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LICENSING EXTRA-PROVINCIAL COMPANIES.

Considerable discussion has been evoked in the public press by the provisions of the new Companies Act of British Columbia requiring extra-provincial companies to become licensed or registered before doing business in the province. The Act has been attacked on the one hand as an obstruction to commerce, and defended on the other on the ground that other provinces, in particular Ontario, have similar Acts in force.

I. Acts in all the provinces.

It is true that in most of the provinces of the Dominion there have been passed during recent years statutory enactments requiring companies not incorporated in the enacting province to become re-incorporated or to take out a license before carrying on business within the province. In the majority of the provinces these enactments are reproductions, with greater or less variation, of the Ontario "Act respecting the Licensing

of Extra-Provincial Corporations." This Act was passed in 1900. It was adopted by New Brunswick in 1903; and the same year enacted in the North-West Territories by an Ordinance which is still in force in Alberta and Saskatchewan. The Province of Quebec enacted similar provisions in 1904, and the Province of Manitoba adopted the Ontario Act in 1909. In March of the present year the British Columbia Companies Act was revised and some of the provisions relating to extra-provincial companies were re-cast in form similar to the Ontario Act. The law in Nova Scotia and Prince Edward Island has remained uninfluenced by the Ontario Act of 1900, though there are provisions in both provinces relating to business by foreign companies.

II. Objects of the Act.

The objects of all these Acts is of course frankly fiscal, though a number of them include provisions intended to afford facilities for a proper representation of the companies in legal proceedings. The genesis of the Ontario Act may be found in the tendency of intending incorporators, during the last number of years, to go to Ottawa for their charters, instead of to the provincial department. License fees were imposed upon Dominion companies on the basis of the amount of capital employed in the province. The effect of this has been to place Dominion charters under the ban, as it were, of a double fee, and encouraging the incorporation of companies, where possible, by provincial authority. The result of the legislation is apparent in the fact that in Ontario a large majority of commercial and industrial companies operate under Ontario charters, while in Quebec where Dominion companies require no license the proportions are reversed and the majority of such companies are chartered by the Dominion department.

III. Constitutional questions.

The boundary betwen the constitutional powers of the provinces and the Dominion over the incorporation of commercial

and industrial corporations is as yet very vaguely defined, but a number of recent cases[1] have brought the matter into prominence with the result that a stated case has been prepared and submitted by Order-in-Council to the Supreme Court.[2] This stated case consists of a series of questions involving the whole subject of company incorporation in its constitutional aspect, and presents perhaps the most important issue that has ever been brought before the Supreme Court in a single case.

The magnitude of the questions involved in this case can scarcely be over-estimated, and whatever the decision, it will almost certainly be appealed to the Privy Council, and will in all probability result in an application to amend the British North America Act. Item 11 of s. 92 of the Act gives the provinces jurisdiction over "the incorporation of companies with provincial objects." The incorporation of banks is specifically relegated to the Dominion Government; but, as the Dominion possesses the residuum of powers not granted to the provinces, the incorporation of companies with other than provincial objects is vested in the Dominion. The whole controversy, therefore, centers around the meaning of the words "provincial objects."

The right of the provinces to impose license fees upon extra-provincial companies is generally supported as based upon the jurisdiction of the provinces over "direct taxation within the province in order to the raising of a revenue for provincial purposes"; and in a number of decisions in the provincial courts[3] Acts imposing such fees have been upheld on this ground.

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1. See *C.P.R.* v. *Ottawa Fire Ins. Co.*, 39 S.C.R. 405; *Re York Loan & Savings Co.*, 11 O.W.R. 507.

2. The text of the case is published on succeeding pages.

3. *Halifax* v. *Western Assurance Co.* (1885), 18 N.S.L.R. 387; *Halifax* v. *Jones*, 28 N.S.L.R. 452; *Waterous Engine Works Co.* v. *Okanagan Lumber Co.* (1908), 14 B.C.R. 238; *Rex* v. *Massey-Harris Co.*, 9 Can. Cr. Cas. 25; *International Text Book Co.* v. *Brown*, 13 O.L.R. 644.

IV. Comparison of legislation in the provinces.

To a proper understanding of the nature and effect of the legislation in the various provinces a brief analysis of their provisions is necessary:—

1. *The Ontario Act.*—The Ontario Act[4] requires all companies not incorporated under the laws of the province to take out a "license" before "carrying on business" within the province. Companies not complying with the provisions of the Act are liable to penalties and are incapable of "maintaining any action, suit or other proceeding in any court in Ontario in respect of any contract" in connection with business carried on contrary to the Act. The fees payable for a license are fixed by Order-in-Council. In these fees the department distinguishes between companies incorporated under Dominion laws and those incorporated in the other provinces. Dominion companies pay twenty-five or fifty dollars according as their nominal capital is within $100,000 or exceeds that amount. Companies of the other provinces pay a fee based upon the amount of capital employed in business in Ontario, the fee being calculated on the schedule of fees for incorporation of companies in Ontario. In order to obtain its license the company must establish a head office in the province and appoint an attorney through whom all legal proceedings must be conducted.

2. *Similar Acts in other provinces.*—In New Brunswick the enactment took the form of an extension of the provisions of an Act "respecting the Imposition of Certain Taxes on Certain Incorporated Companies and Associations"[5]; and the fee imposed is an annual one of either fifty or one hundred dollars according as the capital stock of the company is within $100,000 or exceeds that amount. No distinction is made between Dominion and provincial companies. There is provis similar to that of the Ontario Act disabling companies with...

4. 63 Vict. c. 24.
5. 3 Edw. VII. c. 25, s. 1; Cons. Stats. New Brunswick, c. 18, ss. 7 et seq.

the Act from maintaining actions in the courts. Provision is also made for the appointment of a resident attorney to represent the company.

The Act of Manitoba[6] is modelled upon that of Ontario, having been re-cast in 1909. Before that time, however, an Act of 1883,[7] applicable to foreign loan companies extended in 1892[8] to foreign companies in general, required these companies to become licensed before doing business. A good deal of difficulty was experienced in enforcing the Act and it was of little effect. The present Act is similar in form and effect to the Ontario Act. In the schedule of fees issued under the Act, however, no distinction is made between Dominion and provincial companies, the fees being calculated upon the capital stock of the company. The sections imposing penalties and disabilities are identical with those of the Ontario Act. A power of attorney must be given to the "principal agent or manager of such company" authorizing him to accept service of process.

The "Foreign Companies Ordinance" of the North-West Territories[9] was similar in effect to the Ontario Act. The fees imposed were the same as those for incorporation of companies, ranging from $15 upward. This is still the law in Saskatchewan. In Alberta, the Ordinance has been amended[10] and the fees are calculated upon the "capitalization" of the company, the minimum fee being $75. There is also a curious provision in the Alberta amendment, applicable to certain classes of companies set out in a schedule to the Act, which makes such companies liable to an annual fee of fifty dollars unless they pay their regular license or registration fee. The effect of this appears to be to enable the companies affected to commute their annual tax of $50, by a lump payment based upon the capital of the company. In both provinces a resident attorney must be

6. 9 Edw. VII. c. 10.
7. 46 and 47 Vict. c. 38.
8. 55 Vict. c. 4.
9. 3 Edw. VII. c. 14; amended 4 Edw. VII. c. 10.
10. 7 Edw. VII. c. 5; 8 Edw. VII. c. 20; 9 Edw. VII. c. 4.

appointed as under the Ontario Act, but it is not necessary to establish a head office in the province.

In all these Acts an essential feature is the definition of the words "carrying on business."

The Acts of New Brunswick, Alberta, Saskatchewan and Manitoba all contain provisions similar to the following from the Ontario Act:

> "Provided that taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative or no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of this Act."

It will be seen that this proviso controls the whole effect of the Act and renders it inapplicable unless the company in effect establishes a branch within the province. In this aspect the whole effect of the Act is to impose, by a roundabout method of drafting, a license fee upon companies becoming localized in the province. In New Brunswick, and in other provinces where the fee is an annual one, it may undoubtedly be regarded as a tax, and there are decisions upholding the single fees under the other Acts on the same ground.

