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SCOTT, LOCAL MASTER. DECEMBER 24TH, 1904.

TRIAL.

OTTAWA STEEL CASTINGS CO. v. DOMINION SUPPLY CO.

Mechanics' Liens—Assignment—Debt "Due"—Lien-holder—Priority—When Lien Attaches—Mechanics' Lien Act, R. S. O. ch. 153, secs. 4, 13—Judicature Act, sec. 58 (5).

Ellard, a sub-contractor, commenced work on 19th August, 1903, and completed his contract on 11th October, 1904. He registered a lien on 12th October, 1904. On 14th November, 1903, the contractor by whom Ellard was employed had assigned $2,588.32 of the amount "due" to him from the owner on his contract, to Drummond & Co., also sub-contractors, who duly gave notice thereof to the owner. At the time of the assignment $2,588.32 had been earned under the contract, but it did not become payable until the giving of the architect's certificate on 4th November, 1904.

This action and others consolidated with it in which the liens of the plaintiffs, Ellard, and others, were sought to be enforced, were tried before W. L. Scott, Local Master at Ottawa.

D. J. McDougal, Ottawa, for plaintiffs.

T. A. Beament, Ottawa, for the liquidator of defendants the Dominion Supply Co.

A E. Fripp, Ottawa, for Ellard.

G. F. Henderson, Ottawa, for Drummond & Co. and others.

T. McVeity, Ottawa, for defendants the corporation of the city of Ottawa.

THE LOCAL MASTER held that Ellard's lien related back to the commencement of his work, and under sec. 13 of the Mechanics' Lien Act it was entitled to priority over Drummond & Co.'s assignment for the full amount of the lien, and not merely for that portion thereof actually earned by Ellard up to the date of the assignment; also, that the assignment was valid and bound the debt assigned, though it was not payable at the date of the assignment; also, that a debt due and owing is a sufficient consideration for an assignment of a chose in action, and that the assignment was, therefore, not revocable or impeachable as being voluntary.

JANUARY 23RD, 1905.

C.A.

HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

Appeal to Supreme Court of Canada—Leave to Appeal after Time Expired—Application to Judge in Chambers—Subsequent Application to Court—Election of Forum—Appeal—Discretion.

Motion by defendants, under sec. 42 of the Supreme and Exchequer Courts Act, for an order allowing an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal (3 O. W. R. 851), notwithstanding that the time for appealing had elapsed, and, in the alternative, by way of appeal from the order of MACLAREN, J.A., in Chambers (4 O. W. R. 299), refusing a motion for the same order.

W. M. Douglas, K.C., for defendants.

D. L. McCarthy, for plaintiff.

THE COURT (MOSS, C.J.O., MACLENNAN, GARROW, JJ.A.), held that where a party has two forums to choose from, a Judge in Chambers and the Court, and elects to apply to a Judge, he cannot afterwards come to the Court upon a substantive application. If an appeal lay from the order of Maclaren, J.A., it was not a case in which the Court should interfere with the discretion exercised on the material before him.

Motion dismissed with costs.

JANUARY 23RD, 1905.

C.A.

REX v. ELLIOTT.

Criminal Law—Conspiracy—Trade Combination — Preventing or Lessening Competition — Criminal Code, sec. 520 (d)—"Unduly" — Conviction — Evidence Justifying — Association of Traders—Constitution and By-laws—Limitation of Time for Prosecution — Continuing Offence—Appeal from Conviction—Cross-appeal by Crown.

Defendant was indicted for an offence against sec. 520 (d) of the Criminal Code, which enacts that every one is guilty of an indictable offence and liable to a penalty not exceeding $4,000 nor less than $200, or to two years' imprisonment, who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat, or transportation company, (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any article or commodity which may be a subject of trade or commerce, or in the price of insurance upon person or property.

The indictment came on for trial at the Brantford jury sittings of the High Court in April, 1903, and defendant elected to be tried in April, 1903, and defendant elected to be tried without a jury, as permitted by sec. 4 of 52 Vict. ch. 41 (D.) He was accordingly tried by MEREDITH, J., and found guilty on that count of the indictment framed on the clause of the Code above referred to.

Defendant appealed to the Court of Appeal in the manner provided by sec. 5 of 52 Vict. ch. 41; and the Crown cross-appealed, seeking a conviction upon the other counts.

W. S. Brewster, K.C., for defendant, argued that the word "unduly" in sec. 520 meant no more than "unlawfully," and that, as the acts which were the subject of the alleged conspiracy or agreement were not unlawful, it was not an offence within the Act to conspire or combine or agree to do or commit them. (2) That the prosecution was not commenced in time under sec. 930, which provides that no action, suit, or information shall be brought or laid for any penalty or forfeiture except within two years after the cause of action arises or after the offence is committed, unless the time is otherwise limited by the Act, and that in the present case the time began to run from the date at which the agreement was first entered into.

J. R. Cartwright, K.C., and R. C. Clute, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.—It was proved that defendant was the president and the active participant in an organization composed of himself and, inter alios, some of the persons mentioned in the indictment, known as the Ontario Coal Association, having a formal printed constitution and by-laws, approved on 22nd September, 1900, which were in force and operation within two years before, and indeed up to the time of the trial. Article I., sec. 2, of the constitution declares that the object of the association "shall be the protection of its members against the shipment of coal direct to consumers by producers, mine agents, shippers, or jobbers, and the general improvement of the coal trade in the Province of Ontario." Article V. provided that any firm, individual, or corporation having the defined interest as shareholder in the association, and possessed of certain specified business facilities, and who are regularly and continuously engaged in the sale of coal in the Province of Ontario, shall be eligible for membership in the association. By sec. 4, any organization of coal dealers in any city or town of the province shall be eligible for membership and entitled to one vote for each member of their organization. By sec. 6, miners, jobbers, and wholesale shippers may become honorary members.

Article VII. provides for the mode of hearing and disposing of charges, complaints, and grievances. If amicable adjustment cannot be effected, the president is to be notified to call the executive board together for further action.

By the by-laws, article V., when notified by the secretary, no dealer or member of any organization belonging to the association shall buy coal of any producer, miner, jobber, or shipper, who sells any anthracite coal direct to a consumer in any town where there is a member of this association, or who sells to dealers who refuse to maintain prices fixed by the local organization.

By article VI., no producer, miner, jobber, or shipper, who shall sell coal direct to a consumer in any town or city where there is a member of this association, or to a dealer who refuses to maintain the prices established by the local organization of the town in which he is located, shall be deemed to be in good standing with this association.

Article VII. provides for dealing with claims for violation of the laws of the association. For every sale of anthra-

cite coal made in violation of the provisions of articles V. and VI. of the by-laws, any member of the association doing business in the town or city where such irregular sale is made, may file a claim for 50 cents per ton for all coal thus sold. By secs. 2, 3, and 4, the secretary of the association is to proceed to endeavour to obtain satisfactory redress from the operator or shipper complained of. If the claimant is dissatisfied with the results obtained by the secretary, he may appeal to the executive board. If his claim is sustained by the executive board, the "defendant" is to be notified of the finding, and if the claim is not paid within 10 days thereafter, the secretary shall notify every member of the association that the defendant (giving his name and place of business) is not in good standing with the association. Any member who continues to deal with such operator or shipper after receiving such notice may be expelled from the association on the finding of the board.

By article VIII., the secretary is to publish a list of all members in good standing after the annual meeting, and distribute to members and shippers generally.

Article IX.: The association, through its secretary and executive board, desires to co-operate with all other provincial and state organizations of like aim and purpose, and all operators and shippers who are not in good standing with the association shall be reported to officers of all other associations desiring to co-operate with this association.

A membership list was from time to time published in a small book or pamphlet, shewing such membership to be very widely distributed throughout Ontario; a "look-out list" was also published, addressed by the association "to our wholesale friends," containing the names, according to the printed statement on the first page, of persons in various towns and cities in the Province "who are not regular dealers in coal according to the rules of eligibility of our association, and are not entitled to buy at wholesale under the rules of the trade, but who may seek to buy coal in carload lots at towns where our members are located, and sales made by them will cause an injury to our members, and may result in trouble for the shipper. Our wholesale friends are requested to keep their list constantly in hand, as it will be a guide to them and a guard against irregular shipments," etc.

There was evidence that coal dealers and shippers in Buffalo, from where most of the anthracite coal used in the western part of the province was procured, had refused to sell coal wholesale to persons in Ontario who were not members of the association. . . . In short it was proved, perhaps unnecessarily except for the purpose of shewing the

continued existence of the agreement and of the objects of the association as indicated by their constitution and by-laws, that it was in effective and active operation according to the terms therein set forth. . . .

As sec. 520 was originally framed, it simply imposed pesalties in respect of a conspiracy to commit some unlawful act "unduly" in transactions of the nature of those mentioned in clauses (a), (c), and (d). What was or might be unlawful was left to be ascertained by the general law of the land on the subject, the limited scope of which and the difficulty of its application is well seen by such cases as Mogul S.S. Co. v. McGregor, [1892] A. C. 25, Bohn Manufacturing Co. v. Hallis, 54 Minn. 223, and Macaulay v. Tierney, 19 R. I. 255. When this was further qualified by the word "unduly," it might seem that Parliament had defeated its own object, whatever it may have been, and had made the section unintelligible and innocuous by attaching a penalty only to a conspiracy to do an unlawful act unduly. The difficulty became partly evident to the legislators of 1899, when the word "unduly" was struck out of the sub-clauses (a), (c), and (d). This left the application of the general law untrammelled within its narrow limits; but in the revision of 1900 Parliament shewed that it meant to go further, and did so by striking the word "unlawfully" out of the section and restoring the word "unduly" to the sub-clauses referred to. Thus we are no longer thrown back upon the general law to ascertain what is (a) an unlawful limitation of the facilities for transporting, etc., articles or commodities which may be the subject of trade or commerce, (b) unlawfully preventing the manufacture or production of such article or commodity, or (d) unlawfully preventing or lessening competition in its production, purchase, etc. It is the conspiracy to do these things "unduly" which is now made unlawful and an offence within the meaning of the section. I agree with the construction which has been placed upon it by my brother Meredith in this respect, and the cases I have referred to are of no assistance, as they would not improbably have been different in their result had the law for the Courts which decided them been like ours. What is "undue" with reference to the acts which are the subject of the conspiracy, combination, agreement, or arrangement, is now a question of fact upon the circumstances of each particular case, and I am unable to say that my brother Meredith was wrong in holding that the conspiracy or agreement or combination, by whatever name it may be called, proved in the present case, was one to unduly prevent or lessen competition in the purchase, sale, or supply of anthracite coal, which is a subject of trade or

commerce of vital necessity to every member of the community.

The right of competition is the right of every one, and Parliament has now shewn that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right, that, whatever may hitherto have been its full extent, it is no longer to be exercised by some to the injury of others. In other words, competition is not to be prevented or lessened "unduly," that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be, in one or more of these senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination. The plain object of this association was to restrict and confine the sale of coal by retail to its own own members, and to prevent any one else from obtaining it for that purpose from the operators and shippers. . . .

It was contended that the combination was not within the statute because it affected only the supply at the source in a foreign country, but that is not its whole scope or limit by any means. It strikes at competition in this country in the supply and sale of coal here, and it is immaterial that it affects the conduct of the foreign vendor also, when that has reference to and affects persons resident here: State v. Lancashire Ins. Co., 66 Ark. 466, 477; and see People v. Sheldon, 139 N. Y. 25; Am. & Eng. Encyc. of Law, 2nd ed., vol. 20, pp. 854, 855.

As regards the objection that the prosecution is too late and is barred by sec. 930 of the Code, it may admit of doubt whether that section can apply to a prosecution by indictment, but, if it does, the objection fails, because the offence is a continuing one. The association remained in existence under, and was governed by, its by-laws and constitution, and its members, including defendant, continued to act thereunder up to the time the prosecution was begun.

For these reasons, the appeal must be dismissed and the conviction affirmed.

As to the cross-appeal of the Crown, which asks that defendant may be convicted on those counts of the indictment on which he was acquitted, I think it is sufficient to say that sec. 5 of the Act . . . only gives an appeal from a conviction. The cross-appeal is, therefore, also dismissed.

MACMAHON, J. JANUARY 27TH, 1905.

CHAMBERS.

KERR v. CANADIAN CONSTRUCTION CO.

Costs—Taxation—Witness Fees—Payment—Affidavit of Increase—Travelling Expenses—Railway Passes.

Appeal by plaintiff from certificate of local registrar at Cornwall on the taxation of the costs of defendants, taxed at $870.11, on the ground that the witness fees allowed to defendants by the taxing officer were excessive; and motion for an order that the manager of defendants, William Daly, do attend at Cornwall for the purpose of being cross-examined on his affidavit of disbursements.

E. C. Cattanach, for plaintiff.

Grayson Smith, for defendants.

MACMAHON, J.—The record had been entered for trial at the Cornwall assizes, on 3rd October, 1904, before Meredith, J., and, on plaintiff's application, was adjourned until the non-jury sittings in November, costs to be to defendants if successful.

The action was tried in November before Anglin, J., who directed that judgment be entered for defendants dismissing the action with costs.

The affidavit on which the motion is founded is made by Mr. Cameron, a member of the firm of plaintiff's solicitors, and the only reference to the ground on which the motion is made is contained in the 10th paragraph, which states: "I am informed that the witness fees alleged to have been paid to witnesses Daly and Sutherland were never paid in fact, as both parties travel on a pass."

The affidavit of disbursements was made by William Daly, the manager of defendants, who is engaged on a contract for them at Sudbury, in the district of Nipissing, and in the affidavit he states that he was subpœnaed as a witness at the trial on defendants' behalf, and was paid his necessary expenses in going to and returning from the trial, $56.35—there was taxed off this item $17.55; that William Sutherland, a witness, was subpœnaed at Sudbury and was paid $49.85, his necessary fee going to and returning from the place of trial. (The sum of $5.95 was taxed off this item.) Sudbury is sworn to be 381 miles from Cornwall.

Although the aggregate amount paid for witness fees, as sworn to, appears to have been objected to, no objection was

raised to the specific fees stated to have been paid to the witnesses Daly and Sutherland, until after the taxation was completed and certified to.

A person possessed of a pass entitling him to ride free on a railway is subpœnaed to attend as a witness at a trial, and to reach the place of trial and return therefrom he uses his pass; that would not deprive the litigant, who paid him his witness fees, from recovering them as part of the costs to which he was entitled from the other party.

Both of the witnesses named may have had passes and may have used them; if so, each was in pocket the railway fare required to be paid going to and returning from the place of trial. But, so long as they received the witness fees from defendants, how they travelled is no concern of plaintiff.

While the affidavit of disbursements states positively that the witness fees were paid to Daly and Sutherland, the affidavit of Mr. Cameron merely states he has been informed they have not been paid, and that they both travel on a pass. The source from which this information was derived is not disclosed, and the statement may have emanated from some one who merely surmised it.

Had it been shewn on the material before me that no fees had in fact been paid to Daly and Sutherland, it would have assumed a different complexion.

The motion must be dismissed with costs.

JANUARY 30TH, 1905.

