that the Parliament has now the powers which belong to the Parliaments of all other self-governing colonies" (*z*).

(*x*) Report of Sir John Thompson, 3rd August, 1889.

(*y*) Crooks, Q.C., in *Reg.* v. *Col. P. & S.* 1 Cart. at p. 769.

(*z*) Report of Sir John Thompson, 3rd August, 1889.

IV. IMPERIAL LEGISLATION PRIOR TO CONFEDERATION.

Mr. Lefroy suggests (*a*) that "a question may present itself as to how it is that a Colonial Legislature can have power to amend or repeal in respect to the colonies an Imperial Statute such as the well-known statutes of 27 Eliz., c. 4, and 13 Eliz., c. 5, the former of which, for example, purports to be amended, and the meaning of the latter declared by Ontario Acts"—and he cites the discredited Sir George Cornwall Lewis' essay on the Government of Dependencies (*b*) as furnishing a theory and explanation as follows: "In an English dependency which has been colonized by Englishmen, the laws of the Mother Country are in force so far as they suit the condition of the colony; and an English dependency acquired by treaty or conquest retains generally the laws which it possessed at the time of the acquisition. But the laws just mentioned are not considered as being among the laws of the supreme Government, which the subordinate Government cannot alter; probably because they are considered to have been established directly by the express or tacit authority of the immediate Government of the dependency, although they were so established with the tacit consent of the supreme Government. The laws of the supreme Government, which, according to the English practice, the subordinate Government is unable to alter, are the written laws of the supreme Government which apply explicitly to the dependency, and were, therefore, passed at the time or subsequent to its colonization or acquisition, or they are the written laws of the supreme Government passed before or after its colonization or acquisition, which apply to the dependency by a general description." Lewis is here speaking of a dependency, and it is only necessary to add that, in this respect (if Canada is meant to be included), as in many others, his views require modification, for, in the introduction by Lucas, the latter expressly says that "the self-governing colonies (that includes Canada) of Great Britain are not dependencies" (*c*) and adds that Canada is not a dependency but a protected state (*d*).

Some other view or theory must, therefore, be sought to explain the fact that Canada has repealed and continues to repeal

(*a*) Legislative Power in Canada, p. 230.

(*b*) Edition of 1891, p. 201.

(*c*) Page xliii.

(*d*) Page xliv.

such legislation, and what better theory is required than that it is her right to do so. If, as Mr. Justice Taschereau says (*e*), "When the commencement of a practice was almost coeval with the constitution, there is a great reason to suppose that it was in conformity to the sentiments of those by whom the true intent of the constitution was best known," does not the fact of this repeated dealing with imperial legislation lead inevitably and irresistibly to the conclusion that it was in accordance with the real intent and purpose of the constitution? The "Hibernian" (*f*) was a case

(*f*) (1872) L.R. 4 P.C. 51.

where it was argued that the general and maritime law of the High Court of Admiralty in England was the law of the Court of Admiralty in Lower Canada, and that it could not be altered by a Canadian statute; but the Privy Council dismissed the contention as unfounded. And in the case of the "Eliza Keith" (*g*), a Canadian statute conflicted with the provisions of the Imperial Merchant Shipping Act, 1854, as amended in 1862. The Court said: "Subsequent to these statutes, the B. N. A. Act, 1867, was passed. This conferred upon the Parliament of Canada legislative authority over all matters occurring in Canadian waters, within the subject of navigation and shipping, and in 1868, its co-operation was required to give effect to the same rules of navigation as had been in use in England. The Act respecting the navigation of Canadian waters (31 Vict., c. 58) was accordingly passed. . . . So long as the law respecting Canadian waters is not repealed, or is declared by Her Majesty in the Privy Council to be inoperative, I shall consider it to be binding on this court and decide accordingly in cases of collision upon Canadian waters."

Holmes v. *Temple* (*h*) is a further endorsation of the opinion of the Court of Appeal for Ontario in *Regina* v. *Taylor*, Chauveau, J., expressly holding that the provisions of the English Army Act of 1881 were overridden by the Canadian Statutes in the same behalf. This decision is of great moment because it will be noticed it has to do with "Militia and Defence," a subject with which the safety of the Empire is very much concerned. Again, in the case of "The Royal," in the Vice Admiralty Court, Quebec, it was held that s. 189 of the Imperial Merchant Shipping Act, 1854 (17-18 Vict., c.

(*e*) *Valin* v. *Langlois*, 1 Cart. 323.
(*g*) (1877) 3 Q.L.R. 143.
(*h*) (1882) 8 Q.L.R. 351.

104), which provides that no suit for wages under £50 shall be brought by any seaman in any Court of Vice-Admiralty unless in certain cases mentioned, had been repealed, pro tanto, by s. 56 of the Dominion Seamen's Act, 1873 (36-37 Vict., c. 104, D.), which placed the limit at $200 in the case of any seaman belonging to any ship registered in the Province of Quebec, Nova Scotia, New Brunswick and British Columbia, and this, although s. 109 of the Imperial Act enacts that that part of the Act which includes s. 189 shall apply to all ships in any part of Her Majesty's dominions abroad (*i*).