3. *The Quebec Act.*—The Act of the Province of Quebec[11] is also modelled upon the general lines of the Ontario Act, but does not follow the latter as closely as do the Acts of New Brunswick, Alberta, Saskatchewan and Manitoba. The Quebec statute does not apply to companies incorporated in provinces where companies incorporated by the Legislature of Quebec are allowed to operate without a license. Nor does it apply to companies incorporated by the Dominion. The fee is payable only once and is based upon the capital stock of the company, the minimum being $100. A penalty of $100 is imposed for infractions of the Act. A head office must be named and an attorney

11. R.S.Q., arts. 6098-6110.

appointed. But there is no disabling section like those of the Ontario and New Brunswick Acts.

The Act provides that "no company, firm, broker, agent or other person shall, as the representative or agent of, or acting in any capacity *other than as traveller taking orders*" carry on the business of a company without a license. It is evidently assumed, though not mentioned, that business by correspondence is not affected; and the absence of the disabling clause leaves such business immune as a matter of practical effect.

4. *Nova Scotia Act.*—The Province of Nova Scotia in 1904 passed an amendment[12] to the Act dealing with "General Provisions respecting Domestic and Foreign Companies"[13] making it obligatory for "every incorporated company doing business in Nova Scotia, and having gain for its purpose or object" to pay an annual registration fee based on its nominal capital. Two schedules of fees are given, one for companies incorporated by the Province of Nova Scotia or by the Dominion, and the other for companies not so incorporated. The fees in the first schedule are one-half those in the second. Companies both domestic and foreign are required to submit annual statements of their affairs. A penalty of one hundred dollars is imposed for neglecting or refusing to transmit the registration fee or the statement. A penalty of ten dollars per day is also imposed upon the officers or representatives of the company transacting business without having submitted its annual statement. No definition is given, however, of the phrase "carrying on business" and there are no reported cases in which it has been applied as including business by correspondence.[14] Nor is there in the Nova Scotia Act a provision disabling companies from suing upon obligations contracted in connection with business in the province. The Act does not require the appointment of an attorney nor the establishment of a head office within the province.

12. 3 Edw. VII. c. 24.
13. R.S.N.S., c. 127.
14. See *Halifax* v. *McLaughlin*, 39 S.C.R. 174

5. *Prince Edward Island Act.*—In the Province of Prince Edward Island "an Act to impose Certain Taxes on Certain Companies and Associations of Brewers," passed in 1900, imposes, among a variety of other taxes, one of $100, per year, "upon all incorporated companies and associations" doing business in the province, "whose principal office and organization is not within the province other than those previously enumerated." In 1902, there was inserted after the word "enumerated" the following: "by themselves or by their agent residing in the province, by selling any goods, wares or merchandise in the province, or by soliciting or canvassing for others, either by themselves or by their said resident agent for the sale, exchange or purchase of any goods, wares or merchandise within the province, either by the production of samples, photographs, catalogues, printed or written matter, or simply by word of mouth, without the production of samples, photographs, catalogues, printed or written matter." It will be observed that this implies that the Act does not apply to non-resident agents. The repeal, in 1909, of the "Commercial Travellers" tax left business by non-resident travellers or by correspondence free. There has been no legislation corresponding to that of Ontario.

6. *Peculiarity of British Columbia Act.*—The peculiarity of the British Columbia Act[15] is that it contains no such excepting provision as those in the other Acts which define "carrying on business." There was such a provision in the draft of the revised Act as introduced, but it was struck out in Committee. This leaves the Act to cover what the Acts of none of the other provinces do, viz., business by correspondence and non-resident travellers. The Act moreover contains penalty clauses as strict as those of any of the Acts of the other provinces. Companies carrying on any of their business in British Columbia, no matter, apparently, how occasional or casual it may be, are liable to a penalty of fifty dollars per day upon the company and twenty dollars per day upon its agents. As prosecutions for the

15. 10 Edw. VII. c. 7.

penalties can be entered only with the consent of the Attorney-General, the administration of this feature will depend upon the disposition of the provincial government. But the provision which disables unlicensed companies from suing in the courts is a menace to even occasional business transactions with outside companies, and is a standing invitation to dishonest debtors to repudiate their obligations by taking refuge behind the Act. If for instance a mining company in the province should order a piece of machinery from the East or from the United States or from England the selling company would not be safe in sending the machinery unless it had a license to do business in the province, and a head office and resident attorney. The company might, indeed, escape the penalties of the Act, if it had no property in British Columbia; for the provincial authorities would scarcely pursue it to its own country, but it would be obliged to demand payment in cash before sending the machinery, and such a condition is under modern methods of business prohibitive.

Moreover the conditions which must be complied with before a license is obtainable are extremely onerous. The company must file with the registrar of companies a copy of its charter and articles of association and all its by-laws, rules and regulations and all resolutions and contracts relating to or affecting the capital and assets of the company. This preposterous requirement is in many cases a more serious obstacle than the payment of the fee. It can readily be understood that an extra-provincial or foreign company would hesitate, even for the sake of a large business in a single province, to display upon a public register the information thus demanded. It is still more unreasonable to demand it of a company whose transactions are only casual. It may be that as a matter of practice the occasional business of unlicensed companies would not be interfered with by the provincial authorities, but it is not conducive to respect for law that such a provision should remain upon the statute books to be constantly violated or to be enforced only according to the ability or caprice of the officials.

V. The Problem to be Solved.

It must be assumed that the framers of the British North America Act in giving to the provinces the power to incorporate companies with provincial objects did not intend that the provinces should have the power to interfere with companies operating under Dominion charters, and to prevent them from exercising their chartered powers until they had complied with provisions which are in themselves as onerous as the taking out of a new charter. Granted the provinces may tax business within the province, it is questionable whether they are competent to prevent companies, at all events those incorporated by the Dominion, from doing business until the tax is paid, or to impose disabilities of status incapacitating them from enforcing their rights by an appeal to the courts.

The Supreme Court may be expected to give to the subject the careful consideration to which its importance entitles it. And if the matter is carried further it is to be hoped that no small partizan spirit on the part of the provinces or the Dominion, and no carping assertion of "federal rights" or "provincial rights" will stand in the way of having the questions dealt with in a manner consistent with the magnitude of the interests involved.

There is, in fact, room for constructive statesmanship of the highest order in dealing with the whole question of corporation law in this country. Constitutional law is being constantly made by decisions of the courts in concrete cases, and although in theory the courts are confined to a strict and impartial interpretation of the written constitution, it needs no argument to demonstrate that a chance decision on a hard set of facts, in which the constitutional questions are inadequately argued, or ignored, may influence the whole course of constitutional development. When the British North America Act was passed, the subject of corporation law occupied no such place as it does to-day, and the difficulties that have arisen could scarcely have been anticipated. There are certain companies which can be

more conveniently dealt with by local authority, and there are others that should be under a central administration. Could not the provinces and the Dominion get together, and, without reference to the exigencies of revenue or of party politics, work out a constitutional scheme of administration of corporation law, not on the basis of what the British North America Act might be made to mean, but what will be most conducive to a harmonious development of our federal constitution, and an efficient control over this form of organization. In doing so the provinces need not relinquish any of their powers of taxation, and the Dominion would still retain, in virtue of its jurisdiction over other subjects, a sufficient measure of control in the interest of the country at large.

JUDGES ENGAGED IN OTHER THAN JUDICIAL DUTIES.

The dangers which arise from judges undertaking duties and responsibilities outside of their proper sphere of action, and the apprehension with which such departures from their proper function is regarded in the old country are pointedly set out in the following letter which appeared under the title, "Judges as Directors," in a recent number of the *Times*.

"Since the disastrous and deplorable failure of the Law Guarantee Trust and Accident Society some of the shareholders have stated that they were influenced in buying shares not only in consequence of the high professional standing of the solicitors who were the directors, but also on account of the fact that two well-known judges were the trustees. There has now grown up a strong feeling, both in the profession and out of it, against the present state of things, . . A judge's salary is £5,000 a year, and he is allowed for his expenses on circuit the liberal sum of £7 10s. a day, so that it can hardly be necessary for him to augment his income by directors' fees or trustees' fees. The great dignity and high position of the judges will, I am sure, be better maintained if they cease to act as directors or trustees of public companies, unlimited or limited, and the objection to

their acting in either of these capacities is not removed by the statement that these companies are in a sound and prosperous condition."