DIVISIONAL COURT.

READHEAD v. CANADIAN ORDER OF WOODMEN OF THE WORLD.

Discovery—Examination of Officer of Benefit Society—Clerk of Subordinate "Camp."

Appeal by defendants from order of MEREDITH, C.J., ante 90, affirming order of Master in Chambers, ante 55, dismissing defendants' motion to set aside an appointment for the examination for discovery of one Harley Field, clerk of defendants' Woodstock "Camp," as an officer of defendants.

C. A. Moss, for defendants.

J. W. Bain, for plaintiffs.

THE COURT (BOYD, C., STREET, J., IDINGTON, J.), dismissed the appeal with costs to plaintiffs in any event.

FALCONBRIDGE, C.J. JANUARY 31ST, 1905.

CHAMBERS.

WATT v. MACKAY.

Evidence—Foreign Commission — Examination of Plaintiff abroad—Terms—Costs.

Appeal by plaintiffs from order of Master in Chambers, ante 93, imposing terms upon plaintiffs as a condition of allowing the issue of a commission to take the evidence of one of the plaintiffs abroad.

F. J. Roche, for plaintiffs.

N. F. Davidson, for defendant.

FALCONBRIDGE, C.J., dismissed the appeal with costs.

ANGLIN, J. JANUARY 31ST, 1905.

TRIAL.

CALEDONIA MILLING CO. v. SHIRRA MILLING CO.

Water and Watercourses—Dam—Ownership by two Persons in Common — Agreement—Construction—Rights in Regard to Water—Surplus Water—Injunction—Damages.

Action to restrain defendants from making a wrongful use of water drawn from a dam known as No. 5, erected at Caledonia on the Grand river, and for damages.

G. Lynch-Staunton, K.C., and A. O'Heir, Hamilton, for plaintiffs.

E. E. A. DuVernet and H. Arrell, Caledonia, for defendants.

ANGLIN, J.—Dam No. 5 was erected under statutory powers by the Grand River Navigation Co., who owned and operated mills situated on opposite banks of the Grand river, on which the grist mills of both plaintiffs and defendants are erected, and also the land upon which the saw-mill mentioned below stands. A subsequent owner of these two grist mill properties desiring to dispose of them to different purchasers, it became necessary to provide for the interest which each purchaser should have in the dam and water privileges upon which both depended for power. The parties have not

seen fit to put in evidence the deeds by which the last common owner of both properties conveyed his title to his several grantees, nor has it been shewn with which property he first parted. I am obliged to infer the terms in which these grants were couched, from the language of an agreement made between the respective predecessors in title of plaintiffs and defendants, dated 20th January, 1880, which recited that each of the two parties to that agreement "is seised in fee of an undivided half of the works known as dam number 5 at Caledonia on the Grand river," and that "both the said parties have the right to draw water from and use the said dam number 5 for their own purposes." This agreement provides for the maintenance and repair of this dam at the joint and equal expense of the parties, and also contains the following clause: "And it is hereby further declared, agreed, and understood by and between the said parties hereto that they are and shall be equally interested in all the rents now derived or which may herafter be derived from the supplying of water from the said dam number 5 to any other person or persons or corporations other than the parties hereto themselves, and that, in the event of it being desirable at any future time to lease the privileges of using water from said dam, the parties hereto shall each have an equal voice therein and be equally interested in any rents or revenues derived therefrom."

The deed to plaintiffs from their immediate predecessors in title, William and Hugh Scott, purports to convey "an undivided one-half interest in all the works known as dam number 5 . . . together with an undivided one-half interest in and to the water rights and privileges and water rents due and accruing due after the date hereof from all and every person and persons whomsoever in respect of the said dam"—subject to the agreement of 20th January, 1880.

The deed to defendants from their immediate predecessor, Robert Shirra, purports to convey "an undivided half in all the works known as dam number 5."

For many years the present litigants and the former respective owners of the two grist mills have used the waters stored by dam No. 5 as they required them. At the time these properties passed into the hands of distinct owners, the proprietor of a saw-mill, situated on the same side of the river as, but above, the grist mill of defendants, had, under a lease from their common grantor, a right to use surplus waters stored by the dam and not required for the grist mills, in order to furnish power for his saw-mill. This right was continued by the separate owners of the grist mills by

new leases, and, under the agreement of 20th January, 1880, they for many years shared equally in the rentals derived from this source. Recently, this saw-mill being in the market, defendants acquired it. They now assert a right, without paying rental therefor, and regardless of the effect of such use upon the sufficiency of the supply of water for the requirements of plaintiffs' grist mill, to take from the dam, in order to run their newly acquired property, with larger wheels and increased power, and for purposes other than a saw-mill, such quantity of water as they require for the uses to which they are putting it. Defendants in effect say that, as tenants in common of the dam and other privileges, they are entitled to use "for their own purposes" as much of the water stored by the dam as they require. Plaintiffs maintain that the rights of the parties are restricted to the use of so much water as may be required to run their respective grist mills—and that the right to use surplus waters not required for these purposes must be disposed of for the joint and equal benefit of both parties, pursuant to the agreement of 20th January, 1880.

The evidence satisfies me that defendants have not restricted themselves to the use of the surplus waters for their newly acquired mill, but they have in fact, for this purpose, drawn off waters which were required for plaintiffs' grist mill, and that in so doing they have also used more than one-half of the waters stored by the dam. In these circumstances, I have to determine the rights of the parties in the premises.

If these rights have been the subject of adjustment by contract between the parties, or are defined by the documents creating them, it is upon the construction of these instruments that their extent and scope must depend. In such construction it is proper to take into account the surrounding circumstances existing at the time the grants and contracts were made: Douglas v. Whittemore, 32 Vt. 685; Lindeman v. Lindsay, 69 Pa. 93, 99.

The predecessors in title of plaintiffs and defendants acquired their respective rights by the conveyances from their common grantor. By the agreement of 20th January they, at least in part, expressed their understanding of these rights. The authorities are uniform that a construction of a grant of a water power which will restrict the grantee to the specific use to which the water was applied when the grant was made, will not be adopted unless the language of the grant unmistakably indicates such to have been the intention of the parties: Hines v. Robinson, 57 Me. 324; Ferry v. Smith, 47 Hun 333; Fowler v. King, 71 N. H. 388; Angell

on Watercourses, 7th ed., p. 261; Gould on Waters, 3rd ed., p. 612.

I find no provision restricting the use of the waters stored by dam No. 5 to any particular use, or to any particular mill.

No doubt all rights of property and all interests in easements or privileges in or connected with this dam are vested in the plaintiffs and the defendants. Of the dam itself they are owners in common; in the easements and privileges each has an undivided half interest. "An undivided half of a thing involves the idea of another half in common; and the owners of such, in the absence of express limitation, must have equal rights and privileges in the whole:" Dow v. Edes, 58 N. H. 192, 195. These, by the agreement of 20th January, 1880, have been stated to assure to both owners "the right to draw water from and use the dam number 5 for their own purposes." Reading the documents before me together, and in the light of the circumstances as disclosed in evidence, in my opinion they indicate the following to be the rights of the parties as to the user of the dammed water:—

1. Each party has an absolute right to use in a reasonable manner (Batavia Manufacturing Co. v. Newton Waggon Co., 91 Ill. 230, 245, and Appelton Pulp Co. v. Kimberly, 100 Wisc. 195), for their own purposes, so much of the dammed water which may properly be used for generating power as he requires, not exceeding one-half of the whole of such water: Runnels v. Bullen, 2 N. H. 532, 537; Bailey v. Rust, 15 Me. 440; Richards v. Koenig, 24 Wisc. 360.

2. Each party has a right to use, for their own purposes, over and above the one-half to which each has such absolute right, so much of the remaining water, which may be properly so used, as will not interfere with or impair the user in a reasonable manner by the other party of the water to which he is entitled and which he from time to time requires: Howe Scale Co. v. Terry, 47 Vt. 109, 126.

3. By "their own purposes" are meant any lawful uses to which such water may reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease of the right to use such water to a third party.

4. Any water not required by either party for "their own purposes," thus defined, is "surplus water," to be dealt with acording to the provisions of the agreement of 20th January, 1880.

Judgment will be entered declaring the rights of the parties in these terms, and enjoining the defendants from using the water stored by dam number 5 in contravention of plaintiffs' rights so declared.

Upon the evidence before me I am unable to say what damages were sustained by plaintiffs by reason of the wrongful use made by defendants of the water, which, under the foregoing declarations, they were not entitled to use. Their right to recover such damages as they have suffered I affirm: Runnels v. Bullen, 2 N. H. 523, 535. Unless plaintiffs are prepared to accept a judgment for nominal damages of $25, which, if so advised, they may enter, they may, by electing to take it within ten days, have a reference to the local Master at Hamilton to ascertain the damages to which they are entitled.

Though not wholly right in their contentions, plaintiffs in obtaining a judgment enjoining wrongful and excessive use by defendants of dammed water and for damages, have had a substantial measure of success. They should have their costs of this action down to the present time.

Costs of the reference and further directions, should the plaintiffs elect to take a reference, will be reserved.

JANUARY 31ST, 1905.

DIVISIONAL COURT.

CLARK v. CAPP.

Master and Servant—Dismissal of Servant—Justification—Grounds—Misconduct—Solicitor's Letter—Negligence or Incompetence—Condonation—Revival.

Appeal by defendants from judgment of MORGAN, Jun. J. Co. Court York, in favour of plaintiff in an action for wrongful dismissal from the service of defendants.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., IDINGTON, J.

W. R. Smyth, for defendants.

W. T. J. Lee, for plaintiff.

BRITTON, J.—Plaintiff resided in England, and was engaged by the agent of defendants as "a general mounter" to come to this country and work for defendants at 50 shillings per week, 55 hours of work to constitute the week. Plaintiff agreed to conform to the rules and regulations of defendants. He was to come out at his own expense, but, if he gave satisfaction and remained with defendants 12 months, his passage

money was to be refunded. The agreement in England was in writing, and was made on 8th September, 1903. Plaintiff at once left England and came to Toronto and entered into the employment of defendants, who were wholesale manufacturing jewellers.

A new agreement, prepared by defendants, was submitted to plaintiff in Toronto, and was signed by the parties. The agreement is full, carefully drawn, and properly so, for the protection of the employer, and it contains many stipulations not material for the purposes of this action, but it contains this as to dismissal: "Notwithstanding anything herein contained, the said company (defendants) may instantly dismiss the said W. Clark from their employment before the expiration of the term of his engagement if he is guilty of disobedience to orders, theft, drunkenness, or other misconduct, and in the event of such dismissal shall not be bound to repay the said sum of $45.67 hereinbefore referred to."

In this new agreement defendants agreed to employ plaintiff and plaintiff agreed to serve "as a mounter," or in any other branch of the business carried on by defendants for the time being, etc.

Plaintiff worked until about 26th February, 1904, when he was summarily dismissed. . . . .

Plaintiff was directed to make a silver miniature case, and he did it so badly that it was not merchantable, and it was broken up, and plaintiff was informed that he would have to make it over "in his own time." Plaintiff made it over, and, according to the evidence of defendants' manager, he took 12 hours to do it, but, instead of "docking" plaintiff for 12 hours, the manager "docked" him for 6 hours. Plaintiff was charged $1.45 for 6 hours' time, and on getting his pay, on pay day, 20th February, 1904, he received his proper wages, less $1.45. . . . Plaintiff called attention to his pay being short, and Capp told him "he had been docked for that miniature." Plaintiff said nothing to Capp in reply, but went to a firm of solicitors, who on 24th February wrote a courteous letter to defendants. What happened next is best told by Capp himself:—

Q. What happened on Friday night? (That is Friday 26th February, 1904.)

A. Friday night he (plaintiff) was told to come into the office, that I wanted to see him, and when he came in I shewed him the letter, and I asked him if he had sent the letter to me, and he said "yes." I asked him if he would withdraw it, and he refused to do so . . . and after doing so I said, "Well, I will pay you back what I deducted from you," and I offered him the full amount, 12 hours'

pay. It was an error on my part. And he said, "Oh, that is more than I was deducted," so I said, "All right then, I will give you what you were deducted," and I paid him back, I think it was $1.45, and as soon as he accepted that, I said, "Now, I don't want you here any more," and he turned around and asked me if I meant to discharge him, and I said "yes."

Plaintiff afterwards offered his services, but defendants refused them, and persisted in the dismissal.

Defendants in their statement of defence justify the discharge of plaintiff because plaintiff was "incompetent, dilatory, and negligent in fulfilling his duties, and because he refused to pay for the damages sustained by defendants as the result of his incompetence and negligence.

Unquestionably the real reason for plaintiff's dismissal was that he made his complaint through a firm of solicitors, and would not withdraw the solicitors' letter.

Plaintiff had the right personally to complain of the deduction, and to remonstrate against being compelled to pay for alleged negligence or incompetence in doing the work. I am not expressing, nor am I in a position to give, an opinion upon the merits, as to whether plaintiff was legally liable to pay the $1.45 or any other sum for defective work, but plaintiff had a right to put forward his side of the case, and if he could do it personally, he could do so by an attorney. I am, therefore, of opinion that the real reason for or cause of plaintiff's dismissal was insufficient to justify it.

Defendants now say that they are entitled to rely upon plaintiff's incompetence as good cause for his dismissal, even if the attorney's letter was, in itself, entirely insufficient.

The difficulties in the way of this defence are: 1. The evidence, in my opinion, is not sufficient to establish plaintiff's incompetence to do the work for which he was employed under the agreement signed after he came to Toronto, or even under the agreement made in England, if that agreement was not wholly superseded by the later one. 2. Defendants had full knowledge of plaintiff's skill, if not before, certainly when, he made the miniature-case, and they retained him after that in their employment. They could not do this and afterwards turn him away for that fault without anything new. McIntyre v. Hockin, 16 A. R. 498, is in point in plaintiff's favour.

Assume that "the condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs, the old offence may be invoked, and may be put in the scale against the offender as cause for dismissal," can it be fairly urged that complaint, orally or by letter of employee or his solicitor, if courteously made, of a

deduction of wages by reason of some alleged fault or wrong-doing, is misconduct such as will permit of the old offence being revived and used to justify dismissal? I think not.

Upon all grounds, I think the decision of the County Court Judge is right.

Appeal dismissed with costs.

FALCONBRIDGE, C.J., and IDINGTON, J., each gave reasons in writing for the same conclusion.

OSLER, J.A. JANUARY 31ST, 1905.

C.A.—CHAMBERS.

BOULTON v. BOULTON.

Appeal—Court of Appeal—Delay in Setting down—Extension of Time—Waiver of Right of Appeal—Proceeding in Master's Office—Consent.

Motion by defendants to extend the time for appealing to the Court of Appeal from order of MEREDITH, C.J. (2 O. W. R. 884) on appeal from Master's report.

W. J. Clark, for defendants.

C. A. Moss, for plaintiff.

OSLER, J.A.—I have read all the papers left with me. The appellants are plainly out of time and in delay in setting down their appeal, and the respondent appears to have proceeded regularly in treating it as an abandoned appeal.

