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IN reference to the subject of decentralization, we note that our namesake in England quotes with words of commendation some remarks of ours recently made, in which we called attention to some of the objections to the proposed change. A similar question seems to be engaging the attention of the profession in England in reference to the cities of Liverpool and Manchester.

THE *Western Law Times* credits the ubiquitous granger—the species being known in this country by the more "tony" name of Patron of Industry—with some "amusing antics in the Legislative Assembly chamber: First, he must repeal the Law Society and the Medical Acts, and then he sought to have an Act passed giving time to farmers by way of forceable extensions. Then he sought to prevent a farmer from selling any of his chattels or mortgaging the same, and if he did sell or mortgage the act was to be invalid. This might be called The Forceable Exemption Act. When the Judicature Act was introduced he began to see behind it a new way of making costs; this was enough for him, and the result was that the Act was postponed until next session. After a good deal of talk and annoyance he has at last subsided, and the only apparent result of his session's labours is the increase of the Inferior Court's jurisdiction to $400 and $600, to which we refer elsewhere, and which throws a good deal of work on members of a class that are already burdened."

THIS increase of jurisdiction is a favourite effort on the part of laymen in parliament whereby to immortalize themselves. It is always popular to bring justice to every man's door by enlarging the scope of Division Courts, especially when the result is to cut down lawyers' fees, and the same holds good, to a certain extent, to County Courts. We are compelled, unhappily, to pay some attention to the lay element in the House, as they are the exponents of the levelling spirit of the age, and they have votes, and party politicians exist by these votes. We may consider ourselves lucky if we can keep Osgoode Hall over our heads, and be allowed to conserve for a little longer the limited privileges we enjoy. It should be clearly understood that the interests of the public are bound up with these so-called privileges, which simply mean a highly-trained Bench and Bar. Some cannot, or do not care to see that anything which directly or indirectly lowers the standard must work a more serious injury to the public than to the profession.

THE PRIVY COUNCIL ON BANKRUPTCY.

It was observed by Taschereau, J., in *Attorney-General* v. *Mercer*,* that it is but right, for obvious reasons, that the final and authoritative determination of controversies on the construction of the British North America Act, which is an Imperial statute, should emanate from an Imperial judicial authority; and in his judgment just delivered in the pardoning-power case, as it is commonly called, at present unreported, the same learned judge observes that constitutional questions cannot be finally determined in the Supreme Court, that they never have been, and never can be, under the present system. Perhaps no decision of the Judicial Committee has been awaited with more interest, at all events in the profession, than that which is reported in the present number of this JOURNAL in reference to the Assignments and Preferences Act, upon which it is now proposed to make some comments.

It would, indeed, possess little more than an historical interest to pass in review the various judgments which have been delivered in our courts upon the constitutionality of this Act; but, as

* 5 S.C.R., at p. 673; 3 Cart., at p. 56.

a tribute to the memory of the late Master in Chambers, it may be observed that none of those judgments seem more closely to resemble, as well in the line of reasoning as in the final conclusion, the judgment which has now emanated from the Judicial Committee than does Mr. Dalton's judgment in *Union Bank* v. *Neville*.*

Again, it would be a still more useless proceeding to repeat the arguments which have been, or may be, advanced in favour of or against the conclusions at which the Privy Council have arrived; but it might, perhaps, be of interest to indicate in a few sentences the line of argument adopted by Sir Richard Webster against the constitutionality of section 9, and of the Act generally, and a careful study of a transcript from the shorthand notes of the argument, which I have had an opportunity of reading, may, perhaps, justify me in making the attempt.

Sir Richard Webster urged that, inasmuch as after Confederation the Dominion Parliament had enacted a complete system of bankruptcy and insolvency, which, though in part proceeding *in invitum* against the debtor, yet in other part proceeded upon the basis of a voluntary assignment by the debtor for the benefit of creditors, and in connection therewith contained provisions practically the same as those in the Ontario statute, it had thereby indicated what it regarded as a proper and complete system of bankruptcy and insolvency, and by repealing that system in 1880 it had, in like manner, indicated that its policy was that there should be no such system in operation in the Dominion. It was not, after that, competent, he argued, for the provinces to re-enact the provisions which had been based upon a voluntary assignment, and which were not merely ancillary to, but formed an integral part of, the whole system of bankruptcy and insolvency which the Dominion Parliament had seen fit to repeal. And he pointed out that, at all events, since before the reign of George IV., a general assignment for the benefit of creditors had been, under the Acts, an act of bankruptcy, so that it could not be disputed that there was a relation between conditions of bankruptcy and insolvency and such an assignment. Furthermore, he contended that if the other provisions of the Ontario Act were looked at, in which section 9 is included, and when the full and proper bearing of section 9 was appreciated, it would be

* 21 O.R. 152 (1891).

found to form a part of a system which was a branch of bankruptcy and insolvency law, as distinguished with more interference with the rights of judgment creditors, which might be said to stand independent of bankruptcy. To this, Mr. Carson, of the Irish Bar, who appeared with Sir Richard Webster, added the further argument, that whereas, under the Insolvency Acts, repealed in 1880, an assignment for the general benefit of creditors had been declared to be an act of bankruptcy, upon which a creditor could take proceedings *in invitum* to have the debtor declared bankrupt, and his estate distributed under the Act, all the Ontario Act was doing was leaving out the intervening step which had been necessary to make the bankruptcy rules attach to the distribution of the debtor's property, and prescribing that, at the moment the debtor executed a voluntary deed of assignment under the Act, at that moment, without any further step, all the same consequences should ensue as would ensue if a petition had been presented, and the assignment for creditors had been relied upon as an act of bankruptcy, and that it was narrowing the matter down to a very small distinction to say that the one came within the subject of bankruptcy and insolvency legislation, and the other did not.

As to the argument on the side of the provinces, it is quite clear that Mr. Edward Blake carried the members of the Board with him throughout, except only so far as he contended that provisions for the discharge of the debtor were as much an essential feature of bankruptcy and insolvency legislation as provisions enabling the creditor to proceed *in invitum*. On this point the members of the Board do not seem to have agreed with him.

While speaking of the argument before their lordships, it may, perhaps, be remarked as somewhat strange that no reference appears to have been made, any more than before our own courts, to the English case of *The Queen* v. *Sadlers Company*,* in which there came in question the construction of a by-law of the defendant company, which declared that no person who had become a bankrupt, or otherwise insolvent, should be admitted a member of the Court of Assistants of the company, as it was called, unless it was proved that after his bankruptcy or insolvency he had paid his debts. This matter was referred by the

* 10 H.L.C. 404 (1863).

Lord Chancellor to the judges, and no less than twelve judges discussed at length the meaning of the words "bankrupt, or otherwise insolvent," and "bankruptcy and insolvency." In connection with this argument, I may observe that it would seem from it clearly to have been the opinion of the Board (as may, indeed, be surmised from the judgment itself) that the reason why the two words, bankruptcy and insolvency, were mentioned in section 91 of the British North America Act was in order that there might be no question that the class of legislation referred to was intended to cover non-traders as well as traders, although the distinction between traders and non-traders in respect to bankruptcy and insolvency had, in fact, been done away with by the English Acts before 1867, and also in Upper Canada, and, therefore, at that time bankruptcy and insolvency may be said to have meant one and the same thing —bankruptcy, however, being the word in vogue in England, and insolvency being the word in vogue in Canada.

Passing now to what is more important, namely, a consideration of what the actual judgment of their lordships was, it will be found, I think, that although the constitutional validity of section 9, whereby executions not completely satisfied by payment are postponed to an assignment for creditors under the Act, was alone submitted to them on what may be termed the pleadings, yet they deal with the Act as a whole, as they were urged to do upon the argument, sufficiently to show very clearly that it must be considered *intra vires* throughout. Perhaps the gist of the decision may be correctly stated as follows: That whereas an assignment for the general benefit of creditors had long been known to the jurisprudence of England, and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto; while, on the other hand, it has been a feature common to all systems of bankruptcy and insolvency that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed among his creditors, whether he is willing that they shall be so distributed or not, although provision may be made for a voluntary assignment as an alternative; therefore, such provisions as are found in the enactment in question, relating, as they do, to assignments purely voluntary, do not infringe on the

exclusive legislative power conferred upon the Dominion Parliament.

The enactment in question was, of course, section 9 of the Act, but, as I have already submitted, the premises thus laid down would lead to a like conclusion as to the remaining enactments in the statute. Thus it will be seen that the judgment of Chief Justice Armour, in the very first reported decision upon the constitutionality of the Act, *Broddy* v. *Stuart*,* has received its final justification.

It will thus be seen that the Privy Council do not, in their judgment, profess to define what is covered by "bankruptcy and insolvency." All they say is, that provisions for securing a rateable distribution of an insolvent person's assets, on the application of a creditor *in invitum* of the debtor, is an essential feature of a system of bankruptcy and insolvency, although provision may be made for a voluntary assignment as an alternative. In the course of the argument, indeed, the Lord Chancellor had stated that it seemed to him that there is very little necessarily included in the idea of bankruptcy and insolvency, and that if there was nothing else in an Act but a simple provision that if a man could not pay his debts his estate should, at the application of a creditor, be vested in an official, whose business it should be to distribute it, that would be a bankruptcy law, but that provisions as to fraudulent preferences, though a common adjunct to bankruptcy law, are obviously not an essential part of it.