We wonder what the writer would say of judges who hold extra judicial positions in defiance of express legislation. The above letter hints at the lure of money as being the moving cause of what is said to be the above objectionable practice. It is quite true that judicial salaries in Canada, except perhaps to those paid to some judges in the Province of Quebec, are inadequate; but when members of the Bar go on the Bench they do so with their eyes open in this respect. Whether it is for the money that is in it, or for some other reason, that a certain judge of the High Court of the Province of Ontario still retains his seat on the Board of Directors of a Trust Company, contrary to the statute in that case made and provided, we know not. We have already called attention to this matter, but the evil continues. This apparently persistent breach of a statute by a judge, unless indeed there is some good reason which as yet does not appear, is not a very edifying spectacle. If there is any explanation to be given, or if there is any good reason why the learned judge does not come within the statute, it would be well that such explanation should be made public, either by the Board of the Trust Company or in some other appropriate manner; for it certainly is most undesirable that the public should be under any wrong impression in this matter, if it is wrong. Even if there is no technical breach of the Act, good taste would require the observance of its spirit.

The statute (R.S.C., c. 138, s. 33) seems sufficiently clear. It is as follows: "No judge of the Supreme Court of Canada or of the Exchequer Court of Canada, or of any superior or County Court in Canada shall, either directly or indirectly, as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties."

COMPANY LAW.

QUESTIONS SUBMITTED TO THE SUPREME COURT.

The Committee of the Privy Council of the Dominion of Canada having had under consideration a report, dated 2nd May, 1910, from the Minister of Justice stating that important questions of law had arisen as to the respective legislative powers under the British North America Acts of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of companies and as to the other particulars hereinafter stated, decided that it was expedient that these questions should be judicially determined.

The Minister accordingly recommended that under the authority of s. 60 of the Supreme Court Act, R.S.C. 1906, c. 139, the following questions should be referred by the Governor-General-in-Council to the Supreme Court of Canada for hearing and consideration namely:—

1. What limitation exists under the "British North America Act, 1867" upon the power of the provincial legislatures to incorporate companies?

What is the meaning of the expression "with provincial objects" in s. 92, art. 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

2. Has the company incorporated by a provincial legislature under the powers conferred in that behalf by s. 92, art. 11, of the British North America Act, 1867, power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose? Has the company incorporated by the provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind outside the incorporating province?

3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts:

(*a*) within the incorporating province insuring property outside the province;

(*b*) outside of the incorporating province insuring property within the province;

(*c*) outside of the incorporating province insuring property outside of the province?

Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country?

Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

4. If in any or all of the above mentioned cases (*a*), (*b*) and (*c*) the answer be negative, would the corporation have throughout Canada the power of capacity mentioned in any and which of the said cases on availing itself of the Insurance Act, R.S.C. 1906, c. 34, as provided by s. 4, sub-s. 3?

Is the enactment, R.S.C. 1906, c. 34, s. 4, sub-s. 3, intra vires of the Parliament of Canada?

5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by

(*a*) the Dominion Parliament?

(*b*) the legislature of another Province?

6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the government of the province,

or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses?

For examples of such provincial legislation see Ontario, 63 Vict. c. 24; New Brunswick Cons. Stats. 1903, c. 18; British Columbia, 5 Edw. VII. c. 11.

7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?

VACATION READING.

The Editor of *Law Notes* (U.S.A.), in his August number, provides his readers with some light literature suitable for holiday times. We gladly refer to some of them.

Killing Habitual Criminals.

The judicial putting to death of habitual criminals is not entirely new, but its treatment in the following note is somewhat original:—

Judge Holt of the United States District Court for the Southern District of New York, delivered an address at the recent annual meeting of the Wisconsin Bar Association.

Speaking of what he conceived to be a wise disposition of confirmed criminals, he said:

I would give him a fair trial. I would require proof that he had been a habitual criminal for a long term of years. I would give him an opportunity to make a full defence, and if finally it were established by clear proof that the man was one of those, numbers of whom exist in modern society, whose nature has been degraded by a life of undeviating wickedness into that of a wild beast, incapable of any substantial improvement or alteration, such a man, in my opinion, should be solemnly adjudged to be put to death. But if, in view of the squeamish sentimentality of this age, such a course be deemed impracticable, I should shut him up for life where he could do no more evil to society.'

Emanating from one who is supposed to have some acquaintance with Beccaria's famous treatise, the foregoing is so strangely unscientific that it hardly merits a word in reply. If a common thief or robber is to suffer death, of course theft or robbery will more frequently be accompanied by murder. A rational criminal will know that he may as well slay the witness to his crime. The argument is familiar, unanswerable, and decisive against the infliction of capital punishment for crimes of less enormity than murder.

In the opinion expressed by Judge Holt we think he unconsciously gives substantial support to the assertion by enemies of religion that infidelity is steadily infecting educated people and creeping into high places. Is Judge Holt losing faith in the miraculous efficacy of prayer, and in the divine power to regenerate even the most depraved of men? Only a few years ago there lived in New York city an uneducated man who was well qualified to debate with Judge Holt, and on equal terms, the question whether an habitual thief ought to be executed; his name was Jerry McAuley, and quite likely Isaiah 55: 8 would have been cited by him.

Scoring Judges.

The interchange of views promoted by the various Bar Associations of Anglo-Saxon countries and the research required for

papers read at their meetings are features of interest to the profession these days. The Ohio Bar Association recently passed a resolution upon which our exchange makes its comments. They are as follows:—

"Whereas it is the sense of the Ohio Bar Association that the Supreme Court should in all cases give some clear indication of the grounds upon which its decisions are based, in order that the bar and the people may know the views of the court as to the law involved, now, therefore, be it resolved that the Supreme Court and each of the judges thereof be and are hereby requested in every case hereafter decided to indicate clearly in some appropriate form, the exact point or points on which the decision rests, and the reasons influencing the court, in order that all uncertainty may be dispelled. And by direction of the association a copy of the foregoing resolution, unanimously adopted July 7, was sent to each of the judges of the Supreme Court. Volume 80 of the Ohio State Reports ends with 'memoranda of cases decided and reported without opinion during the period embraced in this volume,' comprising a list of about two hundred cases. But the judgment of the lower court was affirmed in all but six or eight of them. In each case the names of the counsel are printed. How would the counsel for a defeated party like to see his name followed by a sentence which we quote from Judge Cartwright's opinion in 236 Ill. 369, 88 N. E. Rep. 151: 'If attorneys have not yet learned of this obvious proposition by its wearisome repetition in so many cases, it would seem to be of no use to state any principle of law in the decisions of this court'? And suppose it was a case of memorandum affirmance where the court could say, as in *Indianapolis St. R. Co.* v. *Taylor*, 39 Ind. App. 592, 80 N.E. Rep. 436, 'Ninety-five reasons are given why a new trial should have been granted the appellant in the court below.' Or suppose the court filed a memorandum reason that the party's case is 'a structure the foundation of which is inference, its walls are suspicion, and covered with the roof of the imagination, but withal it is nothing but a shadowy phantom, without legal substance,' as in *In re Gilion's Will*, 44 N.Y. App. Div. 621, 60 N.Y. Supp. 65, 68."

Eccentric Reporters.

The mental vagaries of reporters are discussed in a note entitled "Mental diversions for lolling lawyers." We could match some of these in this country. The weather, however, is too warm to do more than refer to one which comes to our mind as we write. In the digest to a volume of the Upper Canada Common Pleas Reports appeared the title "Sue." Curiosity induced an enquiry as to whether this short word had reference to any litigation anent any black-eyed Susan, but it appeared that the rest of the sentence was "Right of Foreign Corporations to, in this country." We decline to do more than refer to the old story of "Great mind" as an index word in an old English Digest. Our contemporary's research appears in the following:—

A few minutes of gentle intellectual exercise for lawyers relaxing on the summer hotel verandah can be got out of the reporter's indexes to volumes 55 and 56 of the Texas Criminal Reports. Read aloud some of the titles in those indexes—all the black-letter words are titles, and there are no sub-divisions—and ask your professional neighbour to guess what sort of a case is indexed under each of the titles named. Thus: "Bad Spelling." Little doubt about that if he is aware that you are reading from a criminal report; it was a motion to quash an information because of bad spelling. "Cooling Time," a murder case of course, says your friend. "Adequate Cause," "Inadequate Cause," "Insult to Female Relative," and "Jealousy" are also murder cases, he will say, if he knows that it is a Texas report. And "Appearance of Danger" will not suggest a contributory negligence case. But "Contemporaneous Transaction" should compel him to scratch his head. Here is the case: "Upon trial for violation of the local option law there was no error in shewing on cross-examination of the defendant that *he had whiskey on hand* like that which he was alleged to have sold to the prosecuting witness." Nor has the Texas reporter put a "bromidic" paragraph under "Conditional Promise." It reads as follows: "Whereupon trial for seduction"—your companion interrupts you by correctly guessing the premise and the condition.

