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THE SCOPE OF THE POWER OF THE DOMINION GOVERNMENT TO DISALLOW PROVINCIAL STATUTES.

The recent refusal of the Minister of Justice to recommend the disallowance of two Ontario statutes, (6 Edw. VII., ch. 12, and 7 Edw. VII., ch. 15), which, according to the allegations of the petitioners, deprived them of their vested rights, has once more directed attention to a very important, but still unsettled question of constitutional law, viz., what are the appropriate limits of the power which the British North America Act confers upon the Dominion Government with regard to the avoidance of Provincial legislation? It is hoped, therefore, that a disquisition upon the subject will not be without interest at the present time.

The position of the Minister of Justice is thus formally stated in his Report to the Governor-General:

> "It is not intended by the British North America Act that the power of disallowance shall be exercised for the purpose of annulling Provincial legislation, even, though Your Excellency's Ministers consider the legislation unjust, or oppressive, or in conflict with recognised legal principles, so long as such legislation is within the power of the Provincial Legislature to enact it."

Reference may also be made to another passage, in which, after specifying the classes of cases in which he considers that the power of disallowance should be exercised, he concludes in these terms:

> "The legislation in question, even though confiscation of property without compensation, and so an abuse of legislative power, does not fall within any of the aforesaid enumeration.

I. Scope of power discussed as a matter of statutory construction.

In a subsequent part of this article we shall have occasion to point out that neither Mr. Aylesworth nor the other Ministers of Justice whose opinion he deems to be correct and binding upon him, have furnished in their reports any affirmative arguments for the doctrine embodied in the above extracts. An inquirer, therefore, who wishes to discuss the soundness of the doctrine with relation to general principles finds himself in the curious position of being unable to obtain from the official documents in which it has been propounded any information respecting the legal conceptions upon which it is based. It is true that, in the debate in the House of Commons on the motion for the production of the papers relating to the Cobalt Lake Case, Mr. Aylesworth justifies his action by invoking a public policy which he declares to be an adequate and decisive reason for refusing to recommend the disallowance of any Provincial statutes except those which deal with matters assigned to the Dominion Legislature. But in an investigation the object of which is to determine the meaning of a specific statutory provision, a vague ground of this description manifestly cannot be regarded as an element which possesses any definite juristic force. Under these circumstances the only course open to the writer is to state the various considerations which in his opinion point to a conclusion different from that which is favoured by the present Minister of Justice and his immediate predecessors in office.

(a) The section of the Act (90), by which the power of disallowance is conferred is entirely unrestricted in its terms. So far, therefore, as this provision itself is concerned, its meaning must be determined with reference to the rule that, if there is nothing to modify, nothing to qualify the language of a statutory clause, it must be construed in the ordinary and natural meaning of the words: Lord Halsbury in *Hampstead* v. *Cotton*, 12 App. Cas. 6. In this point of view the only admissible inference would seem to be, that the provision should be understood as being applicable to all classes of statutes without any exception whatever, unless the Act contains some other

provision which, either expressly or by necessary implication, operates restrictively in that regard. It is certain that the Act contains no provision which expressly circumscribes the scope of the power. Is there any other provision which, upon a reasonable construction, can be said to produce that result by implication? Apparently the only possible ground upon which to base an argument in favour of an affirmative answer to this question is the circumstance that the power of the Provincial Legislatures to make laws in relation to property and civil rights is declared to be exclusive. Presumably it is upon this circumstance that Mr. Aylesworth and those who agree with him would place their reliance, if required to reconcile their doctrine with the unqualified language of the provision regarding disallowance. It is apprehended, however, that no weight will be attributed to such an argument by anyone who adverts to these facts:—that, in the British North America Act, we are dealing with an organic law which defines the powers and functions of the executive as well as of the legislative departments of the State; that the exclusive quality of the various legislative powers conferred by the section of which the provision with which this article is concerned forms a part is predicated merely with reference to the Dominion Legislature; and that the scope of the powers of the executive officers of the Dominion is defined in a distinct part of the Act. The writer is not aware of any principle of statutory construction which can be adduced as a basis for the contention that a restriction of an executive power conferred in general terms by one provision of such a statute may be deduced by implication from another provision which is concerned merely with the apportionment of the legislative powers between the Parliaments created by the same statute.

(b) The second point to be noted is, that the effect of Mr. Aylesworth's view is to confine the scope of the power of disallowance to a class of cases with which the courts are competent to deal and to remove from its scope a class of cases in which the exercise of the power is the only available remedy. A construction which involves this result can scarcely be deemed

satisfactory. On à priori grounds, it is, to say the least, extremely improbable that the framers of the Act, when they conferred the general power of disallowance, intended merely to furnish an alternative means of abrogating such Provincial statutes as should be ultra vires in respect of their subject matter. The more reasonable hypothesis would seem to be, that they regarded questions of jurisdiction as being preferably determined by decisions rendered in the ordinary course of litigation, and that it was their expectation that the validity of legislation in this particular point of view would normally be settled by the courts rather than by the Dominion authorities. This consideration may fairly be said to indicate that the special object of the section as to disallowance was to render possible the annulment of statutes which, although dealing with matters within the legislative domain of the Provincial Parliament, might be objectionable on other grounds.

(c) The improbability that the provision under review is to be construed in such a sense that an application to the legislature itself becomes the only available method of procuring relief in the class of cases under discussion is greatly increased, if we bear in mind that this description of remedy must, in the very nature of the case, be ineffective in a large proportion of instances. The conditions under which political affairs are ordinarily conducted are such that a petitioner, at all events if he is a private individual and not a member of the dominant faction, would have but a very slender chance of procuring relief from the Parliament responsible for the statute complained of. A recantation by that body could, it is to be feared, very seldom be expected except in cases in which public opinion had declared itself so strongly and clearly against the given enactment, that a refusal to repeal it, or grant redress in some other form, might appreciably affect the results of the next election. But it may with some confidence be affirmed that this situation would rarely occur. Usually, it is apprehended, the reception accorded to the application of a sufferer would be no more favourable than such as might be expected from men acting upon the well-

founded assumption that any public sympathy which he might execute would not influence the votes of partisans to any material extent. This practical consideration is sufficient to demonstrate the futility of the comfortable theory (see III., infra,) that, if a legislature has passed an unjust Act, the people, its "constitutional judges," may safely be left to inflict the appropriate punishment upon the guilty members. Setting aside the operation of corrupt and selfish motives, the determinative elements in an election are the opinions of citizens with regard to questions of general and local interest. The supposition that the mass of voters could be induced at any given election to fix their attention upon a single unjust statute, and cast their ballots against candidates on the sole ground that they were responsible for its passage, can only be characterized as an aimiable fiction. It may be readily admitted that, if the party which was in the ascendant when the statute was adopted should be defeated, the position of the applicant for redress would be somewhat more hopeful, although his grievances might have had nothing to do with that defeat. But the history of Provincial politics shews that a sufferer whose ability to obtain recognition for his claims should be expectant upon a transfer of power might have to suffer an experience similar to that of the unfortunate suitors in the unreported, but oft-cited case of *Jarndyce* v. *Jarndyce*. It is assuredly not a very violent supposition that, as practical statesman, the framers of the Federation Act were aware of the difficulties which must be encountered by a person who applies to a legislative body for relief against a statute enacted by itself. If as a matter of fact their attention was directed to this aspect of the matter, the further supposition may well be entertained, that one of the objects which they had in view when they inserted the clause respecting disallowance was to provide a more certain and accessible remedy for persons injured by improper Provincial legislation.

II. Scope of power considered with reference to official expressions of opinion.

The specific pronouncements, judicial and ministerial, which bear upon the question are not harmonious. But the preponderance of authority seems to be distinctly in favour of the conclusion which is indicated by the considerations referred to in the foregoing paragraphs. It is an extremely significant fact that all the utterances which sustain that conclusion have emanated from men who were conversant with public affairs at the time when the British North America Act was passed, and may therefore be reasonably presumed to have possessed an accurate knowledge of the views of its framers with regard to the meaning and object of the clause under discussion.

In the *Goodhue Case* (1873), 19 Grant, p. 385, it was observed by Chief Justice Draper, with reference to an Act which purported to alter a testamentary disposition of property:

> "If, from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are still subject to the consideration of the Governor-General who, as the representative of the Sovereign, is entrusted with authority, to which a corresponding duty attaches, to disallow any law, contrary to reason, or to natural justice in equity."