If any weight is to be attached to the recognition of Imperial Legislation by Canadian Legislation as being in force here, then the same importance must be attached to the formal recognition by the Imperial authorities of Canada's right to repeal Imperial Legislation, as in the case of the Dominion Seamen's Act, 1873, repealing an Imperial Act relating to Canada. The two cases differ in this respect, that it was expressly agreed that Canadian Legislation should be passed without it having any bearing whatever on the question of the right of Canada to legislate exclusively on the subject involved, whereas in the other case no such agreement took place.

Dicey (*j*) remarks that "Acts passed by the Victorian Parliament would not be valid which repealed, or invalidated, several provisions of the Merchant Shipping Acts meant to apply to the colonies." The case of "The Royal," supra, furnishes a complete reply to that contention, so far as the same should be urged as regards Canada. *Riel* v. *The Queen* (*k*), decided by the Privy Council in 1885, is likewise pertinent. There had been three Imperial Statutes for the regulation of the trial of offences in Rupert's Land, since known as the North-West Territories of Canada. The Statutes of Canada made other provisions inconsistent with these statutes, and the conviction of the prisoner had taken place under the Statutes of Canada. The Lords of the Judicial Committee declined to admit an appeal, entertaining no doubt as to the correctness of the conviction. In the same year the same body again decided (*l*) that the Legislature of New

(*i*) (1883) 9 Q.L.R. 148, 151.

(*j*) Law of the Constitution, 3rd ed., p. 102.

(*k*) (1885) 4 Cart. 1

(*l*) *Harris* v. *Davies* (1885) 10 A.C. 270.

South Wales, under a charter not wider than the B. N. A. Act had power to repeal a Statute of James I (21 James, c. 16, s. 6), and had impliedly done so by 11 Vict., c. 13, s. 1, of that colony.

The late Sir John Thompson, referring to the opinion of Lord Carnarvon as to this Act, says that the latter's opinion "seems to have been based on a strict view taken of the Imperial Statute, which declared that Colonial Statutes should be void and inoperative if they should be repugnant to the provisions of any Act of Parliament extending to the colonies or repugnant to the provisions of any order or regulation made under the authority of such Act, and having in such colony the force and effect of such Act." "There may be grounds for argument," continued Sir John, "that, as the B. N. A. Act was passed subsequently to the statute, it confers a constitution more liberal than those to which the statute applied. Another view which may be urged is, that the repugnancy, in order to have the effect indicated, must exist in relation to some statute passed after the creation of the legislature of a colony. The statute does not seem, certainly, to have been construed by the judicial decision in the manner indicated by Lord Carnarvon. If the view which his Lordship takes is correct, it will be impossible for the Parliament of Canada to make laws in regard to any of the twenty-one subjects which constitute the "area" of the Canadian Parliament (to adopt the phrase used in the decision of *Hodge* v. *The Queen*, in relation to the Ontario Legislature), when such legislation was repugnant to any legislation which existed previously, applicable to these subjects in the colonies. There, undoubtedly, did exist Imperial legislation as regards all those subjects in the colonies, at a time long anterior to the gift of representative institutions, and it was never supposed to be necessary that Canada, or the provinces now constituting Canada, before the Union should obtain the repeal of that legislation by the Imperial Parliament before they proceeded to adopt such measures as became necessary from time to time, in the government of the country. It is respectfully submitted, that, in respect to all these subjects, the Parliament of Canada must be considered to have the plenary powers of the Imperial Government (to quote the words of the Judicial Committee) subject only to such control as the Imperial Government may exercise from time to time, and subject also to Her Majesty's right of disallowance, which the B. N. A. Act reserves to her, and which, no doubt,

will always be exercised with full regard to constitutional principles and in the best interests of the empire when exercised at all (*m*).

Another Minister of Justice has been equally strong in his contention. Hon. Edward Blake argued strongly that the definition of colonies given in sec. 1 of the Colonial Laws Validity Act would not comprise the Provinces united into the Dominion of Canada by the B. N. A. Act, 1867, and that the effect of the B. N. A. Act is to repeal the Colonial Laws Validity Act, so far as the Provinces are concerned (*n*). Chief Justice Harrison, in the same case (*o*), says that "the specific provisions of the B.N.A. Act displace the application of that section" (referring to a section of the Colonial Laws Validity Act).

In addition to these opinions, it appears from the statements made on February 7th, 1895, by Sir Mackenzie Bowell, the Premier, and Sir C. H. Tupper, the Minister of Justice, to a deputation of members of the Copyright Association of Canada, that their Government was fully resolved to adhere to the contention as to the powers of the Dominion Parliament raised by the late Sir John S. D. Thompson (*p*).