"Juxtaposition," a prize riddle, is thus solved: "Where upon trial for murder the evidence shewed that the defendant was in such *juxtaposition to the homicide* as to exclude any other issue than that of positive testimony, a charge upon circumstantial evidence was not required." By the way, in volume 56, Texas Criminal Reports, the index title "Murder" covers forty-four paragraphs and twenty-seven cross-references to other titles. "Manslaughter," a mollycoddle offence in Texas, carries only six paragraphs and two cross-references. In a guessing bee based on that index the man who adopts the answer "homicide" as a "system" is likely to defeat all competitors in the long run. But he would score a cipher if asked what is the second word of a title consisting of two words, the first of which is "Shooting," for it is not a homicide case. Is it the name of a kind of animal? Why, no; it is "Craps." How many lawyers can state exactly what is meant by the reporter's title, "Doctrine of Carving"? Is it antonymous of the familiar "doctrine of tacking" of incumbrances? We are pretty sure that Bishop, Wharton, and other text-writers on criminal law would be startled to learn that "carving" had become a word of art or attained to the dignity of a doctrine. In the case cited it was held that, under the Texas statute, "the State can only carve one offence of opening a theatre on Sunday"—that is on a single Sunday. A strenuous and virile word in the Texas reporter's lexicon is "Want." It does him this yeoman service: "Want of Authority," "Want of Chastity," "Want of Consent," "Want of Diligence," "Want of Fraudulent Intent," and "Want of Knowledge"——of proper titles for a creditable index to a law report?

Professional Ethics.

A point in professional ethics which has troubled a few lawyers and a great many laymen for centuries past is thus discussed:—

Paragraph 5 of the Code of Professional Ethics promulgated by the American Bar Association reads as follows: "A

lawyer may undertake with propriety the defence of a person accused of crime, although he knows or believes him guilty, and having undertaken it he is bound by all fair and honourable means to present such defences as the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law." That is to say, if a perfectly sane man confesses to his lawyer that he committed the act for which he is prosecuted, and the evidence adduced against him leaves not a glimmering of doubt in the lawyer's mind that the confession is true, it is the lawyer's duty "by all fair and honourable means to present such defences as the law of the land permits." No "defences" within any just meaning of that term can be presented other than (1) that the act charged is not a crime, or (2) that the accused did not commit the act, or was irresponsible. It is conceded that the first defence is not available, for by the terms of the canon the lawyer *knows* that his client is *guilty;* or if there be a doubt in point of law it may readily be admitted that the lawyer need not and should not hesitate to argue the point. As to the second defence—*i.e.*, the question of fact—the lawyer knows that it is false. Nevertheless, "by all fair and honourable means"—for example, by argument to the court against the admissibility of evidence—he may properly be instrumental in preventing the jury from hearing evidence which might convince them of the fact of guilt. But how about his argument to the jury on the evidence before them? If a felon were fleeing from officers of the law in hot pursuit of him, and a railroad station agent or conductor of a train, knowing him to be guilty and attempting to avoid immediate arrest, should sell him a ticket or provide him with free transportation and thus enable him to escape, is it not clear that the agent or conductor would be punishable as an accessory after the fact? This offence is committed by any one who knowingly "assists the felon to elude justice." *Reg.* v. *Hansill,* 3 Cox C.C. 597, per Erle, J. Does not a lawyer "assist" his known-to-be-guilty client "to elude justice" by successfully employing his talents to persuade jurors that a verdict of guilty will shew that their

reasoning faculties are out of joint? Would it be "fair and honourable" for him by artful advocacy to induce the jury to believe the evidence of guilt is insufficient, when he feels, apart from the private confession of his client, that it logically suffices to exclude reasonable doubt from any rational mind? Is the railroad station agent or conductor under any greater obligation to the community in the matter of apprehension and punishment of felons than the lawyer? Isn't a criminal's right to have a lawyer befuddle a jury as far removed from those hallowed phrases "law of the land" or "due process of law" as a man's right to transportation by a common carrier?

Let us go a step farther and suppose that the lawyer advises or even silently permits his guilty client to take the witness stand and swear to his innocence, and then uses the testimony as an argument to the jury to render a verdict of acquittal. Can this conduct be ethically reconciled with the ruling of the New York Supreme Court in *In re Hardenbrook*, 135 N.Y. App. Div. 634, 121 N.Y. Supp. 250? In that case, decided last December, upon argument before Justices Ingraham, Laughlin, Clarke, Houghton, and Scott, the respondent, an attorney-at-law, was disbarred for conduct exactly described in the judgment as follows:—"It is sufficient if, taking the testimony as a whole, the respondent was proved to have had direct knowledge that the client for whom he appeared, and in whose favour he asked a verdict, had sought to recover on perjured testimony, and, with such knowledge, continued the prosecution of the action, insisting upon the right of his client to a judgment although he knew that her testimony was false. If this was satisfactorily established, it would seem to follow that he had been guilty of such unprofessional conduct as to require discipline. It is not essential in such a case that the attorney or counsel took affirmative action to induce his client to swear falsely, or, in other words, suborned the perjured testimony; but if an attorney, with knowledge of the fact that the testimony upon which his client is seeking to sustain a claim before the court is false and known to his client to be false, so that his client

in giving the testimony is guilty of perjury, insists upon the truth of the testimony and endeavors to procure a verdict in his client's favour, it is certainly deceit and malpractice within the provisions of section 67 of the Code of Civil Procedure."

The case in which the attorney was employed was a personal injury action for a contingent fee, and the court held that the fact of his interest in the result of the controversy merely aggravated his offence.

In the July number of the *Law Quarterly Review* there is an interesting note of the case of *Anna Rama* v. *G.I.P. Ry. Co.*, 12 Bombay Law Reports 73, which is said to be a case of first impression so far as regards English and Indian authorities. It was an action for negligence. It appears that the arm of the plaintiff, a passenger who was leaning out of a railway carriage in an up train, was struck and injured by the door of a carriage in a down train, the door having been left open. It was held that a passenger who puts his arm or any part of his person outside the train does so at his own risk, and undoubtedly so if there is an express warning against this practice. It does not appear from this note whether the plaintiff had his attention drawn to any such warning, nor is it probable that he was in the position of the man in the apochryphal story which recounted that he saw a notice warning passengers to "Keep your head out of the window." Obeying the injunction he suffered injury and naturally thought he was badly treated. The writer of the note in the *Law Quarterly* after referring to the fact that warnings are common in Europe says:—

"They seem rather to assume that, in the absence of warning, it is not necessarily rash or unreasonable to lean out of the window; and on the frequented lines of Central Europe notices are often in two or even three languages, whereas here the notice was only in English, a point not mentioned in the judgment. It was argued for the company that its contract was only to carry passengers inside the carriages and not outside; this is cleverly

put, but really a neat way of begging the question. But it does seem that the passenger, if he knew of the warning, did not act as a commonly prudent man. He was indeed not bound to anticipate that the doors of other trains on the line would be negligently left open; on the contrary he had a right to expect that they would be kept fastened; and this reason at first sight appears to be strong in his favour. The weak point of it is that open doors on other trains are, as a matter of fact and common observation, by no means the only danger to which projecting heads or limbs may be exposed: there may be very little clear space in passing through tunnels, covered bridges, and the like; and an express warning reminds the passenger of this kind of risk if it is not already notorious. It cannot be said, therefore, that he was not bound to be cautious. Then, if the passenger does put his arm outside, he can still keep a look-out, and draw it in when another train is passing. And on the whole it seems, even without any express warning, that not to keep any look-out for possible objects of collision is recklessness in fact amounting to negligence in law. On the other hand (subject, perhaps, to mere possibilities of exceptional circumstances which, if they had existed, it was the plaintiff's business to prove) it is plain enough that the company had no means of avoiding the result at the last moment: therefore the finding for the defendant, on the ground of contributory negligence, was in our judgment correct. As to the inference of negligence against the company in the first instance from the fact that a carriage door in a moving train being left open, there is no difficulty: *Toal* v. *North British Railway Company*, [1908] A.C. 352."