But apart from the importance of this judgment of the Privy Council, as throwing light upon what is meant by bankruptcy and insolvency, in section 91 of the British North America Act, it possesses much constitutional interest by reason of the *dicta* in the concluding portions of it, in which their lordships observe that it may be necessary, by way of provisions ancillary to a system of bankruptcy legislation, to deal with the effect of executions† and other matters, which would otherwise be within the legislative competence of the provincial legislatures, and: "Their lordships do not doubt that it would be open to the Dominion

* 7 C.L.T. 6 (1886).

† In a Nova Scotia case of *Kinney* v. *Dudman*, 2 R. & C., at p. 19; 2 Cart., at p. 412 (1876), it was decided that section 59 of the Insolvency Act of 1869, which was very much like section 9 of our Assignment for Creditors Act, was *intra vires* of the Dominion Parliament.

Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and, therefore, within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

It will, of course, be remembered that as far back as the case of *L'Union St. Jacques de Montreal* v. *Belisle*,* their lordships had said that a local legislature is not incapacitated from enacting a law, otherwise within its proper competency, merely because the Dominion Parliament might, under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject-matter the local law, but they had stated that they were by no means prepared to say that if such a law were passed by the Dominion Parliament it would be within the competency of the provincial legislature afterwards to take the subject-matter of the local Act out of the scope of a general law of the kind so competently passed by the Dominion Parliament, but it is clear that they have now gone much further than the point thus reached, and perhaps we may best arrive at a correct understanding of what they have now said by considering first for a little what they have not said.

It is very clear that they have not confirmed the view expressed by Maclennan, J.A., in the court below, to the effect that "except so far as the Dominion chooses from time to time to occupy the field of bankruptcy and insolvency legislation the province may occupy it,"† a view which appears to be adopted by Mr. Clement in his recent able work on the law of the Constitution.‡

With very great deference, I submit that such a view is contrary both to the express words of the British North America Act, and to the teaching of the reported decisions upon it. As

* L.R. 6 P.C. 31 ; 1 Cart. 63 (1874).

† 20 A.R., at p. 502.

‡ See Clement's Canadian Constitution, pp. 216-7, 393.

far back as 1879 the Judicial Committee said, in *Valin* v. *Langlois*,* "that if the subject-matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament." As Dorion, C.J., says, in *Regina* v. *Mohr*,† the powers "conferred by sections 91 and 92 of the British North America Act are exclusive, so that within the limits assigned to the Dominion Parliament and to the legislature of each province these powers are exclusive," and when the Imperial Legislature placed laws in relation to bankruptcy and insolvency within the exclusive jurisdiction of the Dominion Parliament they must surely have had some more or less definable class of legislation in view, although, as with several other of the enumerated classes of section 91, it may be hard to arrive at a correct definition.

Here, in fact, we get one of the great points of distinction between our Constitution and that of the United States, a distinction which has often been referred to in provincial courts in reference to this very subject of bankruptcy and insolvency.‡ Under the Constitution of the United States, though Article 1, section 8, provides that Congress shall have power "to establish uniform laws on the subject of bankruptcy throughout the United States," and although, by Article 6, the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, it is obvious that the above power, not being made exclusive, there is nothing to prevent a State making and enforcing insolvent laws when there is no bankruptcy law in existence. As Judge Cooley expresses it in his "General Principles of Constitutional Law§: "The mere grant of a power to Congress does not of itself, in most cases, imply a prohibition upon the States to exercise the like power. The full sphere of federal powers may, at the discretion of Congress, be occupied or not, as the wisdom of that body may determine. If not fully occupied, the States may legislate within the same sphere, subject, however, to any subsequent legislation that Congress may adopt. It is not the mere existence of the

* 5 App. Cas. 119; 1 Cart. 163.

† 7 Q.L.R., at p. 187; 2 Cart., at p. 26 (1891).

‡ See per Ritchie, C.J., in *Queen* v. *Chandler*, 1 Hannay 556, 2 Cart. 421; per Hagarty, C.J., in *Clarkson* v. *Ontario Bank*, 15 A.R., at p. 176, 4 Cart., at p. 510; per Burton, J.A., in *Edgar* v. *Central Bank*, 15 A.R., at p. 200, 4 Cart., at p. 539.

§ 1st Ed., at p. 35.

national power, but its exercise, which is incompatible with the exercise of the same power by the States."*

So far, indeed, as their lordships in the above part of their judgment have stated that provisions affecting matters otherwise within the jurisdiction of provincial legislatures may be enacted by the Dominion Parliament as ancillary to a system of bankruptcy legislation, they are merely repeating the principle laid down by them in 1880 in *Cushing* v. *Dupuy*† that: "In assigning to the Dominion Parliament legislative jurisdiction in respect to the general subjects of legislation specified and referred to in section 91 of the British North America Act, the Imperial statute by necessary implication intended to confer on it legislative power to interfere with matters otherwise assigned to provincial legislatures under section 92, so far as a general law relating to these subjects so assigned to it might affect them," a principle which has been illustrated in a great number of cases. But it will be seen that the matter has now been carried further by the statement that the provincial domain having been thus legitimately invaded by the Dominion Parliament, "the provincial legislature would, doubtless, be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament"; and the important thing, it seems to me, is to attach the proper weight, and no more than the proper weight, to the words "interfering" and "affect" in this passage.

It will be remembered that in their other recent decision in *Tennant* v. *The Union Bank of Canada*‡ their lordships observed that "section 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes, which clearly indicates that the legislation of that Parliament, so long as it directly relates to those matters, is to be of paramount authority." But now they are dealing, not with legislation by the Dominion Parliament strictly relating to the enumerated classes of subjects in section 91, but to legislation invading the provincial domain by provisions merely incidental and ancillary to the former. Now, there can be no doubt, I sub-

* See also Bryce on the American Commonwealth, vol. 1, at p. 321.

†5 App. Cas., at p. 415; 1 Cart., at p. 258 (1880).

‡10 T.L.R., at p. 150 (1893).

mit, that the words "interfering" and "affect" must be interpreted in the light of the former judgments of the Privy Council. And just as in *Russell* v. *The Queen** they laid it down that an Act of the Dominion Parliament is not affected in respect to its validity by the fact that it interferes prejudicially with the object and operation of provincial Acts, provided it is not in itself legislation within one of the subjects assigned to the exclusive legislative jurisdiction of the provincial legislatures, so, *e converso*, they laid it down in *Bank of Toronto* v. *Lambe*† that if, on the due consideration of the British North America Act, a legislative power falls within section 92, it is not to be restricted or its existence denied because, by some possibility, it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament.

It appears very clear that it would not be safe to understand their lordships now as meaning more than that, if a portion of the provincial domain had been legitimately taken possession of by the Dominion Parliament in the manner indicated, any subsequent provincial legislation in that domain which directly conflicted with such Dominion legislation would be overridden by the latter. That Dominion legislation must be paramount in such cases of direct conflict has been several times asserted by judges in our own Canadian courts ;‡ but these, and those above quoted from *Tennant* v. *The Union Bank*, are, I think, the first *dicta* of the Judicial Committee asserting the predominance of Dominion legislation. Indeed, on the argument which took place before the Privy Council in 1885 in reference to the Dominion License Acts, 1883-84, which I have had an opportunity of reading, Mr. Horace Davey incidentally said that the question of what is to be the rule in such cases of direct conflict had not yet been before the Privy Council for decision. The result now finally arrived at, however, would seem clearly to carry out the intention of the framers of the Act, for a reference to *Hansard* shows that, on the second reading in the House of

* 7 App. Cas., at pp. 837-8 ; 2 Cart., at pp. 20-1 (1882).

† 12 App. Cas., at pp. 586-7 ; 4 Cart., at pp. 22-3 (1887).

‡ Per Ritchie, C.J., in *Citizens' Insurance Co.* v. *Parsons*, 4 S.C.R., at p. 242, 1 Cart., at p 292 ; per Fournier, J., S.C. 4 S.C.R., at pp. 273-4, 1 Cart., at p. 304 ; per Ramsay, J., *Three Rivers* v. *Suite*, 5 L.N., at p. 333, 2 Cart., at p. 287 ; per Gwynne, J., in *City of Fredericton* v. *The Queen*, 3 S.C.R., at p. 562, 2 Cart., at pp. 54-5 ; per Hagarty, C.J.O., in *In re Local Option Act*, 18 A.R., at p. 580.

Lords, Lord Carnarvon observed that "the authority of the Central Parliament will prevail whe. ever it may come into conflict with the local legislatures,"* and the 45th Quebec Resolution was that: "In regard to all subjects over which jurisdiction belongs to both the general and local legislatures, the laws of the general parliament shall control and supersede those made by the local legislature, and the latter shall be void so far as they are repugnant to or inconsistent with the former." In the words of Taschereau, J., in *Citizens' Insurance Co.* v. *Parsons*†: "Before the laws enacted by the Federal authority within the scope of its powers, the provincial lines disappear; for these laws we have a quasi legislative union; these laws are the local laws of the whole Dominion, and of each and every province thereof."