That there is a concensus of opinion in Canada on all these matters appears from the proceedings in the Canadian House of Commons in the month of June, 1900: Hon. Mr. Fisher, Minister of Agriculture, addressing the House on June 1st, on moving the 2nd reading of Bill No. 167, a Bill to amend the Copyright law said: "I do not wish to dwell upon the disputed question of our constitutional right to pass legislation of this kind. I think there is no single public man in Canada who is prepared for a moment to question or doubt our constitutional right to legislate upon copyright questions. I make this motion to amend our copyright law with the full intention of asserting the right of Parliament to pass this legislation, a right inherent in us under the British North America Act; and there is nothing in this Bill, and there is no intention in proposing this Bill, to derogate from that contention of our constitutional right or in any way to minimize that right" (*q*).

(*m*) Hodgins, p. 35.

(*n*) *Fielding* v. *Thomas*, 5 Cart. 403.

(*o*) At p. 425.

(*p*) See Daily Mail and Empire, February 8, 1895.

(*q*) Debates H. of C. 1900, vol. 52, p. 6506.

Sir Charles Tupper stated that "The Department of Justice sent Mr. Newcombe to England to discuss that subject fully with the Colonial Office, and he was able to report that, in Lord Herschell's Bill, there was a clause which would protect the claim of Canada to absolute jurisdiction in that matter." And Sir Wilfred Laurier added; "I never knew of any divided opinion in this House as to the paramount power of Canada over the subject of copyright" (*r*).

The foregoing contentions may be summarized thus:

1. A careful consideration of
   (a) Historical documents relating to Canada,
   (b) The history of England's colonial policy,
   (c) The B.N.A. Act and events leading thereto; and
   (d) The cases bearing upon the subject

leads inevitably and incontestably to the conclusion that the British Parliament, in passing the British North America Act, intended to leave the Canadian Parliament perfectly free and unfettered as to all the subjects enumerated in s. 91, subject to the exercise of the power of disallowance reserved in the Act.

2. The British Parliament used apt words to accomplish this object, the word "exclusive," in s. 91, having reference to the Imperial Parliament as well as to the Provincial Legislatures.

3. Assuming, however, that "exclusive" has reference only to the Provinces, Canada was still given the right to alter or repeal pre-Confederation Imperial Acts relating to Canada; colonial legislation having that effect has not been disallowed by the Home authorities, thus indicating the concurrence of their opinion with the Canadian views on the subject.

4. So far as imperial legislation relating to Canada and subsequent to the B.N.A. Act is concerned, the English Parliament, though having power to make any change in the law that it desires to make without being subject to have such change declared ultra vires, has, nevertheless, bound itself, until such change occurs, to refrain from interference with Canadian laws relating to the internal affairs of the colony, except by the exercise of its power of disallowance.

V. THE INTERNATIONAL ASPECT.

As to the international features of the copyright question, little need be said. Great Britain, by reason of its acknowledged

(*r*) Ibid. p. 6447. And see Report of the Special Committee of the House of Commons on Copyright, 3rd July, 1900, vol. 35 Journals of H. of C., p. 411.

sovereignty, has the right to legislate for Canada in this regard, but the policy of the Mother Country has undergone a marked change of recent years. Heretofore the question of the effect of an international arrangement upon the welfare of the colony has received scant consideration at the hands of the Home authorities, the results being that the rights of the colony have been bartered away in a manner little short of criminal. A wiser policy now obtains, however, and, so far as Canada is concerned, her consent is sought ere she is bound by anything in an international way that may affect her interests.

In copyright matters, the arrangement that, at present, governs is that known as the Berne Convention, entered into on the 9th of September, 1886. Canada gave her consent to be bound by its provisions upon the express understanding that, upon giving a year's notice, she should be entitled to withdraw from the arrangement (*s*).

The Canadian Government afterwards formally and emphatically requested Her Majesty's Government to give notice of the withdrawal of Canada, but without effect; and England, by her conduct, has left herself open to the imputation of bad faith and of having inveigled Canada into becoming a party to the Convention upon the misrepresentation that she might withdraw in the manner above mentioned. Up to the present the demand that England give the required notice has been deliberately slighted, and, notwithstanding the statement that Canada has consented not to press her request in this connection (*t*), the material available fails to disclose any ground for supposing that that consent would be or has been given. On the contrary, the constant reiteration by the Minister of Justice for Canada of the desire of his Government to be freed from the burdensome provisions of the Berne Convention, leads to the belief that nothing but compliance with the request will satisfy the Canadian Government.

(*s*) Report of Sir John S. D. Thompson—Hodgins' Dominion and Provincial Legislation, p. 1303.

(*t*) Professor Mavor in January number, 1901, of Toronto University Monthly, p. 112.

JOHN G. O'DONOGHUE.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

WEST DURHAM ELECTION.

Ont.] THORNTON *v.* BURNHAM. [May 7.

Election petition—No return of member—Illegal deposit—Parties to petition.

A petition under the Dominion Controverted Elections Act, R.S.C. c. 9, alleged that T. a respondent, who had obtained a majority of the votes at the election, was not properly nominated, and claimed the seat for his opponent; and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents.

Held, that T. was properly made a respondent to such petition, which was properly framed under s. 5 of the above Act. Appeal dismissed with costs.

W. D. McPherson, for appellant. *Aylesworth*, K.C., for respondent.

Ont.] INCE *v.* CITY OF TORONTO. [May 13.