REVIEW OF CURRENT ENGLISH CASES.

ORDER FOR PAYMENT OF COSTS OF MOTION—ACTION TO RECOVER COSTS PAYABLE UNDER ORDER.

Seldon v. *Wilde* (1910) 2 K.B. 9. This was an action brought to recover a sum payable for costs under an order of court. The defendant contended that the statement of claim shewed no cause of action, and was an abuse of the process of the court. The order was made in the Chancery Division on a motion to commit the defendant for not delivering his bill of costs as a solicitor, and it was contended that the order was equivalent to a decree in Chancery on which no action would lie, because no promise can be implied at common law to pay an equitable debt. But Darling, J., held that the same order would be made at law in the like circumstances, and there was therefore no ground for calling it a mere "equitable debt"; and the contention that the order was of a criminal nature was held to be equally untenable, and he held that the action was maintainable, and gave judgment for the plaintiff.

LANDLORD AND TENANT—COVENANT NOT TO SUBLET—RE-ENTRY FOR BREACH OF COVENANT—BREACH OF COVENANT—SURRENDER—ACCEPTANCE OF SURRENDER IN IGNORANCE OF BREACH OF COVENANT—RE-LETTING BY LESSOR—ENTRY BY NEW TENANT—RIGHT OF SUB-LESSEE.

Parker v. *Jones* (1910) 2 K.B. 32 is a curious case on the law of landlord and tenant. One Smith let to Harner a parcel of land the lease containing a covenant by Harner not to sub-let without leave with a proviso for re-entry by Smith in case he committed a breach of the covenant. Unknown to Smith, Harner in breach of his covenant, sub-let to the plaintiff Parker, and thereafter Harner surrendered his lease to Smith who accepted the surrender still in ignorance of the breach of covenant. After the surrender Smith re-let the premises to the defendant Jones, who finding Parker's cattle on the premises turned them out and took possession under his lease, and Parker thereupon brought the present action to recover possession and also damages for trespass. The case was tried in a County Court and

judgment was given for the defendant, but the Divisional Court (Darling and Bucknill, JJ.) reversed the judgment, but for different reasons. Darling, J., taking the ground that assuming Smith was not precluded by the acceptance of the surrender from enforcing his right to forfeit the plaintiff's interest, inasmuch as Smith had accepted the surrender without notice of that interest; still the re-letting of the premises to a new tenant and entry by that tenant, did not operate as an entry by Smith so as to effect a forfeiture and therefore the plaintiff's interest was still subsisting. Bucknill, J., on the other hand, was of the opinion that the acceptance of the surrender by Smith even though in ignorance of the breach of covenant, precluded him from subsequently forfeiting the plaintiff's interest.

COMPANY—WINDING-UP—OFFICIAL RECEIVER AND LIQUIDATOR—FRAUD—EXAMINATION OF PERSON CHARGED—PERSON EXCULPATED FROM CHARGE OF FRAUD—JURISDICTION TO ORDER RECEIVER TO PAY COSTS PERSONALLY—COMPANIES WINDING-UP ACT, 1890 (53-54 VICT. C. 63), S. 8—(R.S.C., C. 144, S. 121).

In re Tweddle & Co. (1910) 2 K.B. 67. A limited company having been ordered to be wound up, the official receiver, who was also liquidator reported under the Winding-Up Act, 1890, s. 8, that in his opinion the facts reported by him constituted a fraud in the promotion or formation of the company, and that certain persons named in the schedule were parties to the fraud. Among the persons so named was one Easten, a director, and on this report he was ordered to be examined. After his examination he applied to the judge for an order exculpating him from the alleged fraud and the order was granted, and the receiver was directed to pay his costs of the examination and of the application for the exculpatory order, and there being no assets of the company, the judge ordered the receiver personally to pay them. On appeal by the receiver to a Divisional Court (Darling and Bucknill, JJ.), those learned judges held that there was no jurisdiction to make an order against the receiver personally. Darling, J., being of the opinion that the receiver had made the report on which the examination was made in the discharge of his duty fairly and honestly, and without any misconduct; and Bucknill, J., taking the ground that even if the judge had power to make the order, in the circumstances, he ought not to have made it. We notice, however, that the Court of Appeal have taken a different view, and have come to the

conclusion that as the official receiver had taken up the position of a litigant and appeared and opposed the application for the exculpatory order the judge had jurisdiction to order him to pay the costs of that motion: see 129 Law Times Jour., p. 239.

LANDLORD AND TENANT—DISTRESS—EXEMPTION FROM DISTRESS—"GOODS COMPRISED IN HIRE PURCHASE AGREEMENT"—"POSSESSION ORDER OR DISPOSITION"—"REPUTED OWNERSHIP"—GOODS OF WIFE OF TENANT UNDER HIRE PURCHASE AGREEMENT—DISTRESS AMENDMENT ACT, 1908 (8 EDW. VII. c. 53), s. 4—(R.S.O., c. 170, s. 31).

Shenstone v. *Freeman* (1910) 2 K.B. 84. In this case the plaintiff sued for the wrongful seizure of goods in distress, on the ground that they were exempt under the Distress Amendment Act, 1908 (8 Edw. VII. c. 53), (see R.S.O., c. 170, s. 31). The goods in question consisted of a piano let by the plaintiffs to the wife of the tenant on a hire purchase agreement in consideration of monthly payments and subject to a condition that on default the plaintiffs might retake possession. At the date of the seizure the monthly payments were in arrear. The English Act, while exempting the property of third persons, provides that such exemption is not to extend to the goods belonging to the husband or wife of the tenant, nor to goods comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant, nor to goods in the order and disposition of the tenant by consent of the true owner under such circumstances that the tenant is the reputed owner. The question, therefore, was, whether the piano was within the exception, and the Divisional Court held that it was not, the piano not being the property of the wife of the tenant, and not being held by the tenant under a hire purchase agreement made by him.

CARRIER—DANGEROUS GOODS—NEGLECT TO GIVE NOTICE TO CARRIER OF DANGEROUS CHARACTER OF GOODS TENDERED—IMPLIED WARRANTY THAT GOODS TENDERED FOR CARRIAGE ARE NOT DANGEROUS—DUTY OF CONSIGNOR.

Bamfield v. *Goole & Sheffield Transport Co.* (1910) 2 K.B. 94. This was an action brought by the plaintiff in her own right and also as administratrix of her deceased husband under the Fatal Accidents Act to recover damages personally to herself, and also pecuniary damages sustained by the death of her husband in the following circumstances. The husband was owner

of a canal boat and the defendants tendered him for carriage thereon a consignment of ferro-silicon in barrels as "general cargo." This substance is dangerous owing to its liability to give off poisonous fumes. In the course of transit the poisonous fumes were given off, the husband died from its effects, and the plaintiff who was also on the boat assisting her husband was rendered seriously ill. Walton, J., who tried the action, gave judgment for the plaintiff in both capacities. And his judgment was affirmed by the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.). Walton, J., had found as a fact that the defendants did not know, and that they were not guilty of negligence in not knowing that ferro-silicon was dangerous, but notwithstanding Williams, L.J., was of the opinion that when shipping such an article it was their duty to communicate to the plaintiff's husband such information as they had as to the nature of the article and therefore to describe it as ferro-silicon, and not as general cargo, and by reason of that neglect of duty they were liable. Moulton and Farwell, L.JJ., on the other hand, held that there is an implied warranty by a consignor that the goods delivered are fit for carriage, and unless the carrier knows or ought to know that they are dangerous, the consignor must be taken to warrant that they are not dangerous.

MARINE INSURANCE—POLICY—WARRANTY—FREE FROM PARTICULAR AVERAGE AND LOSS.