If the delay only were in question, I might have seen my way to relieve the appellants and allow them to set down their appeal for hearing, upon proper terms, notwithstanding the delay. But it appears that since the order appealed from (22nd October, 1903), and under the reference back thereby directed, the parties went into the Master's office, and that the amount due to plaintiff was then settled and arranged by compromise and consent, as shewn by the Master's report of 22nd July, 1904. The appellants now say that this was done without their authority, but that is no part of their reasons of appeal, and indeed could not be. While the Master's report stands, it would seem to be a complete answer to the appeal, and it would, therefore, be useless for me to give the relief now asked.

The motion is, therefore, dismissed, and with costs.

CARTWRIGHT, MASTER. FEBRUARY 1ST, 1905.

CHAMBERS.

SLEMIN v. TORONTO POLICE BENEFIT FUND.

Pleading—Statement of Claim—Motion to Strike out Parts—Allegations of Material Facts.

Plaintiff alleges that for over 27 years he was a member of the Toronto Police force, and as such a contributor to the benefit fund; that under the rules of the fund he was prima facie entitled to a retiring pension; that in pursuance of the rules he made application for such pension to the committee, who reported on it favourably; but that defendants the board of police commissioners were of a different opinion, and refused the application, By sec. 12 of the rules, if the committee and the commissioners fail to concur, in such a case as the present, the judgment or decision of the police commissioners is final.

Plaintiff claimed: (1) a declaration that he was entitled to a half-pay pension for life, being half of the pay or of the average pay received by him in his 20th year of service, equal to $500 per annum, payable monthly, or at the rate of $1.37 a day; (2) payment of arrears of such pension; (3) or, in the alternative, a mandatory order upon defendants the board of police commissioners to sanction the recommendation of the committee; (4) an injunction restraining defendants from refusing or neglecting to recognize plaintiff's right to a pension; (5) in the alternative, repayment of all premiums paid by plaintiff into the fund; (6) a declaration that the police commissioners wrongfully, illegally, and improperly assumed to dismiss plaintiff after his term of service had expired.

The defendants the police commissioners moved to strike out the last clause of paragraph 7 and the whole of paragraphs 11, 18, 20, 24, and 25 of the statement of claim:—

7. The payment required to be made by sec. 15 of the rules for premiums or contributions . . . were deducted monthly from plaintiff's pay, and never came into his hands. Plaintiff was bound to allow such deduction for the said purpose or lose his position on the police force.

11. The action of the committee in approving the application of plaintiff for said pension was approved by the members of the police force at their annual meeting on 10th December, 1904, when all the members of the committee were re-elected for 1905 by acclamation.

18. Defendants have repeatedly recognized and paid claims for pension after service for 25 years, and upon facts and circumstances similar to that of plaintiff.

20. The action of the police commissioners in refusing to sanction the favourable report of the committee is contrary to natural justice and public policy, and the amended rules and regulations made after plaintiff became a member of the force, in so far as they are invoked to support such action, are also contrary to natural justice and public policy, and are null and void as against plaintiff.

24. The defence to this action is not approved by the Toronto Police Benefit Fund, but is authorized by defendants the police commissioners.

25. During the negotiations for plaintiff's engagement by the city of Brantford as chief of police, the defendants the police commissioners informed the chairman of the board of police commissioners for the city of Brantford "that if Detective Slemin would sign an agreement consenting to continue to pay his present assessment into the Toronto police benefit fund until he shall have attained his 55th year of age, or become incapacitated for public service by ill-health in the meantime, they would endeavour to make some arrangement under which Detective Slemin might hold the position of chief constable of Brantford," but plaintiff submits that he was not obliged to accept this onerous condition to obtain what he was entitled to as of right.

W. Johnston, for the applicants.

R. C. Clute, K.C., for plaintiff.

THE MASTER:—The real and substantial question would seem to be, under the concluding words of sec. 12 of the rules, whether the board of police commissioners have absolute discretion, such as is vested in an arbitrator or in the Judge of the Division Court, and can deal with each application to rank on the fund as they think best, without regard to the approval of the committee of the fund, which is elected by the police force.

(1) The objection to the last clause of paragraph 7 is not, in my opinion, well founded. It is nothing more than a statement of the effect of sec. 16 of the rules of the benefit fund, which are part of the evidence on this motion. This says: "All members of the force shall contribute 5 per cent. of the gross amount of their pay monthly towards the fund."

The plaintiff cannot at this stage be deprived of any aid that this provision may give him.

(2) Paragraph 11 does not state a material fact on which plaintiff can rely. What is material is the favourable report of the committee on plaintiff's application. This is set out in paragraph 10, and is confirmed by the statement of defence of the benefit fund. . . .

This paragraph should therefore be struck out.

(3) Paragraph 18 must be allowed to stand. This may prove to be a most material fact in support of the claim, as will appear from a perusal of Ferguson v. Provincial Provident Institution, 15 P. R. 366. To the cases there cited a reference may also be added to a case of Girdleston v. North British Mercantile Ins. Co., L. R. 11 Eq. 197. In giving judgment, Bacon, V.-C., said (at p. 201): "In the bill the plaintiff charges that the contention raised by the letter of 24th April, 1868, and the letters subsequently written on behalf of the defendant company, is entirely contrary to the truth and honour of the said agreement for the insurance of his life, and the whole course of conduct of all parties concerned in the transaction. Part of that course of conduct he might have said much more distinctly was to be proved by the way in which they had entered into policies of assurance with other persons situated as the plaintiff was, the contract being the same in all cases."

This decision is cited in Bray on Discovery, p. 467, as shewing that in such cases defendants must give full discovery to shew their ordinary practice (if such there be) under similar contracts, especially if it has not been to insist on a strict construction of the agreement.

(4) Paragraph 20 should also be allowed to stand, in view of the case last cited. It is merely another way of saying that the conduct of the defendants in this case "is entirely contrary to the truth and honour of their agreement" with plaintiff.

(5) Paragraph 24. This is not material and should be struck out. The benefit fund, as already stated, have put in a defence by which they express no opinion on the merits other than is to be inferred from their approval of plaintiff's claim to a pension. And they therefore submit the matter to the Court.

(6) Paragraph 25 should be allowed to stand. As stated on the argument, it is, in plaintiff's view, a material fact, as shewing the attitude of the commissioners, and involving a recognition by them of plaintiff's rght to a pension.

An order will issue in accordance with the foregoing conclusions. As the substantial success is with plaintiff, the costs will be to him in the cause.

MACMAHON, J. FEBRUARY 1ST, 1905.

CHAMBERS.

PICKEREL RIVER IMPROVEMENT CO. v. C. BECK MANUFACTURING CO.

Discovery—Examination of Officer of Plaintiff Company—Action for Tolls—Timber Slide Companies Act—Information as to Matters Passed upon by Commissioner of Crown Lands—Production of Documents.

Appeal by plaintiffs from order of McAndrew, official referee, sitting for the Master in Chambers, requiring Hieland Hancock, the secretary of plaintiffs, to attend again at his own expense and answer questions which he objected to answer upon his examination for discovery, and to produce the documents referred to in those questions, and requiring plaintiffs to make a further and better affidavit on production.

A. G. F. Lawrence, for plaintiffs.

F. E. Hodgins, K.C., for defendants.

MACMAHON, J.—Plaintiffs are a company owning timber slides, etc., on the Pickerel river, and defendants are a company owning timber, which they intended in the year 1904 to pass through and over plaintiffs' works, for which they were required to pay toll.

Plaintiffs had in January, 1904, made a report to the Commissioner of Crown Lands, which they assumed sufficiently complied with the requirements of sec. 21 of the Timber Slide Companies Act, R. S. O. ch. 194, and had fixed a schedule of tolls proposed to be collected for timber passing through and over the works, which schedule was published in conformity with the requirements of sec. 9.

On 18th March the solicitors for defendants wrote to the Commissioner of Crown Lands stating that they were acting for a client (defendants) who expected to drive timber over the works of plaintiffs, and that, in consequence of defects and omissions—which they pointed out—in the last annual report, dated in January, 1904, filed by plaintiffs in the Department of Crown Lands, it was impossible for them to decide whether the tolls fixed by plaintiffs were fair and reasonable or not.

A copy of the above letter was sent by the Department of Crown Lands to plaintiffs on 22nd March, with a request for an immediate reply, "so that a time for hearing both sides may be fixed and the matter disposed of."

After hearing both sides, the Commissioner of Crown Lands, under the authority conferred by sec. 43, disallowed the schedule of tolls fixed by plaintiffs, and appointed 27th April to consider and fix a proper schedule of tolls, which he is empowered to do by the same section.

In order that the Commissioner may fix the proper tolls to be so paid to a timber slide company, the company may, under sec. 44, demand from the owners of any timber intended to be passed through the works of the company, a written statement of the quantity of every kind of timber which it is intended to pass, and if a false statement is given, the whole of the timber, or such part of it as has been omitted by a false statement, shall be liable to double toll. Defendants, in compliance with the demand made upon them by plaintiffs, represented that they would have logs measuring 2,000,000 feet board measure, which would pass over a section of plaintiffs' works, and the Commissioner, upon the basis of that being the true quantity which would pass through and over the said works, on 6th May fixed the tolls for saw logs 17 feet and under in length at 81 cents per 1,000 feet. And it is alleged by plaintiffs, and not denied, that, after the tolls were so fixed, defendants passed through and over the said works logs which measured only 1,575,845 feet, on which measurement they have paid the tolls as determined by the Commissioner.

The last paragraph of sec. 44 provides that "in case any owner or person in charge, knowingly or wilfully, falsely returns a larger quantity than it is his intention or the intention of such proprietor or person in charge to pass over any of the said sections, the company shall be entitled, in addition to any other remedies it may have, to collect tolls on the difference between the quantity so falsely estimated and the quantity actually passing over the works."

The present action is brought to recover tolls on the difference between the quantity alleged to have been so falsely estimated and the quantity which actually passed over plaintiffs' works.

The numbers of the questions asked Mr. Hancock on his examination for discovery, and which he refused to answer, appear in the notice of motion, and all the questions have reference to the original value of plaintiffs' works; to the cost of renewals and repairs up to 31st December, 1903; as to whether any work was being done by the company this fall; and what was being paid for; what the plaintiffs had done with their sinking fund; how the aggregate sum put in the report for repairs was made up; what were the expenses of management, the manager's and secretary's salaries, etc.

As the Commissioner of Crown Lands was acting in a judicial capacity when both the parties were present before him on 27th April, it must be assumed that he had before him all the information required to be furnished by plaintiffs under sec. 21 of the Act before he fixed the schedule of tolls,—in fact he could not have determined what the tolls should be without such information. And an examination of that section requires that the information to be furnished shall cover everything which could be obtained had the witness answered the questions which were asked.

There is no issue raised as to which the information, if it had been obtained in answer to the questions put, could be given in evidence on the trial. All that information must be furnished to the Commissioner of Crown Lands, who is by the statute made the judge as to what tolls are to be levied, and both the company owning the works and those driving timber over the improvements are bound thereby, and there is no way in which his decision can be questioned at the trial of this action. See Hardy Lumber Co. v. Pickerel, etc., Co., 29 S. C. R. 211-217.

Then as to the appeal by plaintiffs from that part of the same order requiring plaintiffs to make a further and better affidavit on production, particularly regarding the books and papers containing information on the matters referred to in the questions already referred to, and in the additional questions, the numbers of which are also given: the documents sought are the books and statement of plaintiffs shewing the cost of the repairs of the works, etc., etc.

What I have said in regard to the other ground of appeal applies equally to this ground.

The appeal of plaintiffs on both grounds must be allowed, and the order appealed from set aside with costs to plaintiffs in any event.

MACMAHON, J. FEBRUARY 1ST, 1905.

CHAMBERS.

PICKEREL RIVER IMPROVEMENT CO. v. C. BECK MANUFACTURING CO.

Discovery—Examination of Officer of Defendant Company—Action for Tolls—Timber Slide Companies Act—Penalty or Damages.

Appeal by defendants from order of MCANDREW, official referee, sitting for the Master in Chambers, directing C.

Beck, the president of defendants, to attend for examination by plaintiffs for discovery.

F. E. Hodgins, K.C., for defendants.

A. G. F. Lawrence, for plaintiffs.

MacMahon, J.—Plaintiffs are a company owning a timber slide, &c., on the Pickerel river, and defendants are a company owning timber which they intended in 1904 to pass through and over plaintiffs' works, for which they were required to pay toll. Under the first part of sec. 44 of the Timber Slide Companies Act, R. S. O. ch. 194, "Every company may demand from the owner of any timber intended to be passed through any portion of the works of the company, or from the person in charge of the same, a written statement of the quantity of every kind of timber and the destination of the same, and of the sections of the works through which it is intended to pass, and if no written statement is given when required, or a false statement is given, the whole of the timber, or such part of it as has been omitted by a false statement, shall be liable to double toll."

Plaintiffs, being notified that defendants intended to drive timber through or over their works, demanded from them a statement of the quantity, &c., of timber they intended to pass through and over the works, and were notified in writing that the quantity would be 2,000,000 feet board measure, after which the Commissioner of Crown Lands, under the authority conferred on him by sec. 43 of the Act, fixed the tolls which should be paid for the passing of such timber. Defendants, however, instead of driving 2,000,000 feet over the works, passed logs through which only measured 1,575,845 feet, on which they paid tolls.

The action is to recover tolls on the difference between the 2,000,000 feet and the 1,575,845 feet, which passed through plaintiffs' works, under the last paragraph or part of sec. 44, which provides: "In case any owner or person in charge, knowingly or wilfully, falsely returns a larger quantity than it is his intention or the intention of such proprietor or person in charge to pass over any of said sections, the company shall be entitled, in addition to any other remedies it may have, to collect tolls on the difference between the quantity so falsely estimated and the quantity actually passing over the works."

The main ground of appeal is that the action is to recover a penalty, and that in such case an officer of the defendant company cannot be compelled to submit to examination for discovery.

It was held by the Master in Chambers, in Pickerel River Improvement Co. v. Moore, 17 P. R. 287, that where the action was brought under the first part of sec. 42 of the Act (now sec. 44) for "double tolls," it was an action for a penalty, and discovery was refused. But the present action is not under the first part of sec. 44 claiming "double tolls," and thus seeking to penalize the defendants; but is brought under the last part of that section to recover as damages "the tolls computed at the rate of 81 cents per 1,000 feet board measure on 425,155 feet of timber, being the tolls fixed by the Commissioner of Crown Lands, being the difference between the 2,000,000 feet and the said 1,575,845 feet, the quantity actually passed over the said works by the defendants."

Plaintiffs, in order to recover, must shew that defendants, knowingly or wilfully, falsely returned a larger quantity of timber than it was their intention to pass over the works, and the only source from which that evidence can be obtained would be by an examination of an officer of the company and a production of the company's books.

As it is clear that the action is not brought to recover a penalty, the order is right, and the appeal must be dismissed with costs in the cause to plaintiffs in any event.

ANGLIN, J. FEBRUARY 1ST, 1905.

TRIAL.

REX v. BANK OF MONTREAL.