Negligence—Maintenance of streets—Accumulation of snow and ice—Gross negligence.

About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell, receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shewn that there had been a considerable fall of snow for two or three days before the accident and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city had scattered sand on the crossing, but if so the high wind prevailing at the time had probably blown it away.

Held, affirming the judgment of the Court of Appeal, 27 O.A.R. 410, 36 C.L.J. 419, that the facts in evidence were not sufficient to shew that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R.S.O. (1897), c. 223, s. 606 (2). Appeal dismissed with costs.

Aylesworth, K.C. for appellant. *Fullerton*, K.C., and *Chisholm*, for respondent.

Ont.] MACDOUGALL *v.* WATER COMMISSIONERS OF WINDSOR. [May 13.

Municipal corporation—Water commissioners—Statutory body—Powers—Contract.

By 37 Vict., c. 79 (Ont.), the waterworks system of Windsor is placed under the management of a board of commissioners who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system the city supplying the funds to pay for the same. The total expenditure not to exceed $300,000, and not more than $20,000 can be expended in any one year without a vote of the ratepayers.

Held, affirming the judgment of the Court of Appeal, 27 O.A.R. 566, that the board is merely the statutory agent of the city in carrying out the purposes of the Act. and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract.

Held, also, that if an action could have been brought on such contract the city corporation would have been a necessary party.

Quære. Would not the city corporation have been the only party liable to be sued? Appeal dismissed with costs.

Riddell, K.C., for appellants. *Aylesworth*, K.C., for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Master in Chambers.] [Nov. 14, 1900.

MUMMERY *v.* GRAND TRUNK R.W. CO.
WHALLS *v.* GRAND TRUNK R.W. CO.

Action—Fatal Accident Act—Rights of administrator—Rights of relatives—Time limit—Stay of proceedings.

An unmarried man having come to his death by reason of injuries inflicted by the defendants, two actions were brought to recover damages occasioned by his death. The first in point of time was brought by the paternal grandfather and grandmother of the deceased, and the second by his mother, who had obtained letters of administration to his estate after the bringing of the first action. Upon a motion by the defendants to stay one or other of the actions,

Held, that, while the grandfather and grandmother could legally proceed with their action under R.S.O. 1897, c. 166, although brought within six months of the death, so long as there was no executor or administrator, yet an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it; and the first action was the one to be stayed.

Lampman v. *Township of Gainsborough*, 17 O.R. 191, and *Holleran* v. *Bagnell*, 4 L.R. Ir. 740, explained and followed.

The statement in Ruegg on Employers' Liability, 4th ed., p. 121, as to the plaintiff being dominus litis, refers to a plaintiff entitled to proceed with the action.

Held, also, that the administrator would have the right in her action to claim damages sustained by the personal estate of the deceased.

Leggott v. *Great Northern R. W. Co.*, 1 Q.B. 599, followed.

D. L. McCarthy, for defendants. *J. H. Moss*, for plaintiffs Mummery. *R. U. McPherson*, for plaintiff Whalls.

Divisional Court.] [Feb. 19.

RE MARTIN AND CORPORATION OF MOULTON.

Municipal corporations—Closing up road—Necessity for providing another convenient road or way—Farm divided by railway—Separate parcels.

A farm lot occupied by the owner as one farm was diagonally divided by a railway into two separate parcels, having a farm crossing provided by the railway, giving access from one parcel to the other. In addition to a road which afforded access to the parcel where his residence was, there was another road which gave access to the other parcel, and which except by the farm crossing, was the only mode of access thereto.

Held, that the latter road came within s. 629 (1) R.S.O. 1897, c. 223, and could not be closed up by the municipal council, unless in addition to compensation, another road or way was provided in lieu thereof.

A by-law passed by the council directing the closing up of such latter road without the requirements of the statute being complied with was therefore quashed.

Judgment of BOYD, C., reversed.

Held, per BOYD, C., that a notice providing that anyone desiring to petition against the passing of a by-law to close a road must do so within one month from the date thereof, is sufficient under s. 632 (1) (a) of the Act.

J. H. Moss, for applicant. *S. H. Bradford*, contra.

Boyd, C., Ferguson, J.] [May 14.

QUIGLEY *v.* WATERLOO MANUFACTURING CO.

Parties—Addition of—Separate causes of action—Joinder—Rules 186, 192.

An appeal by the plaintiff from the decision of MEREDITH, C. J., ante p. 278, was dismissed without costs.

Child v. *Stenning*, 5 Ch. 695, justified the appeal; but that case, although not expressly overruled or even commented on in the later cases relied on below, is not consistent with them.

F. A. Anglin, for plaintiff. *J. C. Haight*, for defendants. *Kirwan Martin*, for proposed defendants.

Boyd, C., Ferguson, J.] EVANS *v.* JAFFRAY. [May 16.

Parties—Joinder of causes of action—Partnership account—Conspiracy.