In *Leprohon* v. *City of Ottawa* (1877), 4 U.C.Q.B., p. 490, Chief Justice Harrison laid down this broad doctrine:

> "The power of the Governor-General in Council to disallow a Provincial Act is as absolute as the power of the Queen to disallow a Dominion Act, and is, in case, to be the result of exercise of a sound discretion, for which exercise of discretion the executive Council for the time being is, in either case, to be responsible as for other Acts of executive administration."

In *The Corporation of Three Rivers* v. *Sulte* (1882), 5 L.N. 334, Ramsay, J., of the Quebec Court of Queen's Bench (Appeal side) remarked:

"The true check for the abuse of powers, as distinguished from an unlawful exercise of them, is the power of the central government to disallow laws open to the former reproach."

The language used by statesmen speaking in an official capacity is in full accord with these judicial dicta.

In the Report, dated June 8, 1868, which Sir John Macdonald submitted with reference to the course to be pursued with respect to the disallowance of Provincial legislation, he specifies the following classes of cases as being proper for the consideration of the Minister of Justice:

(1) Those which are altogether illegal or unconstitutional.

(2) Those which are illegal or unconstitutional in part.

(3) Those which, in cases of concurrent jurisdiction, clash with the legislation of the general parliament.

(4) These which affect the interest of the Dominion generally.

The meaning of the word "illegal" in the first two of these paragraphs is not entirely clear. But, having regard to the position taken by the statesman who used it in the report next mentioned, it may reasonably be inferred that he intended it to cover statutes which interfered with private rights. Under any other construction, in fact, the two descriptive expressions would be virtually synonymous.

In the report in which the same Minister recommended the disallowance of the Rivers and Streams Bill, passed in 1881 by the Ontario Legislature, the following language was used:

"I think the power of the local legislatures to take away the rights of one man and vest them in another, as is done by this Act, is exceedingly doubtful; but, assuming that such right does in strictness exist, I think it devolves upon this Government to see that such power is not exercised in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the Act overrides

> a decision of a court of competent jurisdiction, by declaring retrospectively that the law always was and is different from that laid down by the court."

Similarly in 1893 Sir John Thompson, in his Report regarding a provision in a Nova Scotia Act which, as was alleged, affected certain rights then in litigation, distinctly recognizes the doctrine that this allegation, if established, would furnish a sufficient ground for the interference of the Dominion authorities.

In the same year Mr. Ouimet, Acting Minister of Justice, remarked with regard to an Ontario enactment then under consideration:

> "Assuming the statute to have the effect which the railway company attribute to it, the case would appear to be that of a statute which interferes with vested rights of property, and the obligation of contract, without providing for compensation, and would therefore, in the opinion of the undersigned, furnish sufficient reason for the exercise of the power of disallowance."

The foregoing citations, it will be seen, furnish an ample support for the following admission made by the present Minister of Justice in his recent report:

> "There seems to be much ground for the belief that the framers of the British North America Act contemplated, and probably intended, that the power of disallowance should afford to vested interests and the rights of property a safeguard and protection against destructive legislation."

It might naturally be expected that a disputant willing to made a concession which weighs so heavily against his own theory must have in reserve some very decisive authorities in favour of that theory. It will be found, however, that this reasonable expectation is not satisfied either by the Report just mentioned or by the speech which he delivered in the House of Commons during the debate on the motion for the production of papers relating to the disallowance of the Act discussed in that Report.

So far as the courts are concerned, it would appear that only a single judicial dictum can be produced in favour of his position.

In *Guay* v. *Blanchet* (1879), 5 Que. L.R., p. 53, Casault, J., remarked:

> "The veto can be pronounced by the Queen only when a law assented to by the Governor-General encroaches upon the prerogatives of the Sovereign or of the Imperial Parliament; and that allowed to the Governor-General can equally only be exercised when a Provincial law makes the same encroachments, or trespasses upon the rights of the Federal Parliament. . . . So long as the Legislatures abide within the limits of what this section (92) of the Act attributes to them, their powers and their authority are absolute, and admit of neither superiors, nor intervention, nor censure."

Mr. Aylesworth has not made any reference to this passage. The only authorities which he has produced are three statements made by his predecessors in office during the last few years. One of those statements, which is found in a report submitted in 1901 by Mr. Mills with regard to an Ontario statute, the effect of which was to impair vested rights and interfere with pending litigation, runs as follows:

> "The undersigned conceives that Your Excellency's government is not concerned with the policy of this measure. It is no doubt intra vires of the legislature, and if it be unfair, or unjust, or contrary to the principles which ought to govern in dealing with private rights, the constitutional recourse is to the legislature, and the Acts of the legislature may be ultimately judged by the people."

In the same year Mr. Mills, after observing that his refusal to recommend the disallowance of a British Columbia Act was based upon the ground that its subject-matter was "within the legislative authority of the province," and that it did not "affect any matter of Dominion policy," proceeded thus:

> "It is alleged that the statute affects pending litigation and rights existing under previous legislation and grants from the province. The undersigned considers that such legislation is objectionable in principle and not justified unless in very exceptional circumstances; but Your Excel-

lency's government is not in any wise responsible for the principle of the legislation, and, as has been already stated, with regard to an Ontario statute, the proper remedy in such cases lies with the legislature or its constitutional judges."

In the following year the position of Mr. Fitzpatrick with regard to another British Columbia Act which impaired the rights of the parties to an action pending when it was passed was thus defined:

"The undersigned cannot help expressing his disapprobation of measures of this character; but there is a difficulty about Your Excellency in Council giving relief in such cases without affirming a policy which requires Your Excellency's government to put itself to a large extent in the place of the legislature, and judge of the propriety of its acts relating to matters committed by the constitution to the exclusive legislative authority of the Province."

From a dialectic standpoint, the conspicuous weakness of these statements is that they are merely unsupported declarations of constitutional doctrine. Their authors have made no attempt to deal with the considerations antagonistic to the theory which they embody. The effect of an ambiguous clause in an enactment cannot be satisfactorily settled by the mere ipse dixit of any jurist, however eminent. The writer submits that something more than mere dogmatic assertion is requisite to overcome the effect of the considerations adverted to under Subdivision II., and of the adverse expressions of opinion quoted above.

III. Scope of power discussed with reference to considerations of public policy:

The only specific argument of a positive character which Mr. Aylesworth has adduced for the purpose of justifying his theory that a Provincial Act should not be disallowed on the mere ground of its being contrary to natural justice is contained in the following passages of a speech delivered on March 1, 1909, in the House of Commons:

"I entertain in all honesty and sincerity the view that it is of vital consequence to the well-being of this Dominion,

that the rights of the Provinces to legislate within the scope of their authority should not be interfered with, and that every Provincial legislature, within the limits prescribed by the terms of the British North America Act is, and ought to be, supreme. I believe that this is a principle of greater importance to the welfare of this Dominion as a whole than even the sacredness of private rights or property ownership. I am willing to go thus far in the enunciation of what I am stating in this House, that a Provincial legislature, having, as is given to it by the terms of the British North America Act, full and absolute control over property and civil rights, in the Province might if it saw fit to do so, repeal Magna Charta itself."

"I advised my colleagues, and, through them, His Excellency, that this power of disallowance which was vested in us was one which, in the interest of the Commonwealth, it was better should not be exercised, even though the Act which was sought to be disallowed went the length of taking my farm from my possession, and handing it over without any compensation to my neighbour, or, it might be, to my political opponent."

From these remarks it is apparent that the speaker has taken his stand upon the broad doctrine, that, on grounds of public policy, it is undesirable that the Dominion authorities should disallow any Provincial statutes, except those which relate to matters outside of its jurisdiction. In one point of view it may be conceded that this doctrine is not open to question. There is nothing in the language of the B.N.A. Act to indicate that the power of disallowance is not as fully discretionary as the other executive powers which are defined by that Act. It is beyond dispute that the Federal Government may, if it pleases, decline to interfere with the action of the Provincial legislatures, not merely in a case where an inequitable statute is involved, but also in a case where it is requested to veto a statute on the ground that it has relation to a matter reserved for the Dominion Parliament. But in the form in which they are propounded

the views of the Minister of Justice will, it is apprehended, scarcely meet with general approbation. It is by no means easy to comprehend in what sense the quality of "sacredness" can properly be attributed by him to Provincial rights when they are exercised in such a manner as to infringe the fundamental rights of citizens in respect of property and free access to the courts. Until this point has been satisfactorily explained, his doctrine will remain open to the criticism, that it is apparently irreconcilable with a principle which is one of the commonplaces of jurisprudence, viz., that the possessor of a right is always deemed to be impliedly subject to a correlative duty to use it in a proper manner. It may be conceded that, if a legislature which is entirely uncontrolled by any external authority contravenes this principle, there is no remedy available for a breach of its duty, except such as it may itself be willing to concede. This is the situation which, in his view, exists whenever a Provincial Parliament has enacted an unjust statute with relation to a matter within its jurisdiction. But, under such circumstances, it is a mere misuse of language to describe the right which has been abused as "sacred."