Otago Farmers' Association v. *Thompson* (1910) 2 K.B. 145. This was an action on a marine insurance policy. The policy covered a cargo of frozen meat and the period of the risk was stated as follows: "Risk commencing at the freezing station works and includes a period not exceeding sixty days after the arrival of the vessel." It also contained the following clause: "Warranted free from particular average and loss unless caused by stranding, burning, or collision of the ship or craft." Owing to causes arising during the voyage, other than "stranding, burning, or collision" of the ship, the meat arrived in a condition unfit for human food, and was condemned, and there was a total loss. Hamilton, J., found as a fact that the expression "warranted free from particular average and loss" was a well-known formula used in connection with insurance of frozen meat, and that the word "loss" in that formula was well understood amongst underwriters to mean all loss total as well as partial, and that the clause, however inapt to express the meaning, was in fact in-

tended to mean that the underwriters only insured against marine risks of stranding, sinking, burning or collision; and he held that, notwithstanding the provision as to the risk continuing after the termination of the voyage, the clause had that meaning in the policy in question and therefore that the defendants were not liable.

LANDLORD AND TENANT—RENT—ASSIGNMENT BY LESSEE OF PART OF DEMISED PREMISES—APPORTIONMENT OF RENT—VALUE OF SEVERED PARTS—DATE AT WHICH VALUE TO BE ASCERTAINED FOR FIXING APPORTIONMENT.

In *Salts* v. *Battersby* (1910) 2 K.B. 155, the question to be determined was the date at which the value of two severed portions of certain demised premises should be ascertained for the purpose of fixing the apportionment of the rent. The action was brought in the County Court to recover rent, and it appearing that the defendant was only assignee of part of the demised premises, the judge held that he was only liable for part of the rent, and in making the apportionment he held that the proper way was to ascertain the proportion the area of the land assigned to him bore to the area of the whole plot under the original lease. On appeal, however, a Divisional Court (Darling and Bucknill, JJ.) held that this was not the proper method of making the apportionment, and that on the contrary the present relative value of the parcels must be ascertained, and the rent apportioned on that basis.

SHERIFF—EXECUTION CREDITOR—LIABILITY OF EXECUTION CREDITOR FOR ISSUING EXECUTION ON SATISFIED JUDGMENT—WRONGFUL SEIZURE—FI. FA.—DEBT PAID BEFORE ISSUE OF EXECUTION—ABSENCE OF MALICE—TRESPASS.

Clissold v. *Cratchley* (1910) 2 K.B. 244. This was an appeal from the judgment of the Divisional Court (1910) 1 K.B. 374 (noted, ante, p. 256). The action was for trespass in seizing the plaintiff's goods under an execution issued on a judgment which had been satisfied before the writ issued. There was no malice on the part of the defendants, and the writ had been issued in ignorance of the prior payment, and on that ground the Divisional Court held that the action would not lie. The Court of Appeal (Williams, Moulton and Farwell, L.JJ.), however, held that the defendants were liable and allowed the appeal and restored the original judgment in favour of the plaintiff.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court—C.P.] [May 17.

RE MOLSON.

WARD *v.* STEVENSON.

Will—Probate—Two testamentary writings of different dates—Letters of administration with both annexed.

Appeal by defendants from the judgment of the Surrogate Court of Northumberland and Durham which found that two testamentary writings of different date together contained the last will and testament of one Molson; and directing that letters of administration with the two writings annexed should be issued to the plaintiff. The first will appointed an executor and had a residuary clause disposing of the whole estate. The second will appointed the same executor, and was called "My last will." It did not in any way refer to the former document, had no revoking clause, no residuary clause, and did not dispose of the whole estate actually existing at the date of the decease, so that as to the part undisposed of, if the second will alone were admitted to probate, there would have been an intestacy.

Held, that the decision of the Surrogate Court judge was correct. *In re Bryan* (1907), p. 125, 76 L.J.N.S.P. 30, distinguished.

Dromgole, for plaintiff. *W. Kingston*, K.C., for respondents.

Falconbridge, C.J.K.B., Britton, J., Middleton, J.] [July 2.

HESSEY *v.* QUINN.

Landlord and tenant—Rent—Excessive distress—Statute of Marlbridge—Damages.

On appeal from the judgment of OSLER, J.A.,

Held, 1. That the statute of Marlbridge is not interfered with or modified by II George 2, c. 19, s. 19, (Imp.) and the latter statute did not apply to actions for excessive distress (see R.S.O. 1897, c. 342). *Whitmorth* v. *Smith*, 5 C. & P. 250, is not in point. The statute of George II. is confined to irregular-

ities or illegalities arising after the distress and has no application to the taking of an excessive distress.

2. In the case of an excessive distress there is a breach of a statutory duty to make a reasonable distress only, and some damages must be presumed; but even when a statute read that in such case the landlord should be "grievously amerced" nominal or nearly nominal damages were allowed unless substantial damages were shewn.

3. In this case there was no substantial damage. The bailiff had nominal possession only and did not interfere with the use and enjoyment of the goods and there was no reason for exemplary or punitive damages.

See *Piggott* v. *Birtles*, I.M. & W. 441; *Chandler* v. *Doulton*, 3 H. & C. 553; *Black* v. *Coleman*, 29 C.P. 507; *Rogers* v. *Parker*, 18 C.B. 112; *Lucas* v. *Tarleton*, 3 H. & N. 116.

Creswicke, K.C., *F. G. Evans*, and *J. M. Ferguson*, for respective parties.

Divisional Court—K.B.] [July 16.

COPELAND v. LOCOMOTIVE ENGINEERS' MUTUAL LIFE, ETC., ASSOCIATION.

Accident insurance—Total and permanent loss of sight—Practical loss of sight—Locomotive engineer.

This was an appeal from the judgment of BOYD, C., who dismissed an action upon an accident insurance certificate of defendants' association. The plaintiff's claim was based upon the constitution and by-laws of the association, which provided that any member thereof "sustaining the total and permanent loss of sight in one or both eyes shall receive the full amount of his insurance." The plaintiff, who was a locomotive engineer, suffered an accident whereby there was, as found by the Chancellor, "a practical loss of sight so far as this man is an engineer," but on the evidence held that it could not have been said that he was totally and permanently blind.

Held, that, the plaintiff could not recover.

Logan, for plaintiff. *Hanna*, K.C., for defendants.

Sutherland, J.] [July 20.

RE MCCRACKEN AND TOWNSHIP OF SHERBORNE.

Liquor License Act—By-law limiting number of tavern licenses in township to one—Monopoly.

This was an application to quash a by-law to limit the number

of tavern licenses in a township to one, reciting that the municipality had not the required population for more than one tavern license and it was expedient to limit the license list to that number. There were two existing licenses in the municipality. The bona fides of the council in making this reduction was not in question and the evidence indicated that one hotel was sufficient for the requirements of the public in the municipality.

Held, that, in view of s. 20 of the Liquor License Act and s. 330 of the Municipal Act no township council can pass a by-law to provide that the number of licenses should be limited to one, and in this case the result of the by-law would be to create a monopoly. By-law quashed.

Haverson, for applicant. *A. Mills,* for respondent.

Meredith, C.J.C.P., Teetzel, J., Sutherland, J.] [July 27.

FORD *v.* CANADIAN EXPRESS CO.

Malicious prosecution—Separate prosecution for forgery and theft—Reasonable and probable cause—Question for judge and not for jury.

The plaintiff was formerly in the employ of White & Co., commission merchants. White & Co. obtained blank books of money orders from the Canadian Express Co. and the Dominion Express Company, and acted as agents for these companies for the purposes of their business only. A telephone message was received by the agent of the Canadian Express Co. asking that a book of money orders be sent to White & Co. The agent (named Mitchell) requested that an order for the same should be sent to them and on its receipt the book of money orders would be delivered forthwith. Shortly afterwards a man called at the Canadian Express office and handed in an order for the money orders written on White & Co. letter heads and signed White and Co. per Cohen. He received a book of money orders and signed a receipt for same. When the defendants went to White & Co. to collect for the book of money orders they first became aware that these orders had never reached White & Co. nor had they telephoned for them. Mitchell then wired the head office in Montreal to know if any of the orders had been cashed and asked them to forward any of the orders. On receiving the money orders Mitchell went to White & Co. and suspicion first fell on a former employee, then on the plaintiff, and two of the

employees of White & Co. informed Mitchell and a detective who had been brought in that the writing on the money orders resembled that of Ford's. Mitchell then obtained a quantity of Ford's writing from White & Co., and on the advice of the detective he took the writing to an expert in writing named Staunton, who remarked that there was a resemblance in some of the letters, but requested that the writing should be left with him over night. They however took the writing away without obtaining any further opinion and consulted the Crown Attorney informing him that the expert said it was Ford's writing, who gave directions for a warrant. This, however, was not obtained till the following day. The prosecution after several remands dropped the charge of forgery and charged the plaintiff with theft. On this charge the plaintiff was sent for trial and acquitted and Mr. Staunton, who was called by the Crown, gave it as his opinion that neither the order nor the receipt for the book was in the handwriting of the plaintiff, Ford. The plaintiff then commenced this action claiming damages in respect of

(1) False arrest. (2) Prosecution for forgery. (3) Subsequent prosecution for theft.

