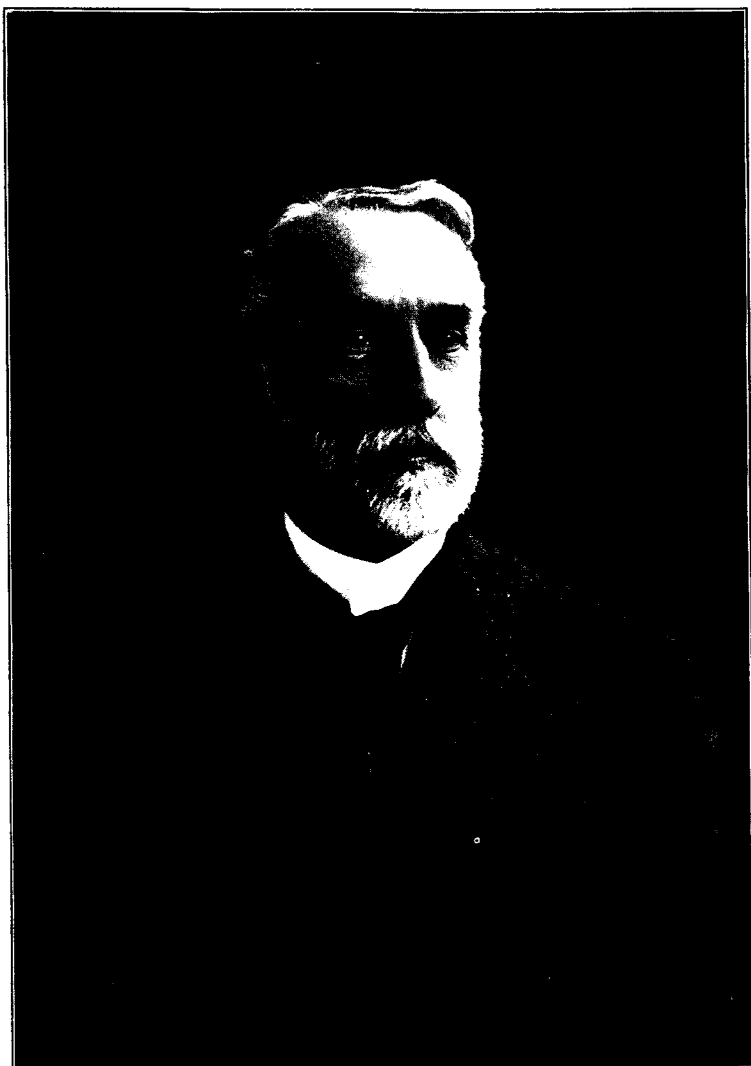

HON. MR. JUSTICE RUSSELL,
HALIFAX.

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For the purpose of giving to our readers a fairly complete summary of the law applicable to the main features of the subject of Trades Unions, we publish in this issue an article from a contributor in the United States. He collects and comments upon the leading authorities in that country dealing with that important subject. The reference of the writer to the early English cases, to be found in the musty tomes of the Henrys, is interesting as showing that there is "nothing new under the sun" even as to this, so-called, modern grievance, except the name "boycott," by which it is best known.

Though the thought conveyed thereby is both barbarous and brutal, the maxim that "to the victors belong the spoils" will be the rule until the millenium comes. We do not propose, therefore, to quarrel with the inevitable; but we do protest, on behalf of those concerned, against the distribution of some of the spoils. Existing governments must, of course, make all appointments necessary for the administration of justice. The necessity that judges should be lawyers is a fact which politicians must most deeply deplore, but there is no such necessity in the case of Sheriffs, Registrars, Surrogate and County Court Clerks, etc. It is generally admitted, and certainly cannot be denied, that positions such as these would be much better filled, and with more advantage to the public, by lawyers than by laymen; and so it borders on the ludicrous to see them given to men taken out of the ranks of auctioneers, bakers, farmers, builders, millers, store-keepers, etc. These men are, doubtless, worthy citizens, and, we may suppose, have done good work for their bosses: but why should available men in the legal profession, who would be glad of such jobs, who have done equally good service, and whose education and legal knowledge fits them for such offices, be passed over. The wonder is that those of them who belong to the party in power put up with it. Lawyers on both sides of politics are more valuable from a party standpoint than any other class, but are contemptuously ignored when the spoils are divided. They do not protest against the injustice. We make bold to do so on their behalf.

INTERFERENCE WITH BUSINESS AND COMMERCIAL RELATIONS BY THIRD PARTIES.

I. INTRODUCTORY.

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I. INTRODUCTORY.

1. Scope of this article.—Whilst this subject might with interest and profit be treated from other standpoints, such as the ethical and the economic, it is intended at present to treat the subject of boycotts and kindred practices appertaining thereto from the legal point of view alone, and to attempt to classify the decisions of the Courts (having a special reference to those of the United States) in defining the essentials that comprise actionable wrongs. The limitations of this article preclude the mention of many details, and the use of much helpful illustration. One relevant and important topic has also necessarily been omitted, viz., the equitable jurisdiction of Courts and the relief which equity would be justified in granting.

2. Rise and growth of trade unions.—To-day as the logical, necessary, and legitimate counterpart of the large corporation, we have the trades unions. Neither the right nor the expediency of such organizations is questioned. Co-operation by and between those having like interests to guard and foster is but a heritage from the impulses that rescued man from his primæval segregate state, and induced him to seek a higher plane as a factor in the social unit. It has been a cherished principle of our courts that the genius of our free institutions, social, political, and industrial, encourages men to seek greater fortunes and larger opportunities in life; and that combinations of labouring men for the purpose of securing greater wages for their hire, or self-improvement in any

way, and of capital to mass together its strength to enlarge industrial activities, are legitimate and commendable. It is adjudged ignoble to do so only as wantonly irrespective of the legal rights of others.

3. Statement of some general principles.—A serious difficulty has arisen in determining what means the individual or organization may employ in enforcing its demands upon another individual or organization, and in distinguishing to what extent one is immune in business from the encroachments of another.

In *Beck* v. *Railway Teamsters' Protective Association*, 42 L.R.A. 407, in which the defendant association by violent and coercive measures had attempted to dictate what men the plaintiff should take into his employ, the court seems to state fairly the rule for the case involved. Speaking of the employer, it was stated: "The law protects them in the right to employ whom they please, at prices they and their employer can agree upon, and to discharge them at the expiration of their term of service, or for violation of their contracts. This right must be obtained or personal liberty is a sham." Continuing further, and speaking of the employed, it was said: "So also the labourers have a right to fix a price upon their labour, and to refuse to work unless that price is obtained. Singly or in combination they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization or to refuse to work except for an established wage; they may present their case to the public in newspapers, or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such a case is to ruin the employer it is damnum absque injuria, for they have only exercised their legal right. The law does not permit either party to use force, violence, threats of force or violence, intimidation or coercion."

Akin to the principles stated above is to be noticed what is comprehended in the term "competition"—what certain acts are licensed within its domain, and what are not. It is a principle of law, long and fully established, that one has no legal protection from the sharpest competition by those engaged in a similar business, and defendants at the bar have constantly sought to justify their tortuous acts as within the legalized scope granted by mere competition. But in doing so they have often made a fatal

error. In combining for a just attainment, they have often devised means that could only stifle and destroy competition itself, and shut others out from the rights and benefits which they themselves were claiming. While what competition really means, and the application of the principles sanctioned by it have raised serious and perplexing questions, the courts seem to have met them fairly and to have found their solution in old established principles not different from those generally invoked in determining liberty and license of action by one person toward another. It is when one oversteps the line and attempts to enhance his own interests by tearing down the lawful business of another through fraud and violence, prompted by a malicious motive, that his acts cease to be competition alone, and become actionable wrongs (*a*).

The courts have not only observed great injustice in the permitting of business enterprises to be dominated by boycotts, but have also given expression to the great dangers that would be attendant with such practices. Nothing jeopardizes the business interests of a commonwealth more effectively than a feeling of insecurity. When one invests his money in a business enterprise it is necessary for him to know whether his own judgment may direct its management and detail, or whether the violence and ignorance of others is to supplant him. Business men have a general idea of their rights and immunities under the law, and a confidence of their enforcement which is indispensable. Neither does our sense of justice allow that a business should be dictated and controlled by those who have no interest therein and no capital invested, who are in no way responsible for its losses or failures and receive no direct benefit in its success, and are non-participators in the profit If, for example, a labour union may by coercive measures control in the employment of help by a corporation, stipulating as to whom they shall employ, and the wage that shall be paid, where is the dictatorial power going to be made to end. It would not be confined to matters of employment. Power thus given would be insatiate in its demands for more, and precedents furnish no guaranty of a moderate and reasonable use of it; indeed, the direst acts known to time, and those which humanity most regrets have been wrought by men in the exercise of irresponsible power.

(*a*) 2 Bishop's Criminal Law, s. 230, note; *Hilton* v. *Eckersley*, 6 E. & B. 47; *Carew* v. *Rutherford*, 106 Mass. 1.

II. ESSENTIALS OF A BOYCOTT AND ACTIONABLE WRONGS.

1. Its meaning and definitions.—Let us now consider what the boycott really is, and what the essentials of boycotting are that will constitute an actionable wrong. Some mention must be made from both the standpoint of the civil action and from that of the criminal action, as they are not in all respects similar.

It will be observed from the statements made that both parties in the subject under discussion have rights which, perhaps, though not strictly so in all phases, may, with general propriety, be called inherent; therefore an amicable and praiseworthy solution of differences is to be obtained by negotiation and adjustment by and between the opposed forces, with the limitations of each to be prescribed by the courts of justice.

A boycott, as commonly understood, "is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse through threats that unless those others do so, the many will cause similar loss to them" (*b*).