An appeal by the plaintiff from an order of MEREDITH, C.J., in Chambers, reversing an order of the Master in Chambers dismissing a motion made by the defendants other than Jaffray, for an order requiring the plaintiff to elect to proceed either against the defendant Jaffray only or against all three defendants on the second branch of his claim. The relief sought against the defendant Jaffray was an account and damages for breach of a partnership agreement between him and the plaintiff; and that sought against the other defendants was damages for the malicious procuring of the breach by the defendant Jaffray and for conspiracy.

Held, that, despite the form of pleading, there was such unity in the matters complained of as between all parties as justified the retention of the co-defendants. The plaintiff sued as a partner of Jaffray, the chief defendant, and alleged that at a point of time Jaffray was, by unfair means adopted by his co-defendants, induced to ignore the plaintiff and to proceed in company with them so to deal with the partnership plant and assets as to make large profits; and that they all were liable to the plaintiff therefor. He asked an account of the partnership, and that it be wound up, which involved the bringing in of all defendants before the Court, not merely the original partner, but those who had wrongly intervened to make and share profits from handling and using partnership assets. *Kent Colliery Co.* v. *Martin*, 16 Times L.R. 486, specially referred to Appeal allowed. Costs in the cause.

F. A. Anglin, for plaintiff. *Riddell*, K.C., for defendant Jaffray. *C. W. Kerr*, for other defendants.

Falconbridge, C.J.] IN RE STRATHY TRUSTS. [May 17.

Trustee—Investment—Shares in company—Conversion.

A testator residing in Kingston, Ontario, bequeathed shares in the Royal Electric Company of Montreal, a commercial incorporated company, to his wife for life, with remainder to five children. No power was given to vary or reinvest. The company being about to be merged in the Montreal Light, Heat and Power Company, application was made under the Trustee Act for a direction as to whether the executrix of the will might take stock in the new company, such stock not being an investment authorized by the Trustee Investment Act. There was evidence that the conversion would be for the benefit of the estate.

H. M. Mowat, K.C., for the executrix and life tenant, cited *In re Pugh* (1887) W.N. 143; *In re Household*, 27 Ch. D. 553; Vaizey's Trustee's Investments. No one appeared for the remaindermen.

FALCONBRIDGE, C.J., said that, as it was manifestly for the benefit of the estate, an order might go authorizing the investment in the new company.

Lount, J.] DAVEY *v.* SADLER. [May 17.

Summary judgment — Rule 603—Promissory note —Defence —Unconditional leave to defend.

In an action upon a promissory note the defendant set up, in answer to a motion for summary judgment under Rule 603, that the consideration for the note consisted in whole or in part of the purchase money of a patent right, and that the note had not the words "given for a patent right" written or printed across the face, and was, therefore, void under the Bills of Exchange Act, s. 30, sub-s. 4, in the hands of the plaintiff, who was alleged to have notice of such consideration. The plaintiff denied that the note was given for such consideration.

Held, that the defendant was entitled to unconditional leave to defend.

Ludwig, for defendant Moore. *D. L. McCarthy*, for plaintiff.

Ferguson, J.] BONBRIGHT *v.* BONBRIGHT. [May 21.

Domicil—Origin—Choice—Abandonment—Husband and wife—Alimony—Writ of summons—Service out of jurisdiction—Rule 162 (c).

In an action for alimony the defendant was served with the writ of summons in November, 1900, in the State of California, where he had gone to reside in September, 1899. He was born in the State of Pennsylvania, and was married to the plaintiff in the State of New York in 1899. For seven or eight years before the marriage he had lived in Canada, most of the time in Ottawa. After the marriage the plaintiff and defendant went to Europe for several months, and afterwards resided for short periods at two places in different states in America. In 1891 they came to Canada, and bought property at a village in Ontario, which was their home from that time on, although during several winters thereafter they went to different places in the United States, where each did something to earn money, but always coming back to the Ontario home in the spring. The plaintiff still continued to reside there, and said she never at any time had any intention of changing permanently her residence or place of abode. The defendant swore that in September, 1899, he sold all the property he had in Canada, and went to the United States to reside, where he had ever since resided, was now residing, and intended to reside, and that he had no property of any kind in Ontario. The defendant had since going to California instituted proceedings there against the plaintiff for a divorce.

Held, that the defendant's domicil of origin was in the United States; that he acquired a domicil of choice in Ontario; that, upon the evidence, he had not abandoned that domicil; and therefore he was still domiciled within Ontario, within the meaning of Rule 162 (c), and service of the writ upon him out of Ontario was permissible.

A. J. Armstrong, for plaintiff. *E. C. S. Hi[illegible]e*, for defendant.

Street, J.] ALEXANDER *v.* ALEXANDER. [May 22.

Practice—Interlocutory judgment—Assessment of damages—Writ of summons—Statement of claim—Non-conformity—Substituted service—Order for.