Bills and Notes—Forged Cheques—Crown—Forgeries by Clerk in Government Department—Liability of Bank—Duty of Customer to Check Accounts—Deposit of Cheques in other Banks—Liability over—Estoppel—Alteration of Position.

Action to recover $75,705, the aggregate amount of 12 cheques forged by one Abendeus Martineau, a clerk in the Department of Militia at Ottawa. These cheques were drawn upon the defendants, and were paid by them and charged against the account of the Receiver-General of Canada. The Quebec Bank, the Sovereign Bank, and the Royal Bank, were brought in by defendants as third parties, and relief over against them claimed, the forged cheques having been deposited by Martineau in these banks at Ottawa, and having been presented for payment to defendants by or through these banks.

A. B. Aylesworth, K.C., and J. H. Moss, for plaintiff.

G. F. Shepley, K.C., J. J. Gormully, K.C., and J. F. Orde, Ottawa, for defendants.

W. R. Riddell, K.C., and R. B. Matheson, Ottawa, for the Quebec Bank.

J. A. Ritchie, Ottawa, for the Sovereign Bank.

G. F. Henderson, Ottawa, and A. W. Greene, Ottawa, for the Royal Bank.

ANGLIN, J.—Six of the cheques, aggregating $20,005, made payable to the order of Charles Coté, a fictitious name assumed by Martineau, were deposited by him with the Quebec Bank, in an account opened in that name, and their proceeds he eventually drew out and lost in stock speculations. Four other cheques, totalling $30,200, he made payable to the order of Charles D. Coté, a pseudonym in which he opened an account with the Sovereign Bank, to the credit of which he deposited these cheques, afterwards drawing out and losing their proceeds in like manner. The remaining two cheques, amounting to $25,500, were drawn payable to the order of A. Martineau, and were deposited by the forger to his own credit with the Royal Bank. These moneys also appear to have been all drawn out by Martineau.

Each of the forged cheques was in due course forwarded by the bank with which it was deposited to the Ottawa clearing house. It was there charged up to the Bank of Montreal (defendants) and sent on to that bank, which debited it in the Militia Department "Letter of Credit Account." On the following day (the second after it had been originally deposited by Martineau) it was, with other cheques, transmitted by the Bank of Montreal to the Militia Department, accompanying the daily sheet or statement, in the nature of a pass-book, which the bank furnished to the department.

Martineau entered the Militia Department in August, 1901. It is not suggested that his superior officers had any reason to believe him dishonest or incompetent. . . His first work was the preparation for signature of cheques for payments to be made by the Department. After some weeks he was given the duty of checking, with the cheques paid by the bank on the previous day and returned therewith, the pass-book sheets sent daily by the bank to the department.

All Dominion government moneys are deposited, with defendants, as with other banks, to the credit of the Receiver-General of Canada. Provision is made by the Audit Act

(R. S. C. ch. 29, sec. 30) for the issue by the Receiver-General, from time to time, on application of the Auditor-General, of credits on the several banks authorized to receive public moneys, in favour of the proper officers of the several departments, for sums voted by Parliament, payment of which has been authorized by warrant of the Governor-General. These credits, during the period covered by the Martineau forgeries, took the form of letters authorizing the bank to honour cheques, not exceeding in the aggregate an amount specified, to be signed in the case of the Militia Department by Lieutenant-Colonel Pinault, the deputy minister, and Mr. J. W. Borden, the accountant. . . . On receipt of these letters of credit or authorization, the amount therein stated was placed to the credit of an account known as the Department of Militia letter of credit account, but no corresponding debit entry was then made in the Receiver-General's account, nor were cheques drawn against this letter of credit account on payment debited to the Receiver-General's account, but only to the letter of credit account itself. At the end of each month, upon a statement of all cheques being furnished to the Auditor-General, and a duplicate of such statement to the Receiver-General, the latter, on request of the Auditor-General, who is required first to satisfy himself of the correctness of such statements, causes a cheque upon his account to be prepared, signed by himself and countersigned by the Auditor-General . . . to reimburse the banks for advances made under such credits: sec. 30 of the Audit Act. Upon receipt of this reimbursement cheque, the amount covered by it, and theretofore charged only against the letter of credit account, is debited by the bank in the Receiver-General's account. . .

On behalf of the third party banks it is contended that the present action against the Bank of Montreal, brought to recover moneys of HisMajesty wrongly paid out by that bank, must fail because the bank have never received reimbursement cheques covering the amounts of the forged cheques, and therefore have not paid out His Majesty's moneys, but have advanced their own funds. The defendants have in fact charged up the amount of the forged cheques in the Receiver-General's account, and refuse to account to him for such moneys. . . . In substance, the question for determination is the same whatever be the appropriate form of relief; and that question is whether, as against the Receiver-General representing His Majesty, the Bank of Montreal are entitled to claim credit for the moneys paid out on the Martineau forgeries. . . .

The procedure provided for by the Audit Act has, however, an important bearing upon the main defence advanced by counsel for the defendants.

Martineau committed the first of his detected forgeries on 19th December, 1901, and the last on 17th October, 1902. . . .

I am unable to find that there was negligence or carelessness on the part of any of the various bank officials who handled these cheques, except as to the cheque which Martineau says bore only the one false signature. . . . There was culpable carelessness on the part of the officers of the Bank of Montreal who passed the particular cheque now under consideration. . . As to the cheque for $3,819.04, the negligence of their own officers precludes defendants from setting up any subsequent default of their customer in bar of his claim.

During the months in which he committed his forgeries, Martineau's duties included the checking of the daily pass-book sheets. These sheets with the accompanying cheques . . . were handed over to Martineau to be checked. Martineau promptly abstracted and destroyed his forgeries, which thus came to his hands. At the end of each month the bank sent to the department a detailed statement shewing all the deposits made to the credit of the departmental account, and all withdrawals by cheques during the month. Martineau was intrusted with the comparison of this statement with the cheques received during the month, and, upon his report of its accuracy, a receipt for such cheques and an acknowledgment of the correctness of the balance as shewn by the statement was given to the bank. . . . Such receipts and acknowledgments are produced for the whole period covered by the Martineau forgeries, and the balances which they shew were, in each instance, reached by debiting the forged cheques to the departmental account. . . .

The right of the Crown to recover in this action is tacitly conceded, both by the defendants and third parties—subject to a question . . . as to the form of the relief sought—unless alleged omission or neglect by officers of the government of duties which the ordinary customer owes to his bank, has barred such right. . . .

I find nothing of negligence or carelessness on the part of the Crown officers in the circumstances preceding the forgeries which conduced to their commission. . . .

But, were the present plaintiff other than His Majesty, I should not, in respect of the 11 forged cheques as to which

I have found there was no want of proper care on the part of their officials, without very mature consideration reject as unavailing to the Bank of Montreal for their defence the failure of the depositor himself to check over his pass-book, or, if this duty was intrusted to an employee, to exercise reasonable diligence in supervising the conduct of his clerk in discharging the trust committed to him: Leather Manufacturers Bank v. Morgan, 117 U. S. 96, 116. If the employer has not been negligent in the selection of his employee, it seems at first a little difficult to understand upon what principle he should, though relieved of responsibility for his clerk's dishonesty in committing a forgery, be liable for his dishonesty in concealing it. Yet, in regard to fraudulent checking, it is said that the bank cannot be in a worse position, because its depositor employs a dishonest clerk for this purpose, than it would have been had this important work been intrusted to honest hands: Critten v. Chemical National Bank, 171 N. Y. 219, 230. But see The Chatterton Case, The Times, 21st January, 1891; Paget on Banking, p. 123. The employer is held responsible in the latter case probably because the clerk omits a duty which he was employed to discharge, and which his employer was bound to perform or cause to be performed, whereas the actual forgery is an act of commission entirely outside the scope of the clerk's employment. . . .

But, though the relation of customer and banker is recognized as that of mandant and mandatory (Scholfield v. Londesborough, [1896] A. C. 514, 537, 545, 548, 550), no English authority establishes any contractual obligation on the part of the banker's customer to examine his pass-book. Indeed, there is modern English authority for the proposition that the customer in regard to his pass-book and vouchers owes to his bank no duty which he must discharge at the peril of being bound, if he omits it, by the debit entries contained in the pass-book, as by a settled account. See Chatterton v. London and Counties Bank, referred to at length in Sir John Paget's work on Banking, pp. 120 et seq. . . .

[Reference to the Vagliano Case, 23 Q. B. D. 243, [1891] A. C. 107.]

No evidence of the custom or course of dealing between banker and customer was offered at the trial of this action. Counsel dealt with the matter not as depending upon evidence, but as a question purely of law—a legal inference from or incident of the relation of banker and customer. . . .

[Reference to Commercial Bank of Scotland v. Rhind, 3 Macq. H. of L. 643.]

In the American cases in which the duty of examination by the depositor is clearly affirmed, and knowledge is imputed to him of all that such an examination carefully and honestly made would give, and in the English cases in which the customer, aware of forgeries and failing to communicate such knowledge to his bank, has been deemed to have adopted such forgeries (McKenzie v. British Linen Co., 6 App. Cas. 82, 110, and Ogilvie v. West Australian Mortgage and Agency Corporation, [1896] A. C. 257, 270), the defence available to the bank is treated, not as the breach of an implied contract, but rather as an estoppel, entitling the bank to resist, in the former class of cases, the opening of the settled account between itself and its customer, and in the latter the repayment to the customer of the forgeries held to be ratified or adopted, without proof that even the most prompt and complete discharge by the customer of the duties imposed upon him would have enabled the bank to recover the whole or any part of the moneys obtained by the forger. . . .

The arguments for the imposition upon the customer of the duty which defendants contend he owes them in regard to the pass-book are cogent, and the American cases, if binding as authorities, would be conclusive in favour of the bank. The English authorities do not appear at all so strongly to support defendants' contention. . . .

[Reference to Paget on Banking, p. 120; Hart on Banking, pp. 200, 203.]

In disposing of the present action on this question, I should, on the other hand, have to consider a matter not urged by counsel for plaintiff. Although the evidence upon this point is not wholly satisfactory, I think it may fairly be inferred that the Bank of Montreal had, from month to month, in their own hands the means of detecting discrepancies between their accounts and those of the department caused by these forgeries. . . . It is difficult to account for the failure of careful bank officers to notice that each of the monthly reimbursement cheques from January, 1902, to February, 1903, was drawn for a smaller sum than the bank books and statements shewed to be due. . . . It is still more difficult to understand how, during this period, if the books of the Ottawa branch of the Bank of Montreal were balanced, these discrepancies remained undiscovered, or, if discovered, why an investigation, which would undoubtedly have unearthed the forgeries, did not promptly follow. . . .

But from another point of view these refunding or reimbursing cheques have a direct and very important bearing upon the rights of plaintiff and defendants. Defendants knew they were dealing with the department under sec. 30 of the Audit Act. They must be deemed to have opened the Militia Department letters of credit account, and to have conducted the business connected with it upon the basis of that legislation. They knew that provision is there made for the issue of cheques "to reimburse the bank for advances under credits to cover the expenditures made and authorized." This is the mode of "settling the account" between the bank and the Government prescribed by the statute. It sanctions no other. The transmission by the bank to the department of the daily pass-books sheets with the paid cheques, however convenient in practice, is not a method of checking or settling the departmental account contemplated by the Audit Act. Whatever authority government officers may have to bind the Crown by a settled account must, in view of these express statutory provisions, be restricted to what they authorize and direct. If so, the bank would seem not to have had the right to regard the retention of the pass-book sheets and vouchers without objection as a settlement of accounts. The express provisions of the statute under which the dealings in question were conducted exclude any implication such as might arise in the case of an ordinary customer. Those provisions defer the adjustment of the interim advances made by the bank under the credits issued to it until the Receiver-General, at the instance of the Auditor-General, issues his reimbursement cheque. The sending of this reimbursement cheque and its acceptance by the bank without protest must, therefore, be regarded as effecting the settlement of the account between the bank and the Crown, if there ever was such a settlement. No reimbursement cheque covered the Martineau forgeries. It may well be that the bank, by their acceptance and retention of these reimbursement cheques without protest, bound themselves by settlements of account which exclude the items that they now claim to charge against plaintiff. If the view which I have expressed of the effect of sec. 30 of the Audit Act be correct, it follows that the bank cannot, on any plea of settled account, justify their retention of His Majesty's moneys to cover these forgeries.

Although in Critten v. Chemical National Bank, the Court declines to treat the liability of the depositor as resting upon either an implied adoption of the forged cheques as genuine, or a ratification of their payment, or an estoppel

from asserting that they are forgeries (p. 228), since Devaynes v. Noble, 1 Merivale 530, 535, where Courts have held the depositor, for want of examination of his pass-books and vouchers, chargeable with forgeries debited to his account, it has almost invariably been upon the ground that "his silence is regarded as an admission that the entries are correct." In Leather Manufacturers Bank v. Morgan, 117 U. S. 96, the Supreme Court of the United States treat such a case as a settlement of accounts by conduct working an estoppel. In Blackburn Building Society v. Cunliffe, Brooke, & Co., 22 Ch. D. 61, at pp. 71-2, Lord Chancellor Selborne, delivering the judgment of the Court of Appeal, speaks of "the doctrine that a pass-book passing to and fro is evidence of a stated and settled account." This I take to be the true ground upon which the ordinary customer, who has had opportunity to examine his pass-book and vouchers, and has failed with reasonable promptness to notify the bank of such forgeries as by a proper examination he would have discovered, is precluded from objecting to these debit items in his account. That ground, for reasons above stated, is not, I incline to think, available to the present defendants.

But upon another ground of a very different character their defence must fail. To whatever disabilities the circumstances above adverted to might subject plaintiff in this action, were he an ordinary customer of defendant bank, they do not, in my opinion, in any wise embarrass the position of His Majesty as a suitor. Whether the defence which counsel urge is available to a bank against their customer, who neglects the duty of examining his pass-book and vouchers with ordinary diligence, should be regarded as arising from breach by the customer of an implied contract or undertaking on his part to perform this duty, or as an estoppel resulting from conduct by negligence or omission inducing a reasonable belief, and therefore tantamount to a representation, that the statements as rendered by the bank were correct, upon which the bank have acted or abstained from action to their prejudice—in either aspect, if effectual in this action, such defence would involve imposing upon the Crown responsibility for the fraud, the negligence, or the omission of its servants. In the one case the Crown would be deemed by implication to have guaranteed the honesty, the fidelity, and the diligence of its employees; in the other, it would be precluded from shewing the truth by reason of the breach of duty of its servants.

The King is not bound by estoppel: Vin. Abr., Estop., 432; The Queen v. Delme, 10 Mod. 200.

The government "does not undertake to guarantee to any person the fidelity of any of its officers, or agents whom it employs:" Story on Agency, sec. 319. Nor may the government, under guise of a breach of an implied contract, be made responsible for laches of its officers for which it would not be directly liable as for breach of duty tortious in character: Gibbons v. United States, 8 Wallace 269, 274; United States v. Kirkpatrick, 9 Wheat. 720, 735; Seymour v. Van Slyck, 8 Wend. 403, 422.