Black's Law Dictionary defines a boycott as "a conspiracy formed and intended directly or indirectly to prevent the carrying on of a lawful business or to injure the business of anyone by wrongfully preventing those who would be customers from buying anything from or employing the representatives of said business, by threats, intimidation, or other forcible means."

The Century Dictionary defines a boycott to be "an organized attempt to coerce a person or party into compliance with some demand, by combining to abstain or compel others to abstain from having any business or social relations with him or it; an organized persecution of a person or company as a means of coercion or intimidation or other forcible means."

Fauntelroy, J., thus states it: "The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators." (*c*).

(*b*) *Toledo, etc., Ry. Co.* v. *Penn. Co.* 54 Atl. 730.

(*c*) *Crump* v. *Commonwealth*, 10 Am. St. Rep. 895.

Sage, J., gives this definition: "A boycott is an illegal conspiracy in restraint of trade" (*d*). This definition, however, seems to invite inquiry rather than to closely define.

The term "boycotting" is of recent origin, and is derived from the name of Captain Boycott, an Irish landlord in Ireland, upon whom the system was severely invoked during the land agitation there in 1880-81, he having incurred the displeasure of certain land tenants. The system was repeatedly resorted to by the agrarian associations, and has since been made the subject of criminal conspiracy. But while, therefore, the term "boycott" is found only in late decisions, yet it is believed that it has called into operation no new principles of law, but merely that old and well established rules of the common law are made to apply. Indeed, it seems that many of the actions brought in the old common law courts arose from acts not differing greatly from those comprising the modern boycott. Some of these will now be mentioned.

The earlier instances appearing in the books where a right of action was granted to a plaintiff because of the interference with his business relations with others seem to have been where tenants were threatened in life and limb, "so that they departed from their tenures to the plaintiff's damage (*e*). This appears to have been a very common occurrence, and there was a common law writ used specially in such cases: "Quare tenentibus de vita et mutilatione membrorum suorum comminatue fuit." Another instance is, "if the comers to my markets are disturbed or beaten by which I lose my toll, I shall have a good action for trespass on the case" (*f*). A case is also recorded where an abbot brought action against those who roughly disturbed them who came to his chapel so that he was deprived of the value of their offerings (*g*). The courts at an early period also distinguished between illegitimate interference with another's business, and mere competition. Thus it was held that if a new school was set up in the town so that "whereas the plaintiffs were used to get for a child 40d. per quarter, now they get but 14d. per quarter," no action would lie against the competitor (*h*); so where a competitive miller diverted the plaintiff's

(*d*) *Casey* v. *Cincinnati Typographical Union*, 45 Fed. Rep. 235.

(*e*) 9 Henry 7, 7 (1494).

(*f*) 14 Henry 4, 47 (1410); 29 Edw. 3, 18 (1356).

(*g*) Bellevue, A. Sur. C. (1396).

(*h*) 11 Henry 4, 47 (1410).

trade (*i*). Another important case bearing on the principles under discussion was *Garrett* v. *Taylor* (*j*) in which relief was granted for threatening to mayhem and vex with "suits" the plaintiff's customers and workmen, "whereby they durst not work or buy." I think the early English cases just cited shew that the modern boycott is not new in its legal aspect, as is sometimes insisted, but that it may be considered in the light of principles enunciated by the common law courts centuries ago. I shall now mention in topical form some of the distinguishing features and essential elements of the modern boycott, as decided upon by our courts. While these topics are chosen more or less arbitrarily, it is deemed they are deserving of special consideration.

It will be observed from the definitions which have been given above that a boycott contemplates the idea of a combination or conspiracy. The acceptation of the term also includes that the combination or conspiracy may be an act by the one party against another directly, or it may be an interference by a third party with the business relations of two other parties with each other. While the object sought in either case is practically the same, and substantially the same judicial principles govern in both, yet the cases arising where three parties are involved have received much the greater attention in the courts, because in them there has been a greater opportunity for the exercise of coercion and malicious intent.

2. **What boycotts are considered lawful.**—The accepted definitions seem to negative the idea that all boycotts are unlawful, although the term has been sometimes loosely so used; but this latter view would make the definition depend wholly upon the legality of the object and means employed, irrespective of results. Some of the most effective boycotts are accomplished by peaceable and legitimate means. But to receive the sanction of the law, there must be a lawful object sought, and by lawful means. There is a slight variance in the decisions as to what may be considered a "lawful object" or "lawful means," and sometimes both have been made to depend upon extraneous results, as it has been held, an actionable wrong for railway employees to suddenly cease work by concerted action, even though they did so peaceably and with legitimate objects in view, on the theory that they were violating

(*i*) 22 Henry 6, 14 (1621).
(*j*) Cro. Jac. 576 (1621).

a duty which they owed to the public. It has also been adjudged unlawful for journeymen tailors to agree to quit peaceably in a body when a large number of garments were unfinished, but this is believed a wide extension of the rule in permitting action to be brought unless on contractual relations. Another writer, by way of illustration, states that trades unions may with impunity combine to boycott goods that do not bear the union label, and that temperance organizations could legitimately agree to boycott goods sold by a groceryman who is also the vendor of liquors.

The English case, *Allen* v. *Flood* (1898) A.C. 156, is interesting in this connection. A representative of the ironworkers on a ship procured the discharge of two shipwrights, also working thereon, under a threat to the employer that unless the shipwrights were so discharged the ironworkers would quit. The shipwrights were discharged, and because of this brought action in tort against those who had procured their dismissal. The plaintiffs recovered a verdict below, but the decision was reversed in the House of Lords by a vote of six to three. However, in the successive courts, out of twenty-one judges and lords, thirteen held the act of the ironworkers an actionable interference with labour. The lords appear to have based their opinion on the grounds that there was no conspiracy, and the employer was induced to break no contract in discharging the plaintiffs.

In *Bohn Manufacturing Company* v. *Hollis*, 54 Minn. 223, the defendants were retail lumber dealers, and formed a voluntary association whereby they mutually agreed not to buy of any wholesale dealers who should sell lumber to persons, not dealers, at any place where a member of the association was carrying on business. The object of the association appears to have been to protect its members against sales by wholesale dealers to contractors and consumers. A dealer having made such a sale, the secretary of the association was about to issue a circular to its members, apprising them of the fact, when the plaintiff brought action to have him enjoined from so doing. The injunction was denied and the case dismissed. The court reasoned that the defendants had similar legitimate interests to protect, that their association was a voluntary one, using no coercion, and that there was no agreement to induce others to enter into the boycott. The court also inferred that the practice of the wholesale dealers in selling to contractors and consumers was a menace to the business

of the defendants, against which they might protect themselves by lawful combination.

Chief Justice Shaw, in his able opinion in *Hunt* v. *Commonwealth*, 4 Met. 111, in which certain members of the Boston Journeymen Bootmakers' Association were indicted for conspiracy in attempting by combination to raise their wages, and which opinion has been understood to decide that working men unquestionably have the right to combine together for such a purpose, although the opinion was written merely to decide the sufficiency of the indictment as framed, said : "Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. A workman who should still persist in the use of ardent spirit would find it more difficult to find employment ; a master employing such an one might at times experience inconvenience in losing the services of a skillful but intemperate workman. Still it seems to us that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy." A long line of decisions agree that certain boycotts and combinations are not repugnant to legal principles when their object, and means of attaining it, are not unlawful. However, as stated above, the courts do not in all instances agree as to what may be considered lawful, and some have taken a lessliberal view than that stated, by Chief Justice Shaw, supra (*k*).

Conspiracy.—As before stated, the accepted definitions of a boycott are all made to rest upon the idea that a combination or conspiracy obtains. However, in regard to the civil action against a boycott, the term "conspiracy" may properly be used only in forming a descriptive definition. There is, strictly speaking, no civil action against conspiracy (*l*), nor is it necessary that a conspiracy exist that a plaintiff may have a right of action because of wrongful interference with his business relations (*m*). Parties affected by a conspiracy may waive a criminal prosecution, and

(*k*) *State* v. *Stewart*, 59 Am. Rep. 710.

(*l*) Biglow on Torts, 214 ; Cooley on Torts, 125.

(*m*) *Robinson* v. *Parks*, 14 Atl. 411.

bring an action for damages where injury has been sustained (*n*), but the gist of all civil actions for damages is the actual damage sustained and not the conspiracy, or confederating together (*o*). The plaintiff must shew a cause of action irrespective of a conspiracy, although proof of a conspiracy is usually necessary as a matter of evidence where the acts alleged are of such a nature as to preclude the idea that they could have been done without a conspiracy existing.

A review of the penal statutes of the several States of the Union as to boycotts and labour combinations (for a compilation of which the writer is indebted to the Sixteenth Annual Report of the Commissioner of Labour, 1901) shews that twenty-four States have made such combinations an indictable offence under statute; also two other States have thought it necessary to protect labour organizations by special statute, giving them a guaranteed range that shall not be regarded a conspiracy. These statutes are in slight respects different, and subject to interpretation by the respective State courts, but, in general, they seem to make the subject of criminal prosecution the mere conspiracy to do those acts, and by those means, which, if accomplished, would form the gist of a civil action. As the differences existing with respect to actions brought under the statute, and where no statute exists, are more properly matters of pleading and procedure they will not be discussed here.

While the statement just made as to the application of the statutes is believed correct, it is interesting to notice how at times the Legislatures in passing them have, in defining a conspiracy, abrogated the common law meaning of the term, aided by some holdings thereunder that do not seem fully sound, but which it is believed have, in the main, been cured by subsequent legislation. The State of New York furnished a good example where probably the first trial in this country for conspiracy to raise wages occurred in 1741, in which bakers were convicted of conspiracy for refusing to bake until their wages were raised (*p*), and the same principle was adhered to again in 1810. In 1834, Judge Savage, in the noted case of *People* v. *Fisher*, 4 Wend. 9, held certain journeymen shoemakers liable for conspiracy for merely agreeing

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(*n*) *Herron* v. *Hughes*, 25 Cal. 555.