By the indorsement on the writ of summons the plaintiff claimed damages for breach of an agreement by the defendant to convey certain land to the plaintiff. By the statement of claim and the plaintiff's evidence it appeared that her real claim was for breach of a subseqent parol contract to the effect that if she would join the defendant (her husband) in a conveyance of the land to a purchaser, he would pay the purchase money over to her. Under an order of a local judge, service of the writ and statement of claim were effected by posting them on the 30th November, 1900, in an envelope addressed to the defendant at a place in Ontario. On the 28th December, 1900, judgment was entered for the plaintiff for default of appearance to the writ, for damages to be assessed. No proceedings were taken upon the statement of claim either to enter judgment or a default note. Upon the action coming down for the assessment of damages, no one appearing for the defendant:—

Held, that, according to the practice, no assessment could be made except upon the judgment for default of appearance, for nothing else was ripe for assessment; and the plaintiff could not have damages pursuant to the claim indorsed on the writ, because it appeared by the evidence that she had consented to the defendant conveying the land in breach of his covenant. The action was, therefore, dismissed, but without costs and without prejudice to a new action being brought upon the causes of action set forth in the statement of claim.

Semble, that the order for service by posting should not have been made, the material being quite insufficient, and there being no probability that the papers would reach the defendant.

J. P. Mabee, K.C., for plaintiff.

Falconbridge, C.J., Street, J.] [May 27.

HOPKINS *v.* SMITH.

Evidence—Discovery—Maintenance—Criminating answers.

Maintenance is an indictable offence in this Province; and in an action to recover damages for maintenance, the plaintiff is not entitled to obtain from the defendants upon examination for discovery such answers as would tend to subject them to criminal proceedings. In such an action no discovery of the matters charged would be had which would not involve the defendants in matters leading up to the offence; and therefore the examination should not be allowed to take place at all.

Masten and *G. C. Thompson*, for plaintiff. *W. M. Douglas*, K.C., *W. E. Middleton*, and *H. E. Rose*, for various defendants.

Boyd, C.] [May 27.

OTTAWA BOARD OF PARK MANAGEMENT *v.* CITY OF OTTAWA.

Public health — Local Board of Health—Expropriation of land for hospital — Public park — Provincial Board of Health — Order in Council.

Motion by the plaintiffs for an interim injunction restraining the defendants from using for purposes other than park purposes the land or any part thereof situate in the city of Ottawa, comprising about 17 1-3 acres, known as "The Rifle Range," and acquired by the plaintiffs for park purposes under the Public Parks Act, R.S.O. c. 233; and restraining the defendants from interfering with the plaintiffs in the management, regulation, and control of such park land; and restraining the defendants from applying permanently such land or any portion thereof for the purpose of erecting thereon a contagious diseases hospital.

Sec. 104 of the Public Health Act, R.S.O. c. 248, provides for the erection and maintenance of contagious diseases hospitals by a municipality. Sec. 106 provides for a temporary hospital in case of emergency. There is no provision in the Act for the expropriation of land to be used in perpetuity (as was claimed by the notice given under the Act). The outlay contemplated was $40,000, which indicated that the building was to be one under s. 104, and not under s. 106.

Held, that, under the restricted powers given to the local board of health, they were seeking to deprive the plaintiffs permanently of property legally set apart for the purposes of a public park; that the actual or virtual expropriation of the land for the use of a hospital in perpetuity, or during the existence of the substantial building contracted for, is not within the powers conferred by the Public Health Act on the local board; and that this radical infirmity attaching to the local board is not overcome by the sanction of the Provincial Board or Health or of an Order in Council. Injunction granted till the trial or further order.

W. Wyld, for plaintiffs. *T. McVeity*, for defendants.

Boyd, C.] IN RE MCINTYRE. [May 27.

Wills—Annuities—Purchase of—Assets of estate—Distribution.

Motion by David McIntyre under Rule 938 for directions to the executors of the will of Hugh McIntyre as to the distribution of the estate among the residuary legatees and as to the providing for the payment of annuities bequeathed by the will.

Aylesworth, K.C., for the motion. *Shepley*, K.C., *Folinsbee*, and *T. Urquhart*, for the other parties.

BOYD, C.—I think the parties interested in the residue are entitled to have sums set apart to answer the annuities from time to time, as sufficient

assets are in the hands of executors, *or* to have sums applied in the purchase of Government annuities in the same way from time to time, as shall seem most expedient to the Master, if the parties (including the annuitants) differ.

Costs of application, and, if reference, then of that, out of the estate.

Boyd, C.] IN RE MCKELLAR. [May 28.

Life insurance—Proceeds of policy—Payment by instalments—Beneficiaries—Vested rights.

Motion by the Imperial Life Insurance Company, under Rule 938, for an order giving directions as to the mode of payment of moneys arising from an insurance effected by them upon the life of one McKellar, now deceased. The insured applied for a policy of $5,000 on his life, payable in the event of his death, in fifteen instalments of $333.33 each. Being asked in the application: "In event of death of beneficiaries" (his three daughters) "do you desire that the assurance shall be made payable to your executors, administrators, or assigns?" He answered: "No; make to my two sons." The policy was drawn payable in fifteen annual instalments to the three daughters, or, in the event of their deaths, to the two sons.

The three daughters applied to the company for payment of the whole amount to them forthwith; and this motion was made in consequence.