It should be observed, moreover, that, if grounds of public policy are to be regarded as determinative factors in the present connection, the ground adverted to in the preceding paragraph is not the only one which should be taken into account. It is unquestionable that the passage of a Provincial statute which infringes vested rights, impairs the obligation of contracts, or interferes with pending litigation has a direct tendency to injure the financial standing, not merely of the Province in which it has been passed, but also of the other Provinces and of the Dominion as a whole. In fact it is notorious that this mischievous result has already been produced in a marked degree by the very statute to which the Mr. Aylesworth's remarks, as above quoted, had reference. Under these circumstances, it may reasonably be contended that the expediency of protecting the general credit of the Dominion constitutes a specific ground of public policy; that this ground should be treated as being paramount to that which is referable to the desirability of uphold-

ing the supremacy of Provincial rights; and that the course pursued by a Minister of Justice with respect to petitions for the disallowance of a statute of the type under discussion should be decided by these considerations. This view, it may be pointed out, is in accord with the opinion of Sir John Macdonald, (see Subdivision II., ante), that statutes which "affect the interest of the Dominion generally" may properly be disallowed.

C. B. LAPATT.

THE SOUTH AFRICAN ACT OF UNION.

It is nearly fifty years since the representatives of the older provinces now forming this Dominion were engaged in the difficult task of seeking to reconcile the seemingly antagonistic interests, which at times appeared to be about to make a federation impossible. That such was accomplished, and that, with few modifications, it has stood the test of time, is no small tribute to those engaged in the conferences which terminated in the federation of nearly all the provinces of British North America.

Forty years later the federal government of Canada lent its aid towards the restoring of equilibrium in a group of other colonies in South Africa, geographically connected but not federated. The similarities and dissimilarities between those colonies and our own original provinces on the questions of race, divergent interests, state rights as opposed to national rights, the franchise, and the requirements of mutual aid to bring united strength, are too well known to need comment here, and it was not strange that those disunited colonies, recognizing the difficulties that lay before them, should cast about for the case which most nearly paralleled their own, and seek from that model to mould a constitution. Their draft Act of Union is now receiving the same careful consideration at Pretoria as the proposed Canadian Act of Union received from "The Fathers of Confederation."

The draft Act may be described as a compromise between union and federation. It bears very many resemblances to the British North America Act, and for that reason, if for no other,

it cannot fail to interest us. In order to indicate the parallel between the two constitutions it will be found convenient to deal with the various subjects under their different headings.

The Act of Union.—Parliament was called for March 30th to consider a draft of the constitution, which is in the form of an Act of the Imperial Parliament, similar to that of Canada and of Australia. Before the Act of Union can take effect it must not only be passed by the Imperial Parliament, but two or more of the present self-governing colonies must agree to enter the union, either by an Act of their Parliament or by resolutions passed by both Houses of their Parliaments.

The Governor-General and the Council.—The Governor-General is to be appointed before the establishment of the Union, and he will summon a ministry to govern until, at least, the first general election. The Cabinet Council is to consist of ten persons, holding office during the pleasure of the Governor-General, under British constitutional conditions.

Parliament.—The Union Parliament is to consist of the King, and two Houses—the Senate, and the House of Assembly. The Governor-General may dissolve one or both Houses simultaneously, but he may not dissolve the Senate during the period of ten years after the establishment of the Union. The Senate is to consit of eight nominated members and eight members elected by each province. Half of the nominated senators are to represent the coloured people, but no coloured man may sit in the federal Parliament. The Senate cannot dissolve for ten years, but at the end of this period it may be reconstituted by Parliament. The House of Assembly is to consist of 121 members, as follows: The Cape, 51; Transvaal, 36; Natal, 17; Orange River Colony, 17. Members are to be paid £300 a year. In the event of a deadlock between the Senate and the House of Assembly the two Houses will be convened together, and the majority of the combined Houses may pass the bill. The Canadian method of a "conference" between the two Houses may be less troublesome, but has neither the definiteness nor finality of the South African procedure. The usual provisions are made for the royal veto.

Franchise.—Voters' qualifications in the different colonies remain as they are. This means no native vote for the Transvaal. Parliament may fix the qualifications to entitle persons to vote. Special provisions are made in the Cape regarding race and colour. Members of the House of Assembly must be registered voters, British subjects, and residents for five years within the Union.

Laws and treaties.—All existing differences in the laws of the colonies entering the Union remain untouched, except where the constitution itself requires them to be altered. For example, the laws affecting Asiatics or natives in the respective colonies will remain as they are until Parliament alters them. The Union will assume all treaty obligations and rights of the various colonies.

Language.—Absolute equality is accorded to Dutch and English, both of which are to be the official languages of the country. No officer of the public service in any colony at the time of the union is to be dispensed with by reason of his want of knowledge of either English or Dutch

Judiciary.—The Colonial Supreme Courts will remain as they are, but will be given jurisdiction in matters in which the validity of any provincial ordinance comes into question. An Appeal Court of South Africa will be constituted, to consist of the Chief Justice of South Africa, two ordinary judges of appeal, and two additional judges of appeal temporarily assigned from time to time by the Governor-General in Council from any of the provincial divisions to sit in the appellate division when required. There is to be no appeal to the Privy Council, except in cases in which the King in Council may be pleased to grant special leave to appeal to him from the appellate division. The location of the Appeal Court is not mentioned in the Act.

Native affairs.—The control of native affairs will be under the Governor-General in Council. The government of native territories, at present under Imperial control, may be transferred to the Union under mutual agreement.

Railways and harbours.—The control of all railways, harbours and ports is to be exercised by the central government through a

Board consisting of three commissioners, and a Minister as chairman. Ports and railways are to be administered on business principles, with due regard to agricultural and industrial development in the Union, and to promoting the settlement of an agricultural and industrial population inland by means of cheap transport. Their earnings are to be confined as nearly as possible to what is necessary for working, including provision for betterment, depreciation and payment of interest on capital.

Civil service.—A commission will deal with the re-organization, but officers of the railway and harbour departments will not come under its jurisdiction.

Seats of Government.—Pretoria is to be the seat of the federal Government, but Cape Town is to be the seat of the legislature of the Union. The seats of the provincial Governments shall be: For Cape of Good Hope, Cape Town; for Natal, Pietermaritzburg; for Transvaal, Pretoria; for Orange Free State, Bloemfontein.

Provincial Government.—The provinces are to be internally governed by an administrator appointed by the central government, a provincial council elected by the voters, and a provincial administration of from three to five persons elected by the provincial council. The administrator, therefore, is not in the position of a Governor or Lieutenant-Governor, advised by ministers responsible to Parliament. He is simply chairman of an executive committee elected for a definite period by the provincial council, which itself has been elected for the same period. He cannot dismiss his executive committee or dissolve his council, nor can the council dismiss its committee after it has once elected them. Provincial administrators are to hold office for five years. The provincial council is to consist of the same number of members as are elected by that province for the House of Assembly. Provincial councils are elected for three years and are not subject to dissolution.

Provincial powers.—Provincial councils, subject to the assent of the central government, may legislate by way of ordinances in relation to matters coming within the following classes: (1) Direct taxation within the province in order to raise a revenue for

provincial purposes. (2) Borrowing of money on the sole credit of the province. (3) Education for a period of five years, and thereafter until Parliament otherwise provides. (4) Agriculture, within certain restrictions. (5) The establishment and management of hospitals and charitable institutions. (6) Municipal institutions, etc. (7) Local works and undertakings other than railways, harbours and such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work, and to provide for its construction. (8) Roads and bridges other than those connecting two provinces. (9) Markets and pounds. (10) Fish and game preservation. (11) Punishments for infringing provincial ordinances. (12) Generally all matters of a local or private nature. (13) Other subjects in respect of which Parliament shall delegate the power of making ordinances to the provincial council. All provincial legislation is subject to the veto of the Governor in Council. Provincial boundaries may be altered only with the consent of the provincial councils.