(*o*) Am. & Eng. Enc. of Law, vol. 6, page 873.

(*p*) Trial of Journeymen Cordwainers, p. 83, (1810).

together not to work until better wages were obtained. This decision was rendered in construing the agreement to be "an act injurious to trade or commerce," which by statute was a penal offence. This case was considered an authority for the proposition that working men could not combine to peaceably raise their wages in New York without forming an unlawful conspiracy, which rule was followed until 1870, when its harshness was realized, and a more liberal one was adopted by statutory enactment.

Whether or not a conspiracy exists depends upon whether a lawful object is sought, or whether lawful means are being employed in its accomplishment, both of which must be determined by considering what elements constitute a lawful or unlawful purpose, and what means may with impunity be employed.

4. Malicious intent. — The terms "malice," "motive," and "intent" are used in a liberal sense in the books, and in their application are not clearly differentiated. Malice is constantly referred to as an essential of a boycott, and boycotting, when actionable, as a malicious wrong. It seems, however, that the term "malice" should find its application respective to the intention of the offender, and not to his motive. In *Barr* v. *Essex Trade Council*, 30 Alt. 881, the court said: "When we speak in this connection of an act done with a malicious motive it does not necessarily imply that the defendants were actuated in their proceeding by spite or malice against the complainant in the sense that their motive was to injure him personally, but that they desired to injure him in his business in order to force him not to do what he had a perfect right to do." It is a malicious wrong to intentionally do those things, without legal excuse, that will in the natural course of events injure another in his lawful pursuits and attainments. Malice does not mean merely an intent to harm, but an intent to do a wrongful harm or injury, and if the said acts are wrongful, malice will be implied, and the wrong done a malicious one (*q*). In *Keeble* v. *Heckeringill*, 11 Eastern 573, note, the defendant had persisted in firing guns to frighten away wild fowl about to enter plaintiff's decoy pond. In discussing the case Lord Holt said, relative to the intent: "If the defendant had merely set up a second decoy, no action would lie; but it is otherwise where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood."

(*q*) *Doremus et al.* v. *Hennesly*, 52 N. W. 924.

5. Violence and intimidation.—It has sometimes been difficult to determine what acts were comprised in these terms because of the shrewdly concocted subterfuges that offenders have invented to cover their malicious deeds. The law, however, looks rather to the object and effect than to the means employed. For a trades union to place a "picket" around the premises of one boycotted is an act of intimidation, and "actual violence or threat of violence is not needed to make a boycott unlawful when intimidation and coercion are employed to prevent persons from dealing with the persons boycotted" (*r*). It was held to be a threat of violence when a trades union informed one whom they wished to boycott that they had substantially ruined the business of certain other persons (*s*). A simple request by a body of strikers under circumstances that convey a threatening intimidation is held to be no less obnoxious than to use physical force (*t*). The display of banners with a mere request thereon to boycott the plaintiffs was held to be an act of intimidation because of the power that was known to exist to enforce the request, and it was held not necessary that the intimidating acts be done on the premises of the plaintiff (*u*). It is therefore seen that intimidation and threats of violence cannot be entirely hidden under sophistry and pretenses, but that intent and results will be made to govern.

6. Interference with respect to contractual relations.—It seems now fairly well settled that a body of working men have a right to "walk out" at any time when not under contract, and even though they are, the courts will not enjoin them from so doing (*v*). But the law imposes upon third persons certain duties enjoining interference with the business relations of others. When such persons have procured a breach of contract, and action has been brought against them therefor, they have sought to defend on the ground that a contract cannot impose any obligation upon a person not a party to it. While this proposition is not denied, it is not allowed to excuse the one who has maliciously procured the breach, and he is held liable for the wrong (*w*).

The courts have refused to recognize any special difference between the interference when contractual relation exists and when

(*r*) *Beck* v. *Railway Teamsters' Protective Assn.*, supra.
(*s*) *State* v. *Glidden*, 55 Conn. 46.
(*t*) *Re Doolittle*, 23 Fed. Rep. 545.
(*u*) *Beck* v. *Railway Teamsters' Protective Assn.*, supra.
(*v*) *Arthur* v. *Oakes*, 63 Fed. 310.
(*w*) *Walker* v. *Cronin*, 107 Mass. 555; *Lumbley* v. *Gye*, 2 E. & B. 216.

it does not, the means and results accomplished forming the basis of the action (*x*). Perhaps the only distinction to be noticed in this country is a tendency of the courts in some cases to be more liberal with offenders who have by their malicious acts only induced others to do what they, the others, had a right to do, but would not have done but for the force brought to bear upon them. In a well reasoned case, handed down by the Supreme Court of Maine in 1897, the following statement of what is believed to be the general rule is given: "Our conclusion is that wherever a person by means of fraud or intimidation procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract definite as to time is broken, or that an employer is induced, solely by such procurement, to discharge an employee, whom he would otherwise have retained (*y*).

7. Black-listing.—This is a practice analagous to boycotting as it interferes with freedom in obtaining employment. It rests, however, on a slightly different basis from the legal standpoint, as the act itself is deemed dangerous and against public policy and cannot be defended on any ground. This statement is true, however, only of the eighteen States that have special statutes prohibiting blacklisting, and corporations from exchanging blacklists with each other. In those jurisdictions where there is no statute a civil action would lie for the wrong committed that had worked an infringement on the rights of another. It is believed that good policy dictates that blacklisting should be dealt with according to the same principles as those that define other torts, that is to say, that when a blacklist is formed, it must be without malice or prejudice towards those whose names are thus defamed, clear of all fraud, and only a true statement of facts. A further extension of immunity than this deprives an employer of profiting from the costly experience of others, and the public of one means of security against the employment of profligate employees, and throws about the unskillful and unworthy a protection greater than past achievements have made them to deserve (*z*).

WM. H. WARREN.

(*x*) *Hopkins* v. *Stave Co.*, 83 Fed. 912.
(*y*) *Perkins* v. *Pendleton*, 38 Atl. 96.
(*z*) *Hundley* v. *L. & N. R. R. Co.*, 48 S. W. 429.

DOG-LAW IN DOGGEREL.

BY CHARLES MORSE.

(Reprinted, by permission, from the *Green Bag.*)

I. DOGS AND TRESPASSERS.

SARCH v. BLACKBURN. 4 C. & P. 297.

REGULA: Contra nocentem tenere canem non est culpa.

I sing the old Ford watchman: (What better name than Sarch
For him who spent his vigils in dogging mischief's march?)

But Fate, with her grim ironies, ne'er lets us go unflogged;
And this dog's tale unfolds to us how doggers may be dogg'd.

Defendant was a milkman; and, lest his patrons saw
How milk and water coalesce, he kept a canine jaw

To fright away all trespassers; and up this legend nailed:
"Beware the dog!"—a sign before all hearts but Sarch's quailed.

'Twas not so much that Sarch's nerve proclaimed heroic breed,
As that the plaintiff in his youth had not been taught to read.

One summer morn, his duties done, the plaintiff left his beat,
And plann'd to cut through Blackburn's lot and save his weary
feet.

In vain kind Phœbus threw his rays on that portentous sign;
Unletter'd Sarch maintained his march past pigs, and fowl and kine.

The kennel's near, yet no one warns—the men are in the mews,
A moment more and Towser's teeth are fastened in his trews!

Though homespun's tough, 'twas not enough those sharp teeth to
enmesh;
A lucky Shylock Towser proved—he *got* his pound of flesh!

Nota.—By no exercise of poetic license may a dog be set down as able to remove a pound of carnous tissue at one fell bite, hence we feel it incumbent upon us at this juncture to unhorse the reporter from Pegasus, and bid the latter go to grass, the former to prose, so that Sarch and his cause may be reported aright.

The following proposition of law is a fair deduction from the instructions of Tindal, C. J., to the jury in this case: *A person is justified in keeping a dog in his yard for the protection of his premises, and if one in the act of trespassing upon such premises is bitten by the dog, he has no right of action against the owner.* But the learned Chief Justice said that a man has no right to keep a ferocious dog in such a situation, in the way of access to his house, that a person coming there for a lawful purpose may be injured by it. In such a case the owner of the dog could not excuse his liability by showing that he had posted up a danger notice by which the person injured might have been put on his guard had he read it. (See also Brock *v.* Copeland, 1 Esp. 203; Curtis *v.* Mills, 5 C. & P. 489.)

In the United States it is no defence for the defendant in an action for keeping a vicious dog to show that the plaintiff was at the time trespassing upon the defendant's property, for the purpose of hunting (Loomis *v.* Terry, 17 Wend. [N.Y.] 496); or of picking berries (Sherfey *v.* Bartley 4 Sneed [Tenn.] 58); or for no particular purpose (Pierret *v.* Moller 3 E.D. Smith [N.Y.] 574). Concerning a householder's right, in general, to protect his grounds, Cowen, J., said in Loomis *v.* Terry *(supra)*: "As against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that, in these and the like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way." See the Quebec case of Dandurand *v.* Pinsonnault (7 L.C J. 131), decided under the Civil law, but enunciating practically the same doctrine as that of the above cases in the American Courts.

II. THE SCIENTER IN DOG-LAW.

Sing, tuneful Muse, from your Pierian dell,
(You'll have to help me for I don't sing well!)
Please sing the *Canidæ*, you will not weary us—
We're sober lawyers, though our star's not Sirius!
('Tis pale Astraea beckons us to Heaven—
Adumbrative in Coke, but clear in Beaven.)

What dearer theme than dogs our pen bestirs?
Man loves them all—both thoroughbreds and curs.
Perchance they've souls—now prithee, don't say
"Pshaw"!—
Mens rea's theirs in Massachusetts' law.[1]
'Tis true that legislation frets them now;
But that's because their ranks unduly grow
In cities, where our nerves get such ill-usance
They oft regard sweet singing birds a nuisance.
But dogs at common law were treated well
If honest truth the old Reporters tell.
Ferae naturae non, the cases say,
Down from the time of Sir John Holt, C. J.[2]

[1] Hathaway *v.* Tinkham, 148 Mass. 65.