A valuable comment on the meaning of these latest *dicta* of the Privy Council appears to be contained in the following words of Lord Watson, spoken in the course of the argument: "The view I have taken of it is this, that within the area given to the Dominion Parliament by section 91 there is a legislative area, part of which is their own exclusively, but that area may include, in addition, certain ancillary provisions which touch and trench upon the provincial law; and as long as these are enactments in that part of the area, it would exclude the right of the province to legislate to the effect of destroying—derogating from—their enactment. It would take away their power as effectually as if it belonged to the primary area. If there had been no legislation, then my impression was that, within what I call the secondary area, the provincial parliament was free to legislate." And when, a little way further on, Sir Richard Webster said that, "by the frame of section 91, you are to read out of section 92 anything which is enumerated in section 91," Lord Watson replied to him: "That is rather suggesting that the area of a legislative power is defined and capable of definition, and is absolutely exclusive in all cases. That is not the view which has been suggested by the decisions of this Board. The decisions of this Board rather point to this, that there is a certain extent of that legislation which might be reserved to the province, but there are many ancillary regulations which might be made in carrying out their primary object and the power given to them, in which

**Hansard*, 3rd Ser., Vol. 185, at p. 566.

†4 S.C.R., at p. 307, 1 Cart., at p. 326.

they can override the provincial authority. But the provincial authority is there."

It will be observed, of course, that in the *dicta* now under consideration the Privy Council appear to be referring to a case where the Dominion legislation precedes the provincial legislation, because they say the provincial legislature would be "then precluded from interfering"; but what if the provincial legislation preceded the Dominion legislation? In that case the view advanced by Mr. Edward Blake upon the argument was that provincial legislation would be placed in abeyance. And in the argument before the Privy Council upon the Dominion License Acts of 1883-4, the point was somewhat discussed before the Board in reference to the *dicta* in *L'Union St. Jacque de Montreal* v. *Belisle*, to which I have referred above. Lord Monkwell, one of the Board, is reported as saying in reference to those *dicta*: "It is intimated that if the Dominion Parliament had occupied the ground before them the local government could not occupy it. But suppose the local government has occupied the ground?" Whereupon the following conversation is reported between him and Sir Farrer Herschell, who appeared for the Dominion of Canada, and who sat on the recent case in his present capacity as Lord Chancellor:

Sir Farrer Herschell: "I do not think it can depend on which is first or last, because if the Dominion Parliament can deal with it at all it is not a matter exclusively committed to the provincial legislature."

Lord Monkwell: "It would follow, if the Dominion Parliament could, by a general law, exclude the local parliament from dealing with the matter, it could, after the local parliament had dealt with it, make it null and void."

Sir Farrer Herschell: "Yes, I think it follows, because the powers of the Dominion Parliament are unlimited, except so far as matters have been exclusively given to the provinces."

Lord Monkwell: "It may be so. The two things are not quite the same."

Sir Farrer Herschell: "It would not necessarily follow as a matter of reasoning, but on the construction of the two sections."

But it may occur to the mind, cannot the provincial legislatures, in legislating upon the enumerated classes of subjects in section 92, incidentally affect, by ancillary provisions, matters

exclusively assigned to the Dominion Parliament; and what would happen then if such provisions conflicted with the provisions of a Dominion Act? There has been, I think, no decision or *dictum* either of the Privy Council or of the Supreme Court of Canada to the effect that provincial legislatures have any such power incidentally to legislate upon matters assigned to the Dominion Parliament, but unquestionably Osler, J., in *Jones* v. *The Canada Central Railway Co.*,* asserts that they can do so, and that in this respect the powers conferred upon provincial legislatures must receive a no less liberal construction than those conferred upon the Dominion Parliament. And the same has been asserted by the Quebec Court of Queen's Bench (appeal side) in the case of *Bennett* v. *Pharmaceutical Association of the Province of Quebec*,† and by Cross, J., in the same court in the case of *Regina* v. *Mohr*,‡ and other cases in provincial courts might be cited upon the same point. But conceding this to be so, I submit that since Dominion legislation is to prevail, even when it has invaded, though legitimately, the provincial domain, *a fortiori* it must prevail over any provincial Acts when it is legislating strictly in its own domain, and the words "notwithstanding anything in this Act" may be appealed to in support of this view.

In short, if it is allowable to relieve the tedium of a long legal article by being a little frivolous, it may be said, I think, with truth, that this decision in respect to the Assignment for Creditors Act (notwithstanding that the provincial enactment in question has been held to be *intra vires*, and though interpreting the *dicta* in the modified sense above indicated), and the other recent case of *Tennant* v. *The Union Bank*, are almost the first instances of the Dominion Parliament "scoring" before the Privy Council. The "scoring" has hitherto been, for the most part, on the side of the provincial legislatures. But now, when we consider how much of the provincial domain might be incidentally invaded by the Dominion Parliament when legislating upon the broad general subjects enumerated in section 91, their lordships seem to have left it, in its relation to the provincial legislatures, almost in as happy a position as a man occupied towards his wife in the good old days, when he could say, "What is yours is mine, but what is mine's my own."

* 46 U.C.R. 250, 1 Cart. 777 (1881).
† 11 Dor. Q.A. 336, 2 Cart. 250 (1881).
‡ 7 Q.L.R., at p. 191, 2 Cart., at p. 268 (1881).

I can scarcely conclude without venturing a word or two upon the question of how far the recent decision of the Supreme Court in *Quirt* v. *The Queen** is affected by this last decision of the Privy Council. In that case, it will be remembered, the Supreme Court decided in favour of the validity of a Dominion Act, which, after reciting the insolvency of the Bank of Upper Canada, and that its assets were vested in trustees (as they were, by virtue of an assignment for the benefit of creditors, assumed to be made by the Bank in 1866), who had made but little progress in the settlement of its affairs, and that the Dominion of Canada was by far its largest creditor, and that it was in the interest of all persons concerned that provision should be made for the more speedy winding-up of its affairs, then vested in the Queen for the Dominion of Canada all the property and assets of the Bank, and transferred to Her Majesty all the powers of the trustees, and provided for the sale of the assets, the settlement of the claims of the creditors, and the disposal of the surplus. The Supreme Court arrived at this conclusion in favour of the validity of the Act by viewing it as an Insolvency Act, though relating only to a single institution. Upon the argument before the Privy Council in the recent case as to our Assignment for Creditors Act, Mr. Edward Blake said that he cared very little whether the Supreme Court were right or wrong in their decision, for that his whole argument was based on the proposition that the Dominion Parliament could exercise large powers, in part superseding provincial legislation, if effectual. But, for reasons clearly indicated by Burton, J.A., in the court below,† there would seem, I submit, to be great doubt whether the Supreme Court could now, in view of the decision of the Privy Council, hold that the Act was an Insolvency or Bankruptcy Act at all, unless, indeed, on the very peculiar ground that it was a proceeding *in invitum* against the debtor by the Dominion Parliament at the instigation of the Dominion Government as a creditor of the debtor. If, in the light of the present decision, the Act in question in *Quirt* v. *The Queen* could not now be regarded as an Insolvency Act at all, then, I submit, the decision in that case could not now be supported.

A. H. F. LEFROY.

*19 S.C.R. 510 (1891).
†20 A.R., at p. 496-8.

CURRENT ENGLISH CASES.

The Law Reports for February comprise (1894) 1 Q.B., pp. 133-271; (1894) P., pp. 13-57; (1894) 1. Ch., pp. 73-230.

DEFAMATION — LIBEL — CORPORATION, ACTION FOR LIBEL AGAINST — SPECIAL DAMAGE.

South Hetton Coal Co. v. *North-Eastern News Association*, (1894) 1 Q.B. 133, was an action brought by a joint stock company for libel. The plaintiffs were proprietors of collieries, and owned a number of cottages in connection therewith. The libel complained of charged that these cottages were kept in a grossly unsanitary condition, being for the most part unfit for human habitation. The action was tried by Lord Coleridge, C.J., with a jury. No special damage was proved, and the Chief Justice ruled that the matter discussed in the article complained of was one of public interest, and he, in effect, left it to the jury to say whether the defendants had gone beyond the limits of fair and *bona fide* comment. The jury found a verdict for the plaintiffs for £25. The defendants appealed on the ground that the plaintiffs, being a joint stock company, had no cause of action in the absence of proof of special damage; that no action for libel would lie by a company except for injury to its business, and none was proved; and also, because there was no evidence, that the defendants had exceeded fair and *bona fide* comment. The Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) were of opinion that none of the points raised by the defendants were sufficient to defeat the plaintiffs; that although a corporation could not maintain an action for libel in respect of anything reflecting upon them personally, yet they could do so for anything reflecting on their management of their trade or business, without proving any special damage. They also were of opinion that the matter commented on was one of public interest, but that there was evidence from which the jury could properly find, as they had in effect done, that the defendants had exceeded fair and *bona fide* comment.

INTERNATIONAL LAW—FOREIGN SOVEREIGN—JURISDICTION OVER FOREIGN SOVEREIGN—PROOF OF STATUS OF SOVEREIGN.

Mighell v. *Sultan of Johore*, (1894) 1 Q.B. 149, was an action for breach of promise of marriage, in which the defendant moved

to set aside an order for service of the writ, and to stay all proceedings, on the ground that he was an independent sovereign prince, over whom the court had no jurisdiction. The judge before whom this motion came caused a communication to be made to the Secretary of State for the Colonies, and in answer a letter was written to the judge by an official at the Colonial Office informing him that the defendant was, in fact, recognized by Her Majesty as an independent sovereign prince. It appeared that the defendant had been living in England *incognito*, and had passed himself off as "Mr. Baker," and it was alleged that while so residing he had made the alleged promise. Wright, J., before whom the motion originally came, made the order as asked, and this was affirmed by Wills and Laurance, JJ., whose decision, in turn, was affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), who considered the case governed by the decision of the Court of Appeal in *The Parlement Belge*, 5 P.D. 197. The Court of Appeal also held that Wright, J., had taken the proper course in order to ascertain the status of the defendant. The court was also clear that, although a foreign sovereign might submit to the jurisdiction of the court, yet that the fact of the defendant having taken an assumed name, and acted as a private individual, afforded no evidence of such submission.