The resemblance to our British North America Act will readily be seen. On the other hand, a very important point of difference will have been noted, namely, the supremacy of the central Parliament. The provincial councils have power to legislate respecting the designated classes of subjects only with the approval of the central government. The provinces will certainly not have responsible government under the terms of the Act now being considered. Is responsible government receiving a set back or has the time not yet come to entrust them with it? There are not wanting thoughtful men who see the need even in this country of some efficient supervision and control of provincial legislatures. It is certainly wise to begin in this way in South Africa, and it may be found desirable to make these safeguards permanent.

To what extent the proposed Act of Union will be modified or altered before it reaches the final stage is still a matter of doubt, as all interests have not yet reached a consensus ad idem. Whatever may be the result, Canada will welcome this latest confederation within the British Empire.

REVIEW OF CURRENT ENGLISH CASES.

TRUSTEE—BREACH OF TRUST—IMPROPER INVESTMENT—POWER TO INVEST "IN HIS OWN NAME OR UNDER HIS LEGAL CONTROL"—CONTRIBUTORY MORTGAGE—RELIANCE ON SOLICITOR—REPORT OF VALUER—RELIEF UNDER JUDICIAL TRUSTEES ACT (59-60 VICT. C. 35), S. 3—(62 VICT. (2), C. 15, S. 1. ONT.).

In re Dive, Dive v. *Roebuck* (1909) 1 Ch. 328. This was an action brought by cestuis que trust against their trustee for breach of trust. By the will of a testator the defendant was empowered as trustee to invest the trust fund "in his own name or under his legal control" in (amongst other investments) freehold, copyhold, leasehold or chattel real securities. The defendant invested £2,000 part of the trust fund in a contributory mortgage in the following circumstances. A surveyor brought the proposed loan to the attention of the trustees' solicitor, who recommended it to the trustee and also suggested the same surveyor as a suitable person to value the property. The trustee accordingly in good faith appointed the surveyor and it was arranged that he was to be paid a fee only in the event of the loan going through. The surveyor made his report, from which it appeared that the property was a speculative character, but the surveyor nevertheless advised that it formed a good security for the proposed loan by the trustee and his co-mortgagee. The trustee relying on the advice of the surveyor and his solicitor in good faith advanced the £2,000. The mortgagor subsequently became insolvent, and the mortgaged property was sold and the greater part of the £2,000 was lost. The defendant claimed to be relieved as having "acted honestly and reasonably" within the meaning of the Judicial Trustees Act 1896 (59-60 Vict. c. 35), s. 3 (62 Vict. (2), c. 15, s. 1, Ont.), but Warrington, J., came to the conclusion that the defendant had not acted "reasonably" in the circumstances—that the making an advance on a contributory mortgage was of itself a breach of trust, and that in employing and acting on the report of the surveyor who had introduced the loan he acted unreasonably, and that even on the information contained in the report the loan was unreasonable, because it appeared that the mortgaged property was leasehold and subject to a rent equal to the interest on the money loaned, and therefore although he found the defendant had acted honestly and relying on the advice of his solicitor, he was not entitled to be relieved from liability.

WILL—CONSTRUCTION—GENERAL LEGACY—CHANGE IN VALUE OF SHARES—WILL SPEAKING FROM DEATH OF TESTATOR—CONTRARY INTENTION—WILLS ACT, 1837 (1 VICT. c. 26), s. 24—(R.S.O., c. 128, s. 26).

In re Gillins, Inglis v. *Gillins* (1909) 1 Ch. 345. A testator by his will gave twenty-five shares in a company to W. F. Ware. At the date of the will the shares were of the par value of £50 with £1 credited as paid. Subsequently the shares were divided into £10 shares with £1 credited as paid; and at the time of the testator's death he owned £10 shares but no £50 shares in the company. The question Warrington, J., was called on to decide, was whether the will as to the legacy in question was to be construed as speaking from the death of the testator, or from its date, and whether the twenty-five shares bequeathed were to be deemed £50 shares or £10 shares. He decided that there was nothing in the will shewing a contrary intention, and therefore, that it must speak from the death, and that being so the legatee was entitled only to shares as they existed at that time, viz., 25 £10 shares.

MORTGAGOR—MORTGAGEE—MORTGAGOR GETTING IN OUTSTANDING INCUMBRANCES—MERGER—DECLARATION AGAINST MERGER.

Re Gibbon, Moore v. *Gibbon* (1909) 1 Ch. 367. In this case the facts are too complicated to be here set out in detail and it must suffice to say that inter alia Neville, J., decided that where a mortgagor gets in an outstanding charge, and takes a transfer with a declaration against merger, that declaration will prevent a merger in the event of his dying intestate; but if the effect of keeping the charge alive would prejudice the rights of any mortgagee of the mortgagor so getting in the outstanding incumbrance, then the charge will merge in the inheritance notwithstanding a declaration against merger; and if there is a merger in favour of a mortgagee then there is a merger for all purposes, which will bind those entitled upon the death of the mortgagor intestate.

WILL—CONSTRUCTION—GIFT TO PERSONS WHO WOULD BE NEXT OF KIN UNDER STATUTE OF DISTRIBUTION—JOINT TENANCY OR TENANCY IN COMMON.

In re Nightingale, Bowden v. *Griffiths* (1909) 1 Ch. 385. In this case a testator had devised and bequeathed property to per-

sons who under the Statute of Distribution would be the next of kin of his daughter if she had died unmarried, and the question was whether such persons took as joint tenants or as tenants in common. Neville, J., decided that the reference to the statute was operative also to determine the mode in which the beneficiaries would take, and as next of kin under the statute take as tenants in common, so in like manner did the beneficiaries take under the will.

TRUSTEE—INVESTMENT—BREACH OF TRUST—HAZARDOUS SECURITY —DEPRECIATION—VALUATION—NEGLIGENCE—56-57 VICT. c. 53, s. 8—(R.S.O. c. 130, s. 8)—59-60 VICT. c. 35, s. 3—(62 VICT. (2) c. 15, s. 1, ONT.).

Shaw v. *Cates* (1909) 1 Ch. 389 is another case in which beneficiaries under a will charged trustees with liability for loss occasioned by improper investment of the trust fund. The defendants relied on the protection of 56-57 Vict. c. 53, s. 8 (see R.S.O. c. 130, s. 8), but it appeared that the valuer appointed to make the valuation of the mortgaged property had been suggested by the mortgagor and was paid by him to the knowledge of the solicitors of one of the trustees, though not apparently to the knowledge of the other trustee or her solicitor. This being the case Parker, J., held that the valuer was not one "employed independently of any owner of the property," and therefore the trustees were not within that section. The trustees also relied on the protection of 59-60 Vict. c. 35, s. 3 (see 62 Vict. (2) c. 15, s. 1, Ont.), but the learned judge held that although the trustees had acted honestly, they had not acted reasonably in acting on the report of the surveyor, which in the circumstances did not warrant in his judgment as large an advance as had been made. Both of the unfortunate trustees, one of whom was a woman, appear to have trusted wholly to the advice of their respective solicitors, and not to have exercised any independent judgment in the matter such as the legal gentleman known as "the ordinary prudent man" would have exercised in dealing with his own money. Revising the valuer's report therefore in the light of subsequent events, the learned judge came to the conclusion that the trustees who had lent two thirds of the value of the property according to his own estimate, had lent too much and that in the circumstances little more than one-half should have been lent, and he therefore held them liable for the difference which amounted to £1,000. He

however held that the trustees were not guilty of any breach of trust for omitting to make inspection of the property until after the interest on the investment ceased to be paid.

CONTRACT OF SERVICE—AGREEMENT TO REFER DISPUTES TO FOREIGN TRIBUNAL—ACTION FOR INJUNCTION—SPECIFIC PERFORMANCE —STAY OF PROCEEDINGS.

Kirchner v. *Gruban* (1909) 1 Ch. 413. In this action the defendant, a German subject, had entered into a contract with the plaintiffs to act as their representative in England for a specified time, and not to divulge any of their business matters to other persons; and under a money penalty bound himself not to quit their employment during the specified period; and the parties both agreed that in case of any dispute arising between them, to submit themselves to the exclusive jurisdiction of the Leipsig courts, and to the exclusive applicability of German law. Before the specified time had elapsed the defendant quitted the plaintiffs' employment and entered the service of a rival English firm. This action was brought for an injunction to restrain the defendant from engaging in any other business than the plaintiffs' and from divulging to others matters relating to the plaintiffs' business, until the expiration of the agreed time, or until a decision of the Leipsig court. The defendant appeared conditionally, and asked to stay all proceedings on the ground that the disputes should be referred to the Leipsig court. The application of the plaintiffs for an interim injunction, and the defendant's application to stay proceedings, were heard together before Eve, J., who held that an injunction could not be granted restraining defendant from taking other employment as that would be in effect specifically enforcing a contract of service, which though negative in form, was positive in substance, which it was contrary to the course of the court to do. And as regarded the application to restrain the defendant from divulging to others matters relating to the plaintiffs' business, the learned judge was of opinion that the principle on which the court grants relief in such cases is, that, according to English law, there is an implied contract between an employee and his employer, that the employee will not divulge information obtained in the course of his employment, to the prejudice of his employer; but he was unable to say whether, according to German law, by which the contract was by the agreement of the parties to be construed, any such implied contract could be deduced from the contract in question. While refusing the motion for an injunction he

granted the defendants' application for a stay of proceedings on his counsel undertaking that the defendant would submit himself in all respects to the jurisdiction of the Leipsig court.