[2] Mason *v.* Keeling, 12 Mod. 332.

"*Bad law,*" you cry, with Towser at your calf;
"*Yet law,*" replies his owner with a laugh.
You go to Court, the dog is cleared amain:
"He's bit but once—and may not bite again";[3]
"A dog, forsooth," (thus runs the Court's advice)
"Is mansuete till he's lunched upon you twice!"[4]
But after that he's no experimenter,[5]
He's *ferus*, and you set up the *scienter.*[6]
So far from mercy then the dog recedes
He may be hung for his carniv'rous deeds.[7]
And in his dining he can't wait for curries,
A half-hour's fatal 'twixt to single worries.[8]
Nor, if provoked to make bite "number two,"
Will that avail to shield him from his rue.[9]
Aye, more, once Towser bites, he may be brought,
In proprio corpore, before the court;
There to assist the drowsy jury's mind
In judging if his owner deemed him kind;[10]
And if the jury learn he has been chained,
Thus the *scienter* they may find maintained.[11]
In self-defence a bite's within the law,
But let the dog bite quick or hold his jaw;
If he delays and later vents his spite,
He's simply slept upon his legal right.[12]
"If I am bitten, I may kill!" you say:
Not so if Towser bites and runs away.[13]
(The Muse digresses—but not ours to damn:
Que voulez-vous? Peste! C'est méthode de femme.)
A man may keep a vicious dog to guard
His curtilage—but let him be in ward;

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[3] Fleeming *v.* Orr, 2 MacQ. H.L.C. at p. 25.
[4] *Ibid.*, at p. 23.
[5] Beck *v.* Dyson, 4 Camp. 198; Vrooman *v.* Lawyer, 13 Johns. (N.Y.) 339.
[6] Spring Co. *v.* Edgar, 99 U.S. at p. 654.
[7] Per Lee, C. J. in Smith *v.* Pelah, 2 Strange 1264.
[8] Parsons *v.* King, 8 T.L.R. 114.
[9] Smith *v.* Pelah *(supra)*; Fake *v.* Addicks, 45 Minn. 37.
[10] Line *v.* Taylor, 3 F. & F. 732.
[11] Jones *v.* Perry, 2 Esp. 482.; Webber *v.* Hoag, 8 N.Y. Supp. 76.
[12] Keightlinger *v.* Egan, 65 Ill. 235; Linck *v.* Scheffel, 32 Ill. App. at p. 20.
[13] Morris *v.* Nugent, 7 C. & P. 572.

If *licensees* are bitten when they enter,
A judgment's theirs *sans* proof of the *scienter.*[14]
But *trespassers* at night fare not so well,
They risk the canine being kind or fell.[15]
Tho' when *you* trespass, with your dog appendant,
His bite will throw all burdens on defendant.[16]
E'en harbouring a dog you do not own
Will mulct you if his viciousness be known.[17]

EPILOGUE.

And so the doctrine runs at Common Law,
When mortals suffer from the canine jaw.
So, be he bitten, 'tis beyond dispute
A man is worser off than a dumb brute.
For when of sheep your dog proves a tormenter
The plaintiff need not set up the *scienter;*
You're liable by statute, and are fined
Whether you knew the culprit fierce or kind.
The moral is: *Guard Towser all you can;*
But when he bites, pray let him bite a man!

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[14] Smillie *v.* Boyd, 24 Sc. L.R. 148; Muller *v.* McKesson, 73 N.Y. 195.
[15] Sarch *v.* Blackburn, 4 C. & P. 297; Loomis *v.* Terry, 17 Wend. (N.Y.) 497.
[16] Beckwith *v.* Shoredike, 4 Burr. 2092; Green *v.* Doyle, 21 Ill. App. 208.
[17] McKone *v.* Wood, 5 C. & P. 1; Wood *v.* Vaughan, 28 N.B. 472.

THE LIABILITY OF A MANUFACTURER FOR INJURIES TO THIRD PERSONS RESULTING FROM IMPROPERLY CONSTRUCTED ARTICLES.

This paper will have nothing to do with the liability of the manufacturer and seller of goods to the purchaser, for injuries resulting to the purchaser by reason of the unsafe or defective condition of the thing sold. Only questions arising between the manufacturer and third parties, between whom there is no contractual relation, come within the scope of this discussion.

General rule of liability.—A party is required to respond in damages to another for an injury sustained by the latter only when such injuries results from the breach of some particular duty owing from the one to the injured party. In the complex relations of society the law recognizes two distinct duties distinguished by their origin; namely, contractual and legal, the one having its foundation in contract, the other existing independently of contract, and solely as a creature of the law. But a single act may, of course, result in a breach of both contractual and legal duty. If one has committed a breach of contract, he is liable to those only with whom he has contracted; and if one has committed a breach of legal duty, he will be liable for injury thereby to one to whom the duty was owing. But a single act may create a breach of legal, and of contractual, duty with another respecting the same matter (*a*.)

Negligence in the manufacture of harmless articles; Rule of non-liability.—It is the prevailing rule that a manufacturer is liable only to the immediate purchaser for the negligent and improper construction of an article not necessarily dangerous, or for an omission of duty not imminently hazardous to life. A manufacturer supplying an article not necessarily dangerous owes no duty to the public; his only duty is to the one with whom he contracts for the sale of his wares, as determined by the contract, expressed or implied. If the article sold is imperfect and results in injury to any one, the only duty violated is, as to the manufacturer, that imposed by the contract; and accordingly, only those sustaining injuries arising from defects in the manufactured article,

(*a*) *Thomas* v. *Winchester*, 6 N.Y. 397; *Norton* v *Sewall*, 106 Mass. 143; *Peters* v. *Johnson*, 50 W. Va. 644, 41 S.E. Rep. 190, 67 L.R.A. 428; Whit. Smith Neg. 10.

who stand in contractual relations with the manufacturer, can recover from such manufacturer therefor *(b.)*

The leading case on this subject is the English one of ***Winterbottom*** v. ***Wright.*** (*c.*) There the plaintiff, a mail coachman, was injured by the breaking down of a mail coach that the defendant had contracted with the postmaster-general to provide and keep in repair for the carrying of the mail. The coachman was an employee of neither the post office department nor the defendant, but of another person who, also under contract with the postmaster-general, provided the horses and the coachman for conveying the coach. The plaintiff's injury was the result of the defendant's negligence in failing to keep the coach in proper repair. In holding that the plaintiff could not recover, Lord Abinger said: "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the considerations of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Alderson, J., in giving his opinion to the same effect, said: "The contract in this case was made with the postmaster-general; and the case is just the same as if he had come to the defendant and ordered a carriage, and had handed it at once over to Atkinson. The only safe rule is to confine the right to recover to those who enter into a contract; if we go one step beyond that, there is no reason why we should not go fifty."

The case of *Collis* v. *Selden*, *(d)*, in which this question next arose, was an action by the plaintiff to recover from the defendant for injuries that he had received by the falling of a chandelier that the defendant had negligently and improperly hung in a public house. Following the Winterbottom case, it was held that the plaintiff could not recover; and the rule enunciated in these cases has been consistently adhered to in subsequent English cases (*e.*)

(*b*) ***Winterbottom*** v. ***Wright***, 10 M. & W. 109, and a number of U.S. decisions cited in Central L.J., p. 321.

(*c*) ***Winterbottom*** v. ***Wright***, 10 M. & W. 109.

(*d*) *Collis* v. *Selden*, L.R. 3 C.P. 495.

(*e*) ***Heaven*** v. ***Pender***, 11 Q.B Div. 503; *Francis* v *Cockrell*, L.R. 5 Q.B. 501; *Blakemore* v. *Railway Co.*, 8 El. & Bl. 1035; *Longmeid* v. *Holliday*, 6 Exch. 761.

The American rule.—The courts of this country have quite universally adopted the principle of the English cases on this subject. The earliest exposition of this principle by the American courts appeared in the opinion of Strong, J., in the case of Mayor, etc., of the *City of Albany* v. *Cunliff* (*f.*) Without setting forth the facts, which are of some length, it was said: "The court below based the alleged responsibility of the defendants in this suit on the general ground that where one party sustains an injury by the misfeasance of another, the sufferer may maintain an action against the wrong-doer for redress. That rule operates where the injury is effected directly by the wrong, or where it results from the mal-construction of some object while it is in the possession or under the control or in any manner used under the agency or instructions of the party originally in fault. But I know of no case where it has been held that a stranger can recover for damages sustained by reason of the defective construction of an object of the builder, after the title to the object has changed, and it has passed out of his possession and is no longer subject to his control, and in no wise used pursuant to any authority or directions from him." The principle of this case has been re-affirmed in the later New York cases and followed by various other courts of the United States.

Illustrative cases.—Among the many cases illustrating this rule may be mentioned that of *McCaffrey* v. *Massburg, etc., Mfg. Co.* (*h*). There the plaintiff built a drop press in which was a heavy weight held by a hook. The hook, because of having been made of iron or steel of a poor quality, broke and let the weight fall upon and mash the hand of an employee of the purchaser of the machine from the manufacturer. The action for the injury thus sustained was brought by the employee against the manufacturer. The declaration averred the defendant's knowledge of the dangerous character of the appliance and that it was likely to endanger the life and limb of an operator exercising due care in the use of it. It was held, on demurrer to the declaration, that the plaintiff could not recover. *Bragdon* v. *Perkins-Campbell Company* (*i*) was an action

(*f*) *Mayor, etc.* v. *City of Albany* v. *Cunliff*, 2 N.Y. 166.

(*h*) *McCaffrey* v. *Massburg & Granville Mfg. Co.*, 33 R.I. 381, 50 Atl. Rep. 651, 55 L.R.A. 822.