At the close of the plaintiff's case, defendant's counsel objected that the absence of reasonable and probable cause was not proved and that the defendants were not liable for the acts of Mitchell, their agent, who laid the information, and moved for a nonsuit. The motion was refused and the defendants adduced evidence in support of their defence. The trial judge put several question to the jury which were all answered in favour of the plaintiff, and the damages assessed down to the first arrest for forgery and the first remand were placed at $1,500. From the first remand down to the time of the charge for forgery was abandoned $750, and the damages in respect of prosecution for stealing at $750.

Upon motion for judgment on the findings of the jury the Chief Justice ruled that there was on absence of reasonable and probable cause and directed that if the plaintiff so desired judgment should be entered in his favour for $750, the damages awarded in respect of the prosecution for theft, leaving him to go to trial again on the other issue, as several of the questions which were intended to be submitted to the jury had not reached the jury and were not answered by them. The defendants then appealed to this Court on the following grounds.

(1) Absence of reasonable and probable cause was not shewn and the Chief Justice should have so ruled and have withdrawn the case from the jury.

(2) There was no evidence to warrant this submission to the jury of the question whether Mitchell in doing what he did was acting within the scope of his employment so as to make the defendants responsible for his action.

Held, 1. If the law is as it was laid down in *Hamilton* v. *Cousineau*, 19 A.R. 203, it may be that the Chief Justice was right in leaving to the jury the question which he put to them as to the honest belief of Mitchell, but the court was of the opinion that it was not, and that the effect of *Archibald* v. *McLaren*, 21 S.C.R. 515, was to overrule that case and to settle the law as far as the courts of this province are concerned in accordance with the views expressed by Armour, C.J. and Street, J., in the Divisional Court. Nothing appeared upon the evidence justifying even the suspicion much less the finding that Mitchell did not at the time he laid the information for forgery honestly believe the plaintiff to be guilty. So far as appeared Mitchell did not know him even by sight and had no motive for making a false charge against him, nor was there anything which warranted the submission to the jury of the question as to the defendants having taken reasonable care to ascertain the true fact of the case before Mitchell laid the information.

2. As to the prosecution for theft it should have been ruled that the plaintiff had established want of reasonable and probable cause.

3. Though the expert's opinion was that neither the receipt nor the order had been forged by the plaintiff, there was the evidence of the two employees that the plaintiff was the person who presented the forged order and signed the receipt.

H. H. Dewart, K.C., and *J. S. Lundy*, for plaintiff. *J. M. Ferguson*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] [July 29.

IN RE THOMAS MCNUTT.

Collection Act—Commitment for fraud—Form of Warrant—Commission—Presumption as to acts of.

A warrant of commitment to gaol for fraud under the Collection Act, R.S. 1900, c. 182 was attacked on the ground

that it did not shew on its face that the debtor was a resident of the county for which the Commissioner who granted the warrant acted. Sec. 27 (2) of the Act contained the following provision: "The warrant of commitment may be in the form I. in the schedule, etc." The warrant in question exactly followed the form which did not require that the fact referred to should be shewn on its face.

Held, that the warrant was sufficient and that the application for the discharge of the debtor must be dismissed. *Re Baltimore*, 25 N.S.R. 106, distinguished.

Held, also, that it was to be presumed that the Commissioner acted rightly. *McKay* v. *Campbell*, 36 N.S.R. 522; *The Queen* v. *Silkstone*, 2 Q.B. 52; and *Taylor* v. *Clemstone*, 11 C. & F. 641, referred to.

Power, K.C., in support of application. *Ralston*, K.C., contra.

Graham, E.J.—Trial.] [August 3.

MILLER *v.* WEBBER.

Fisheries—Net set without license—Fisheries officer justified in seizing—Powers of Dominion Parliament.

Held, 1. Legislation prohibiting the use of nets of certain descriptions for the purpose of taking deep sea fish, except under special license, having in view the prevention of over fishing or the undue destruction of fish on the coasts of Canada, is reasonable and in the interests of the general public and is within the jurisdiction of the Dominion parliament to enact.

2. It is within the jurisdiction of the Dominion parliament to impose a license fee or tax as a condition of the issue of such licenses where granted.

3. It is a sufficient justification to a fisheries officer seizing a net set for the purpose of taking deep sea fish on the coast of one of the provinces of Canada to shew that it was set without license or the payment of the fee required.

J. A. McLean, K.C., for plaintiff. *Macilreith*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] [June 21.

DOMINION EXPRESS CO. v. CITY OF BRANDON.

Taxation—Corporations Taxation Act, and business tax levied by—63 & 64 Vict. c. 35, s. 2—Construction of statutes.

The taxation imposed upon express companies for Provincial revenue by sub-s. (*m*) of s. 3, of the Corporations Taxation Act, R.S.M. 1902, c. 164, as re-enacted by 5 & 6 Edw. VII. c. 87, s. 7, is a business tax, being based partly on the number of its branch offices in the Province, and, since s. 18 of the same Act provides that, when a company pays such tax, no similar tax shall be imposed or collected by any municipality, the defendant city has no right to impose, under s. 2 of 63 & 64 Vict., a tax on the company in respect of its branch office in the city, such tax being expressly called a business tax by the last named Act. The original Corporations Taxation Act was assented to on the same day as the Act under which the defendants sought to impose the tax in question.

Held, that it must be presumed that the intention of the Legislature was that s. 18 of the former Act should govern and should exclude the tax under the latter Act. Injunction to go restraining defendants from proceeding under distress warrant to levy the tax in question.

Coyne, for plaintiffs. *Matheson*, for defendants.

Mathers, C.J.] [July 1910.

DAVIES v. CITY OF WINNIPEG.

Negligence—Municipality—Liability of for non-repair of sidewalk.

Under s. 667 of the Municipal Act, R.S.M. 1902, c. 116, or under s. 722 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77, a municipality is not liable for the consequences of an accident caused by the want of repair of a sidewalk unless negligence on its part is shewn.

The plaintiff was injured by the tilting up of a loose plank in a sidewalk only ten years old which had been regularly inspected by an officer of the city without discovery of the defect

and no notice of the defect had been brought home to the city in any way. It appeared that the plank had got loose by the breaking of the nails and not by reason of age or decay of the wood.

Held, that the defendants were not liable.

Howell and *H. V. Hudson*, for plaintiff. *T. A. Hunt* and *Auld*, for defendants.

Mathers, C.J.] [July 8.

MANNING *v.* CITY OF WINNIPEG.

Municipal corporation—Contract of, without by-law—Employment of counsel by city— Acceptance of services—Liability of corporation on executed contract—Winnipeg charter, ss. 472, 833.

The council of the city of Winnipeg has authority, under section 833 of its charter, 1 & 2 Edw. VII. c. 77, to employ counsel to conduct an inquiry into any matter connected with the good government of the city or with the conduct of any part of its public business; but such employment is not one of the matters which, under s. 472 of the charter, may be dealt with otherwise than by by-law.

When such employment was by resolution only and there was no formal acceptance of the work by the council, although the plaintiff had completed it according to his instructions, it was

Held, that he could not recover in an action against the city for the amount of his bill of costs rendered. *Arnold* v. *Poole*, 4 M. & G. 866; *Silsby* v. *Dunnville*, 8 A.R. 524; *Waterous* v. *Palmerston*, 21 S.C.R. 556; *Barrie School District* v. *Barrie*, 19 P.R. 33, and *Brown* v. *Lindsay*, 35 U.C.R. 509, followed. *Clark* v. *Cuskfield Union*, 21 L.J.Q.B. 349; *Haigh* v. *North Brierly*, E.B. & E. 873; *Lowford* v. *Billericay* (1903), 1 K.B. 772; *Bernardin* v. *Dufferin*, 19 S.C.R. 581, and *Emerson* v. *Wright*, 14 M.R. 636, distinguished.