"Even in regard to matters connected with the cause of action relied on by the United States, the government is not responsible for the laches, however gross, of its officers:" Nichols v. United States, 7 Wallace 122.

It is a standing maxim of English law that in the King there can be no laches: Black Com., vol. 1, p. 247. For the same reason negligence is not imputable to him.

"This doctrine is indeed not confined to an exoneration of the Crown from liability for the torts of its agents and servants, but is carried so far as to exonerate the Crown or government from the non-performance of contractual obligations which, in the case of private persons, would be fatal to their rights, when such non-performance or negligence consists in the omissions of public officers to perform their duties:" per Strong, J., in The Queen v. McFarlane, 7 S. C. R. at p. 242. "In the case of contracts, they are to be construed as though they contained an exception of the Crown for liability in respect of any wrongful or negligent breach by its servants:" per Strong, J., in The Queen v. McLeod, 8 S. C. R. p. 28. "If Her Majesty could not be made liable in tort for the negligence of the persons who caused the injury to the suppliant of which he complains, it is impossible that she should become liable from the fact that the negligence which is said to have caused the injury is alleged to be in breach of a duty arising out of a contract:" per Gwynne, J., S.C., at p. 66. See, too, Black v. The Queen, 29 S. C. R. 693, 699. . . .

[Cook v. United States, 91 U. S. 309, and United States v. Barker, 12 Wheat. 559, referred to.]

In England the Crown, holding a bill of exchange seized under an extent before it is due, is said to be not chargeable with the neglect of its officer to give notice of dishonour: West on Extents, pp. 26, 29; Byles on Bills, 15th ed., p. 290.

It may be contended that in this latter case the holding by the Crown is ascribable to the exercise of powers incident to its sovereignty, and not to any "entry into the domain of commerce." But neither should the opening in a chartered bank of a current account, necessary for the convenient handling of its moneys to be used in meeting the exigencies of the public service, be deemed an undertaking of commercial transactions implying an abrogation pro tanto or quoad hoc of privileges and rights peculiar to sovereignty. If it were, the government could not, without seriously endangering public interests, avail itself of the facilities afforded by an institution owing its existence to a parliamentary charter.

Whatever may be the case in the United States, where the immunity of the government from responsibility for the laches or negligence of its officers is founded upon considerations of public policy, in British dominions, where this wholesome privilege is part of the ancient prerogative right of the Crown, no implication of waiver by conduct, no consent express or implied given by any officer (Regina v. Bank of Nova Scotia, 11 S. C. R. 1, 11), no inference of extinction or abandonment to be drawn from statutory provisions (Liquidators of Maritime Bank v. The Queen, 17 S. C. R. 657, 661), nothing less equivocal, authentic, and compelling than a clear legislative enactment, in express terms taking it away, can be permitted to deprive the sovereign of the protection afforded by this portion of his royal prerogative, if he be minded to claim it: Chitty on Prerogative, p. 383.

In my opinion, therefore, plaintiff is entitled to recover from defendants the amount claimed, $75,705, with interest from the date at which such sum was, or the respective dates at which its component parts were, charged against the account of the Receiver-General of Canada, and were thus converted to the use of defendants. From this, however, must be deducted the sum of $12,443.77, found upon Martineau's person when arrested, which was taken possession of by the Dominion government. This money Martineau acknowledges to be a portion of that derived by him from his forgeries. Interest upon this latter sum from the date of its recovery must also be credited. Plaintiff shall have the costs of this action from defendants.

The questions raised by the claim of the defendants against the third party banks must now be considered. Counsel for the Bank of Montreal argued that the third party banks are liable as indorsers, or upon warranty or representation that the cheques were genuine, involved in or to

be implied from their presentation of such cheques for payment through the clearing-house. Defendants also claim to recover from each of the three banks to which they paid proceeds of the forgeries, the several amounts thereof, as moneys paid and received by and under mistake of fact.

Upon the evidence I find that the third party banks were not indorsers. They did not become parties to the cheques to pass title thereto. They did not place their names upon them with intent to assume liability, or for any other purpose than to identify as their property such cheques as they had respectively sent to the clearing-house, and to signify to the officer there in charge, to what bank he should credit such cheques. Nothing depends upon the fact that these forged cheques were passed through the Ottawa clearing-house.

Neither did they warrant or represent anything as to the genuineness of the cheques. Defendants did not act voluntarily on the request of the third parties. They paid in assumed discharge of their obligations to the plaintiff. In such cases there is no implication either of warranty or of representation upon which a claim for indemnity could be founded: Corporation of Sheffield v. Barclay, [1903] 2 K. B. 580. Neither was there any passing of title by delivery, the cheques being "at home" with the Bank of Montreal.

The third parties resist the claim of defendants upon several distinct grounds, viz.: 1st, that there was negligence on the part of defendants in making the payments which precludes recovery; 2nd, that, by the law merchant, failure on the part of the drawee to give notice of dishonour of a forged bill on the day of its presentment and payment, absolutely discharges a bona fide holder for value who has received payment innocently; 3rd, that a similar statutory obligation, its breach entailing like consequences, is imposed by sec. 54 of the Bills of Exchange Act; 4th, that the fact that defendants paid their own customer's cheque and the change in position of the third parties since payment by defendants render it inequitable that the latter should be permitted to recover.

I have found that, except as to the fourth cheque of the series, there was no negligence on the part of any of the bank officers in passing these cheques. It may be that the special negligence on the part of the Bank of Montreal in regard to the fourth cheque, precludes recovery from the Quebec Bank of the money paid upon it. I find it unnecessary to dispose of this question.

On behalf of the Royal Bank evidence was given to establish that, although, when deposited, the last two cheques

of the series were formally placed to Martineau's credit in his account, the ledger-keeper was in fact instructed not to permit him to draw against that account in respect of the sums represented by these cheques until they had been actually paid by the Bank of Montreal. It is not pretended that Martineau was informed of these special instructions, or of anything which would restrict his right to treat these deposits as actual credits which he was immediately entitled to use. In Capital and Counties Bank v. Gordon, [1903] A. C. at p. 245, Lord Macnaghten says: "It is well settled that if a banker before collection credits the customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque." And Lord Lindley, at p. 249: "It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it unless something occurs to deprive him of that right. Nothing occurred in this case to the knowledge of the bank which had any such effect." I cannot regard the Royal Bank as a mere agent of Martineau for the collection of the cheques deposited with it. Like the two other third party banks, on whose behalf no such evidence was offered, I must treat the Royal Bank as holders in due course of the two last cheques of the series, so far as there can be bona fide holders in due course of forged paper: Bills of Exchange Act, sec. 29.

On behalf of the Quebec Bank it was proved that its rules requiring certain notices of withdrawal to be given are notified to depositors by being printed inside their pass-books. The manager, on examination in chief, stated that these rules were insisted on; but on cross-examination he conceded that the rule requiring 15 days' notice of withdrawals is not always observed. In the case of the Royal Bank the pass-book contains a notice that the bank reserves the right to require 15 days' notice when all or any portion of a deposit is withdrawn. There is no evidence of any similar provision affecting the Sovereign Bank account.

An examination of the Coté account with the Quebec Bank, shews that notice of the forgeries to the bank would have enabled the bank to protect themselves, in the case of the first forged cheque, if given on or before the 5th day after it was deposited; of the second cheque, if given on or before the 69th day; of the third, on or before the 39th day; of the fourth, on or before the 34th day; of the fifth, on or before the 5th day; and of the sixth, on or before the 3rd day. In the case of the Sovereign Bank notice would have had a similar effect if given as to the seventh and eighth cheques

on or before the 7th day after their deposit, and as to the ninth and tenth cheques, on or before the 3rd day following their deposit (allowing for accumulated interest not credited). In the case of the Royal Bank notice would have been effective if received in the case of the eleventh cheque, on or before the 6th day following its deposit, and of the twelfth cheque, on or before the 8th day after its deposit. In each case a still later notice would have enabled the bank to protect themselves as to part of the amounts of these cheques which, except three, were paid by defendants on the day after their deposit with one of the third party banks. The second cheque, deposited 24th December, 1901, was paid 26th December, 1901; the 5th, deposited 18th April, 1902, was paid 21st April, 1902, being the second juridical day after its deposit; and the last cheque, deposited 15th October, 1902, was paid 17th October, 1902.

In the case of every cheque of the series, therefore, the position of the recipient bank was altered to their prejudice after the day on which payment was made by defendants. This clearly distinguishes the present case from Imperial Bank of Canada v. Bank of Hamilton, [1903] A. C. 49, in which the face value of the forged cheque had been obtained by the depositor from the former bank before its presentation for payment at the latter. The Privy Council, in holding the want of notice of the forgery to the Imperial Bank on the day of payment to be unavailing as a defence, lays distinct stress upon the fact that "no loss has been occasioned by the delay in giving it:" p. 58. The question presented for my determination, therefore, is not concluded by that decision. I have not overlooked the language found at p. 57 of the report, where Lord Lindley, speaking for the board, says: "Quite apart from the fact that the appellants were not prejudiced by want of notice on the day of payment, it appears to their Lordships that the stringent rule referred to . . . does not really apply to this case." His Lordship was speaking of the well known rule in regard to genuine bills and notes laid down in Cocks v. Masterman, 9 B. & C. 902, "reasserted in even wider language by Matthew, J., in London and River Plate Bank v. Bank of Liverpool," [1896] 1 Q. B. 7. That rule in no wise depends upon negligence, and involves a conclusive presumption of prejudice for want of notice on the day of presentation for payment. The Judicial Committee held it inapplicable to "a simple forgery," whether or not actual prejudice resulted from notice not being promptly given. But I understand that this judgment

simply excludes from consideration, as inapplicable to the case of mere forgeries—such as we are dealing with—the rules as to notice established in regard to genuine bills and notes.

What I have said answers the second and third contentions of counsel for the third parties, but does not affect the question raised by their final contention as above stated. As to the third ground, the Bank of Montreal never were acceptors of any of these cheques, within the meaning of sec. 54 of the Canadian Bills of Exchange Act (see sec. 17, subsec. 2). I, therefore, proceed to deal with the question between defendants and the third parties apart from all considerations as to notice peculiarly applicable to bills and notes of established genuineness.

Where in the course of business, as the result of mistake of fact between them, a loss has fallen on one of two equally innocent and blameless parties, it is held by some Courts in the United States that such loss must remain where the chance of business has placed it: Gloucester Bank v. Salem, 17 Mass. 33. Though this doctrine received some countenance from Mansfield, C.J., who said, in Price v. Neal, 3 Burr. 1357, "If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man," it is now well established in English law that money paid and received under mutual mistake of fact may be recovered back, unless, in all the circumstances, it would be inequitable to permit such recovery: Imperial Bank v. Bank of Hamilton, [1903] A. C. 49; Kelly v. Solari, 9 M. & W. 54; Ryan v. Bank of Montreal, 12 O. R. 39, 14 A. R. 533.

The grounds upon which recovery has been successfully resisted in many cases of forged signatures are two, viz.: that the fact that the person seeking to recover is the banker of the drawer, whose signature has been forged, in the absence of any fault on the part of the payee, deprives him (the banker) of all right to relief; and that a prejudicial alteration of his position by the payee after payment, renders it unjust that he (the payee) should be required to refund. These two grounds demand careful consideration.

For defendants it is contended that, while the duty of the banker to his customer to know his signature is absolute, he owes no such duty to any other person, and no third party can claim any benefit from such an obligation.

It cannot be denied that there is a great mass of authority to the contrary. In Price v. Neal, 3 Burr. 1357, Lord

Mansfield says: "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he paid it." In Smith v. Mercer, 6 Taunt. at p. 81, Dallas, J., says: "If an acceptor is then bound to know the drawer's handwriting, is it less the duty of a banker to know the handwriting of his customer? In degree, it is more; for he sees it, probably, every day. I consider, therefore, the payment of this bill as a want of due caution on the part of the plaintiffs." Heath, J., says: "The situation of bankers is most peculiar; they are bound to know the handwriting of their customers." Gibbs, C.J., approves of these statements. In both of these cases the right of recovery of the banker from the holder for value, whom he had paid, was under consideration. In neither was there any evidence that by greater care the forgery could have been detected.

In Wilkinson v. Johnston, 3 B. & C. 428, 436, the Court speaks of the fault of a drawee who pays on a forged signature. To Bramwell, B., in Hart v. Frontino Gold Mining Co., L. R. 5 Ex. at p. 115, is attributed this statement: "As against a bona fide holder for value a banker paying a forged cheque cannot afterwards recover back the money." In Simm v. Anglo-American Telegraph Co., 5 Q. B. D. at p. 196, Lindley, J., says: "A banker paying a forged cheque to an innocent holder for value cannot recover back its amount. In Sheffield Corporation v. Barclay, [1903] 2 K. B. 580, Vaughan Williams, L.J., refers approvingly to the dicta of Bramwell, B., and Lindley, J.

In Union Bank of Lower Canada v. Ontario Bank, 24 L. C. J., Dorion, C.J., says: "If a bank accept a forged cheque of its customer, and the forgery consist in the signature of its customer, it cannot recover the money, because it is bound to know the signature of its own customer." And Cross, J., adds: "An admitted exception is where the drawee of a bill pays it, thus recognizing the signature of the maker. He must bear the loss if it turns out that the maker's signature is forged." Numerous American cases may be found to the same effect. See Levy v. Bank of United States, 4 Dall. 234; Bank of United States v. Bank of Georgia, 10 Wheat. 333. In the case last cited Story, J., says: "After some research, we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." See, too, National Bank of Commerce v. National Mechanics' Banking Association, 55 N. Y. 211, 213, 214. These cases would afford ample authority to support a judgment against the defendants.

It will be noticed, however, that neither Lindley, J., nor Bramwell, B., speaks of the banker as bound to third parties to know his customer's signature. While advancing the proposition broadly that his mistake precludes recovery, these Judges abstain from stating for what reason it is, or should be so. Cross, J., alludes to the banker's recognition of the forged signature.

There is no relation between the banker and the payee which can extend to the latter—a stranger—the obligation which the banker is under to his customer, the real foundation of which must be that, in the absence of a genuine signature, the banker has no mandate or authority from the customer to pay. Notwithstanding the profound respect which I entertain for such eminent jurists as Lord Mansfield, Sir A. A. Dorion, and Mr. Justice Story, I am bound to express my opinion that the alleged right of the stranger to set up a duty to himself of this kind, appears to rest upon no solid foundation, and is incapable of logical proof; and, in the light thrown upon the real position of simple forgeries by the Privy Council judgment in Imperial Bank v. Bank of Hamilton, the propositions stated by all the distinguished Judges whom I have quoted, must, I venture to think, be deemed too broad. In the much canvassed case of London and River Plate Bank v. Bank of Liverpool, [1896[1 Q. B. pp. 10, 11, Matthew, J., discussing some of the judgments from which I have taken excerpts, and realizing the difficulty which I find, would support them by suggesting as the real ground for these decisions the rule laid down in Cocks v. Masterman. But Matthew, J., spoke before it was decided that the holder of a simple forgery has not the same rights as to notice which belong to the holder of genuine negotiable paper.