(*i*) *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. Rep. 109, 58 U.S. App. 91, 30 C.C.A. 56, 47 Cent. L.J. 208.

ex delicto by the wife of the purchaser of a sidesaddle against the manufacturers to recover for injuries sustained by the wife by the breaking of the saddle. The substantial averment against the defendant was that it was the duty of the defendant to make and deliver to the purchaser, for the plaintiff's use, "a safe, sound, strong, and skillfully made saddle;" but that "the said defendant, disregarding its duty in the premises, negligently and unskillfully made, and delivered to said plaintiff, by the said husband, an unsafe, unsound, and weak saddle," by reason whereof the plaintiff sustained injury and was damaged. The court, by Dallas, circuit judge, held, after a careful review of the authorities, that the plaintiff was properly non-suited. The cause of *Curtin* v. *Somerset (j)* also may be referred to in this connection. That was an action by a guest at a hotel against the contractor and builder thereof. The building had been accepted by the owner but was so poorly constructed that, at an entertainment given at the hotel by the proprietor, a company of guests having gathered on the porch, a girder, which in some way supported it, gave way and the porch fell injuring the plaintiff. The court held the contractor owed no duty to the public or to the plaintiff but only to the one for whom he contracted to erect the building, and that the plaintiff could not, therefore, recover from the defendant for the injuries so received.

Negligence pertaining to articles imminently dangerous.—The law imposes upon every one the duty to the public to avoid acts in their nature dangerous to the lives of others; and so, the manufacturers and sellers of articles in their nature imminently dangerous are required to exercise proper care to render such articles reasonably safe for use, not only to the purchaser thereof, for, as to the purchaser, the duty is owing under the contract, but to all other persons who may come in contact with them, as a duty imposed by law and existing independently of contract. The act of negligence being imminently dangerous to the lives of others, the law creates the duty to the public, and the wrong-doer is therefore liable to any member of the public injured by defects in such articles resulting from the negligence of the manufacturer, even if there be no contractual relations between the parties. *(k)* As said

(j) *Curtin* v. *Somerset*, 140 Pa. St. 70, 21 Atl. Rep. 244.

(k) *Parry* v. *Smith*, 4 C.P. Div. 325; *Landridge* v. *Levy*, 4 M. & W. 324; *Bank* v. *Ward*, 100 U.S. 204, 25 L. Ed. 621, and a number of U.S. decisions cited in Central L.J., p. 326.

in a recent, well considered case, the principle that governs this class of actions is, "that one who deals with an article imminently dangerous owes a public duty to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved." *(l)*

The New York case of *Thomas* v. *Winchester (m)* is a leading one on this subject. That was an action brought to recover damages from the defendant for negligently putting up, labelling and selling as the extra extract of dandelion, a simple and harmless medicine, a jar of the extract of belladonna, a deadly poison, by means of which the plaintiff to whom, being sick, a dose of the dandelion was prescribed by her physician, a portion of the contents of the jar was administered as the extract of dandelion, the poison resulting in great injury to the plaintiff.

The defendant, Winchester, had purchased the extract sold from another, which had been prepared and labeled by the agent of Winchester. Winchester had sold the extract to one Aspinwall, a druggist, who in turn sold it to one Foord, of whom the plaintiff's husband purchased the poisonous extract. In holding that the plaintiff could recover notwithstanding there was no privity or connection between the defendant and the plaintiff, the court, by Ruggles, C.J., said: "In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? Or that the exercise of that caution was a duty only to his immediate vendee whose life was not endangered? The defendant's duty," continued the court, "arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened, could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in

(*l*) *McCaffrey* v. *Massburg & Granville Mfg. Co.*, 23 R.I. 381, 50 Atl. Rep. 651, 55 L.R.A. 822.

(*m*) *Thomas* v. *Winchester*, 6 N.Y. 397, 57 Am. Dec. 455.

this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion by some person then unknown."

In the recent case of *Huset* v. *J. I. Case Threshing Machine Co.*,(*n*) which leaves but little to be said on the subject, and which contains an admirable collection and review of the authorities, the plaintiff was an employee of an owner of a threshing machine manufactured by the defendant. The owner of the machine, bought it of another who purchased it directly from the defendant. The injuries, to recover for which the plaintiff sued, was sustained by him by falling through an insecure piece of sheet iron into a revolving cylinder. The machine as thus constructed was imminently and necessarily dangerous. The circuit court sustained a demurrer to the complaint containing these allegations. The Court of Appeals, in holding that the demurrer was erroneously sustained, Sanborn, Cir. J., speaking for the court, said: "Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise, and vice versa. It is a rational and fair deduction from the rules to which brief reference has been made, that one who makes or sells a machine, a building, a tool or an article of merchandise, designated and fitted for a specific use, is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale."

Thus, this rule has been held to apply to an action against a builder of a scaffold for his negligence in its construction, whereby a servant of the one for whom it was built was injured by its falling (*o*); to an action against a refiner of oil below the legal fire

(*n*) *Huset* v. *J. I. Case Threshing Machine Co.*, 120 Fed. Rep. 865, 57 C.C.A. 237, 61 L.R.A. 303.

(*o*) *Devlin* v. *Smith*, 89 N.Y. 470; *Coughtry* v. *Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387; *Bright* v. *Barnett & Record Co.*, 88 Wis. 299. 60 N.W. Rep. 418.

test, put upon the market for sale for illuminating purposes, by a purchaser from one to whom it was sold by the refiner, to recover for injuries which he sustained by an explosion thereof (*p*); and probably would apply to a caterer who dispenses unwholesome food to one not in contractual relations with him (*q*).

So, for the violation of a duty imposed by statute with reference to dangerous articles, there may be a recovery by any one injured because of a breach thereof, without fault on his part (*r*).

The Doctrine of implied invitation.—In many cases the courts have applied the doctrine of implied invitation to fasten upon the manufacturer a liability for injury to third persons resulting from defects in negligently manufactured articles (*s*). In the case of *Bright* v. *Barnett Record Co.*, a scaffold case,—an action against a contractor by a servant of one for whom the contractor built a scaffold in such a negligent manner as to cause it to fall and injure the servant, the court, in holding that the defendant could be held liable on the ground of an implied invitation, said: "The first position taken by the learned counsel of the appellant in their brief is that the appellant owed the deceased no legal duty arising from contract or otherwise. This is no doubt the general rule. 'The liability of the builder or manufacturer for such a defect is in general only to the person with whom he contracted.' But this case belongs with a class of cases that can be sustained outside of this general principle, and may rest on two well-established principles of law. The defendant, in furnishing this staging for the use of the employees of the fire extinguishing company, on which they might stand or walk in doing their work, had, in effect, invited and induced the deceased to walk on it while doing his work, and was liable to him if he suffered an injury from its defective condition, caused by the negligence of its construction. The case may rest on this simple implied invitation."

Fraud and bad faith.—In some cases the liability of the manufacturer or seller is put upon the ground of fraud and deceit

(*p*) *Elkins* v. *McKean*, 79 Pa. St. 493; *Wellington* v. *Oil Co.*, 104 Mass. 64.

(*q*) *Bishopp* v. *Weber*, 139 Mass. 411, 1 N.E. Rep. 154, 52 Am. Rep. 154.

(*r*) *Ives* v. *Welden*, 114 Ia. 576, 87 N.W. Rep. 408, 54 L.R.A. 854.

(*s*) *Heaven* v. *Pender*, L.R. 11 Q.B. Div. 503; *Pickard* v. *Smith*, 10 C.B. (N.S.) 470; *Mulchey* v. *Society*, 123 Mass. 487; *Gilbert* v. *Nagle*, 118 Mass. 278; *Bight* v. *Barnett & Record Co.*, 88 Wis. 299, 60 N.W. Rep. 418, 26 L.R.A. 524; *Coughtry* v. *Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387.

consisting in selling an article known to be dangerous, the defect in which is concealed. Conspicuous in this group of cases is the case of *Schubert* v. *J. R. Clark Co.* (*t*). The facts in that case, as stated by the court, are substantially as follows: The plaintiff, a house painter, was in the service of one Phelps. He was engaged in the work of painting the interior of a certain building. His employer, Phelps, as a purchaser, ordered from a retail merchant a new 10 foot stepladder, directing it to be delivered to the plaintiff at the place where he was at work. The merchant, not having such a ladder in his stock of goods, ordered the defendant corporation to deliver such a step-ladder to the plaintiff for his use. The defendant delivered a ladder to the plaintiff pursuant to that order. This we construe to have been a purchase by the merchant from the defendant. The defendant was a manufacturer of such goods and the ladder so delivered had therefore been manufactured by it, "to be sold for the purpose of being used." It was made of poor, cross-grained and decayed lumber, and "was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same." It was alleged that the defendant knew or ought to have known of such defects and insufficiency. Neither the plaintiff nor his employer nor the merchant from whom the latter ordered the ladder knew of such defects and it was so varnished, oiled and painted that they could not discover them. The plaintiff, supposing the ladder to have been made of good material, and of sufficient strength, proceeded to use it in the performance of his work and while standing on it, seven feet above the floor, it broke, without his fault causing him to fall and he was thereby injured. The court, by Dickson, J., said: "If the defendant knowingly delivered such an article for the plaintiff's use, it was its duty to warn him of the danger by disclosing the hidden defects; and neglect of that duty would constitute actionable negligence. Every one may be supposed to understand that such articles are manufactured, sold or disposed of with a view to their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer, would ordinarily assume, without inquiry, and without any express

(*t*) *Schubert* v. *J. R. Clarke Co.*, 49 Minn. 331, 51 N.W. Rep. 1103, 32 Am. St. Rep. 559, 15 L.R.A. 818.

warranty, that it was what it appears to be,—a thing intended for actual use; and that it has not been so negligently manufactured that by reason of concealed defects its use would be attended with danger of serious injury. And this must be supposed to be understood by the person who disposes of it; and if, knowing the existence of such defects, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith. Under such circumstances silence would partake of the nature of an assurance that the thing had not any such known but concealed defects."