NUISANCE—REVERSIONER, LIABILITY OF—LANDLORD AND TENANT—WEEKLY TENANCY—INJURY CAUSED BY DEFECTIVE REPAIR OF DEMISED PREMISES.

In *Bowen* v. *Anderson*, (1894) 1 Q.B. 164, a very similar question was raised to that involved in *Hett* v. *Janzen*, 22 O.R. 414. The plaintiff was injured through a defect in the coal plate in the pavement in front of a house owned by the defendant, but let by him to a weekly tenant. The evidence showed that the defect had existed some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to a defect in the flagstone in which the plate was set, or to the presence of clay which prevented the plate from fitting. On this evidence a verdict was found for the plaintiff; but Wills and Collins, JJ., ordered a new trial, on the ground that some essential questions had not been left to the jury, viz., whether or not the defendant had provided proper means to secure the plate, and whether or not the acci-

dent was due to the neglect of the tenant to use the appliance provided, as in case these questions were answered affirmatively the defendant would not be liable. The court also took occasion to express the opinion that in *Sandford* v. *Clarke*, 21 Q.B.D. 398, they had proceeded on a wrong ground in assuming that a weekly tenancy comes to an end at the end of each week, and, on the contrary, they consider that it continues from week to week until determined by some notice; but how long that notice should be they do not say. The reporter in a note refers to an Irish case, *Harvey* v. *Copeland*, 30 L.R. Ir. 412, where it was held that a reasonable notice was necessary, and that a reasonable notice means a week's notice.

PARLIAMENT—PETITION TO PARLIAMENT—REFUSAL OF MEMBER OF PARLIAMENT TO PRESENT PETITION—MANDAMUS.

Chaffers v. *Goldsmid*, (1894) 1 Q.B. 186, was a rather singular action. The plaintiff had forwarded to the defendant, who was a member of parliament for the division in which the plaintiff was a voter, a petition complaining of the conduct of one of Her Majesty's judges. The defendant had declined to present it, and thereupon the action was brought, praying a mandamus to compel the defendant to present the petition. Collins, J., affirmed an order of a master striking out the plaintiff's statement of claim as frivolous; and, on appeal, Wills and Grantham, JJ., affirmed the order, holding that there is no right of action in a person desirous of petitioning parliament to compel any particular member to present it.

PRACTICE—JUDGMENT FOR COMMON LAW CAUSE OF ACTION—SEQUESTRATION—ORD. XLII., R. 3 (ONT. RULES 862, 883).

Hulbert v. *Cathcart*, (1894) 1 Q.B. 244, carries the law as laid down in *Ex parte Nelson, Re Hoare*, 14 Ch.D. 41, one step further. In this case the plaintiff had recovered a judgment for a debt against a married woman. He subsequently obtained an order in Chambers directing the defendant to pay the amount of the judgment within a time limited, and in default that a sequestration should issue against the defendant's separate property, from which order the defendant appealed, and Wills and Wright, JJ., unanimously rescinded the order, holding that there was no jurisdiction to make it. This decision agrees with *London and Canadian Loan and Agency Co.* v. *Merritt*, 32 C.P. 375, and seems

to settle the point that a sequestration cannot be resorted to for the purpose of enforcing payment of an ordinary judgment for debt.

PRACTICE—AMENDMENT OF PLEADING—ORD. XXVIII., RR. 9, 10; (ONT. RULES 432, 433).

Hanmer v. *Clifton*, (1894) 1 Q.B. 238, is an interpretation of Ord. xxviii., rr. 9, 10 (Ont. Rules 432, 433), which provide for the marking a pleading, when amended, with the date of the order, if any, under which the amendment is made. It was held by Charles and Wright, JJ., affirming Kennedy, J., that the copy of an amended pleading served on the opposite party need not be marked with the date of the order under which the amendment was made, and that it is a sufficient compliance with the Rule if the original pleading is so marked.

SOLICITOR—PROFESSIONAL MISCONDUCT—SOLICITOR BORROWING MONEY FROM CLIENT RECENTLY COME OF AGE.

In re Solicitor, (1894) 1 Q.B. 254, it is almost needless to say that the court (Wills and Wright, JJ.) were of opinion that a solicitor who had borrowed sums amounting to £65,500, without security, from a client recently come of age, and acting without any independent advice, and a large portion of which he had failed to return, was guilty of professional misconduct, and a fit subject for suspension from practice for two years.

SOLICITOR TRUSTEE—PROFESSIONAL CHARGES—SETTLED ACCOUNT.

In re Webb, Lambert v. *Still*, (1894) 1 Ch. 73, was an action to set aside a release, and to open a settled account. The plaintiffs were residuary legatees, and the defendants were executors; they were also solicitors, and under the will of the testator they were authorized to charge for their professional services. About nine years before the bringing of the action, having wound up the estate, the defendants rendered to the plaintiffs an account, in which they charged an item of £122 for professional services rendered by themselves. They did not inform the plaintiffs that they were entitled to demand a bill in detail, but the defendants signed a memorandum that they had examined and found the account correct. The balance appearing to be due to them was paid to the plaintiffs, and they executed a release in favour of the defendants. In support of the plaintiffs' case, there was evidence

of an experienced solicitor's clerk that he believed that on a taxation of the plaintiffs' costs, as they appeared in their costs' ledger, at least one-sixth would be struck off; but it appeared that the amount of the costs charged in the costs ledger exceeded by £7 8s. 4d. the amount of costs actually charged, and with that exception there was no evidence of any overcharge, or of any error in the rest of the account. Under these circumstances, Romer, J., dismissed the action, and his judgment was affirmed by the Court of Appeal (Lindley, Smith, and Davey, L.JJ.), who, although of opinion that, in strictness, it was the defendant's duty to have informed the plaintiffs that they were entitled to have a bill rendered, and to have it taxed, yet their neglect to do so was not of itself sufficient to entitle the plaintiffs to open the settled account.

COMPANY—WINDING UP—CONTRIBUTORY—AGREEMENT TO ACCEPT PAID-UP SHARES.

In re Macdonald, Sons & Co., (1894) 1 Ch. 89, was an application to remove from the list of contributories of a company being wound up the names of the applicants. The facts were that the company in question was formed for selling medicated food and wine, and in order to promote the business of the company an offer was made to the applicants, who were practising doctors, to give them paid-up shares in the company in consideration of their recommending the company's wares to their respective patients. The company had, in fact, no power to issue paid-up shares, but they issued certificates for paid-up shares to the applicants, who accepted the offer. None of the applicants were placed on the register of shareholders. After the winding-up proceedings were in contemplation, but before their commencement, the secretary wrote to the applicants to return the certificates, as the shares had not been allotted, and they were accordingly returned, but the liquidator nevertheless placed the applicants on the list of contributories. The Court of Appeal (Lindley, Smith, and Davey, L.JJ.) agreed with Williams, J., that the applicants were not liable as contributories, as an agreement on their part to accept paid-up shares could not make them liable to accept unpaid shares. Some of the judges, however, seemed to think that the bargain in question was anything but creditable to the applicants as professional men.

COMPANY—WINDING UP—DEBENTURE-HOLDERS' ACTION—RECEIVER.

In *British Linen Co.* v. *South American Co.*, (1894) 1 Ch. 108, there was a contest between the debenture-holders of a company being wound up and the liquidator of the company as to the appointment of a receiver. On the same day the winding-up order was made, a receiver was appointed, in an action brought by the debenture-holders; the liquidator then applied to be appointed receiver for the debenture-holders, and to discharge the receiver appointed in their action, and this application Williams, J., granted, on the liquidator undertaking to keep a separate account on behalf of the debenture-holders; but the Court of Appeal (Lindley and Smith, L.JJ.), although thinking Williams, J., had proceeded on a correct principle, yet, on the ground that it had been established, by fresh evidence on the appeal, that a considerable part of the assets consisted of securities which could not be realized in the ordinary way, but could only be got in by a commercial liquidator, they varied the order of Williams, J., by continuing the debenture-holders' receiver as to this latter class of securities, and appointing the liquidator of the company receiver of the other assets of the company.

RESTRAINT OF TRADE—CONTRACT—AGREEMENT BY VENDOR OF BUSINESS NOT TO CARRY ON OR BE INTERESTED IN ANY SIMILAR BUSINESS—BUSINESS CARRIED ON BY VENDOR'S WIFE.

Smith v. *Hancock*, (1894) 1 Ch. 209, shows that a covenant by the vendor of a business not to carry on, or be in any wise interested in, a similar business within a particular area is not broken by the vendor's wife carrying on a similar business, separately from her husband, the husband taking no part, nor being interested in it.

MORTGAGOR AND MORTGAGEE—SOLICITOR-MORTGAGEE—PROFIT COSTS—REOPENING SETTLED ACCOUNT.

In *Eyre* v. *Wynn*, (1894) 1 Ch. 218, Kekewich, J., has held that the rule which prevents a solicitor-mortgagee from charging the mortgagor with any profit costs, either for work done in respect of the mortgaged property, or for drawing the mortgage itself, or, where the mortgage is of a life interest, for collecting and distributing the income as solicitor or agent of the mortgagor, is not affected by a covenant on the part of a mortgagor to

pay all sums that may become due and owing by the mortgagor to the mortgagee, inasmuch as a covenant to pay profit costs to a solicitor-mortgagee would be void, as a clog on the equity redemption; and leave was therefore given to a mortgagor to overcharge and falsify settled accounts in which such profit costs had been charged; but, following *Re Doody*, (1893) 1 Ch. 129, an inquiry was directed as to whether any part of the solicitor-mortgagee's costs were payable to his partner, leaving it to be discussed subsequently whether such proportion of the costs would be chargeable against the mortgagor.