J. F. Edgar, for the company. *A. R. Clute* and *F. W. Harcourt*, for the children.

BOYD, C.: The three daughters apply to accelerate the payments and obtain the whole amount insured forthwith. It is sought to further this result by citing cases as to vesting of legacies, so as to entitle the daughters surviving the insured to become the recipients of the whole fund, though payable by instalments. It does not appear to me desirable to incorporate the somewhat technical and not always satisfactory doctrine as to the vesting of legacies into these policies of insurance. The intention of the insured was certainly to eke out the amount insured, so far as possible, by means of annual payments for the benefit of his daughters, if alive at the date of payment, and, if not, for the benefit of his sons who might survive the deceased daughters. I therefore do not sanction the proposed application that the whole should be paid en bloc to the daughters, to the possible exclusion of the sons.

No order and no costs.

Boyd, C.] SINCLAIR *v.* CAMPBELL. [May 29.

Security for costs — Both parties out of jurisdiction — Rival claimants of funds.

Where both plaintiffs and defendants were resident out of Ontario and both claimed a fund of $500, bequeathed by a will, both were required to give security, each to the other, for the costs of an issue directed to be tried.

In re La Compagnie Generale d'Eaux Minerales, [1891] 1 Ch. 451, followed.

Re Societé Anonyme des Verreries de l'Etoile, 10 Pat. Cas. 290, and *Re Miller's Patent*, 11 Pat. Cas. 55, distinguished.

J. T. Small, for plaintiffs. *F. E. Hodgins*, for defendants.

Boyd, C.] GRANT *v.* SQUIRE. [May 30.

Will — Construction — Devise — Estate — Defeasible fee — Executory devise over.

Action for the recovery of land. The plaintiffs were the widow, children, and brother of John Grant, deceased. By a memorial, dated in 1833, of a will bearing date the 7th August, 1830, it appeared that the testator devised the land in question "to his loving son Alexander, during his natural life, after the demise of his mother, and after his death, then he did bequeath the same his heir-at-law should he have any (sic); if not, he did bequeath the same to his brother John Grant."

Held, that the gift to Alexander gave, by the operation of the rule in Shelley's case, a fee simple or tail to him: *Dubber* v. *Trollope*, Ambl. 453, 457. Heir is nomen collectivum and carries the fee. But the last clause of the devise imports a defeasible estate in Alexander, should he die and have or leave no child, and as he left no "lawful heir" or "heir-at-law," his fee tail or simple was defeated by the executory devise in fee simple in favour of John: *Matthews* v. *Gardner*, 17 Beav. 254.

D. B. Maclennan, K.C., for plaintiffs. *J. Leitch*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MERRITT *v.* COPPER CROWN MINING CO. [April 10.

Practice—Mandamus—Order for set aside—Setting case down for hearing.

Plaintiff, a foreign shareholder in a foreign corporation doing business in the Province of Nova Scotia, obtained a mandamus ordering the defendant company to produce for the inspection of plaintiff the register of stockholders, shewing the names and places of residence of persons holding shares and stock in the company, and the number of shares held by each person. Also to produce and file in the office of the Provincial Secretary an abstract of receipts and expenditures, profits and losses of the company within the province for each year during which the company did business within the province. Also to file at the office of the Commissioner of Mines for the province a copy of the charter or act of incorporation of the company, and of the by-laws and regulations of the company, together with a list of officers, etc.

Held, setting aside the order and allowing defendants appeal, that it was not just and convenient to grant the order as the effect of it would be to decide the whole case upon affivadavit, leaving nothing to be disposed of at the hearing. And that while such an order might be useful in some cases in order to preserve the rights of parties or the subject matter until there could be a deliberate disposition made of it at the hearing, or where the matter could not wait until a hearing, it should not otherwise be disposed of in a summary way.

Semble, that under the rules enabling a case to be set down for hearing at any time a strong case must be made out for pursuing a different course.

Held, that as the merits of the case must be disposed of later the costs of both parties to the appeal ought to abide the event.

H. Mellish, for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Full Court.] ROACH *v.* RIPLEY. [April 13.

Dyke land—Liability of owner for necessary repairs—Lost deed—Inference in relation to—Easement.

In 1847 T. R. purchased from R. a portion of a large tract of marsh land of which R. was owner. From the time of the purchase down to the time of his death in 1886 T. R. contributed either by the performance of work or

in cash, in the proportion of one-seventh of the whole amount, toward the maintenance and repair of a dyke and aboideau erected prior to the time of the purchase for the protection of the land against the sea. In an action brought by plaintiffs claiming under R. against defendant claiming under T. R. to recover a proportion of the cost of rebuilding the aboideau it appeared that the dyke in question had never been brought under the and Marsh Lands, but that the provisions of the Act had been followed in operation of the Act, R.S. c. 42, of Commissioners of Sewers and Dyked relation to the calling of meetings of proprietors, the summoning of proprietors to perform work, and the apportionment of the cost of such work among the proprietors according to their acreage.

There was some evidence of the existence of an agreement signed by T.R. having reference to his liability to contribute towards the keeping up of the dyke and aboideau, but at the time of the commencement of the action the agreement had been lost, and there was no evidence to shew the exact contents of the agreement.