Finding myself unable to agree with the proposition that the banker owes to the holder of a cheque the duty of knowing his customer's signature, I prefer not to rest my decision upon it.

Upon a distinctly different ground the banker may be precluded from recovery. The finding that there was no negligence on the part of the Bank of Montreal officials (except as to the fourth cheque) because the forgeries were so executed that no reasonable care in examination would have detected them, involves a finding that the bank had not means of knowledge. It is not, therefore, driven to rely upon the principle established by Kelly v. Solari, 9 M. & W. 54. (See Jacobs v. Morris, [1902] 1 Ch. at p. 833). But, though he has neither knowledge nor the means of knowledge of the

forgery, if a banker by his conduct represents to a person in the position of any of the third party banks that he is prepared to treat a drawer's forged signature as genuine, and such person, in consequence of such representation, acts, or refrains from acting, to his prejudice, is the banker ex aequo et bono entitled to ask the Courts to shift his loss to the innocent person whom he has misled, however blamelessly? Did defendants so represent?

Matthew, J., meets this situation in London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7, thus, when, speaking of Price v. Neal, he says: "It seems to me the principle underlying the decision is this, that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position." But the banker did in fact consider the signature genuine, and, unless his conduct is to be taken as calculated to convey more than this belief to the holder whom he pays, there is no misrepresentation to found an estoppel. He, therefore, need not seek to withdraw from that position. Does he not, however, go further, and impliedly assert that he accepts and assumes responsibility for the cheque as genuine? Such, it seems to me, is the construction which a reasonable man might be expected to put on a banker's payment of his customer's cheque, drawn upon him, and it is from this position that he cannot, if his assumption of it has been the cause of appreciable detriment to a person who might be expected to rely upon it, as against such person, be permitted to recede. Had defendants made express representations that these cheques were genuine, they would beyond doubt be bound thereby: Deutsche Bank v. Beriro, 1 Com. Cas. 255. They must be assumed to have known that payment of these cheques would be likely to induce in the holders a belief, upon which they might act, or refrain from action, that the Bank of Montreal deemed the forged signatures of the departmental offices genuine and had accepted and assumed responsibility for the cheques to which they were appended. The fact that the banker has special facilities for recognizing forgeries of his customer's signature, and may be expected, for his own protection, to take every precaution to detect such forgeries, fosters this belief, and is calculated to beget in the holder absolute confidence in his security, so much so as to give to this representation by conduct all the force of an express representation of fact.

Upon the assumption that the holder of a forgery had the same rights as to notice as the holder of a genuine bill, no inquiry as to resulting prejudice to him would be requisite,

because in that case such prejudice would, in the absence of notice, be conclusively presumed: Mather v. Maidstone, 18 C. B. 294. But, since the decision in Imperial Bank v. Bank of Hamilton, the holder of a simple forgery cannot claim such rights. Therefore, the inquiry as to loss or prejudice consequent upon the representation is relevant and necessary: Simm v. Anglo-American Co., 5 Q. B. D. at p. 217, per Brett, L.J.; Smith v. Chadwick, 9 App. Cas. at p. 196.

Had the third party banks been merely agents for collection, the fact of prejudicial alteration in position and the causal connection therewith of defendants' conduct would be obvious. Is it less so where, although the amounts of the forged cheques had been placed to the credit of the depositor before, the banks in fact retained their proceeds, or the consideration to be given for them, until after, payment by the drawer?

In the case of the Royal Bank clearly not, because, upon the positive and uncontradicted evidence of its manager, payment was made by the bank to Martineau solely in reliance upon the assurance which payment by defendants afforded. The estoppel in favour of the Royal Bank is, in my opinion, complete. Its alteration in position is unquestionably directly attributable to the confidence engendered by the act of the defendants.

I do not find in its rule requiring notice of withdrawal sufficient ground for distinguishing the case of the Quebec Bank from that of the Sovereign Bank. In the absence of express evidence to that effect, should it be inferred that the conduct of defendants induced the alteration of position which ensued in the case of these banks?

In the first place the onus of proving that such is not the case is perhaps upon defendants: Smith v. Hay, 21 Beav. 552, 7 H. L. C. 750; Redgraves v. Hurd, 20 Ch. D. at pp. 21 and 24; Trail v. Baring, 4 DeG. J. & S. at p. 330. The position of defendants required that they should either pay or refuse to pay these forged cheques. In the latter event the third parties, instead of being "lulled to rest," would have been warned immediately to take steps to protect their interests, which, in this case (in that respect different from most others) it is clear would have been effective.

In Knights v. Wiffen, L. R. 5 Q. B. at p. 665, Blackburn, J., says: "If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris and demanded back his money; very likely he might not have

derived much benefit if he had done so; but he had a right to do it."

These third party banks had the forger's moneys in their own hands.

Cameron, C.J., in Merchants Bank v. Lucas, 13 O. R., says at p. 526: "If it is necessary that there should be affirmative evidence of their being prejudiced by actual doing or refraining from doing, there has been no legal estoppel in this case. But I am of opinion that the principle of estoppel is more extensive in its application, and it will be sufficient if it be shewn that, in the absence of the matter of estoppel, the plaintiffs might have put themselves in a position from which a benefit might accrue to them. It is unimportant whether they would have taken steps to secure the benefit or not."

It is not unreasonable to infer that the change in position of the third party banks, subsequent to the payment by defendants of the forged cheques, is attributable, in part at least, to the fact that such payment was made. They refrained from taking steps which there is every reason to suppose they would have taken in the event of non-payment by defendants on presentation—a fact of which they would undoubtedly have had prompt notice.

Though the inference that the loss sustained is ascribable to the misrepresentation established, is not a conclusion of law, as had been stated by Jessel, M.R., in Redgraves v. Hurd, (Smith v. Chadwick, 9 App. Cas. 196, and Smith v. Land and Loan Corporation, 28 Ch. D. 16), without express evidence that the payments to Martineau by the Sovereign Bank and the Quebec Bank were induced by the fact that the Bank of Montreal had honoured the cheques deposited by him, as a juror I find little difficulty in drawing such an inference of fact.

Upon the ground of estoppel arising from its payment of the forged cheques and the change in the position of the third parties which ensued, rather than for default or breach of duty in failing to detect forgeries of its customer's signature, or upon any conclusive presumption of culpable negligence raised by that misfortune, the Bank of Montreal should, in my opinion, be held not entitled to recover.

Apart from any application of the principles of estoppel, the third parties appear to have a defence to the claim made upon them for repayment. "When one of two innocent parties must suffer by the acts of a third, he who has enabled

such third person to occasion the loss must sustain it." Although the third party banks had credited Martineau's account with the amount of the forged cheques before they were presented for payment, that mistake or indiscretion, if I may so call it, would have been quite innocuous to them, had it not been for the subsequent mistake of defendants in honouring those cheques. This act of defendants was, I think, the proximate cause which enabled Martineau to reap the benefit of his frauds. Upon the principle established by Lickbarrow v. Mason, 2 T. R. 63, they must bear the loss. Upon both grounds, however, in my opinion, defendants cannot ex acquo et bono claim to be relieved at the expense of the third parties from the loss which they have sustained.

But, inasmuch as the third parties have, upon equitable grounds, successfully resisted defendants' claim, they must in turn do equity. While the claim made against the third parties will be dismissed with costs, the Royal Bank must pay to defendants the balance of $250 which they appear to hold to Martineau's credit, and the Quebec Bank the sum of $5, which they retained. The Sovereign Bank account had been closed some time before Martineau was arrested.

In Parsons on Bills and Notes, 2nd ed., p. 80, in Daniel on Negotiable Instruments, 5th ed., pp. 378-9, and 682, in Hart on Banking, p. 203, in Chitty on Bills, 11th ed., p. 431, and in Sir John Paget's Law of Banking, at pp. 164 et seq., will be found statements supporting several of the propositions upon which this judgment rests.

FEBRUARY 1ST, 1905.

DIVISIONAL COURT.

BAILEY v. BAILEY.

Deed—Discharge of Mortgage—Execution without Understanding or Advice—Repudiation—Setting aside—Evidence.

Appeal by defendant from judgment of MEREDITH, C.J., in favour of plaintiff, without costs, in an action for a declaration that a discharge given by plaintiff of a mortgage made by one James Bailey and assumed by defendant, was null and void, the discharge having been executed by the plaintiff without advice and without knowledge on his part of its meaning and effect.

W. H. Kingston, K.C., for defendant.

I. B. Lucas, Owen Sound, for plaintiff.

The judgment of the Court (BOYD, C., STREET, J., IDINGTON, J.), was delivered by

BOYD, C.—The evidence, to my mind, disproves any intelligent execution of the discharge by plaintiff. Defendant procured it to be drawn by the local conveyancer, Davidson, and he himself could not read it, and he says that having the discharge thus drawn in his pocket he did not understand it. The doctor (in attendance on plaintiff, who was old and bed-ridden) says he heard nothing of it before, and when it was produced it was the first document of that kind that he had ever seen, and that it seemed partly a mystery to him. It was apparently read over at full length by the doctor to the old man, and, without a word of explanation asked or given, was then signed. Confessedly it did not represent the real agreement as deposed to by defendant, for part of the money was still to be paid on the mortgage, though it was to be discharged. But that this was the real agreement depends entirely on the contradicted testimony of defendant. Whatever the real agreement was, it was not provided for in any manner at the time this absolute discharge was signed. This discharge should, for this reason, in all the circumstances, be set aside as not representing the real transaction, and there is no evidence by which it can be rectified. The old man was not in a condition to give away this much money secured by mortgage without having some sort of protection to see that he was being fairly dealt with. . . .

There was prompt repudiation by plaintiff on his becoming thoroughly aware of what had happened. The evidence repels the notice that plaintiff was of generous disposition, and shews that it would be unlikely that he should make such a present of hundreds of dollars during his life—whatever he might do by will. . . .

Altogether I agree with the views and conclusions of the trial Judge. . . .

The mortgage will stand for the balance due after crediting the payment on 10th March, and plaintiff disclaims seeking to retain any personal remedy against the original mortgagor.

Judgment affirmed with costs.

MAGEE J. FEBRUARY 2ND, 1905.

TRIAL.

ONTARIO SILVER AND ANTIMONY CO. v. ANDREW AND ONTARIO BANK.

Partnership—Liability of Reputed Partner for Moneys Deposited with Co-partner and Misappropriated — Private Bankers—Registration of Partnership—Chartered Bank—Liability for Moneys Misappropriated by Customer to Pay Debt to Bank—Trust—Notice—Alteration of Bank's Position—Cheque.

Action to recover $5,826.75, the amount of a cheque given by plaintiffs to Thomas Howarth, then president, to be deposited with a firm of Andrew & Howarth, private bankers, of which Thomas Howarth was a member, to the credit of plaintiffs, and alleged by plaintiffs to have been deposited with defendants the Ontario Bank and applied upon the indebtedness of the firm to the bank.

The partnership between defendant Andrew and Thomas Howarth was formed in 1881. They did business as private bankers at Oakville, and opened an account with the Ontario Bank of Toronto, to the credit of which they from time to time deposited moneys received, and drew cheques upon it. They also borrowed money from the bank upon their own promissory notes collaterally secured by their customers' paper to a greater amount. Their current account with the bank was sometimes overdrawn.

Thomas Howarth died 1st December, 1902.

Defendant Andrew testified that he had in fact retired from the firm in 1891, and that Howarth thereafter carried on the business alone, but still in the name of Andrew & Howarth, Andrew allowing his name to be used and also leaving his money in the business. No notice of the dissolution was given to the Ontario Bank, nor to the customers or the public. A declaration of the partnership had been registered in 1882, but no declaration of the dissolution.

At Howarth's death the liabilities of the business exceeded the assets by $40,000 or $50,000.

Plaintiffs had in 1892 acquired a mining lease, and never had any other asset except a small amount of money raised on stock, which had been eaten up in expenses. The lease had remained on their hands, and the company had been dormant, except for a few spasmodic meetings of directors,

till in 1902 a sale was effected for $6,000 under an option given a few years before. Howarth was president, and one Critchley was a director, and they two, being the largest shareholders, were asked by their fellow-directors to conclude the sale. They did so, and in September, 1902, $5,826.75 was paid by the purchaser to plaintiffs' solicitors, and it was proposed by Howarth, and agreed by Critchley, that the cheque should be deposited in the Andrew & Howarth bank. Critchley supposed that Andrew was a partner, and a responsible man. The solicitors made out a cheque in favour of "Thos. Howarth or order," adding beneath the payee's name "President Ont. Silver & Antimony Co." A meeting of the directors was held on 7th November, 1902, at which a resolution was passed sanctioning and confirming the payment to Howarth as president for deposit in his bank. Howarth was present, and stated that the money was on deposit in "our bank."

The cheque for $5,826.75 was received by Howarth at Toronto on 27th September, 1902, and was by him on the same day taken to the Ontario Bank and indorsed in blank "Thomas Howarth," and then deposited to the credit of himself in a savings bank account which he had opened in June, 1902, and to the credit of which there was, before this deposit, only $65. In making the deposit Howarth told his son, who was the receiving teller of the Ontario Bank, that the cheque represented the proceeds of the mining company's sale, and that he would distribute it so soon as things were arranged among the shareholders. It was not shewn that any other officer of the bank had any knowledge of this, nor that the son knew what moneys his father would be entitled to on the distribution. On the same day Howarth drew $525 out of the savings bank account, for some purpose.

At that time Andrew & Howarth owed the Ontario Bank $27,000 on paper, besides an overdrawn account of about $900. On 21st October, by letter, and previously by word of mouth, the manager asked Howarth to reduce it.

On 29th September, 10th and 11st October, respectively, Howarth drew cheques on his savings bank account for $2,000, $2,000, and $1,000, and these were directly deposited on the same dates to the credit of the Andrew & Howarth account in the Ontario Bank. The manager of that bank admitted that he knew at the time of these deposits that $5,000 came from the private account of Howarth to the firm account, though he disclaimed any knowledge of the source from which the private account moneys came. The balance of the $5,826.75 was chequed out by Howarth on 27th November, 1902.

Howarth gave no credit to plaintiffs in the books of Andrew & Howarth, for the $5,826.75, nor did he make any debit entry.

At his death on 1st December, 1902, the liability of Andrew & Howarth to the Ontario Bank had been reduced to about $20,000.

After Howarth's death the Ontario Bank, in consideration of $2,500 paid to them by Andrew, released him from any claim against him personally in respect of the firm. It was not shewn that at that time either the bank manager or Andrew knew anything of plaintiffs' claim.

R. B. Henderson, for plaintiffs.

C. Millar, for defendant Andrew.

J. H. Moss, for defendants the Ontario Bank.

MAGEE, J., after setting out the facts at length, and finding that Andrew's account of the dissolution of partnership was entitled to credence, and that there was a dissolution in 1891, of which the Ontario Bank and the outer world were not notified, concluded:—

Andrew's liability in the matter as a reputed member of the firm was not greater than if he had been an actual member of it. Howarth having received the cheque not as a member of the supposed banking firm, but as president of plaintiff company, to be deposited with the banking firm, and the cheque requiring his personal indorsement, defendant Andrew, if liable as a partner, did not become liable by Howarth's receipt of it on 27th September, nor by Howarth's statement on 7th November, 1902, made to discharge himself of his personal duty, that the amount had been so deposited.