Notes and Selections.

THE HEN AND HER CHICKENS.—On a certain day some years back the town of X. was in a state of considerable excitement, for the Circuit Conrt was just then sitting there, and on that day there was to be heard, in appeal, a civil case which had excited general interest in the town and its neighbourhood. It was not the magnitude of the interests involved which attracted general attention; it was, perhaps, rather the very insignificance of those interests, combined with the position occupied by the litigant parties, and their feelings towards each other, which the case had evolved. The circumstances of the case were these: Messrs. A. and B. were next-door neighbours at X. The premises of the two were divided from each other by a wall, which was not high enough to prevent the fowls of the one from having access to the back yard of the other. Now, as both Mr. A. and Mr. B. were fanciers of poultry, it may be easily imagined that this state of affairs in time gave rise to complications and to strained relations between the two. Things came to a climax through the conduct of a certain black hen belonging to Mr. A. Instead of laying her eggs in her own proper yard, as a well-behaved hen should do, she succeeded, with the perversity and secretiveness of her sex, in depositing a baker's dozen, or thereabouts, of her eggs in a secluded spot in the yard belonging to Mr. B. Mr. A., finding that he no longer got his due of eggs from his black hen, became suspicious, and cooped her up in his own yard. Meanwhile, a broody white hen belonging to Mr. B., on discovering the black hen's nest, thought she could do no better than exercise her hatching propensities upon the eggs found therein. In due course she surprised and delighted her owner with a brood of

beautiful young chickens. His delight, however, was somewhat diminished, and his surprise considerably augmented, when Mr. A. came forward to claim the chickens as his own, contending that, inasmuch as the eggs belonged to him, the chickens also were his. The fact that the eggs had been laid by Mr. A.'s hen could not be disputed, but what Mr. B. did dispute was that the chickens which had been hatched by his own hen belonged to any one else than himself. When two parties, with their respective friends and sympathizers, differ on a point like this, it is almost a natural consequence that they should go to law, especially if they have the means for doing so. To law accordingly they went; and the important question had thus to be decided, To whom did the chickens belong—to the owner of the hen that had laid the eggs, or to the owner of the hen that hatched them? Well, then, the case was tried in due course in the local court of the district. There was, no doubt, much learning and much oratory devoted to the elucidation of the problem involved, and many, doubtless, were the authorities cited thereon. Anyway, the court, after due and proper consideration, said that there could be no doubt on the subject, and decided that Mr. B., the owner of the hen that hatched the eggs, was entitled to the young brood, and accordingly awarded them to him, with condemnation of the other side in the costs of the action.

This decision was, no doubt, eminently satisfactory for Mr. B., and no less so for his white hen and also for her chickens, whilst probably the black hen, could she have understood all about it, would not have been much troubled in mind concerning the matter. But as to the losing party, it need hardly be said that this judgment did not please or satisfy him—who ever heard of a judgment that did?—and so it came about that appeal was noted to the Circuit Court, and that, as we stated at the beginning, the town of X., on the occasion of its sitting there, was in a state of considerable excitement.

When the case was being heard in the Circuit Court, there was a large attendance of spectators, apparently anxiously interested in the question which they considered to be at issue: Which is the mother of the chickens, the hen that lays the egg or the hen that hatches it? And there they enjoyed the privilege of listening to very profound discussions on the philosophy of hen's eggs—much to their own profit, it is to be hoped. And who shall say that this question was not one well worthy of public interest? For has not a Greek tragedian of old, in one of his masterpieces

sought to interest his audience by a discussion amongst the members of his indispensable chorus of the nearly allied question as to which is the parent of the child, the father, from whom the vital principle proceeds, or the mother who bears it. But, however this may be, the arguments used by counsel on both sides were deeply interesting. And in giving an outline of those arguments we claim something of the privilege of a Livy, who, it is well known, used to give long *verbatim* reports of speeches delivered by great generals and others on occasions when we know that he certainly was not present himself (inasmuch as their delivery in some cases had taken place hundreds of years before his own time), and whereof no shorthand writers had left a stenograph record.

Counsel for appellant, then, argued that surely the hen that had laid the eggs, and that therefore had been concerned (which the other hen was not) in the establishment of the vital principle therein, must be considered the mother of the chickens; a chicken being merely a further development of an egg. Supposing, he urged, a hen brings out duck's eggs, the ducklings would be considered the offspring of the duck and not of the hen. And, supposing in this case the eggs had been brought out by means of an incubator, surely the incubator would not be considered the mother, but the hen that had laid the eggs. He maintained, therefore, that he had right and justice, science, common sense, and law all on his side in claiming those chickens (which, by the way, had developed into young cocks and hens) for the owner of the hen that laid those eggs. Counsel for respondent, on the other hand, submitted that eggs are eggs, and they will remain eggs until by the care and labour of the hatching hen, or by the care and labour of some person who uses an incubator, they are transformed into chickens. Ask the ducklings brought out by a hen who their maternal parent is, and they will give a practical demonstration of the proper reply by taking refuge under the mother hen. The hen that had laid the eggs and the hen that hatched them were perhaps both, in some sense, the parent of the chickens; for both operated in bringing into active life the vital principle established by the male bird, but the strong affection and the fostering care which the former displayed towards her chicks proved that she was the true mother. And as to "vital principle," he would be able to show the unreasonableness of his opponent's contentions by an example taken from the vegetable world. Suppose B. had in good faith taken a few seeds from a pumpkin belonging to A., and had planted them, to whom would the subsequent crop of pumpkins belong? As a matter of fact, the contents of a pumpkin seed are merely an embryo pumpkin plant; and within the seed, therefore, resides the potentiality of its developing into a perfect plant, with the latent possibility of producing a crop of pumpkins; yet would any one contend that

because the vital principle of the plant was derived from A.'s pumpkin, therefore the whole crop also belonged to A.? Possibly A. might be entitled to reclaim the value of the seeds, but he was not entitled to more. But he considered that the matter had been set at rest by the legislation of Justinian. For just as within a seed there resides the potentiality of, under certain circumstances (namely, when the requisite amount of care and attention is devoted to it), developing into a plant bearing in course of time its own particular crop, so there resides in a block of marble the potentiality of, under certain circumstances (namely, again, when the requisite amount of care and attention is devoted to it), being transformed into a bust or statue; so also in a mass of potter's clay the potentiality of being transformed into a magnificent vase; in a piece of canvas the potentiality of being transformed into a beautiful and valuable painting. Now, Justinian had specially decreed that in the cases here mentioned the statue should not belong to the owner of the marble, but to the sculptor who had devoted his time and labour to it. Similarly, the vase belonged to the potter and the picture to the painter. The rule, therefore, is that when an article of comparatively small value belonging to one person had, by the care and contrivance of another, been transformed into an article of considerable value, the finished article should belong to the latter, though the former might be entitled to the value of the rough material. The same rule applies when one in good faith brings out the eggs belonging to another, in an incubator, or in any other way. The question, after all, was therefore not at all one of parentage. For if parentage came into consideration, and the chickens accrued to the owner of the hen who laid the eggs, then if a person buys eggs and has them hatched, by virtue of parentage the chicks would belong to the person who sold the eggs, which is absurd. If it was a case of *Black Hen* v. *White Hen*, possibly Black Hen might, with some show of justice in the case just put, lay claim to the parentage of the chicks; but this was an action not between the hens, but between the owner of the rough material out of which the chickens had been developed, and the person through whose care and attention in maintaining his hatching hen the development had taken place; the hen being a mere machine employed by him, just as an incubator would have been. Clearly, therefore, the plaintiff had no right to lay claim to the young fowls of which his own client was now in possession. His client would have been willing to pay the value of the eggs, which, however, the plaintiff had not claimed. He therefore prayed that the appeal might be dismissed with costs. After hearing Mr. A.'s counsel in reply, the court dismissed the appeal as prayed. And inasmuch as in a similar case Besoldus arrives at a similar conclusion, it is possible that something may be said in favour of the view of the case taken by the court.—*Cape Law Journal.*

DIARY FOR APRIL.

1. Sunday.....*1st Sunday after Easter.*
2. Monday.....County Court sits for motions. Surrogate Court sits.
4. Wednesday..New Parliament Buildings at Toronto opened, 1893.
5. Thursday....Canada discovered, 1499.
7. Saturday.....Great fire in Toronto, 1847.
8. Sunday.....*2nd Sunday after Easter.* Hudson Bay Company founded, 1692.
9. Monday.....County Court non-jury sittings in York.
14. Saturday.....Princess Beatrice born, 1857.
15. Sunday.....*3rd Sunday after Easter.* President Lincoln assassinated, 1865.
16. Monday.....Last day for notice for Call
17. Tuesday.... Hon. Alexander Mackenzie died, 1892.
18. Wednesday..First newspaper in America, 1704.
19. Thursday....Lord Beaconsfield died, 1881.
22. Sunday.....*4th Sunday after Easter.*
23. Monday.....St. George.
24. Tuesday.....Earl Cathcart, Gov.-Gen., 1846.
25. Wednesday...St. Mark.
26. Thursday....Battle of Fish Creek, 1885.
27. Friday .....Toronto captured (Battle of York), 1813.
28. Saturday.....Last day for filing papers for certificate and Call and payment of fees.
29. Sunday.....*Rogation Sunday.*

Reports.