WILL—CONSTRUCTION—GIFT TO NEPHEWS AND NIECES—SUBSTITUTIONARY GIFT TO CHILDREN OF ANY NEPHEW OR NIECE "WHO SHALL DIE IN MY LIFETIME"—NIECE DEAD AT DATE OF WILL LEAVING CHILD.

In re Metcalfe, Metcalfe v. *Earle* (1909) 1 Ch. 424. In this case a testator had given his residuary estate to such of his nephews and nieces, "as shall be living at my decease and have attained or shall attain 21 years," equally, if more than one, "provided always that if any of my nephews and neices shall die in my lifetime leaving a child or children who shall survive me and attain the age of 21 years then and in every such case the last mentioned child or children shall take (if more than one, equally) the share which his, her or their parents would have taken in any residuary estate if such parents had survived me and attained 21 years." A niece of the testator was dead at the date of the will, having left children who survived the testator and attained 21 years. Joyce, J., held that such children were entitled to share in the residue, notwithstanding their parent was dead at the date of the will.

WATERCOURSE—ARTIFICIAL CHANNEL—MILL STREAM—RIPARIAN PROPRIETORS—TITLE TO BED OF STREAM—PRESUMPTION—TRESPASS—INJUNCTION.

Whitmores v. *Stanford* (1909) 1 Ch. 427 was an action to restrain defendants from interfering with the plaintiffs' rights in a mill stream. The stream in question flowed in an artificial channel through the land of the plaintiffs. There was no evidence as to how it originated but for more than 250 years it had been in existence and the plaintiffs and their predecessors in title had used the waters for the purposes of a tannery on their premises situate on either side of the stream, and the defendants and their predecessors had used the waters for a corn mill lower down the stream. The defendants had control of a weir by which the principal part of the water was admitted to the stream and they had been accustomed from time to time to scour the bed of the channel and had lately removed pipes and other devices which the plaintiffs had placed in the bed of the stream where it passed

through their premises for the purpose of utilizing the water for their tannery. The main questions in the action were (1) in whom was the bed of the stream vested so far as it lay within the area of the plaintiffs' premises, and (2) had the plaintiffs a right to abstract water from the stream for the use of their tannery. Eve, J., who tried the action found that, having regard to the notorious and constant user of the water by the plaintiffs and their predecessors in title for 250 years, the bed of the stream when it passed through their premises was the property of the plaintiffs and belonged to them and that the defendants were consequently guilty of trespass in interfering with the plaintiffs' pipes, etc., which formed no obstruction to the flow of water to the defendants' mill; and he also held that it must be inferred that the mill stream was originally constructed for the mutual benefit of the owners of the tannery and the mill and that the plaintiffs were entitled under a presumed reservation made when the channel was constructed to a reasonable user of the water, not causing sensible injury to the owners of the mill. He therefore granted an injunction and damages.

COMPANY—WINDING UP—CREDITOR—DEBENTURE STOCK HOLDER —UNPAID INTEREST—COMPANIES ACT, 1862 (25-26 VICT. C. 89), S. 82—(R.S.C., C. 144, S. 2(J), S. 12).

In re Dunderland Iron Ore Co. (1909) 1 Ch. 446. This was an application for the compulsory winding up of a company, the applicants were debenture stock holders whose interest was in arrear. For securing the debenture stock a trust deed had been made between the company and trustees for the debenture stock holders, which provided that the company would pay the half yearly interest direct to the stock holders whose receipts should be a good discharge to the trustees and the company. The certificate delivered to each stock holder stated the rate of interest and dates of payment and certified that the stock holder was the registered owner of the stock which "is issued subject to the provisions" of the trust deed; but it did not contain any direct covenant with the stock holder to pay him the interest. Eady, J., held that the applicants were not creditors of the company and therefore not competent to petition for a winding-up order. In the Dominion Act a "creditor" is defined to include "all persons having any claim against the company present or future, etc." R.S.C., c. 144, s. 2(j), and it may be, that under this definition a person having "a claim" to interest in arrear as holder of deben-

ture stock, would be deemed "a creditor" entitled to apply under s. 12 for a winding-up order. In this case the learned judge finds that the applicants were in the position of cestuis que trust and that the contract by the company was made with their trustee which gave the cestuis que trust no right of action as creditors against the company.

MASTER AND SERVANT—COMMON EMPLOYMENT—NEGLIGENCE OF FELLOW SERVANT—ACCIDENT TO WORKMAN AFTER CONCLUSION OF WORK WHILE LEAVING EMPLOYERS' PREMISES.

Coldrick v. *Partridge* (1909) 1 K.B. 530 was an action brought under the Fatal Accidents Act, 1846 (see R.S.O., c. 166). The deceased was a workman employed in the defendants' colliery. He had concluded his day's work and availed himself of the privilege of riding on a railway of the defendants on their premises, free of charge from the colliery towards the place where he lived. While so travelling owing to the negligence of a servant of the defendants' engaged in constructing some masonry work to strengthen a bridge under which the railway ran the deceased was struck by a piece of scaffolding which had the effect of throwing him off the car he was travelling on, and under the wheels of the train, whereby he was killed. The defendants set up the defence of common employment, which the plaintiff contended did not apply, because the deceased and the servant who caused the accident were not engaged in pursuing a common object, and also because when his work was done the deceased ceased to be in the position of a servant and was entitled to the same protection as a stranger using the railway by invitation of the defendants. Bray, J., who tried the action was of the opinion that the risk attending the user of the train in going to and from his work was one of the risks which the deceased must be presumed to have undertaken, and that it was not essential that the fellow servant should be engaged in the same work as the deceased in order to make the doctrine of common employment applicable. He therefore held that the plaintiff could not recover and his judgment was affirmed by Court of Appeal (Williams, Farwell and Kennedy, L.JJ.).

BASTARDY—AGREEMENT BY FATHER TO PAY MOTHER FOR MAINTENANCE OF ILLEGITIMATE CHILD—DEATH OF MOTHER—SURVIVAL OF CAUSE OF ACTION.

In *James* v. *Morgan* (1909) 1 K.B. 564, the defendant, the father of an illegitimate child, agreed with the mother to pay a

weekly sum for the support of the child until it attained a certain age. The mother died and her administrator brought the present action to recover arrears which had accrued due since her death under the agreement. The judge of the County Court who tried the action held that the agreement came to an end on the death of the mother, and that the plaintiff could not recover, and this decision was affirmed by the Divisional Court (Bigham and Walton, JJ.).

STATUTE OF LIMITATIONS—ACTION ON BOND—ACKNOWLEDGMENT IN WRITING—SECONDARY EVIDENCE—EXECUTOR OF DECEASED —JOINT OBLIGOR—JOINT AND SEVERAL LIABILITY—3 & 4 WM. IV. c. 42, ss. 3, 5—(R.S.O., c. 72, ss. 1, 8; c. 146, s. 2).

Read v. *Price* (1909) 1 K.B. 577 was an action on a bond, whereby the obligors bound themselves, their executors and administrators jointly and severally. One of the obligors had died and his executor had given a written acknowledgment; and one of the questions in the action was whether that acknowledgment would prevent the Statute of Limitations (3 & 4 Wm. IV. c. 42, s. 3) running against the surviving obligors. Channel, J., held that it would not, because the executor of the deceased obligor did not become a joint obligor with the surviving obligors but merely represented the several liability of his testator. But it appearing that the deceased obligor had during his lifetime made certain payments on account which had been accompanied by letters acknowledging the debt it was held that although such letters had been destroyed parol evidence of their contents was admissible, and that these acknowledgments were binding on the co-obligors, and prevented the running of the statute in their favour. Although under R.S.O., c. 72, s. 8, part payment alone by a person liable to pay, without any written acknowledgment, appears to be sufficient to prevent the running of the statute; yet we find under R.S.O., c. 146, s. 2, neither acknowledgment nor payment by one of several obligors will prevent the statute running against any co-obligor. This case, therefore, as far as it holds that the acknowledgment, of one joint debtor is binding on other joint debtors, would not be law in Ontario.