Held, that after the lapse of time in view of the position of the parties and the necessity of the work for their protection, the requirements of the Act and the facts shewn in relation to payments made and work done, there was evidence from which to infer the existence of an agreement touching the keeping up and repair of the dyke and aboideau, constituting a covenant running with the land by which defendant was bound.

Held, also, the judge of the County Court having found that the amount which defendant was required to pay was not excessive, that such finding was supported by the evidence and should be affirmed.

W. A. Henry, for appellant. *H. W. Rogers*, for respondents.

Full Court.] NACNUTT v. SHAFFNER. [April 13.

Principal and agent—Goods disposed of by agent in violation of authority—Notice to party taking—Bona fides—Ordinary course of business—Finding set aside and new trial ordered—Factors Act, c. 11, s. 2, sub-s. 1, held inapplicable.

D. was entrusted by plaintiffs with a number of carriages for sale under an agreement in writing, under the terms of which D. was required to sell only to responsible parties and to take in payment cash or promissory notes. The agreement contained the following provision: "Notes of the purchasers only will be taken for goods in this contract; old machines, horses or trades of any kind are entirely at the risk of the agents, and they will be held strictly responsible for all such notes."

D. disposed of two of the carriages to defendant at different times. In the first case the consideration was goods out of defendant's shop, to be supplied to D. for the use of his family. In the second case the consideration was part cash and part a waggon of defendant's taken in exchange.

In an action by plaintiffs claiming the return of the goods or their value.

Held, per RITCHIE, J.:—1. The agreement between plaintiffs and D. contemplated the trading of the goods.

2. The two transactions must be distinguished, the disposal of the waggon in the first case for goods to be delivered subsequently being different from the barter in the second case, which was a transaction not unusal in the province.

3. It was a material question in the determination of the case to ascertain whether the transaction took place in the ordinary course of the agent's business, and this not having been found there must be a new trial.

Per TOWNSHEND, J.:—1. The transaction so far as the first sale was concerned was a direct breach of authority.

2. As regard the second sale the authority given to D. would only cover a barter made in good faith.

3. The findings of the jury on this point in defendant's favor being unreasonable and perverse they must be set aside and a new trial ordered.

4. The provisions of the Factors' Act, c. 11. s. 2, were inapplicable under the circumstances stated.

J. J. Ritchie, and *F. L. Milner*, for appellant. *W. E. Roscoe*, K. C., for respondent.

Province of British Columbia.

SUPREME COURT.

Martin, J.] BIRD *v.* VIETH. [July 31, 1900.

Costs—Security for, by foreign plaintiffs—Appeal.

Summons for release of an undertaking which had been lodged in Court as security for the costs of the action by plaintiffs who were resident outside the jurisdiction. The action had been tried and judgment given for plaintiffs and defendants had given notice of appeal to the full Court.

Held, that the security should stand pending the appeal.

A. D. Crease, for plaintiffs. *Duff*, for defendants.

Full Court.] [March 27.

B. C. MILLS LUMBER AND TRADING CO. *v.* MITCHELL.

WALKER, Garnishee, and CHAMPION & WHITE, Claimants.

Money order—Indorsement of—Parol Assignment—Interpleader.

Defendant, under contract to build for one W., purchased the materials from plaintiffs who subsequently got judgment against him, and who garnished the moneys due from W. to defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect Grant. Before the garnishee proceedings defendant had accepted the following order drawn upon him by Nicholas & Barker to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270 and charge the same to my account for plastering Place Block, Hastings Street, W., in full to date;" which order the defendant thus indorsed in favour of Grant: "Please pay that order and charge to my account on contract for Robert Walker Block on Hastings Street, City."

Held, in interpleader, by the full Court, affirming MCCOLL, C.J., that apart from the order there was a parol assignment specifically appropriating to the assignees the sum in question out of the moneys to arise out of the contract.

Per WALKEM and DRAKE, JJ.: The document is a money order or bill of exchange and not an equitable assignment.

Davis, K.C., for appellants. *Martin*, K.C., contra.

Irving, J.] DAVIES *v.* DUNN. [April 16.

Practice—Ex juris writ—Action to rescind purchase of shares in mining company—Order XI.

Application on behalf of defendant Dunn to set aside an order of FORIN, Lo. C.J., for service ex juris and notice in lieu of writ and the service thereof.

Held, setting aside the order, that an action to rescind purchase from defendant of shares in an incorporated company on the ground of misrepresentation, is not an action within Order XI., so as to enable the plaintiff to obtain an ex juris writ against the defendant.

Marshall, for application. *Charles Wilson*, K.C., contra.

Martin, J.] IN RE OLIVER. [May 7.

Succession duty—Amount payable by half-sister of testator.

Summons to determine the amount of succession duty payable by applicant who was a half-sister of the testator and a devisee under his will.

Held, that the words "sister of the deceased" in sub-s. 4 of s. 2 of the Succession Duty Act Amendment Act of 1899, do not include a half-sister.

Moresby, for the summons. *Maclean*, D. A.-G., for the Crown.