ASSESSMENT CASES.

IN RE APPEAL OF ST. CATHARINES AND WELLAND CANAL GAS LIGHT COMPANY.

(Reported for THE CANADA LAW JOURNAL.)

Assessment of gas mains—Con. Asst. Act, 1892, s. 34, s-s. 2.

Held, that gas mains laid by a gas company for the purpose of conveying gas to consumers, and which are allowed to be laid upon a public highway, are not taxable.

[ST. CATHARINES, Dec. 19, 1893, SENKLER Co.J.

This was an appeal to the County Judge from the Court of Revision of St. Catharines.

The assessment of the appellants for 1893 was $54,000, being an increase of $20,000 over the assessment of previous years, and it was conceded that the increase was on account of the gas mains of the company, which, it was claimed by the city, were assessable against the appellants as real estate.

F. W. Macdonald for the city of St. Catharines.

R. G. Cox for the appellants.

SENKLER, CO.J.: It was contended on behalf of the city that on the authority of *Rex* v. *Birmingham Gas Co.*, 1 B & C. 508; *Rex* v. *Brighton Gas Co.*, 5 B. & C. 466; *Rex* v. *Cambridge Gas Co.*, 8 A. & E. 63, these mains were taxable. In these cases similar mains in England were held to be taxable under the Act 43 Eliz., which makes the occupiers of the lands assessable for the relief of the

poor, it being held that the companies were the occupants of the land on which the pipes were laid.

The appellants cited (among others) the case of the *Chelsea Water Works* v. *Bowley*, 17 Q.B. 358, in which the pipes of a waterworks company were held to be not assessable for land tax under the statute 34 Geo. III., cap. 5, by which all lands and tenements and all hereditaments are charged with land tax, and contended that this case was applicable to the present rather than those cited for the city, as, under our Assessment Act, land itself is assessable, and not the occupiers.

It is quite clear that personal property of appellants is exempt from taxation under Con. Asst. Act of 1892, s. 34, s-s. 2, and unless these mains are real estate they cannot be assessed.

In the case of *Toronto Street Railway* v. *Fleming*, 37 U.C.R. 118, our Court of Appeal held that the rails and sleepers of the Toronto Street Railway were not assessable as land, and that the cases cited by the city solicitor were not applicable, but that *Chelsea* v. *Bowley* was, the statute under which it was decided being more analogous to our own. In the judgment of BURTON, J., all these cases and many others were dealt with, and the distinction between the assessment of occupiers of land and of land itself clearly pointed out.

The case of *Chelsea* v. *Bowley* has been sometimes criticized as not consistent with some of the other cases. In the very recent case of *Metropolitan Railway Company* v. *Fowler*, L.R.A.C., 1893, in the House of Lords, *Chelsea* v. *Bowley* was attacked, but it was said by the Lord Chancellor that if the facts found by the court in that case were correctly found, viz., that the company had only an easement, the decision was right, and an easement was not assessable.

Reference was also made by the city solicitor to the fact that by the Assessment Act, s. 7, it is enacted that "all property" in the province shall be liable to taxation, subject to certain exemptions, whereas in former Acts the words were "all the land and personal property"; and it was suggested that the change was occasioned by some remarks of PATTERSON, J., in *Toronto Street Railway Company* v. *Fleming*, at page 127, where he says: "If there was a general law that all property should be assessable for municipal purposes, I should have no hesitation in deciding that this was assessable property. The question, however, is: Is it assessable as land?" and he then points out that public roads are exempt.

Although this change is made, I cannot find any change in the meaning given to "property," "land," "real property," and "real estate," in the interpretation clauses of the Act; and if anything is now assessable that was not before the change was made, it must be dealt with as "personal estate," or "personal property," as these terms include "goods, chattels, etc., and all other property *except land and real estate and real property as above defined*, and except property herein expressly exempted." (Sec. 2, s-s. 10.)

In my opinion, these mains are chattels which the appellants are allowed to place upon the streets, or at most an easement, and in either view are not assessable as land. I therefore reduce the assessment to $34,000.

For the justice of this decision, I may refer to the closing remarks of MR. JUSTICE BURTON in *Fleming* v. *Toronto Street Railway Company* at p. 125, showing that under any other construction there would be a double assessment, the dividends or earnings of the appellants being clearly assessable.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present: Lord Herschell, L.C., Lord Watson, Lord Macnaghten, Lord Shand, Sir Richard Couch.

ATTORNEY-GENERAL OF ONTARIO *v.* ATTORNEY-GENERAL OF THE DOMINION OF CANADA.

Jurisdiction of Provincial Legislature—Act respecting Assignments and Preferences, validity of.

Held, that the Legislature of Ontario had jurisdiction to enact s. 9 of R.S.O., c. 124, intituled "An Act respecting Assignments and Preferences by Insolvent Persons."

[Feb. 24th, 1894.

This was an appeal from the decision of the Court of Appeal for Ontario of May 9th, 1893, reported 20 A.R. 489.

Hon. Edward Blake, Q.C., (of the Canadian Bar) *Mr. Haldane*, Q.C., and *Mr. Bray* for the appellant.

Sir Richard Webster, Q.C., and *Mr. Carson*, Q.C., (of the Irish Bar) for the respondent.

The LORD CHANCELLOR, in delivering the considered judgment of the committee, said: This appeal is presented by the Attorney-General of Ontario against the decision of the Court of Appeal of that province. The decision complained of was an answer given to a question referred to that court by the Lieutenant-Governor of the province in pursuance of an Order in Council.

The question was as follows: "Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, c. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons'?" The majority of the court answered this question in the negative; but one of the judges who formed the majority only concurred with his brethren because he thought the case was governed by a previous decision of the same court; had he considered the matter *res integra* he would have decided the other way. The court was thus equally divided in opinion.

It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the Provincial Legislature by s. 92 of the British North America Act, 1867, which enables that legislature to make laws in relation to property and civil rights in the province unless it is withdrawn from their legislative competency by the provisions of the 91st section of that Act, which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency.

The point to be determined, therefore, is the meaning of those words in s. 91 of the British North America Act, 1867, and whether they render the enactment impeached *ultra vires* of the Provincial Legislature That enactment is s. 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting Assignments and Preferences by Insolvent Persons." The section is as follows:

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed

by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

In order to understand the effect of this enactment, it is necessary to have recourse to other sections of the Act to see what is meant by the words "an assignment for the general benefit of creditors under this Act."

The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment, or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it.

The second section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or give any of them a preference.

Then follows section three, which is important: its first subsection provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors as thereinafter provided for the purpose of paying, rateably and proportionately, and without preference or priority, all the creditors of the debtor their just debts.

The second subsection enacts that every assignment for the general benefit of creditors which is not void under section two, but is not made to the sheriff nor to any other person with the prescribed consent of the creditors, shall be void as against a subsequent assignment which is in conformity with the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith.

The fifth subsection states the nature of the consent of the creditors which is requisite for assignment in the first instance to some person other than the sheriff.

These are the only sections to which it is necessary to refer in order to explain the meaning of section nine.

Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the Province and in the Dominion. The enactments of the first and second sections of the Act of 1887 are to be found in substance in sections 18 and 19 of the Act of the Province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the Province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or

non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory. This Act was in operation at the time when the British North America Act came into force.

In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the Provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875, which, after being twice amended, was, together with the amending Acts, repealed in 1880.

In 1887, the same year in which the Act under consideration was passed, the Provincial Legislature abolished priority amongst creditors by an execution in the High Court and County Courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors, and all other creditors who within a month delivered to the sheriff writs and certificates obtained in the manner provided for by that Act.

Their lordships' proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now, there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the Provincial Parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that Parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887, which abolished priority as amongst execution creditors, provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now, it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and

effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed it was one of the grounds for an adjudication of insolvency.

It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their lordships think it clear that the ninth section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their lordships to be material. If the enactment would have been *intra vires*, supposing section nine had applied to all assignments without these restrictions, it seems difficult to contend that it became *ultra vires* by reason of them. Moreover, it is to be observed that by subsection (2) of section 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act.

At the time when the British North America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the Province of Canada. Attention has already been drawn to the Canadian Act.

The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors.

It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy, with the consequence that the bankrupt was divested of all his property, and its distribution amongst his creditors was provided for.

It is not necessary, in their lordships' opinion, nor would it be expedient, to attempt to define what is covered by the words "bankruptcy" and "insolvency," in section 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in

the case of an insolvent person his assets shall be rateably distributed amongst his creditors, whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only an alternative. In reply to a question put by their lordships, the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

In their lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their lordships that such provisions as are found in the enactment in question, relating, as they do, to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose, to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as a part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

Their lordships will therefore humbly advise Her Majesty that the decision of the Court of Appeal ought to be reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.

Appeal allowed.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Ct.] [Feb. 20.

FARWELL *v.* THE QUEEN.

Information of intrusion—Subsequent action—Res judicata—Jurisdiction of the Exchequer Court—B.N.A. Act, s. 101.

In a former action by information of intrusion to recover possession of land in British Columbia, the title to such land was directly in issue and determined (see 14 S.C.R. 392). On an information of the Attorney-General for the Dominion of Canada, praying for an order of the court directing the defendant

to execute to the Queen in right, of Canada, a surrender or conveyance of the same land, the defendant, in answer to the information, set up the provincial grant relied on in the first action, and contended further that the Parliament of Canada had no power to give to the Exchequer Court original jurisdiction.