Hoskin, K.C., for plaintiff. *T. A. Hunt* and *Auld*, for defendants.

Mathers, C.J.] [July 8.

DAVIS *v.* BARLOW.

Parliamentary elections—Return of election made by returning officer—Jurisdiction of Court of King's Bench —Injunction —Breach of, by agent of defendant—Contempt of court—Manitoba Controverted Elections Act, R.S.M. 1902, *c.* 34.

The Court of King's Bench has no jurisdiction to hear and

determine a complaint against the return of a member to serve in the Legislative Assembly of Manitoba otherwise than in proceedings under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34. *Regina* v. *Prudhomme*, 4 M.R. 259, followed.

The court has power, however, to deal with the defaults and misconduct of election officers and compel them to perform their public duties.

An interim injunction had been issued restraining the defendant, the returning officer, his servants and agents from delivering his return to the clerk of the Executive Council. Defendant had already handed the return to an express company for transmission, and the agent of the company was notified of the injunction, but delivered the return in spite of it.

Held, that such agent was liable to be committed, not technically for a breach of the injunction, but for a contempt of court tending to obstruct the course of justice: Kerr on Injunctions, 599.

Hudson, K.C., and *Coyne*, for plaintiff. *Dennistoun*, K.C., for defendant.

Mathers, C.J.] [August 1.

RE SCHRAGGE AND CITY OF WINNIPEG.

Railway company—Compensation—Land injuriously affected, though not encroached upon by work—Winnipeg charter, 1 & 2 Edw. VII. c. 77, ss. (c) added to s. 708 by s. 15 of 3 & 4 Edw. VII. c. 64.

Where the statute under which a claim was made for damages to land, caused by the construction of certain works and the closing up of certain streets, provided that any advantage which the real estate might derive from the contemplated works should be deducted from the sum estimated for damage done to the land in arriving at the compensation to be paid, and it was found that the detriment to the claimant's property caused by the closing of the streets was more than offset by the advantage accruing to it from the construction of the works, it was

Held, 1. The claimant could not recover anything in respect to such detriment.

2. Even if the detriment to the claimant's land should alone be considered, he is not entitled to compensation by reason only that he is, by the construction of a public work, deprived of a mode of reaching an adjoining district from his land and is obliged to use a substituted route which is less convenient, if the consequent depreciation in the value of his property is general

to the inhabitants of the particular locality affected, though his property may be depreciated more than that of any of the others. The claimant in such a case would have no right of action at common law, and therefore his land was not injuriously affected within the meaning of the statutes, the test in such cases being, would the complainant have a right of action if the work had been done without statutory authority? *King* v. *McArthur*, 34 S.C.R. 570, followed; *Chamberlain* v. *West End, Etc. Ry. Co.*, 2 B. & S. 617; *Metropolitan* v. *McCarthy*, L.R. 7 E. & I. App. 243; *Caledonian Ry. Co.* v. *Walker*, 7 A.C. 259, and *Tate* v. *Toronto*, 10 O.L.R. 650, distinguished.

Elliott and *MacNeill*, for claimant. *J. Campbell*, K.C., and *T. A. Hunt*, for City of Winnipeg.

Prendergast, J.] [August 4.

EGGERTSON *v.* NICASTRO.

Fraudulent conveyances—27 Eliz. c. 4—Voluntary settlement—Consideration—Subsequent purchaser for value.

The wives of the defendants were sisters, and, on the death of Nicastro's wife, the defendant Pinaro, from motives of humanity and relationship, took over and afterwards maintained the infant children of Nicastro with his consent, as the latter was, through habitual and excessive drinking, unable to take care of them. About eight months afterwards, Nicastro conveyed to Pinaro the property in question, being all he had in the world, in trust for the maintenance of the children and Pinaro continued to support and maintain them. One year later, Nicastro gave an agreement of sale of the property to the plaintiff for a valuable consideration.

Held, 1. At the time of the conveyance to Pinaro, he had a good cause of action against Nicastro on the implied contract to pay for the support and maintenance of the children; and, as a pre-existing debt may be a valuable consideration, the deed was not voluntary in its inception. *Cracknall* v. *Janson*, 11 Ch. D. at p. 10, followed.

2. There was, at all events, an ex post facto consideration sufficient to support the deed in that Pinaro continued to maintain the children for a year before the conveyance to the plaintiff. *Prodgers* v. *Langham*, 1 Sid. 133; *Johnson* v. *Legard*, T. & R. at p. 294, and *Bayspoole* v. *Collins*, L.R. 6 Ch. A. at p. 292, followed.

Anderson, K.C., and *Garland*, for plaintiff. *Graham* and *Fullerton*, for defendants.

Book Reviews.

A Manual of County Court Practice in Ontario. By M. J. GORMAN, K.C., LL.B. 2nd edition. Toronto: Canada Law Book Co., Limited.

It is eighteen years since the first edition, and this new book was urgently needed as many important changes have been made in the jurisdiction of the courts and their equity jurisdiction, which had been taken away, restored and increased. As might have been expected, the work is well done, and we have before us a comprehensive and convenient compendium of County Court practice in the Province of Ontario, comprising the statutes and rules relating to the powers and duties of County and District Court judges and the jurisdiction, procedure and practice of County and District Courts and in appeals therefrom to the High Court with reference to Canadian and English decisions. A useful part of the work for practitioners is the tariffs of fees for County Courts and General Sessions. A number of special forms are also given. The writer in his preface criticises some of the legislation on this subject and his remarks are much to the point and well worthy of consideration for future use. The book has been almost re-written and will be most useful to the many practitioners who must necessarily have it on their office shelves.

Criminal Proceedings on Indictment. By E. B. BOWEN-ROWLANDS, Barrister-at-law. Second edition, 1910. London, Eng.: Stevens & Sons, Limited; Toronto: Canada Law Book Co., Limited. $5.50.

This admirable work summarizes in the form of rules of practice the procedure of criminal trials, so much of which, both in England and Canada, is still dependent upon precedent and ancient custom. These rules are concisely stated, with annotations subjoined to each. Special pleas, motions to quash indictments, applications for postponement, challenge of jurors and the functions of the trial Judge are thoroughly dealt with from the standpoint of the experienced counsel.

A chapter on criminal jurisdiction includes the rules as to degrees of criminality, capacity to commit crime, accessories and venue; but, otherwise the subject matter is quite distinct from that usually found in books upon Crimes and Criminal Evidence.

What is evidence of a crime and what constitutes a crime are subjects which the author leaves to writers upon those subjects, except so far as it became necessary to include references to such matters as they affect procedure. An elaborate index covers seventy of the six hundred and seventy-five pages of this work, which we commend to Canadian barristers practising in the criminal courts.

The Law of Maintenance and Desertion and Affiliation, with the Acts for the Custody and Protection of Children. 3rd edition. By T. C. MARTIN and G. T. MARTIN. London: Stevens & Haynes, Bell Yard, Temple Bar. 1910.

The chapters on maintenance and desertion have been revised and notes have been added on marriage, agency of the wife, contracts of infants, and larceny by the husband or wife. These will be found very useful. Other portions of the book are not applicable directly to this country, but may often be helpful for reference.

A short review of the Law of Bankruptcy. By EDWARD MANSON, Barrister-at-law. 2nd edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1910.

The author brings the decisions up to date, and apoligises for not leaving out cases, a practice which, he remarks, "gives a horrible sense of insecurity." This, however, depends a good upon circumstances.

The Law Quarterly Review. London: Stevens & Sons, 119, 120 Chancery Lane. July, 1910.

In addition to the notes, which are as interesting as usual and one of which has already been referred to in these columns (ante p. 433), the following articles appear in this number: The promotion of peace, by Mr. Roosevelt; The new judiciary; Burgage tenure in mediæval England; The return of a company's capital to its shareholders; The rule in *Re Cobbold;* The co-operative nature of English sovereignty; What is company law, etc., etc. These are followed by the usual masterly reviews of recent law books. Edited as it is by so learned a writer as Sir Frederick Pollock, the *Law Quarterly* is always interesting and instructive. In several places we see the mark of his masterly pen.