Howarth having actually deposited $5,000 of the money to the credit of the banking firm, and in so far carried out his instructions, although he made no entry thereof in the firm's books, and those instructions having been given on the faith of Andrew's supposed partnership, the latter became liable to the extent of $5,000 as fully as he would have been if Howarth had originally deposited the $5,826.75, as instructed. The fact that Howarth, when he did deposit, at once drew out the money to pay the firm debt, and apparently made the deposit with that intention, does not affect the liability. All moneys deposited with any bank are liable to be so applied, unless in special circumstances on stipulation.

As to whether, under R. S. O. 1887 ch. 130, sec. 6 (R. S. O. 1897 ch. 152, sec. 7), Andrew is precluded by non-registration of the dissolution from asserting that he

has ceased to be a partner, and as to the application of that Act to persons carrying on that class of business, the question has already been decided against him by Falconbridge, C.J., in Town of Oakville v. Andrew, 3 O. W. R. 820, as to this very partnership. It is to be noted, however, that at the time of the dissolution in 1892 the statute was not the same as at present. In R. S. O. 1887 ch. 130, what is now sec. 7 of R. S. O. 1897 ch. 152 preceded what is now sec. 6, and the word "aforesaid" would apply only to preceding sections, and would not seem to refer to dissolutions. If so, the decision in Bank of Toronto v. Nixon, 4 A. R. 346, that registration of dissolution was not necessary, would be in point.

Apart from these statutes, Andrew having knowingly allowed his name to continue to be used in the firm for the purpose of keeping up its credit, and those interested in plaintiff company who consented to the deposit of the cheque being under the belief that he was a member of the firm, he is liable to plaintiff company for the $5,000, and interest since its deposit, at the ordinary savings bank rate of the time until demanded, and thenceforth at the legal rate, which I compute to amount to $5,546.67.

Against this (but subject to the rights, if any, of any persons interested who are not parties to this action, and to any rights not in question in this action), he, being practically a surety as well as nominal partner, will, after plaintiffs have been paid the full $5,826,75 and interest, be entitled to whatever excess Howarth would have been entitled to receive from plaintiffs out of the $5,826.75 in respect of money due him from plaintiffs or of amounts paid the solicitors or otherwise for the company. His rights, if any, against the estate of Howarth or in respect of shares held by Howarth are not to be prejudiced.

As regards the Ontario Bank, they were not affected with notice of the $5,826.75 being held by Howarth in a fiduciary character, either at the time of its deposit, or at the time of the transfer of $5,000 to the firm account, or of the payments thereout upon their debt. They have no reason to suppose that Howarth was not entitled to the money to do as he pleased with. The words "President Ont. Silver & Antimony Co.," after his name on the cheque, would give no more idea of the interest of any one else than if they were "Shareholder Ont. Silver & Antimony Co." At the most they were descriptive, and would help in ear-marking for the parties the transaction in connection with which the cheque was given, but could not have the effect of restricting the cheque's

negotiability, or of giving notice of a trust. The cheques on the $5,000 were as properly received by the bank on their debt as any other moneys of the firm, or of a partner in the firm, and, after so receiving them, and when still in ignorance of any claim in respect of them, the bank altered their position by releasing Andrew. The bank, therefore, are not liable to repay plaintiffs the money received out of plaintiffs' money on the bank's debt.

But plaintiffs contend that, even if the bank are not liable to do that, plaintiffs are entitled to have any surplus in their hands, after the bank's claim has been paid, and a reference to the Master to ascertain such surplus is asked.

Now, in the first place, that is based on the assumption that the $5,000 were moneys held upon trust or in a fiduciary character, and that they remained impressed with that character when at the credit of the banking firm in the Ontario Bank. They were undoubtedly so impressed while at the credit of Howarth in the bank, but it was never intended that they should be so in the hands of Andrew & Howarth, and they were, at the instance of plaintiffs themselves, discharged of the trust when they went to the firm's credit. They were simply to be an ordinary deposit with a banker, which within five minutes after their receipt might be paid out to some previous depositor or in discharge of other debts of the bank, or lent or dealt with as the bankers might deem proper. The doctrine of In re Hallett's Estate, 13 Ch. D. 696, does not apply, and I need only refer to the observations in that case to shew the distinction.

But, in the second place, even if they were impressed with the character of trust or fiduciary moneys while at the firm's credit, they were paid out and the whole fund dissipated. They did not pass into other property, which plaintiffs might claim or have a charge upon. There is no opportunity of applying for plaintiffs the rule of appropriation of payments out of a mixed fund which was adopted in In re Hallett's Estate, for here the whole mixed fund was gone at Howarth's death. Even assuming that where trust moneys have been misapplied to the payment of a trustee's mortgage, and the relief thereby of his lands or property, the beneficiaries should have a charge upon that property so relieved—it is not here shewn that any of the collaterals now held by the bank were held also as security for the $5,000 paid, and from some correspondence put in it would seem that, in some cases at all events, specific collaterals accompanied specific notes, and were given up on payment of these notes.

The action must be dismissed as against the Ontario Bank with costs.

MAGEE, J. FEBRUARY 2ND, 1905.

TRIAL.

MOORE v. GRAND TRUNK R. W. CO.

Trial — Jury — Inconsistent and Unsatisfactory Findings — Retrial.

Action for damages for death of plaintiff's husband, who was struck by a train in crossing a track of defendants.

Four questions were submitted to the jury, and answered as follows: "1. Q. Was the death of plaintiff's husband, William Moore, occasioned by negligence of defendants? A. Yes. 2. Q. If so, wherein did such negligence consist? A. In not ringing bell. 3. Q. Could William Moore have avoided the injury by the exercise of reasonable and ordinary care? A. Yes. But it has not been proven to us that he did not use ordinary care? 4. Q. What damages do you assess? A. $2,700." In consequence of the apparent inconsistency in the answer to question 3, the jury were then asked: "5. Q. If William Moore had used reasonable and ordinary care, would he have sustained injury? A. In absence of evidence to prove that he did not use ordinary care, we believe he did use ordinary care." This answer the jury afterwards changed to "Yes." Then two more questions were put: "6. Q. Did the deceased use reasonable and ordinary care in going towards and on plaintiffs' (should have been defendants') track upon the occasion of the injury? A. Yes. 7. Q. If he did not do so, wherein was he negligent?" Not answered.

R. C. Clute, K.C., and E. G. Morris, for plaintiff.

W. R. Riddell, K.C., for defendants.

MAGEE, J., referred to and quoted from the judgments in Rowan v. Toronto R. W. Co., 29 S. C. R. 717, and held that on the answers of the jury in the present case judgment could not be entered for either party, and the action must be retried. See Faulkner v. Clifford, 17 P. R. 363, and Carter v. Grasett, 14 A. R. 685.

BOYD, C. FEBRUARY 2ND, 1905.

TRIAL.

SANDWICH EAST (No. 1) ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES v. TOWN OF WALKERVILLE.

Schools—Separate Schools—Adjoining Municipalities—Three-mile Limit—Separate School Supporters—Notice—Change in Assessment Rolls—Court of Revision.

Action for a declaration that plaintiffs were entitled to have those of the ratepayers of defendant municipality who

gave notice that they were supporters of the Roman Catholic separate school for section 1, Sandwich East, assessed and placed on the roll of defendant municipality as supporters of that school, and to have the taxes collected from them applied to the support of that school.

J. E. O'Connor, Windsor, for plaintiff.

J. H. Coburn, Walkerville, for defendants.

BOYD, C.—Upon the question of law raised on the record and by the written arguments, I find in favour of plaintiffs upon this point, that the provisions of the Separate Schools Act, R. S. O. ch. 294, sec. 42 et seq., apply to the case of the contiguous municipalities of Walkerville and Sandwich East. That is to say, I think that the supporters of separate schools resident in Walkerville, where there is no separate school, may by proper notice become supporters of the nearest separate school in Sandwich East within the limit of 3 miles' distance from that school. This will practically withdraw such persons from contributing to the public schools of the town, and render them liable to be assessed for the maintenance of the nearest separate school in Sandwich East—which appears to be that controlled by plaintiffs.

Upon the other question of law raised on the pleadings and argument, I am of opinion that the contention of defendants is right: that is, it is not open for the Court to make or direct changes in the assessment rolls of the town for the year 1903 so as to change the body of ratepayers named by withdrawing those who are or are found to be supporters of separate schools. That is a matter of detail, to be regulated and adjusted by application for redress to the Court of Revision under sec. 49 of the Separate Schools Act, which is expressly framed to meet just such cases of complaint that one who is a separate school supporter is wrongfully placed upon or omitted from the roll. This complaint may be by the person aggrieved or by any ratepayer of the locality—but not in a subsequent year by the corporate body of trustees for the separate school section, alleging themselves to be interested. I see no right of initiative in this body under the statute, nor do I know what locus standi they have to seek such relief in the High Court.

Beyond these declarations, no useful result can follow any more detailed consideration of the minor issues.

Unexplained delay has arisen in submitting the case to me for decision. . . . It was before me at Sandwich on 22nd September, 1903, and the direction was given to tabulate evidence as to the notices and withdrawals of a mass of

ratepayers, and send in, based upon this compilation of the evidence, written arguments by the counsel. . . . They were not laid before me with the other papers till 27th January, 1905.

For all practical purposes, the judgment I now give is the only one that will be of any service to the parties, for the matters undisposed of are of slight importance, going back to the payment of $6 from 5 different ratepayers in 1901.

Success being divided, I think there should be no costs to either party.

FEBRUARY 2ND, 1905.

DIVISIONAL COURT.

IMPERIAL TRUSTS CO. v. NEW YORK SECURITY AND TRUST CO.

Mortgage — Interest on Interest Accruing after Maturity of Principal—Construction of Proviso.

Appeal by defendants from order of IDINGTON, J., dismissing defendants' appeal from report of Master in Ordinary in a mortgage action.

The appeal was heard by BOYD, C., TEETZEL, J., MAGEE, J.

W. H. Irving, for defendants.

H. C. Fowler, for plaintiffs.

TEETZEL, J.—The mortgage in question contains the following proviso:—"Provided this mortgage to be void on payment of $5,000 . . . with interest from the date hereof at the rate of 8 per cent. per annum as follows:—The said principal sum at the expiration of one year from the date hereof, and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every 12th day of November, February, May, and August hereafter, the first of such payments of interest to be due and made on the 12th day of November next. . . .; it being agreed and understood that in the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same." Then follows the

statutory covenant "that the mortgagor will pay the mortgage money and observe the above proviso."

In computing interest after maturity of the principal money, the Master allowed plaintiffs compound interest at 8 per cent. per annum, making the rests quarterly. Upon the argument Mr. Irving, for the defendants, while conceding that the above proviso entitled plaintiffs to interest at 8 per cent. per annum on all principal money as well after as before maturity, contended that plaintiffs were not even entitled to simple interest upon the quarterly gales of interest upon the principal money after maturity of the latter, much less compound interest. The words "as well after as before maturity thereof," in the first sentence of the proviso, have, I think, only the effect of extending the rate of interest to principal unpaid both before and after the year, and are not intended to and do not qualify the mode of payment. I think the word "payable" must, by necessary implication, be read into the proviso immediately before the word "quarterly" and be qualified by that word. Under this proviso, the mortgagor would clearly have no right, after default in paying principal, to insist that his interest was only payable quarterly, nor could the mortgagee refuse to accept payment of all principal and accrued interest and to discharge the mortgage at any time before a quarterly gale day. After the year the accrued interest is due and payable at any time the mortgagee may choose to sue for it, so that the word "quarterly" has no force when applied to any payments of interest except during the specific term of the mortgage.

In the second sentence of the proviso no express provision is made for payment of interest on interest that may accrue after maturity of the principal, or on default in paying same, and, in the absence of express words, I do not think we ought to presume that the parties intended to make provision for a breach of the covenant. The words "said interest not being punctually paid" can only refer to the interest in respect of which dates of payments are previously fixed, and the only dates so fixed are the four dates before and at maturity of the principal. The word "punctually," etymologically construed, means "on the point," i.e., I think, in this case, at the exact time fixed for payment in the previous sentence.

Then the words "date of its maturity" can only have reference to the previously fixed dates of maturity of interest, and not to the daily maturity which would occur after the expiration of the year. The last phrase of the proviso can also have reference only to the same dates of maturity.

It does not seem to me, therefore, that the proviso, taken as a whole, entitles plaintiffs to any interest upon interest which accrues after maturity of the principal money. I think it is clearly deducible from the authorities that, where a claim is made to convert interest into capital, the intention of the parties should be indicated by clear and unambiguous language, and, in my opinion, no such intention is indicated in this case, except as to interest accruing during one year.

See St. John v. Rykert, 10 S. C. R. 278, at p. 288; Bythewood, 4th ed., vol. 3, p. 895, and precedents, p. 1131; Am. and Eng. Encyc. of Law, 2nd ed., vol. 16, p. 1073; Coote on Mortgages, 7th ed., p. 1181.

I would allow the appeal with costs, and direct the report to be amended by striking out all allowances for interest on interest which has accrued since maturity of principal.

BOYD, C., and MAGEE, J., gave reasons in writing for the same conclusion.

MAGEE, J., referred, in addition to the cases cited by TEETZEL, J., to People's Loan and Deposit Co. v. Grant, 18 S. C. R. 263.

FEBRUARY 2ND, 1905.

DIVISIONAL COURT.

O'DONNELL v. CANADA FOUNDRY CO.

Malicious Procedure — False Arrest and Imprisonment — County Constable—Absence of Malice and of Notice of Action—Responsibility for Arrest—Special Employment and Payment of Constable—Labour Troubles—Picketting.

Appeal by plaintiff from judgment of ANGLIN, J., 4 O. W. R. 402, dismissing action for false arrest and imprisonment.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

J. G. O'Donoghue, for plaintiff.

G. H. Watson, K.C., for defendants.

BOYD, C.—In the face of the direct evidence given by plaintiff's witnesses, there is no room for any implication of authority being brought home to defendant company so as to make that body responsible for the arrest or prosecution of plaintiff.

The company made application to the high constable of the county for police protection, for which the company were

willing to pay, and he detailed two officers of his force, of whom defendant Wilson was one, with instructions to see, in his capacity as a constable, that persons and property were protected. He received no directions or instructions from the company or any one on its behalf, and none other than those emanating from his official superior. He was charged with this duty about the beginning of May, and about a week before the arrest he was handed a paper of instructions (dated 9th July, 1903), by the chief constable, calling his attention to and setting forth sec. 523 of the Criminal Code, and according to defendant Wilson's own statement in evidence he acted on the last clause of that paper—the besetting and watching clause—in arresting plaintiff on 16th July.

There is no evidence that the company defendant, or any of its officers, intervened in any way with regard to the co-defendant after he was appointed to this duty in May; he was allowed to follow his own course and take such steps as he deemed expedient and proper to carry out the duty for which he had been detailed by the high constable.