INSURANCE—ACCIDENT INSURANCE—DEATH CAUSED BY ACCIDENT —INTERVENING CAUSE—ACCIDENT CAUSING DISEASE RESULTING IN DEATH.

Re Etherington & Lancashire & Yorkshire A.I. Co. (1909) 1 K.B. 591. This was an appeal from the judgment of Channell,

J., on an award in the form of a special case stated by arbitrators in respect of a claim upon an accident insurance policy. By the policy in question the insurers bound themselves to pay the amount of the policy, in case within three calendar months from the occurrence of an accident to the insured causing him bodily injury, such accident should directly cause the death of the insured. "Provided always and it is hereby as the essence of the contract agreed as follows: That this policy only insures against death where accident within the meaning of the policy is the direct and proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." The facts were that the assured received a heavy fall while hunting and the ground being very wet he was wetted to the skin. The effect of the shock and the wetting was to lower his vitality and being obliged to ride home after the accident while wet his vitality was still further lowered, the effect of which was that pneumonia in his lungs developed from which he died within three calendar months of the accident. The pneumonia was not septic or traumatic but arose from the lowering of the vitality of the deceased which allowed the germs called pneumo-cocci, which in small numbers are generally present in the respiratory passages, to multiply greatly and attack the lungs. In these circumstances Channel, J., found that the death was caused by the accident within the meaning of the policy, and that the case did not come within the above proviso and consequently that the company was liable to pay the amount of the policy: and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.), affirmed his decision.

CRIMINAL LAW—CRUELTY TO ANIMALS—MORE THAN ONE OFFENCE CHARGED.

Johnson v. *Needham* (1909) 1 K.B. 626. The Cruelty to Animals Act, 1849, s. 2, enacts that "If any person shall . . . cruelly . . . ill-treat, abuse or torture . . . any animal" he shall be liable to a penalty. The defendant was charged before justices that he "did cruelly ill-treat, abuse and torture a certain animal to wit a grey gilding." On the hearing of the summons the justices being of the opinion that several offences were charged called on the prosecutor to elect on which he would proceed which he declining to do, they dismissed the summons.

On appeal, the Divisional Court (Lord Alverstone, C.J., and Bigham and Walton, JJ.), held that the justices were right, and dismissed the appeal holding that the words "ill-treat," "abuse" and "torture" in the Act created three separate offences, and therefore a conviction for "ill-treating, abusing and torturing" would be bad.

PRACTICE—RECEIVER—EQUITABLE EXECUTION—MARRIED WOMAN DEBTOR—MONEYS PAYABLE FOR MAINTENANCE.

In *Paguine* v. *Snary* (1909) 1 K.B. 688 an unsuccessful attempt was made to obtain the appointment of a receiver by way of equitable execution of a weekly sum ordered to be paid to the execution debtor, a married woman, by her husband, for her maintenance; but the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.), overruling Phillimore, held that such payments were inalienable and therefore not liable to equitable execution.

CRIMINAL LAW—EVIDENCE—ADMISSION BY PRISONER IN CUSTODY —STATEMENT IN REPLY TO CONSTABLE.

In *King* v. *Best* (1909) 1 K.B. 692 the prisoner after he was in custody was questioned by a police constable, and his answer was given in evidence against him. He had been previously warned that anything he said might be given in evidence against him. It was contended on behalf of the prisoner that the evidence was inadmissible, but the Divisional Court (Lord Alverstone, C.J., and Channell and Walton, JJ.), overruled the objection and *Rex* v. *Garvin*, 15 Cox C.C. 656, was overruled.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.B.] PORTER *v.* PURDY. [March 29.

Lease for years—Covenant for renewal—Option of lessor—Ejectment—Equitable defence—Procedure.

A lease for years provided that when it expired the lessor had the option of renewing for a further term or paying for improvements. On its expiration the lessor notified the lessee that he would not renew, that he had appointed an appraiser to value the improvements and requested her to do the same, which she did. The valuation was made and the amount thereof tendered to the lessee, but she refused it, claiming that valuable improvements had been excluded by the appraisers. As she refused to surrender possession of the premises the lessor took an action of ejectment to which the invalid appraisement was offered as a defence, and the lessee also, by plea on equitable grounds, asked for an order declaring the valuation of the improvements a nullity and directing the lessor to renew the lease.

Held, affirming the judgment appealed against, 38 N.B. Rep. 465, Idington, J., dissenting, that no valid appraisement had been made; that the acts of the lessor in giving notice of his refusal to renew, demanding possession and bringing ejectment constituted a valid exercise of his option under the lease, and that the lessor was entitled to possession.

Held, also, Idington, J., dissenting, that an equitable plea to an action of ejectment on which relief may be granted under s. 289, C.L.P. Act of New Brunswick, must state facts which would entitle defendant to retain possession which the plea in this case did not do.

Appeal dismissed with costs.

McKeown, K.C., for appellant. *Ewart*, K.C., and *W. B. Wallace*, K.C., for respondent.

Man.] [March 29.

WINNIPEG FISH CO. *v.* WHITMAN FISH CO.

Sale of goods by sample—Delivery—Condition f.o.b.—"Sale of Goods Act," R.S.M. 1902, *c.* 152—*Notice of rejection—Reasonable time—Breach of warranty—Damages.*

By contract made at Winnipeg, Man., the plaintiffs sold to the defendants, by sample, a carload of cured fish to be shipped during the winter from their warehouse at Canso, N.S., "f.o.b. Winnipeg." The sample was sound and satisfactory. The fish arrived in Winnipeg in a frozen state and were received by the defendants and kept by them in an outhouse for several weeks before being placed in the freezer, the atmospheric conditions be such that the fish could not, in the meantime, have deteriorated by thawing. When some of the fish were sold they proved unsound, were returned by customers and the whole shipment was found not up to sample and unfit for food. On inspection the health inspector condemned the whole carload and it was destroyed. About six weeks after the fish had been received by them, the defendants notified the plaintiffs of the rejection of the carload so delivered. In an action for the price at which the fish had been sold, the defendants counterclaimed for damages for breach of warranty and consequent loss in their business.

Held, reversing the judgment appealed from (17 Man. R. 620) that the sale had been made subject to delivery at Winnipeg, that any loss occasioned by deterioration in transit should be borne by the sellers, and that, under the circumstances, the purchasers had notified the sellers of the rejection within a reasonable time, as contemplated by the Sale of Goods Act, R.S.M. 1902, c. 152; that the plaintiffs could not recover and that the defendants were entitled to have damages on their counterclaim. Appeal allowed with costs.

Newcombe, K.C., for appellant. *Ewart,* K.C., for respondent.

Ont.] [April 5.

EQUITY FIRE INS. CO. *v.* THOMPSON.
STANDARD FIRE INS. CO. *v.* THOMPSON.

Fire insurance—Statutory condition—Construction of statute—Gasoline "stored or kept"—Temporary use.

A condition of the contract of insurance against fire imposed by the Ontario Insurance Act (R.S.O. 1897, c. 203, s. 168, sub-s.

10(f)), is that a company is not liable for losses occurring while gasoline, inter alia "is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company."

Held, reversing the judgment of the Court of Appeal, 17 Ont. L.R. 214, Idington and Anglin, JJ., dissenting, that the words "stored or kept" must be interpreted separately and that the keeping prohibited need not be continuous and habitual, but a temporary keeping for a special purpose may avoid the policy. *Mitchell* v. *City of London Assur. Co.* (15 Ont. App. R. 262) distinguished.

A building used as a drug and furniture shop, the upper rooms of which were occupied by the proprietor's clerk, a qualified chemist, as tenant, was insured. The clerk had a gasoline stove which he used for three or four days and then put away in an unoccupied room, it containing about a pint of gasoline. Three months later he brought it down to the shop and used it for making a syrup, when the building took fire, and was totally consumed.

Held, that this was a "keeping" of gasoline on the premises in violation of the statutory condition and the insurance company was not liable for the loss.

Appeal allowed with costs.

Raney, K.C., for appellant. *Gamble*, K.C., for respondent Thompson. *Hellmuth*, K.C., for respondent Union Bank.

Railway Board.] [April 5.

COUNTY OF CARLETON v. CITY OF OTTAWA.

Railway crossing — Protective works — Contribution to cost — Party interested—Municipality—Distance from works.

