Ontario.]

MCRAE v. MARSHALL.

Master and servant—Agreement for service—Arbitrary right of dismissal—Exercise of—Forfeiture of property.

By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who, in consideration thereof, agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employee performed his duties, and was given the right to dismiss the employee at any time for incapacity or breach of duty, the latter, in such case, to have his salary up to the date of dismissal, but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Held, reversing the judgment of the Court of Appeal and of the Divisional Court, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, such right being absolute and not required to be exercised judicially, but only in good faith.

Held, per Ritchie, C. J., Fournier, Taschereau and Patterson, J J., that such right of dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong and Gwynne, J J., that the share of M. in the profits was only a part of his remuneration for his services, which he lost by being dismissed equally as he did his fixed salary.

Appeal allowed with costs.

Dalton McCarthy, Q.C., for appellant.

Nova Scotia.] OTTAWA, May 12, 1891.

MERCHANTS BANK OF HALIFAX v. WHIDDEN.

Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty, the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment,

Held, affirming the judgment of the court below, Gwynne, J., dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per Ritchie, C. J.: K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm, and when the firm received that money they became debtors to the bank for the amount.

Per Strong and Patterson, J J.: That the agent, being bound to account to the bank for the funds placed at his disposal, became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. The right the bank had to elect to treat the act of the agent as a tort was not important, as in any case there was a debt due.

Per Gwynne, J.: The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper, and were not obliged to look to any other for payment.

Appeal dismissed with costs.

Henry, Q.C., and *Ross, Q.C.*, for appellant.

W. Cassels, Q.C., and *W. B. Ritchie* for respondent.

Nova Scotia.]

MUNICIPALITY OF CAPE BRETON v. MCKAY.

Municipal corporation—Appointment of board of health—R. S. N. S. 4th ser. c. 9—37 Vic. c. 6 s. 1 (N. S.)—42 Vic. c. 1 s. 6 (N. S.)—Employment of physician—Reasonable expenses—Construction of contract—Attendance upon small-pox patients for the season—Dismissal—Form of remedy—Mandamus.

Sec. 67 of the Act by which municipal corporations were established in Nova Scotia (42 Vic. c. 1) giving them "the appointment of health officers . . . and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R.S.N.S. 4th ser. providing for the appointment of boards of health by the Lieutenant Governor in Council. Ritchie, C. J., *dubitante* as to appointment by the executive in incorporated counties.

A board of health appointed by the executive council, by resolution, employed M. a physician to attend upon small-pox patients in the district "for the season" at a fixed rate of remuneration per day. Complaint having been made of the manner in which his duties were performed, he was notified that another medical man had been employed as a consulting physician, but refused to consult with him and was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal, and claiming payment for his services up to the date at which the last small-pox patient was cured and special damages