Lewis v. *Terry* (*u*) was an action brought by the guest of the purchaser of a folding bed, against the seller thereof, for injuries resulting from the negligent construction of the bed. The defects in the bed rendering it dangerous for use, and being known by the seller at the time of the sale, but undisclosed to the purchaser, it was held that there might be a recovery, the case apparently resting on the fraud of the seller.

Upon this ground, also, the plaintiff was held entitled to recover against a dealer selling a gun to the plaintiff's father, which, from defects therein, known to the dealer but undisclosed, exploded, resulting in injury to the plaintiff (*v*.)

Numerous other cases, English and American, have been put upon this ground,—of the fraud of the seller, which are cited in the note (*w*.)

It has been said that in this class of cases it is not necessary that the article in which the defect exists shall be "imminently dangerous," to fasten a liability upon the manufacturer. (*x*). It is necessary, however, it need hardly be said, that the manufacturer should have knowledge of the defect rendering dangerous the

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(*u*) *Lewis* v. *Terry*, 111 Cal. 39, 43 Pac. Rep. 398, 52 Am. St. Rep. 146, 31 L.R.A. 220, 42 Cent. L.J. 264.

(*v*) *Landridge* v. *Leby*, 2 M. & W. 519, 4 M. & W. 337.

(*w*) *George* v. *Skivington*, L.R. 5 Ex. 1; *Longmeid* v. *Holliday*, 6 Exch. 761; See also *Heiser* v. *Kingsland, etc., Co.*, 110 Mo. 605, 19 S.W. Rep. 630, 15 L.R.A. 821; *Elkins* v. *McKean*, 79 Pa. St. 493; *Bank* v. *Ward*, 100 U.S. 195, 26 L. Ed. 112; *Bradgon* v. *Perkins-Campbell Co.*, 87 Fed. Rep. 109, 58 U.S. App. 91, 30 C.C.A. 567.

(*x*) *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. Rep. 109, 30 C.C.A. 567.

article sold, before the rule laid down can have any application. *(y)*.

Conclusion.—We have studied the cases on this branch of the law with a view to deducing certain general rules on the subject and ascertaining the principle underlying the various decisions. We, however, are not so sanguine as to believe that perfect orde. has been wrought from such a chaotic mass of cases. The West Virginia court was not far from the truth when, to the question, "What is the test or criterion always applicable"? it answered, "Hardly any. Each case involving this nice principle must be largely its own arbiter."—*Central Law Journal.*

(y) *Heizer* v. *Kingsland & Douglas Mfg. Co.*, 110 Mo. 605, 19 S.W. Rep. 630, 33 Am. St. Rep. 482, 15 L.R.A. 821.

The arguments advanced in the United States in favour of limiting the right of appeal in criminal cases are not convincing. As to the contention that juries have a better opportunity to decide upon the credibility of the witnesses, it may be said that the truth that juries are the best judges of the facts is now sufficiently recognized by the judges who review cases on appeal. But every one knows that juries may come, and often do come, to erroneous conclusions, and it is but just that their verdicts should sometimes be set aside on the ground that they are contrary to, or unsupported by the evidence. Against the objection that a defendant who has the means to avail himself of an appeal may escape through technicalities, it may be answered that that is not a reason for taking away the right of appeal. It is rather a reason for amending the law with reference to the grounds upon which a new trial may be granted. There is a section in the New York Code of Criminal Procedure which provides as follows: "After hearing the appeal the court must give judgment without regard to technical errors, or defects, or to exceptions which do not affect the substantial rights of the parties." Th : might be improved upon by enumerating the technical errors which should be disregarded. The .laim that the right of appeal gives a defendant of means an advantage over the poor defendant is undoubtedly well founded. It is most unfortunate, as are all the disadvantages of poverty.—*Law Notes.*

ENGLISH CASES.

LIBEL BY SERVANT OF CORPORATION — LIABILITY OF COMPANY FOR MALICIOUS LIBEL.

Citizens Life Assurance Company v. *Brown* (1904) A.C. 423, was an action against a limited company to recover damage for a malicious libel written and published by one of its officers. The defendants contended that malice could not be imputed to a corporation, relying on the dictum of the late Lord Bramwell in *Abrath* v. *North Eastern Ry. Co.* 11 App. Cas. 247, 250, but the Judicial Committee of the Privy Council (Lords Macnaghten, Davey and Lindley, and Sir A. Wilson) declined to adopt that view, and held, affirming the judgment of the court below, that although the servant may have had no actual authority, express or implied, to write the libel complained of, if he did it in the course of an authorized employment the corporation is liable.

FINAL JUDGMENT — APPEAL — OMISSION OF FACT IN PETITION FOR SPECIAL LEAVE TO APPEAL—COSTS.

McDonald v. *Belcher* (1904) A.C. 429, was an appeal from the Supreme Court of Canada. The action was brought by executors to recover monies due to their testator's estate. At the trial the judge gave judgment in favour of the plaintiffs for an item of their claim amounting to $50,000, and directed a reference as to the other items, reserving costs. According to the Yukon Territorial Act, 1899, s. 8, it was necessary to bring an appeal from a final judgment within 20 days, and the Supreme Court of British Columbia held that as to the $50,000 the judgment was final, and an appeal therefore failed because not brought within 20 days. The defendants then appealed to the Supreme Court of Canada, which court, without considering the question of jurisdiction to entertain the appeal, reversed the judgments of the lower courts and granted a new trial. From that order the plaintiffs applied to the Judicial Committee of the Privy Council for special leave to appeal, alleging that the construction or the Yukon Territorial Act was a matter of general public importance, but omitted to state, as the fact was, that the Act had been repealed. Leave was

granted, and this omission was urged as a reason for depriving the applicants of costs; but the Judicial Committee (The Lord Chancellor and the Lords Lindley and Kinross, and Sir A. Wilson) being of opinion that on the merits the appellants were entitled to succeed, on the ground that the judgment as to the $50,000 was a "final judgment" from which, after the lapse of 20 days, no appeal lay either to the Supreme Court of British Columbia or to the Supreme Court of Canada, allowed the appeal with costs, notwithstanding the omission to state that the Act in question had been repealed, which in the circumstances was considered immaterial.

CONTRACT — PREVENTION OF PERFORMANCE OF CONTRACT — QUANTUM MERUIT.

Loader v. *Slowey* (1904) A.C. 442, was an appeal from the Supreme Court of New Zealand. The defendants in the action had become sureties for the due performance of a contract for the building of a tunnel and other works by one, McWilliams, for a municipal corporation. McWilliams having made default and been dismissed from the work, the defendants employed Slowey to complete the job, and by arrangement with the defendants the corporation by its servants assumed the direction and control of the work by Slowey and ultimately, as the jury found, wrongfully took possession of the works and prevented Slowey from completing them. Slowey then sued the defendants on a quantum meruit for the work actually done by him. The New Zealand Court held he was entitled to recover and the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley) affirmed the judgment.

PRACTICE—SPECIAL LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL—APPEAL TO SUPREME COURT OF CANADA — UNSUCCESSFUL APPELLANT TO SUPREME COURT.

In *Canadian Pacific Ry.* v. *Blain* (1904) A.C. 453, the Judicial Committee of the Privy Council (Lords Davey and Robertson, and Sir A. Wilson) once more reiterate the rule that in considering applications for leave to appeal by an appellant who has unsuccesfully appealed to the Supreme Court of Canada, the Committee will not grant the leave unless a question of law is raised of sufficient importance to justify it, wherever the applicant has elected to appeal to the Supreme Court, and not to His

Majesty in Council as he might have done. The question of the duty of a railway company to protect its passengers from assault was not considered to be a question of law of sufficient importance to warrant leave to appeal being given to a railway company seeking to deny that the law imposes such a duty on them.

ASSIGNMENT—CHOSE IN ACTION—NOTICE — MORTGAGE — ACKNOWLEDGMENT IN MORTGAGE OF RECEIPT—ASSIGNEE—JUD. ACT, S. 25, SUB-S. 6, (ONT. JUD. ACT, S. 58 (5)).

In *Bateman* v. *Hunt* (1904) 2 K.B. 530, the plaintiffs as assignees of a mortgage claimed to recover the amount acknowledged to have been received by the mortgagors in the body of the mortgage and also in a receipt endorsed thereon, and several objections were raised by the mortgagors to their right to recover. The mortgage was originally given under the following circumstances—viz., a solicitor was instructed by the defendants to procure a loan for them of a specified amount on the security of a mortgage. The mortgage deed was prepared and executed by the defendants purporting to be in consideration of the specified sum the receipt whereof was acknowledged in the body of the deed, and also in a receipt indorsed thereon. The solicitor himself advanced a sum of money, the amount of which was disputed, but the mortgage was made out in the name of a clerk in his office as mortgagee. The clerk subsequently assigned the mortgage to the solicitor, who afterwards assigned it by way of a sub-mortgage to the plaintiffs' testator. The solicitor and the plaintiffs' testator died without ever having given notice of the assignments to the defendants; but notice was given by the plaintiffs before action of both assignments. The defendants contended (1) that the plaintiffs were not entitled to sue in their own names, because the notice was insufficient under the Jud. Act, s. 25, sub.-s. 6 (Ont. Jud. Act, s. 58 (5)). (2) That if entitled to sue they were bound by the equities between the defendants and the original mortgagor, and that the full amount purported to be secured had not in fact been advanced, and that was one of the equities to which the plaintiffs as assignees were subject. The judge at the trial (name not given) gave judgment in favour of the plaintiffs and the Court of Appeal (Collins, M.R., and Stirling and Matthew, L.JJ.) affirmed his decision, holding that the statute prescribes no limit of time within which notice is to be given, and that it is sufficient if given

before action; and, also, that under *Bickerton* v. *Walker*, 31 Ch. D. 151, the assignees were entitled to rely on the acknowledgment in the deed and receipt endorsed; that the full amount of principal secured had been advanced, and that the plaintiffs had the better equity.