On an application under ss. 237, 238 of the Railway Act, R.S. 1906, c. 37, for works to protect a railway crossing over a public highway the Board of Railway Commissioners has jurisdiction to order a municipality, as a party interested, to contribute to the cost though the works are not within the bounds of such municipality, nor immediately adjacent thereto. Appeal dismissed with costs.

Sinclair, K.C., *D. H. McLean, McVeity, Ewart*, K.C., and *W. L. Scott*, for various parties.

Ont.] STUART *v.* BANK OF MONTREAL. [April 5.

Husband and wife—Contract—Separate estate—Security for husband's debt—Independent advice—Stare decisis.

A bank pressed its debtor for security and accepted the guarantee of hi[illegible]ife and a mortgage upon her property.

Held, reversing the judgment of the Court of Appeal (17 O.L.R. 436) IDINGTON, J., dissenting, that the wife having executed the guarantee and mortgage on request from her husband and without any independent advice, the contract did not bind her. *Cox* v. *Adams*, 35 Can. S.C.R. 393, followed. Appeal allowed with costs.

Hellmuth, K.C., and *W. J. Elliott*, for appellant. *Shepley*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] McDONOUGH *v.* COOK & CRAWFORD. [April 5.

Promissory note—Payee against endorser—Irregular endorsement—Liability.

Appeal by defendant Crawford from the judgment of CLUTE, J. The plaintiff as payee of two promissory notes recovered judgment against the maker and also against Crawford, who had endorsed the notes before their delivery to the plaintiff. Crawford appealed on the ground that this endorsement did not make him liable to the plaintiff.

Held, following *Robinson* v. *Mann*, 31 S.C.R. 484, that the defendant Crawford was liable. This was the case of a note, and there being no drawer, the defendant, not having signed as a maker, is subject to all the provisions of R.S.C. 1906, c. 119. Even if the plaintiff were not a holder in due course, but only a holder for value, he would be entitled to recover under the Act.

Bartram, for appellant. *McCurry*, for plaintiff, respondent.

HIGH COURT OF JUSTICE.

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

MENZIES *v.* FARNON.

Marriage—Action for declaration of invalidity—R.S.O. 1897, *c.* 162, *s.* 31—*Motion for judgment in default of defence—Suspicion of collusion—Trial in open court—Oral evidence.*

The plaintiff, a girl under 19 years of age, brought this action, by her next friend, against a man with whom she went through a ceremony of marriage when only 15, to obtain a declaration that a valid marriage was not effected or entered into. The action invoked the jurisdiction conferred by s. 31 of R.S.O. 1897, c. 162, as amended by 7 Edw. VII. c. 23, s. 8, and by the statement of claim the plaintiff alleged such facts as brought her claim within that enactment. The defendant did not appear or defend, and the plaintiff moved for judgment upon the statement of claim, supported by affidavits of herself, her mother and the defendant. The defendant stated that he procured a marriage license, without obtaining the consent of either of the plaintiff's parents; and it was shewn by a certificate that the return of the marriage contained the information that the plaintiff was then 18 years of age.

Held, that, in the circumstances, the motion for judgment was properly refused and the plaintiff left to proceed to trial in the ordinary way.

Per RIDDELL, J.:—No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open court, coram populo, by viva voce evidence.

Judgment of TEETZEL, J., affirmed.

Harcourt Ferguson, for plaintiff. No one appeared for defendant.

Britton, J.—Trial.] [April 4.

CLISDELL *v.* KINGSTON AND PEMBROKE R.W. CO.

Railway—Carriage of goods—Delivery to consignee—Seizure by railway company for unpaid tolls—"Seize"—Termination of carrier's lien—Demand—Conversion—Damages.

By s. 345 of the Dominion Railway Act, R.S.C. 1906, c. 37, a railway company may, instead of proceeding by action for the

recovery of tolls upon goods carried, "seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof," etc.

Held, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to re-take goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee.

Semble, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls.

Held, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods.

A. W. Holmested, for plaintiff. *Hellmuth*, K.C., for defendants.

Clute, J.] RE MCGARRY. [April 20.

Will—Construction—Book debts—Ejusdem generis.

The testator bequeathed to his wife the homestead and all the furniture therein with certain exceptions, and some other real estate. He also devised to her all moneys in bank, notes, mortgages and all goods and chattels whatsoever and wheresoever, including his beneficiary certificate in the A.O.U.W.

Held, 1. The words "all goods and chattels whatsoever and wheresoever" is a good bequest of book debts. They are ejusdem generis with moneys in bank, notes, mortgages, etc.

2. The words "goods and chattels" are broad enough to cover "book debts."

German, K.C., for executor. *F. W. Hill*, for J. H. McGarry.

Meredith, C.J.C.P.] [April 23.

COLBECK *v.* ONTARIO & QUEBEC NAVIGATION CO.

Appeal—Breach of charter-party—Judgment at trial—Reference to master—Damages.

Appeal from report of local master at St. Catharines in an

action for damages for breach of charter-party. Judgment at the trial for plaintiff and reference to master to assess damages.

Held, that the measure of the plaintiff's damages is the additional sum beyond the contract price which it would have cost the plaintiff to have hired another steamer to take the place of the one he had hired from the defendants for the remainder of the season, he being prevented from using it owing to it not being in a condition to pass inspection; or, if no other steamer could have been hired the loss he sustained by not being able to run the steamship for the full term for which it had been hired; or, in other words, such sum as would have put plaintiff in the same position as he would have been if he had not been prevented from running steamship for the whole of the term for which he had hired it, but had been able to run it during the whole of that term if he had been so minded. Reference back to the master.

German, K.C., for plaintiff. *MacGregor Young*, for defendant.

Boyd, C., Magee, J., Latchford, J.] [April 28.

RE KINRADE INQUEST.

Coroner's inquest—Summons to witness by coroner—Warrant by coroner to compel attendance on default—Service and execution of summons and warrant outside of his county—Certiorari—Terms.

The inquest on the body of Ethel Kinrade was held in the city of Hamilton in the county of Wentworth by a coroner appointed for that county. Florence Kinrade, then residing in an adjoining county, was served with a summons or subpoena issued by the coroner to appear at an adjourned sitting. She had been examined at length at two previous sittings. Proof of due service on the witness was furnished. The witness having failed to attend, the coroner issued his warrant for her apprehension and handed it to a constable for execution. Counsel on behalf of the witness then applied to a judge in Chambers for a writ of certiorari to remove the warrant for the purpose of being quashed on the ground that this summons was of no avail outside the county of Wentworth. Notice of the application was directed by the judge to be given to the Attorney-General of Ontario.

On return of the motion, MR. JUSTICE TEETZEL, before whom the motion came, granted the writ, but preserved all objections

by the Crown as to its lying, and referred the points raised to the decision of a Divisional Court, where they were subsequently discussed.

Held, that the issue of the warrant in question was a ministerial and not a judicial act, and therefore was not removable by certiorari.

Quære, whether the subpoena summons which preceded the warrant could have been lawfully served outside the jurisdiction of the coroner.

Semble, but however this may be, the court agreed that it was not executeable beyond such jurisdiction, and since it appeared that the witness whose attendance was desired has been subjected to two exhaustive examinations it was thought that any further examinations should be confined to new matter and not be used for the purpose of laying a foundation for any collateral purpose.

Cartwright, K.C., and *J. B. Mackenzie*, for the Crown. *Lynch-Staunton*, K.C., *Robinette*, K.C., and *Hobson*, for the witness.

Clute, J.—Trial.] [April 29.

KENT *v.* OCEAN ACCIDENT CO.

Accident insurance—Receipt in full—Intention—Injury developing after settlement.

The plaintiff was an insurance inspector, and at the time of the accident, was insured by defendants. While a passenger on the C.P.R., travelling from Orangeville to Toronto, plaintiff received the injuries complained of. He returned the same evening to Orangeville and did not consider himself injured to any serious extent. Afterwards the injuries developed and the plaintiff put in a claim for eight weeks' disability. The company sent him a cheque for $425 in settlement of the claim and the plaintiff "acquitted and discharged the company from all and any further claim under said policy, which I have or might hereafter have, as the result of said injuries." At the time plaintiff said he did not read this over and did not notice that it was a release of all his claim, or know the extent of his injuries. Since signing the receipt plaintiff instead of improving, became worse, and for 21 weeks and about five days was totally disabled. There was no question of fraud in this case, both parties acted bonâ fide.