Held, affirming the judgment of the court below, that there was *res judicata* as to the title sought to be relied on by defendant. *Attorney-General of British Columbia* v. *Attorney-General of Canada* (14 App. Cas. 295) distinguished.

Held, also, that the Parliament of Canada had power to give jurisdiction to the Exchequer Court of Canada in all actions and suits of a civil nature at common law or equity in which the Crown, in right of the Dominion, is plaintiff or defendant. B.N.A. Act, s. 101. TASCHEREAU, J., *dubitante*.

Appeal dismissed with costs.

D. McCarthy, Q.C., for appellant.

Hogg, Q.C., for respondent.

Exchequer Ct.] [Feb. 20.

THE QUEEN *v.* DEMERS.

Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record prior to statutory conveyance to Dominion Government—Federal and provincial rights—British Columbia Land Acts of 1873 and 1879—47 Vict., c. 6 (D.).

On 10th September, 1883, D., *et al.*, obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the twenty-mile belt south of the C.P.R., reserved on the 29th November, 1883, under an agreement between the Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 Vict., c. 14 (B.C.). On 29th August, 1885, this certificate was cancelled, and on same day a like certificate was issued to respondents, and on the 31st July, 1889, letters patent under the Great Seal of British Columbia were issued to respondent. By the agreement ratified by 47 Vict., c. 6 (D.), it was also agreed that three and a half millions additional acres in Peace River District should be conveyed to the Dominion Government, in satisfaction of the right of the Dominion under the terms of Union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might, at the date of the conveyance, be held under pre-emption right, or by Crown grant.

On an information by the Attorney-General for Canada to recover possession of the 640 acres,

Held, affirming the judgment of the Exchequer Court, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D., *et al.*, being subsequently abandoned or cancelled, the land became the property of the Crown in right of the province, and not in the right of the Dominion.

Appeal dismissed with costs.

Hogg, Q.C., for appellant.

McCarthy, Q.C., for respondents.

Ontario.] [Feb. 20.

HOLLIDAY *v.* HOGAN.

Surety—Discharge of—Endorser of note—Release of maker—Reservation of rights.

The plaintiff H., and the defendants J. and H., were both creditors of the other defendant, a hotel keeper. The debtor borrowed $600 from H., giving a note endorsed by J. and H., who also assigned to H. to the extent of $600 a chattel mortgage on the debtor's property. The debtor, not being able to pay the claim against him, sold out his business to a third party, who was accepted by both creditors as their debtor, and an agreement was entered into between the plaintiff and the new debtor by which time was given to the latter to pay his debt, but in all the negotiations that took place no mention was made of the $600 note. An action was brought against both maker and indorser of said note, which, on the trial, was dismissed as against the indorser, the trial judge holding that plaintiff had reserved his rights as against the indorser. This decision against the indorser was affirmed by a Divisional Court (22 O.R. 235), but reversed by the Court of Appeal (20 O.R. 298).

Held, affirming the judgment of the Court of Appeal, that the indorser was relieved from liability by the release of the maker.

Appeal dismissed with costs.

Johnston, Q.C., for the appellant.

Moss, Q.C., for the respondent.

Ontario.] [Feb. 20.

NORTHCOTE *v* VIGEON.

Specific performance—Agreement to convey land—Defect of title—Will—Devise of fee with restriction against selling—Special legislation—Compliance with provisions of.

Land was devised to N., with a provision in the will that he should not sell or mortgage it during his life, but might devise it to his children. N. agreed, in writing, to sell the land to V., who, not being satisfied of N.'s power to give a good title, petitioned, under the Vendors and Purchasers Act, for a declaration of the court thereon. The court held that the will gave N. the land in fee with a valid restriction against selling. N. then asked V. to wait until he could apply for special legislation to enable him to sell, to which V. agreed, and thenceforth paid to N. interest on the proposed purchase money. N. applied for a special Act, which was passed, giving him power, notwithstanding the restriction in the will, to sell the land, and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act, N., in order to obtain a loan on the land, had leased it to a third party, and the lease was mortgaged, and N. afterwards assigned his reversion in the land.

In an action by V. for specific performance of the contract to sell the land, defendant claimed that the contract was at an end when the judgment on the petition was given; that he could give no title under the will; and that if performance were decreed the amount received on the sale of the land should be paid to him, and only the balance to the trust company.

Held, affirming the decision of the Court of Appeal, that the contract was

kept alive by N. after the judgment as to title; that V. was entitled to her decree for performance; and that the whole purchase money must be paid to the trust company.

Marsh, Q.C., and *Roaf* for the appellants.

McPherson and *Clarke* for the respondents.

Ontario.] [Feb. 20.

GRAND TRUNK R.W. CO. *v.* BEAVER.

Railway company—Purchase of ticket by passenger—Refusal to deliver to conductor—Ejectment from train—Contract between passenger and company—Railway Act, 51 Vict., c. 29, s. 248 (D.).

By s. 248 of the Railway Act, 51 Vict., c. 29 (D.), any person travelling on a railway who refuses to pay his fare to a conductor on demand may be put off the train. B. purchased a ticket to travel on the Grand Trunk Railway from Caledonia to Detroit, but had mislaid it when the conductor took up the fares, and was put off the train for refusal to pay the fare in money or produce the ticket.

Held, reversing the decision of the Court of Appeal (20 A.R. 476), which affirmed the judgment of the Divisional Court (22 O.R. 667), that the contract between a purchaser of a railway ticket and the company implies that the ticket will be delivered up when demanded by the conductor, and that B. could not maintain an action for being ejected on refusal to so deliver.

Appeal allowed with costs.

McCarthy, Q.C., and *Nesbitt* for the appellants.

DuVernet for the respondent.

Ontario.] [Feb. 20.

CLARKE *v.* HAGER.

Contract—Illegal or immoral consideration—Transfer of property—Intention of transferor—Knowledge of intended use—Pleading.

H. sold a house to a person who had occupied it as a house of ill-fame, taking a mortgage for part of the purchase money. The equity of redemption was assigned to C., and to an action of foreclosure C. set up the defence that the price paid for the house was in excess of its value, and a part of it was for the good will of the premises as a brothel. On the trial it was found as a fact that H., when selling, knew the character of the buyer and the kind of place she had been keeping, but that the house was not sold for the purpose of being used as a place of prostitution. Judgment was given against C. in all the courts below.

Held, affirming the decision of the Court of Appeal, TASCHEREAU, J., dissenting, that the particular facts relied on as constituting the illegal or immoral consideration should have been set out in the statement of defence; that if the house had been sold by H. with the intention that it should be used for an immoral or illegal purpose, the contract of sale would have been void and incapable of being enforced, but mere knowledge by C. of the buyer's intentions so to use it would not avoid the contract.

Appeal dismissed with costs.

R. Clarke, appellant, in person.

Armour, Q.C., for the respondent.

Quebec.] [Feb. 20.

HARBOUR COMMISSIONERS OF MONTREAL *v.* GUARANTEE CO. OF NORTH AMERICA.

Insurance—Guarantee—Notice to insurer of defalcation—Diligence.

By the conditions of a guarantee policy insuring the honesty of W., an employee, it was stipulated that the policies were granted upon the express conditions: (1) That the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept; and (2) that the employers should immediately, upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing, or likely to entail, loss to the employers, and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, no supervision was exercised over W.'s books, as represented they would, and, when the guarantors were notified, over a week after employers had full knowledge of the defalcation, W. had left the country.

Held, affirming the judgment of the court below, that, as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy.

Appeal dismissed with costs.

H. Abbott, Q.C., for appellants.

Cross, Q.C., and *Geoffrion*, Q.C., for the respondents.

British Columbia.] [Feb. 20.

"OSCAR AND HATTIE" *v.* THE QUEEN.

54-55 Vict. (U.K.), c. 19, s. 1, s-s. 5—Presence of a British ship equipped for sealing in Behring Sea—Onus probandi—Lawful intention.

On August 30th, 1891, the ship "Oscar and Hattie," a fully-equipped sealer, was seized in Gotzleb Harbour, in Behring Sea, while taking in a supply of water.

Held, affirming the judgment of the court below, that, when a British ship is found in the prohibited waters of Behring Sea, the burthen of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the seal fishery. Behring Sea Act, 1891, 54-55 Vict., c. 19, s. 1, s-s. 5.

Held, also, reversing the judgment of the court below, that there was positive and clear evidence that the "Oscar and Hattie" had entered the prohibited waters at Gotzleb Harbour for the sole purpose of getting a supply of water on her return trip from Copper Island to Vancouver Island, and that she was not used or employed at the time of her seizure in contravention to 54-55 Vict., c. 19, s. 1, s-s. 5.

Appeal allowed with costs.

McCarthy, Q.C., and *Eberts*, Q.C., for appellants.

Hogg, Q.C., for respondent.

British Columbia.] [Feb. 20.

CITY OF VANCOUVER *v.* CANADIAN PACIFIC R.W. CO.

44 Vict., c. 1, s. 18—Powers of Canadian Pacific R.W. Co. to take and use foreshore—B.C. Statutes 49 Vict., c. 32, City of Vancouver—Right to extend streets to deep water—Crossing of railway—Jus publicum—Interference with—Injunction.