MASTER AND SERVANT — NEGLIGENCE — MASTER — NURSING ASSOCIATION— CONTRACT TO SUPPLY NURSE—NEGLIGENCE OF NURSE.

Hall v *Lees* (1904) 2 K.B. 602, was an action by husband and wife against the committee of a Nurses' Association to recover damages occasioned to the wife by the negligence of a nurse supplied by the Association. The Association was formed for the purpose of providing for the supply of properly qualified nurses, to attend the sick in a certain neighbourhood. The Association, for that purpose appointed and paid salaries to nurses, for whose services they made charges to persons on whose application they were supplied. The regulations of the Association provided for a certain supervision over the nurses by a superintendent appointed by the Association; but with regard to a nurse, when engaged in nursing a patient, they provided that while so engaged she should not absent herself from duty without the permission of the patient's friends, and that she should implicitly follow the instructions of the patient's doctor. A form was sent out by the Association to persons applying for a nurse, to the effect that while engaged in nursing the patient the nurse was to be regarded as employed by that person. Two nurses were supplied by the Association for the purpose of nursing the female plaintiff, and owing to the carelessness of one of them the female plaintiff, while under the influence of an anæsthetic, was injured by a hot water bottle. The trial took place before Jelf, J., and a jury. The jury found the injury was caused by the negligence of the nurses, or one of them, and that the Association had undertaken to nurse the female plaintiff through the agency of the nurses as their servants, and they assessed the damages at £300. The defendants contended that the second finding of the jury cound not be supported on the evidence. The Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) agreed with that contention and set aside the verdict, and gave judgment dismissing the action holding that the contract between the plaintiff and the Association was a contract to supply a properly qualified nurse, but not a contract to nurse the female plaintiff.

COMPANY—DEBENTURE—FLOATING SECURITY—EXECUTION AGAINST COMPANY—PAYMENT TO SHERIFF TO AVOID SALE—MONEY IN SHERIFF'S HANDS.

Robinson v. *Burnell's V. B. Co.* (1904) 2 K.B. 624, was an interpleader between a debenture holder whose debenture constituted a floating security on all the assets of a joint stock company, and an execution creditor of the company, as to the right to certain moneys in the hands of a sheriff under the following circumstances: The execution creditor had placed a fi. fa. against the company in the hands of the sheriff, and in order to prevent a sale thereunder the company arranged to pay and did pay to the sheriff daily a certain proportion of its daily takings: while this money was still in the hands of the sheriff, the debenture holder procured the appointment of a receiver and it was contended that the receiver was entitled to the money. Channell, J., held that the payments to the sheriff must be deemed to be payment to the execution creditor, and that the receiver was therefore not entitled to the money in question.

ADMIRALTY—SALVAGE—TOWAGE CONTRACT BETWEEN OWNERS OF SALVING AND SALVED VESSELS—MASTER AND CREW OF SALVING VESSEL.

The Friesland (1904) P. 345, was a salvage action, the plaintiffs were the owners, master and crew of the Cruizer, and the defendants were the owners of the Friesland. The defendants were informed by telegraph that the Friesland was lying disabled off the coast of Ireland, and agreed with the owners of the Cruizer for the towage of the vessel to Liverpool on the usual towage terms, but before the owners of the Cruizer could instruct the master, and before the agreement for towage was made, the Cruizer had proceeded to the disabled vessel, and had commenced towing her to Liverpool. Under the circumstances, Jeune, P.P.D., held that though the owners of the Cruizer were bound by the towage agreement, her master and crew had acquired independent rights which must be dealt with on salvage terms.

PRINCIPAL AND AGENT—POWER OF ATTORNEY—POWER OF SALE—PROPERTY HELD IN MORTGAGE.

In re Dowson & Jenkins (1904) 2 Ch. 219, was an application under the Vendors' and Purchasers' Act. The vendor was a mortgagee, and the sale had been made under a power of sale in the mortgage, and the question in dispute was as to the sufficiency of a power of attorney made by the mortgagee to enable the

attorney to carry out the sale. The mortgagee had given instructions to his solicitor to put the property up for sale by auction, but before the day fixed for the sale he had to leave England and executed the power of attorney. It contained extensive powers of management and power to ask, demand, sue for and recover all sums owing to the donor, and to give, sign and execute releases and other discharges for the same, and also power to sell any real or personal property belonging to him. The power, however, contained no reference to the mortgage or the power of sale or the impending sale thereunder. Kekewich, J., on construction of the whole of the power of attorney, came to the conclusion that it did not authorize a sale by the attorney of property held as mortgagee by the principal, and the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) agreed with him, on the ground that the mortgaged lands could not be said to be lands belonging to the principal.

STATUTE OF LIMITATIONS—PRINCIPAL AND AGENT—MONEYS REMITTED TO AGENT FOR SPECIAL PURPOSE AND NOT ACCOUNTED FOR—EXPRESS TRUST—FRAUD—ACTION FOR ACCOUNT—(R.S.O. c. 129, s. 32).

In *North American Timber Co.* v. *Watkins* (1904) 2 Ch. 233, the decision of Kekewich, J. (1904) 1 Ch. 242 (noted *ante* p. 307) has been affirmed by the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.). In 1883 money had been remitted by the plaintiffs to the defendant to buy lands. In 1901 the plaintiffs discovered for the first time that the defendant had charged the plaintiffs more for the lands, than he had actually paid. The action was for account and the defendant set up the Statute of Limitations as a bar. The Court of Appeal agreed that the defendant was an express trustee, and they also considered that he had been guilty of a fraud, and in either view the Statute of Limitations was no defence.

COMPANY—JOINT DEBENTURES ISSUED BY SEVERAL COMPANIES—JOINT AND SEVERAL COVENANT—CHARGE OF JOINT DEBENTURES ON COMPANIES' UNDERTAKINGS.

In re Johnston Patents Co. (1904) 2 Ch. 234, three joint stock companies issued joint debentures which they jointly and severally covenanted to pay, and which they respectively charged on their several undertakings and assets. Each of the companies received a part of the proceeds of the debentures. Byrne, J., was

of opinion that the debentures were wholly ultra vires and null and void, but the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) came to the conclusion that they were not wholly void, but were valid and binding on the several companies to the extent to which the money advanced on them had come to the hands of each company. The articles of association empowered the directors to borrow any sum of money not exceeding the amount of the preference share capital of the company. No preference share capital had in fact been issued, and the Court of Appeal held that this clause did not limit the amount that could be borrowed.

BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—CERTIFICATE NOT TO BE CONCLUSIVE AS TO SUFFICIENCY OF WORK OR MATERIALS—DEFECTIVE WORK—MATERIALS—DAMAGES.

Robins v. *Goddard* (1904) 2 Ch. 261, was an action brought by builders under a building contract clause 16 of which empowered the architect to order in writing from time to time the removal of improper materials, the substitution of proper materials, and the removal and proper re-execution of any work not in accordance with the drawings and specifications. Clause 17 provided that any defect which might appear within twelve months from the completion of the work arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specifications should, upon the written direction of the architect, be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. Clause 30 provided for payment of the contractor under progress certificates, to be issued by the architect, and contained the proviso: "No certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects, as provided by this contract." The architect had issued certificates for the sum claimed by the plaintiffs, and had made no order or direction under clauses 16 and 17. The defendant, nevertheless, claimed that he was entitled to set off damages he had sustained by reason of defective work and materials, and that the architect's certificates were not conclusive. Farwell, J., however, held that in the absence of any order or direction by the architect under clauses 16 and 17 the architect's certificates were conclusive, and that the defendant was not entitled to set off the damages he claimed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ontario.] LAKE ERIE & DETROIT RIVER R.W. CO. *v.* MARSH. [Oct. 22.

Appeal—Special leave.

Special leave to appeal from a judgment of the Court of Appeal for Ontario, 60 & 61 Vict. c. 34, s. 1 (E.), may be granted in cases involving matters of public interest, important questions or law, construction of Imperial or Dominion statutes, a conflict between Dominion and Provincial authority, or questions of law applicable to the whole Dominion. If a case is of great public interest, and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. Leave refused.

Riddell, K.C., for appellants. *Faulds*, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

MacMahon, J.] JOHN INGLIS CO. *v.* CITY OF TORONTO. [Oct. 22.

Municipal corporation—By-law closing street—Motion to quash—Consent of Dominion Government—Amending by-law.

The Municipal Act, 3 Ed. VII., c. 19, s. 628, provides that without the consent of the Government of the Dominion of Canada, no municipal council shall pass a by-law for the stopping up or altering the direction or alignment of any street made or laid out by the Dominion of Canada, and a by-law for any of the purposes aforesaid shall be void unless it recites such consent. On Sept. 26th, 1904, the Municipal Council of Toronto passed by-law 4420, stopping up and closing a certain portion of Strachan Avenue in that city. It was afterwards discovered that Strachan Avenue was a street which had been laid out by the Dominion of Canada, being part of the Ordnance Survey, and the consent of the Dominion Government was sought and given by Order-in-Council of Oct. 6th, 1904. On

Oct. 10th, 1904, the City Council passed by-law 4428 amending by-law 4420 by reciting the consent of the Dominion Government. A motion to quash the by-law was launched, and notice served Oct. 1st, 1904, before the passing of the amending by-law.

Held, that when by-law 4420 was passed, the powers of the city council were spent, and as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, it could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law, and must be declared invalid.

H. S. Osler, K.C., for the motion. *Watson*, K.C., and *Fullerton*, K.C., contra.

Trial—MacMahon, J.] PINKE *v.* BARNHOLD [Oct. 22.