CLUTE, J.:—The question simply is, did the plaintiff's mind go with the terms of the paper which he signed, and was he aware of its effect? The plaintiff's claim was for a definite number of weeks and not a claim for his injuries, whatever, they might be, more or less, and the letter inclosing the cheque treats it as such. I do not think the defendants are entitled to set up the form of receipt as a bar to the plaintiff's action for reasons indicated. That the plaintiff is suffering and has suffered from serious ill-effects from the injuries, which were not contemplated or taken into consideration at the time of the settlement, is, I think, beyond doubt and for this he is entitled to recover. Judgment for plaintiff for $1,260 and costs.

McKeown, for plaintiff. *Blackstock*, for defendant.

COUNTY COURT OF GREY.

REX *v.* MORRISON.

Liquor License Act, s. 125—*Sale to an inebriate—Evidence.*

On an information that the defendant being a license holder did unlawfully deliver liquor to one W. said W. being a person having the habit of drinking liquor to excess and upon whom and concerning whom had been served upon the defendant the notices prescribed by s. 125 of the Liquor License Act no evidence was given at the trial that the person had the habit of drinking to excess.

Held, that such evidence was necessary to secure a conviction.

[OWEN SOUND, April 15—Hatton, Co. J.

Appeal from a conviction made by two justices of the peace at the town of Meaford dated March 23, 1909, for a violation of s. 125, sub-s. 5 of the Liquor License Act. The defendant, a licensed hotel keeper, on Feb. 8, 1909, sold and delivered at his licensed premises two glasses of beer to one W. concerning whom a notice was served by the license inspector under s. 125 of the Liquor License Act. At the trial it was objected that no evidence had been adduced that W. was a person who had the habit of drinking to excess and the conviction was made notwithstanding this objection the magistrates holding that the service of the notice was sufficient.

Sutherland, for the respondent, tendered evidence on the appeal that W. was a person having the habit of drinking to excess.

HATTON, Co.J.—That question having been raised and argued at the trial and no evidence having been given on the point it is too

late to give such evidence in appeal; such evidence could only be given in these cases as in other appellate courts.

Haverson, K.C., for the appellant.—Sec. 125 authorizes the serving of a notice not to deliver liquor to a person having the habit of drinking liquor to excess. Sub-s. 5 provides that if the person so notified delivers liquor to the person having such habit, the information charges that the defendant delivered liquor to W. a person having such habit, that he had such habit requires proof as much as the delivery of liquor.

Sutherland, contra.—It will be presumed the person has the habit of drinking otherwise the notice would not have been given, the notice is sufficient evidence.

HATTON, Co.J.—At the hearing before justices no evidence was given by the prosecutor that the interdicted person was a person who had the habit of drinking liquor to "excess." The prosecution contented itself with proving due service of the notice referred to in sub-s. 1 of s. 125. Objection was taken by defendant's counsel that this was insufficient but the objection was overruled and the conviction made. Under these circumstances I refused the request of the respondent to be allowed to give such evidence on the hearing of the appeal. This is the substantial objection to this conviction; and, contrary to my first idea at the hearing, I think it must prevail and the conviction must be quashed.

Sub-s. 5 of s. 125 does not in words apply a penalty for the selling, etc., to the person as to whom notice has been served, but for selling, etc., any such liquor to the person having such habit. Notice the difference between this and the language of sub-ss. 6 and 8. There is no form in the appendix for an information under this section and the prosecutor must follow the words of the section and allege as was done here that the interdicted person was a person having such habit, etc. This would appear to me to be an affirmative allegation which must be proven affirmatively by the prosecution unless such proof is rendered unnecessary by the express words of the statute. I do not find any such. This allegation seems to me as necessary of proof as would be the service and sufficiency of the notice required by the section. This point appears to have been decided in this way some years ago by the learned judge of the county of Wentworth, in an unreported case.

The case of *Northcote* v. *Brunker*, 14 A.R. 364, is also to my mind instructive upon the point here. The action was originally a County Court one for damages under the section in question. The point upon which it went to the Court of Appeal was as to the sufficiency of the notice served upon the hotel keeper, and the point in question here was not raised at all. One of the allegations in the statement of claim was that the interdicted person was a person "having the habit, etc.," and evidence pro and con was given and a finding of the jury made upon this point. The trial judge evidently did not consider this unnecessary evidence. Upon appeal each of the judges taking part in the judgment referred to this finding of the jury, and there is no comment that the evidence was unnecessary, although the section was directly before the court. It is true the case turned upon another point and no comment was called for, but I feel strengthened in my opinion by the fact that none such was made. See also *Austin* v. *Davis*, 7 A.R. 478, in the same way.

The appeal will be allowed with costs.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] McINTYRE *v.* HOLLIDAY. [April 12.

Appeal from verdict of jury on weight of evidence—Workmen's compensation for injuries.

Although the court, to which an appeal is made from the verdict of a jury in an action brought by a workman against his employer for injuries alleged to have been caused by the employer's negligence, feels grave doubt whether the evidence was such as to justify reasonable men in rendering a verdict for the plaintiff upon it and whether the jury were not influenced by sympathy irrespective of the weight of evidence, yet, in the present state of the law as laid down in the leading cases, the appeal must be dismissed if there was, in support of the verdict, any evidence that the jury might have believed.

Heap, for plaintiff. *Affleck*, for defendant.

KING'S BENCH.

Mathers, J.] [March 19.

VULCAN IRON WORKS CO. *v.* WINNIPEG LODGE No. 174.

Trades unions—Strikes—Combined action—Conspiracy to injure employers—Picketting and besetting—Damages—Injunction —Principal and agent—Criminal Code, s. 523.

Held, 1. Besetting and watching the premises of an employer by members of a trades union, if done in concert with a view to compel the employer to change the mode of conducting his business and to comply with their demands for better pay by persuading men not to work for him or to seek employment from him, especially when accompanied by some attempts at intimidation by threats of violence, amounts to a common law nuisance punishable in damages. *Lyons* v. *Wilkins* (1899) 1 Ch. 255 and *Cotter* v. *Osborne,* 18 M.R., 44 C.L.J. 508, followed.

2. Such besetting and watching may be wrongful under s. 523 of the Criminal Code, although done merely to obtain or communicate information.

3. When a body of men unite to perform an act or to accomplish a purpose, leaving it entirely to the discretion of those they employ as to the means they shall make use of, all must be responsible for the acts of each individual thus employed and they cannot evade responsibility by saying that what was done was without instructions, so that where a number of the defendant lodges appointed a strike committee and afterwards recognized such committee and its transactions, the lodges were held liable as well as the individuals for the illegal acts committed by the pickets acting under the instructions of the strike committee, although there was no proof of any resolutions or formal acts of the lodges authorising such conduct. *Giblan* v. *National Amalgamated* (1903), 2 K.B., at p. 624 followed.

4. The receipt of strike pay by a lodge from its grand lodge and the subsequent payment of same to its men will not of itself make the lodge liable for past illegal acts committed by its members without its authority. *Denaby* v. *Yorkshire* (1906) A.C. 384 followed; *Smithies* v. *National Assn. of Plasterers,* 25 L.T.R. 205, distinguished.

5. Damages should be awarded against the defendants found guilty for inducing the boiler makers union to employ its coercive machinery and power to compel a number of its members

to withdraw from their employment with the plaintiffs, for the loss caused to the plaintiffs in not being able to secure workmen through the illegal conduct of the defendants and for the loss of the services of men who would otherwise have remained in their employment, but not in respect of individual members peaceably persuading employees to quit work or because one of the lodges censured two of its members who returned to work, nor for losses sustained by the strike independently of the illegal acts proved.

Injunction made perpetual restraining the parties found guilty from besetting and watching the place where the plaintiffs carry on business or any other places in which any person or persons employed or about to be employed by the plaintiffs . . . with a view to compel such other person or persons to abstain from working for the plaintiffs, etc., or for any other illegal purpose and from intimidating by threats of violence such person or persons and from persistently following such person or persons about from place to place.

O'Connor and *Blackwood,* for plaintiffs. *Fullerton* and *Manahan,* for defendants.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] ROBINSON *v.* MCKENZIE. [April 11.

Examination of parties—Discovery—Officer of company.

The examination of an officer of a corporation may be had without an order being specially made for that purpose.

Harper, Martin, K.C., and *W. A. Macdonald,* K.C., for various parties.

Morrison, J.] PIPER *v.* BURNETT. [April 22.

Security for costs of appeal—Order 58, *rule* 15*a.*

A respondent must make his application for security for costs of appeal with due promptness, and it is too late to apply when the appeal is set down and about to be heard.

J. A. Russell, for applicant. *Woods,* contra.