By section 18, 44 Vict., c. 1, the Canadian Pacific Railway Co. "have the right to take, use, and hold the beach and land below high-water mark in any stream, lake, navigable water, gulf, or sea, in so far as the same shall be vested in the Crown, and shall not be required by the Crown to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

By 51 Vict., c. 6, s. 5, the location of the company's line of railway on the foreshore of Burrard Inlet, at the foot of Gore avenue, Vancouver city, was ratified and confirmed.

The Act of Incorporation of the city of Vancouver vests in the city all treets, highways, etc., and in 1892 the city began the construction of works extending from the foot of Gore avenue, with the avowed object to cross the railway track at a level and obtain access to the harbour at deep water.

On an application for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway;

Held, affirming the judgment of the court below, that the *jus publicum* of every riparian owner to get access to and from the water at his land is subordinate to the rights given to the railway company by statute on the foreshore in question, and, therefore, the injunction was properly granted.

Per KING, J.: When any public right of navigation is interfered with, it should be maintained and protected by the Attorney-General for the Crown.

Appeal dismissed with costs.

D. McCarthy, Q.C., and *Hamersley* for appellant.

Robinson, Q.C., for respondent.

BURBIDGE, J.] [Feb. 19.

KUYPER *v.* VAN DULKEN.

Trade mark—Registered and unregistered mark—Jurisdiction of court to restrain infringement—Exactness of description of device or mark—Use of same by trade before registration—Effect of—Rectification of register.

(1) The Exchequer Court has no jurisdiction to restrain one person from selling his goods as those of another, or to give damages in such a case, or to prevent him from adopting the trade label or device of another, notwithstanding the fact that he may thereby deceive or mislead the public, unless the use of such label or device constitutes an infringement of a registered trade mark.

(2) In such a case the question is not whether there has been an infringement of a mark which the plaintiff has used in his business, but whether there has been an infringement of a mark as actually registered.

(3) When any one comes to register a trade mark as his own, and to say to the rest of the world, "Here is something that you may not use," he ought to make clear to every one what the thing is that may not be used.

(4) In the certificate of registration, the plaintiff's trade mark was described as consisting of "the representation of an anchor, with the letters 'J.D.K. & Z.,' or the words 'John De Kuyper & Son, Rotterdam,' etc., as per the annexed drawings and application." In the application the trade mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J.D.K. & Z.,"or the words "John De Kuyper & Son, Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing Geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *facsimile* of which was attached to the application, but there was no express claim of the label itself as a trade mark. This label was white, and in the shape of a heart, with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor, with the letters "J.D.K. & Z.," and the words "John De Kuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which, it was admitted, were common to the trade. The plaintiffs had, for a number of years prior to registering their trade mark, used this white heart-shaped label on bottles containing Geneva sold by them in Canada, and they claimed that by such use and registration they had acquired the exclusive right to use the same.

Held, that the shape of the label did not form an essential feature of the trade mark as registered.

(5) The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle having at the feet V.D.W. & Co., above the eagle being written the words "Finest Hollands Geneva"; on each side are the two faces of the medal, underneath on a scroll the name of the firm "Van Dulkin, Wieland," etc., and the word "Schiedam," and, lastly, at the bottom the two faces of a third medal in the shape of a heart ("*Le tout sur une étiquette en forme de cœur*"). The colour of the label was white.

Held, that in view of the plaintiffs' prior use of the white heart-shaped label in Canada, and the allegation by the defendants, in their pleadings, that the use of a heart-shaped label was common to the trade prior to the plaintiffs' registration of their trade mark, the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart-shaped label forms no part of such trade mark.

H. Abbott, Q.C., and *Campbell* for plaintiffs.

A. Ferguson, Q.C., and *Duhamel*, Q.C., for defendants.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[Feb. 28.

BRYCE *v.* LOUTIT ET AL.

Nuisance—Water—Municipal corporations.

One who dams up surface water upon his own land is responsible for damages caused by the breaking of the dam and the consequent escape of this

water, but municipal corporations who have built under a highway a culvert for the drainage of this surface water in ordinary course are not liable because the water when suddenly discharged rushes through this culvert and causes damage to lands on the other side of the highway.

Judgment of SIR THOMAS GALT, C.J., reversed.

Garrow, Q.C., for the appellant.

Aylesworth, Q.C., for the respondent Loutit.

Cassels, Q.C., and *Holt* for the respondents, the corporations.

[Feb. 28.

HANLEY *v.* CANADIAN PACKING CO.

Sale of goods—Quantity—Description—"Carload."

The defendants agreed to buy from the plaintiff a "carload of hogs" at a rate per pound, live weight. The plaintiff shipped a "double-decked" carload, and the defendants refused to accept this, contending that a "single-decked" carload should have been shipped. There was a conflicting evidence as to the meaning given in the trade to the term "carload of hogs," and it was shown that hogs were shipped sometimes in the one way and sometimes in the other.

Held, (HAGARTY, C.J.O., dissenting) that the plaintiff had option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked carload the defendants were bound to accept.

Judgment of the County Court of Middlesex reversed.

J. F. Hellmuth and *W. C. Fitzgerald* for the appellants.

H. Elliott for the respondents.

[Feb. 28.

MUSKOKA MILL & LUMBER CO. *v.* MCDERMOTT.

Timber—License—Trespass—Crown Lands Department—R.S.O., c. 28.

The legal right of a license of timber limits under a license issued by the Ontario Crown Lands Department ceases (except as to the matters specially excepted by the Act) at the expiration of the license, and there is no equitable right of renewal capable of being enforced against the Crown, or sufficient to uphold a right of action for trespass committed after the expiration of the license and before the issue of a renewal.

The insertion in an expired license of a lot omitted by error does not confer upon the licensee such a title as enables him to maintain an action for trespass committed on the omitted lot.

Judgment of the District Court of Muskoka reversed.

Moss, Q.C., for the appellants.

R. S. Cassels for the respondents.

[Feb. 28.

KENNY *v.* CALDWELL.

Evidence—Survey—Plan—Description.

The description of a lot prepared for and used by the Crown Lands Department in framing the patent is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road when the surveyor's field notes do not conflict with the plan, and no road has been laid out on the ground.

Judgment of the Common Pleas Division reversed.

McCarthy, Q.C., and *Pepler*, Q.C., for the appellant.

Lount, Q.C., and *Hewson* for the respondent.

HIGH COURT OF JUSTICE.

Chancery Division.

Div'l Court.] [Sept. 16, 1892.

TIFFANY *v.* MCNEE.
METCALF *v.* MCNEE.

New trial—Jury—Improper conduct towards—Motion for new trial—Time when to be made.

During the trial of an action for libel, the defendant published in his newspaper a sensational article in reference to the trial. The plaintiff's solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the court, or take any action in respect thereto, and proceeded with the trial to its close. The jury brought in a verdict for the defendant.

Upon a motion to the Divisional Court for a new trial on the ground of improper conduct towards and undue influence upon the jury,

Held, that the application was too late.

Osler, Q.C., for the action.

G. T. Blackstock, *contra*.

Common Pleas Division.

Di rt.] [Dec. 30, 1893.

CALDWELL *v.* MILLS.

Master an —Workmen's Compensation Act—R.S.O., c. 141—Negligence—Defect in way—Superintendent—Use of plank for purpose not intended.

The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, about eleven feet long by eight inches wide and three inches thick, which the evidence showed had a knot in it two inches wide, and was cross-grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer, carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and, while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way beyond the plank.

Held, that the plank was a "way" within the meaning of s-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, and that the knot and cross-grain were defects in the way, for which the defendant was responsible.

Wallace Nesbitt for the plaintiff.

Osler, Q.C., for the defendant.

Div'l Court.] [Dec. 30, 1893.

MILNE *v.* MOORE.

Administration—Domestic and foreign creditors—Right to rank pari passu—Jurisdiction of Master on foreign debts.

A testator, resident and domiciled up to the time of his death in the United States, was possessed of personal property there as well as in Ontario. Probate was granted to his executrix in the United States as well as in Ontario; and there are foreign creditors in both countries. In administration proceedings in Ontario,

Held, that the foreign creditors were entitled to rank *pari passu* with the creditors in Ontario.

Re Kloobe, 28 Ch.D. 175, followed.

It was urged that only claims provable in the administration proceedings were those for which an action could be maintained; and that *Re Kloobe* was distinguishable because, since it was decided, the right to maintain an action by foreign creditors was restricted to lands.

Held, that the rules as to maintenance of action by foreigners depended on the procedure with regard to service, which were not applicable here, and that even if they were the contention raised could not prevail, in that the parties were all before the Master without any objection being taken to his jurisdiction.

W. R. Riddel for the appeal.

McBrayne, *contra.*

STREET, J.] [March 2, 1894.

RE WALLACE *v.* VIRTUE.

Division Court—Jurisdiction—Amount ascertained by signature—R.S.O., c. 51, s. 7, s-s. (c)—Prohibition.

The defendant covenanted in a lease to pay the plaintiff $210 on a certain date, as rent reserved in the lease. That amount has been reduced by a payment of $34, leaving the sum of $180.40 due for principal and interest. The plaintiff brought his action in the Division Court for that amount, and prohibition was applied for, upon the ground that the amount was not within the jurisdiction of the Division Court.

Held, that the $210 was an amount ascertained by the signature of the defendant under s-s. (*c*) of s. 7, R.S.O., c. 51, the motion was dismissed.

McDermid v. McDermid, 15 A.R. 287, and *Robb* v. *Murray*, 16 A.R. 503, referred to and considered.

C. J. Holman for the motion.

Douglas Armour, *contra.*