Church membership—Expulsion of member—Domestic tribunal—Injunction—Civil Courts.

The plaintiff sought an injunction restraining the trustees of St. Peter's Church in Berlin proceeding with a resolution, passed by them, expelling him as a member of the church on the ground of certain actions of his, not necessary to mention here. No notification was given calling upon the plaintiff to attend the meeting at which the resolution was passed, nor was he made aware in any way of the intention of the trustees to expel him. The plaintiff's civil rights were not affected by the expulsion.

Held, that the civil courts would not, after an adjudication by the domestic tribunal depriving the plaintiff of his membership, investigate the legality or regularity of the proceediegs, and the motion must be dismissed.

Clement, K.C. for plaintiff. *Millar*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] [Sept. 12.

BANNATYNE *v.* SUBURBAN RAPID TRANSIT CO.

Trees on highways—Municipal Act—Railway Company cutting down trees on part of highway needed for its track—Injunction—Compensation to owner of adjoining land.

Motion to continue until the trial an interim injunction preventing the defendants from cutting down and removing shade and ornamental trees growing on the side of the highway adjacent to the plaintiffs' land.

The defendants' Act of incorporation empowering them to construct with the consent of the municipality their line of railway along the public

highway therein according to the plans to be approved by the council. The Act further provided that the several clauses of the Manitoba Railway Act, R.S.M. 1902, c. 145, should be incorporated with and deemed part of the Company's Act of incorporation.

By the plan of the roadway approved by the council, the centre line of the Company's Railway was to be twenty feet from the boundary of the highway in front of the plaintiffs' land.

Defendants cut down some of the trees there and were proceeding to cut down and remove the remainder when the injunction was obtained; claiming that, under their Act of incorporation and their agreement with the municipality which had been ratified by the Legislature, they had an absolute right to cut the trees down and build their tracks according to the said plan without making any compensation to the plaintiffs.

Sec. 688 of The Municipal Act, R.S.M. 1902, c. 116, provides as follows:—"Every shade tree, shrub and sapling now growing on either side of any highway or road in this Province shall be deemed to be the property of the owner of the land adjacent to such highway or road opposite which such tree, shrub or sapling is; and the owner of such land shall be allowed to fence in such trees for a space not exceeding eight feet from his boundary line." Under this section the plaintiff claimed the trees in question and the right to fence in eight feet of the highway adjoining their land, and notified the Company of their intention to fence in the eight feet accordingly.

Held, following *Douglas* v. *Fox*, 31 U.C.C.P. 140, that the plaintiffs had such an interest in the trees in question and in the eight feet of the highway as would entitle them to maintain an action to prevent destruction of the trees and encroachment upon the eight feet strip by any unauthorized person; and that the Legislature, in conferring upon the Company its powers as to the construction and working of its railway, had not deprived the plaintiffs of their right to compensation under s. 7 and other provisions of the Railway Act.

Where a statutory right has been conferred, the Legislature will not be deemed to have taken away that right by a later statute unless the plain language of the statute shews an intention to do so: *Re Cuno*, 43 Ch.D. 12.

While permitting to the Railway Company the full exercise of the special powers granted to it, the Legislature has protected the plaintiffs' rights by providing that compensation shall be made not only for land taken but also for lands injuriously affected by the construction and operation of the railway: *Parkdale* v. *West*, 12 A.C. 602; *North Shore Railway Co.* v. *Peon*, 14 A.C. 612; and other cases.

A railway company is bound under the statutes to take the necessary steps to settle the amount of the compensation to be paid to an owner whose land will be injuriously affected by the construction of the proposed work, and to pay the same, before the land is taken or the right interfered with: *Hendry* v. *Toronto H. & B. Ry.* 27 O.R. 46; subject, however, to the power conferred upon a Judge of the Court, by s. 25 of the Manitoba Railway Act, to order that immediate possession be given to the Company upon proof that such is necessary to carry on the railway work, and upon the Company furnishing proper security for payment of the compensation to be awarded.

Order that injunction be continued until the trial of the action, but to be dissolved upon the Company giving security to the satisfaction of the judge that it would forthwith proceed under the statutes to settle the amount of the compensation to be awarded to the plaintiffs for the injuries complained of: and for any other injuries to the plaintiffs' land which would be occasioned by the construction and operation of the proposed line of railway. Costs reserved.

O'Connor, for the plaintiffs. *Munson*, K.C., for defendants.

Richards, J.] GARDANIER *v.* CANADIAN NORTHERN R.W. CO. [Sept 29.

Practice—Examination for discovery—King's Bench Act, Rule 387—Officer of company—Conductor of railway train, when he may be examined as an officer.

Motion to compel the conductor of one of the defendants' trains to attend and be examined, under Rule 387 of the King's Bench Act, for discovery as to the plaintiff's claim in this action, which was for injuries received by him while acting as brakesman on the train. It appeared that the plaintiff went under one of the cars by order of the conductor in charge of the train for the purpose of adjusting some chains, and that, while he was so engaged, the train was started without warning to him and caused the injury complained of.

Held, that the conductor, under the circumstances, was an officer of the railway company within the meaning of the Rule, and must attend and submit to be examined as to his knowledge of the matter in question: *Moxley* v. *Canada Atlantic Ry. Co.*, 15 S.C.R. 145; *Leitch* v. *G.T.R. Co.*, 13 Pr. 369, and *Dixon* v. *Winnepeg*, 10 M.R. 663, followed.

Potts, for plaintiff. *Laird*, for defendants.

UNITED STATES DECISIONS.

PARENT AND CHILD:—A child is held *McKelvey* v. *McKelvey* (Tenn.) 64 L.R.A. 991, to have no right of action to recover damages against his father and stepmother for cruel and inhuman treatment inflicted upon him by the latter with consent of the former.

RAILROADS:—The right of a railroad company to give one teamster an exclusive right to enter upon the railroad property to solicit the privilege of carrying the baggage of passengers, and to exclude others from its grounds, is sustained in *Hedding* v. *Gallagher* (N.H.) 64 L.R.A. 811, where the reasonable requirements of passengers are thereby fully met.

TREES:—The owner of trees in a highway is held, in *Hazlehurst* v. *Mayes* (Miss.) 64 L.R.A. 805, to have no right of action for the necessary trimming of them for the installation of an electric-lighting system for the municipality, which has full authority to establish the same, and full jurisdiction over the highway within its limits.

SUNDAY: The repairing of a belt in a factory so as to prevent 200 hands from losing a day's work the following day is held, in *State* v. *Collett* (Ark.) 64 L.R.A. 204, to be within an exception to a Sunday law permitting works of necessity on that day, where the defect was not discovered until too late to repair it on Saturday with the appliances at hand, and the owner of the mill was not negligent in not having foreseen the accident or having appliances at hand to repair it immediately.

CARRIERS—INJURIES TO PASSENGERS BY CARS PASSING EACH OTHER TOO CLOSELY.—We desire to call attention to a valuable opinion by Judge Goode of the St. Louis Court of Appeals in the case of *Kreimelmann* v. *Jourdan*, 80 S.W. Rep 323. In this case a street railway company ran open summer cars, with a continuous footboard on each side, on double tracks so close together that passengers using the inside footboard would be struck by cars going in the opposite direction. Plaintiff in this case was so struck and injured while he was passing from the rear of the car, along such footboard, to a seat, without knowledge that the tracks were so close together as to render his position dangerous. The court held that he was not guilty of contributory negligence as a matter of law, though he was well aquainted with the operation of street cars, defendant having taken no precautions to prevent such use of the inside footboard by passengers.

Judge Goode, in the course of a very valuable opinion, said in part: "The proposition is greatly insisted on that the court erred in refusing to instruct that the plaintiff could not recover if he stepped on the footboard without first looking for a car on the north track. The rule that a person must look or listen before going on a given spot, or forfeit any relief for an injury received thereon, prevails when the spot is known to be in the track or course habitually passed over by trains, cars, waggons, or other instru-

mentalities whose impact will inflict injury. We are not sure a jury must be told a plaintiff cannot recover for a personal injury if he did not look around before going where he was hurt, except when the accident occurred while the plaintiff was crossing a railway track, which is a warning of danger to a person about to cross it. When a man steps on a railway track, he knows he is going where danger lurks, and knows, too, whence the danger is to be apprehended; that is from the approach along the track of an engine or car. Hence the propriety and the wisdom of requiring him to look in advance to see if the track is clear, or requiring that specific act as a discharge of the duty to use ordinary care. A person crossing a railway track at a common highway crossing has no reason to rely on the railway company's having arranged the operation of trains to insure his safety, and hence must look for trains. But under circumstances which give him the right to trust to the railway company's care, the rule in regard to looking for trains before crossing a track does not prevail: *Terry* v. *Jewett*, 78 N.Y. 338; *Warren* v. *Ry.*, 8 Allen, 227, 85 Am. Dec. 700; *Klein* v. *Jewett*, 26 N. J. Eq. 474; *Jewett* v. *Klein*, 27 N. J. Eq. 550. The footboard on which the plaintiff stepped was intended, among other things, for passengers to walk to a seat on. In itself, it gave no warning that a person using it was likely to be hit by a car on the near track, but tended to produce an impression that he would be safe on the board, for it was not to be supposed the defendant would invite its patrons to expose themselves to great peril. Nor was the north track a warning to him, for he might believe, with reason, that a passing car would miss him; and, if he told the truth, that was his belief. We do not feel justified in prescribing as the measure or quantum of care to be used by a passenger in such a situation that he must look for approaching cars before stepping on a footboard. The more satisfactory test of right conduct under the circumstances that surrounded the plaintiff is the one which prevails universally, namely, did he exercise ordinary care to insure his own safety? The facts did not call for a charge to the jury that plaintiff was bound to look for another car before he stepped on the board, though failure to take that precaution would defeat his action if the jury thought it was an essential element of due care."