In the face of this express and explicit statement of how he was appointed, and under whose directions he acted, it would be obviously improper to infer that he was acting under the authority or control of the company defendant.

According to one of the latest cases, the implication of authority in such matters as the present is not to be lightly imputed, nor is the doctrine to be extended: Cullimore v. Savage Co., [1903] 2 Ir. 589. The whole of the evidence leads to the conclusion that in this particular transaction the officer was acting not as the agent or servant of the company, but as a police officer instructed by his chief and subject to his control.

Of American cases, one is very much in point as to the circumstances of this employment—where the police officer was acting at the request of and paid salary by a private corporation: Tolchester v. Stemneys, 72 Md. 313 (1890), which was followed in the same year in Wells v. Washington, 19 D. C. 385.

Altogether I would affirm the judgment with costs.

MAGEE J., gave reasons in writing for agreeing with the Chancellor as to defendant company.

As to defendant Wilson, he was of opinion that notice of action was not proven, and that the evidence for plaintiff negatived any absence of good faith or of fair and reasonable belief that he was acting in the discharge of his duty as a peace officer.

MEREDITH, J., concurred, giving reasons in writing why the action should be dismissed as against both defendants.

FEBRUARY 2ND, 1905.

DIVISIONAL COURT.

FRENCH v. LAWSON.

Master and Servant—Contract of Hiring—Breach—Dismissal of Servant—Grounds for—Evidence.

Appeal by defendant from judgment of MACMAHON, J., in favour of plaintiff in action for wrongful dismissal of plaintiff from the service of defendant. Plaintiff was employed as a baker in defendant's restaurant at Copper Cliff. Defendant justified the dismissal on the ground that plaintiff was careless and produced inferior bread.

J. H. Clay, Sudbury, for defendant.

A. H. Marsh, K.C., for plaintiff.

The judgment of the Court (BOYD, C., STREET, J., IDINGTON, J.), was delivered by

BOYD, C.—This case turns entirely upon the evidence. . . . I see no reason to challenge, but rather to support the conclusion of MacMahon, J. Plaintiff was proved to be a competent baker, and his work was admittedly good for over a month. His work was done also to the satisfaction of the manager . . . while he was in charge. . . . There were, no doubt, complaints as to bad bread . . . after the cold nights set in, in October, but the explanation on the evidence is that at first the flour was musty, and then the fresh car-load of flour was of poor quality . . . and there was, besides, the ill-protected bake-house, which was of wood, and one part of which admitted cold draughts during day, and became cold altogether at night. The flour, besides, was at times procured in small quantities from Sudbury, and became cold in its transmission, and no proper means of its being warmed to the proper point before it was required for baking. When better flour was obtained during Wakeman's time, at the beginning of 1903, plaintiff made bread as good as Wakeman's (which is conceded to be good), and Wakeman then recommended that defendant should keep on plaintiff in his employ. But he was dismissed, and hence this action, which has been rightly determined, and the appeal should be dismissed with costs.

FEBRUARY 2ND, 1905.

DIVISIONAL COURT.

CHAMPAGNE v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Failure to Give Warning of Approach of Train—Reasonable Excuse for Omission to Look for Train before Crossing—Question for Jury—Nonsuit Set aside—New Trial.

Action to recover damages for injuries sustained by plaintiff at a highway crossing of defendants.

Plaintiff was driving in a southerly direction, at night, along a road called the Luzon road, which crosses defendants' line at a right angle. The carriage in which he was driving was struck at the crossing by an express train of defendants from the east. Plaintiff was thrown out and injured, and his carriage was damaged.

The action was tried at Sandwich before TEETZEL, J., and a jury.

At the close of plaintiff's case, the trial Judge determined that there was no evidence to submit to the jury, and dismissed the action.

Plaintiff appealed, and his appeal was heard by BOYD, C., STREET, J., IDINGTON, J.

R. C. Clute, K.C., for plaintiff.

W. R. Riddell, K.C., for defendants.

STREET, J.—For the purposes of this appeal we must assume in favour of plaintiff that defendants failed to give the statutory warning, as they approached the highway, by sounding the whistle and ringing the bell of the engine. The evidence shews, however, that for a distance of about 1,000 feet to the east of the crossing there was no obstruction of any kind to hinder the view of a train coming from that direction, as the train in question was.

Plaintiff says that he neither saw nor heard the train approaching until he found himself actually crossing the track, immediately before he was struck, when it was too late to avoid it. He says that the night was so dark that he could not even see the fences at the side of the road, and that he mistook his position in consequence, and supposed that he

was still some 400 feet away from the railway track when he found himself upon it. His evidence as to whether he was or was not keeping a look-out is very confused and contradictory. It seems plain, however, that he must have seen the train had he been at all on the alert. There is some evidence that the cover of the carriage in which he was sitting was up, and this may have prevented his seeing the train.

In these circumstances, we are to determine whether the nonsuit was right. Has plaintiff adduced evidence which should go to the jury, not only that defendants were negligent, but that the injury he received is attributable to their negligence? If he has failed to do so, the nonsuit was right.

The case of Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41, which was relied on by both parties, does not determine the case before us. . . .

In the present case plaintiff has proved negligence on the part of defendants, and he has also connected their negligence with his injury by saying that, if they had given the statutory warning, he would probably have heard it, and so avoided the accident. There is, therefore, a distinction in this respect which prevents the decision in the Wakelin case from being a guide to us.

In my opinion, we are clearly bound by the authorities to leave to the jury, upon the facts in evidence, the question whether the reason given by plaintiff for his not having seen the train, is a sufficient one. It is for them to determine whether plaintiff exercised reasonable care in the circumstances.

There are numerous dicta in the cases which cover the point, but the late case of Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224, seems to me decisive upon the question which arises here.

The authorities appear to have gone this far: that where the railway company fail to give the statutory warning of the approach of a train, and an accident happens, plaintiff is entitled to have the opinion of the jury upon any reasonable excuse given for the omission to look out for the approach of the train, and the Judge cannot himself pass upon the sufficiency of the excuse. . . .

In my opinion the excuses offered by plaintiff in the present case for his omission to see the approach of the train in time to avoid the accident, should not, in accordance with the authorities, have been withdrawn from the jury.

Nonsuit set aside and new trial ordered. Defendants to pay costs of former trial and of this appeal.

BOYD, C., and IDINGTON, J., gave reasons in writing for the same conclusion.

MACMAHON, J. FEBRUARY 3RD, 1905.

WEEKLY COURT.

RE CANADA WOOLLEN MILLS, LIMITED.

Company—Winding-up—Offer to Purchase Assets—Guarantee-money Deposited with Liquidator—Return by Liquidator without Order of Court—Impossibility of Offer being Accepted.

Appeal by the liquidator of the company from an order (dated 7th January, 1905) made by James S. Cartwright, official referee, in the course of a reference for the winding-up of the company, requiring the liquidator on or before 14th January, 1905, to pay into Court the sum of $10,000, being the amount paid by G. F. Benson on 30th September, 1904, with the offer made by him to purchase the assets of the company.

H. Cassels, K.C., and R. S. Cassels, for the liquidator.

W. G. Thurston, for the executors of E. T. Carter, creditors.

G. H. D. Lee, for the Dominion Bank, creditors.

MACMAHON, J.—After an attempted sale by auction on 15th September, 1904, which proved abortive, Mr. W. D. Long, on 22nd September, made an offer in writing to purchase the whole assets of the bankrupt estate and pay therefor $253,000. This offer was accepted by the referee. . . .

On 30th September, 1904, G. F. Benson made to the liquidator an offer of $275,000 for the property and assets of the company as covered by the offer of Long. Benson agreed not to withdraw his offer without leave of the Court; and should he . . . do so "the Court is to be at liberty to deal with the sum of $10,000 deposited by me, as to it seems proper."

The $10,000 was paid by Benson to the liquidator, who deposited it in a chartered bank, as required by sec. 35 of the Winding-up Act.

Both Long and Benson were inspectors of the estate at the time they made their respective offers to purchase.

The firm of W. T. Benson & Co. (of which G. F. Benson is a member) by motion asked the referee to reconsider the offer of Long . . . and the action taken thereon. The

principal grounds of the motion were: (1) that Long's offer was too low; (2) that the liquidator was opposed to the offer being accepted; and (3) that Long, as an inspector, was disqualified from being a purchaser. This motion was, on 11th October, 1904, dismissed, and it was ordered that the sale to Long be confirmed, and the liquidator was directed to carry out the sale.

W. T. Benson & Co. appealed from that order . . . and I, on 23rd October, 1904, allowed the appeal and set aside the order of the referee, on the ground that Long, being an inspector of the estate, was disqualified from becoming a purchaser: 4 O. W. R. 265.

Long obtained special leave to appeal to the Court of Appeal from that order, and the appeal has been heard, and is standing for judgment.

On 27th October, 1904, the liquidator advised the inspectors that the sale to Long had been set aside by the Court, and it was therefore necessary to consider the best means to be adopted for the disposal of the mill properties, and he called a meeting of the inspectors at his office on 1st November, 1904, to assist and advise. . . . The minutes of the meeting state "that the inspectors are of opinion that the offer of G. F. Benson should not be accepted, and that the liquidator should at once look for purchasers of the remaining assets of the company." They then place a minimum limit as to the prices which they consider should be accepted for certain of the properties belonging to the estate.

Acting on the advice of the inspectors, the liquidator declined to accept Mr. Benson's offer, and returned him his deposit of $10,000.

The argument on behalf of the respondents was, that, the $10,000 having been paid to the liquidator as a guarantee of Benson's good faith in making his offer, the liquidator was bound to retain it until it was determined by the Court whether Benson should be bound by his offer and obliged to complete the purchase of the assets, and on refusal should forfeit his deposit.

It is impossible to see upon what principle Benson could be forced to carry out his offer by completing the purchase. The referee having on 11th October dismissed the application of G. F. Benson & Co., holding that Long was the purchaser, and confirming the sale to him, G. F. Benson would be entitled to an immediate return of the deposit. And an appeal by W. T. Benson & Co. from the referee's order did not place G. F. Benson in any different position. His offer

had been rejected, and when it was decided that Long, because he was an inspector of the estate, could not become a purchaser, that did not constitute a renewal or revival of his (G. F. Benson's) offer.

Benson, being an inspector of the estate, was disqualified from becoming a purchaser, unless he had first obtained the sanction of the Court. . . . And had the liquidator, after judgment was given setting aside the sale to Long, accepted Benson's offer, the sale was liable to attack on the same ground upon which it was held that the sale to Long was invalid.

The inspectors reached the conclusion that Benson's offer should not be accepted, and the liquidator's duty was at once to notify him of that fact, and to return his deposit.

The deposit was returned on 3rd November, and since then the liquidator has, with the assent of Long and of the inspectors (except H. J. Carter), disposed of over $175,000 of the assets of the company; and, as Benson's offer was for the whole of the assets, the liquidator could not enforce specific performance, and on that ground alone Benson could not be held to his offer. . . .

Appeal allowed and order of referee set aside with costs.

STREET, J. FEBRUARY 4TH, 1905.

TRIAL.

DONOVAN v. TOWNSHIP OF LOCHIEL.

Nuisance — Fouling Watercourse — Ditch Constructed to Carry Refuse from Factory—Liability of Municipality—Trespass—Local Board of Health.

Action for damages for fouling plaintiff's watercourse by refuse carried into it by means of a ditch constructed by defendants, and for an injunction.

D. B. Maclennan, K.C., for plaintiff.

J. Leitch, K.C., for defendants.

STREET, J.—Plaintiff is a farmer owning farm A.; to the north of him is farm B., owned by another farmer; to the north of farm B. is a township road within the jurisdiction of defendants. Abutting on the road, and at the north-west

corner of farm B., is a small parcel of land upon which a cheese factory has been in operation for a number of years. A drain from the cheese factory leads into the ditch at the side of the highway. A few years ago complaint was made to the provincial board of health by plaintiff and others using the highway that the whey and other refuse from the cheese factory had collected in and formed a stagnant pool on the highway close to the cheese factory, and in front of farm B., which was dangerous to the public health. This complaint was referred to defendants, who sent their road commissioner to investigate it. He seems to have thought that the way to abate the nuisance was to turn it upon the neighbouring land-owners. The owner of farm B. refused to permit a drain to be made for the purpose of carrying it upon or through his premises. The local board of health is said then to have given directions that the pool on the highway should be drained at the expense of the municipality south through farm B. to a watercourse of small size leading through plaintiff's farm A., from which his cattle were in the habit of drinking. The consent of the owner of farm B. to this arrangement was procured by the payment to him of $10, which defendants paid, and the ditch was dug at the expense of defendants by their own road commissioner, although the work is carefully stated in their books to have been done by direction of the board of health. There is no evidence of any notice to any one of any contemplated action by the board of health, nor any minutes or written evidence whatever of the action alleged to have been taken by the board.

The result is that the refuse from the cheese factory has been ever since carried, at certain seasons of each year, from the cheese factory to the highway, and thence along the ditch cut for the purpose, through farm B., into plaintiff's watercourse, which has been sensibly polluted in consequence. Plaintiff alleges that a number of his cows drinking from the stream have been made sick and have died in consequence. There is evidence that refuse from a cheese factory would cause the sickness noticed in plaintiff's cattle.

Defendants deny that they made the ditch in question from their highway, and they say that, if they did make it, they did so by order of the local board of health, and are not responsible.

The construction of the ditch or drain from defendants' highway to plaintiff's watercourse was undertaken by defendants' own officer, and was paid for by defendants under special resolutions of the council of the municipality, duly

recorded in their minute books, in which, however, it is stated that the ditch was ordered by the board of health.

Defendants were clearly trespassers in throwing this deleterious matter upon plaintiff's land, unless they can shew a clear statutory power entitling them to commit a trespass in abating the nuisance, and absolving them from liability for having committed it. It is almost needless to say that no such authority is to be found in any Act.

If they were guilty of maintaining the nuisance, as they undoubtedly were, the board of health had power, after due notice to them, to order them to abate it, and, in default of their obeying the order, then to have it done at defendants' expense. But if in abating the nuisance they commit a trespass there is nothing in the Act absolving them from the consequences.

In any event I can find no evidence of any valid order by the board of health to defendants for the doing of any work.

Defendants have sought to shew that the refuse which escaped as far as plaintiff's land was too inconsiderable in quantity to have affected the health of his cattle.

I think it is shewn that at certain seasons refuse from the factory sufficient to have affected plaintiff's cattle was carried through the drain dug by defendants to plaintiff's land; there is evidence of sickness in the cattle which might have been caused by this refuse. In these circumstances, I do not think plaintiff is called on to prove (which would be, in fact, impossible) that the sickness did actually arise from that cause.

I think, therefore, that defendants are liable.

I assess the damages at $200, and I order that defendants be restrained from permitting any injurious matter to escape from the highway to plaintiff's land, and from permitting or causing to flow upon plaintiff's land, by way of the said ditch or otherwise from the highway, any water or other liquid or solid matter which would not naturally have reached it.

Defendants must pay the costs of the action.