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WHEN A SEAL IS NECESSARY FOR THE PURPOSE OF AUTHENTICATING A CONTRACT OF EMPLOYMENT MADE BY A CORPORATION.

1. **English common law doctrine and its limitations.**
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1. English common law doctrine and its limitations.—The general rule is that a body corporate is not bound by any contract which is not under its corporate seal[1]. But this rule has from the earliest traceable periods been subject to certain exceptions; and various decisions in the older reports shew conclusively that one of these exceptions had relation to the hiring of inferior servants[2]. "The principle to be collected from those decisions is, that an appointment under seal was not necessary in the case of officers or ser-

[1] Lindley, Companies, 5th ed. p. 220: Addison, Contr. 11th ed. p. 345.

"The rule of the law is clear; that prima facie and for general purposes a corporation can only contract under seal, for the proper legal mode of authenticating the act of a corporation is by means of its seal." *Austin* v. *Guardians of Bethnal Green* (1874) L.R. 9 C.P. 91; per Coleridge, C.J.

For a general review of the authorities as to the rule requiring the affixing of the corporate seal to corporate contracts, see Story, Agency, 9th ed. § 53, last note.

Even a resolution of the members of the body corporate is not equivalent to an instrument under its seal. Lindley, Companies, p. 221.

[2] A corporation may have ploughmen and servants of husbandry, butlers, cooks, and such like, without retainer by deed. 4 H. 7, 17, cited in *Arnold* v. *Poole* (1842) 4 Man. & G. 860, (p. 876).

A dean and chapter may retain a bailiff, receiver, or other servants without writing (i.e. writing under seal). 4 H. 7, 6 cited in *Arnold* v. *Poole*, ubi supra.

In Angell & Ames, Corp. § 281, the following authorities are cited as shewing that it was established at an early period that a corporation might appoint agents of little importance, as a cook, a butler, or a bailiff to

vants required to perform acts of trifling import or immediate necessity'"[3].

The rationale of this as well as all the other recognized exceptions to the general rule has been declared to be "convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat

take a distress. 4 H. 6, 7, 13, 17; 7 H. 7, 9; 13 H. 8, 12; Plowd. 91b; 12 Ed. 4, 10a; 4 H. 7, 15, 26; 26 H. 8, 8b; Bro. Corp. 51; Bro. 182b.

In Com. Dig. "Franchises" (F. 13) it is said: 'A corporation which has a head may give a personal command, and do small acts without deed: as it may retain a servant, a cook, butler, etc."

In one of the older cases it has been laid down generally that "one may justify in trespass as bailiff to a corporation without deed." *Panel* v. *Moore* (1553) Plowd. 91. So also it seems to have been laid down with any qualification in *Manby* v. *Long* (1684) 3 Lev. 107, 2 Saund. 305; *Anon.* (1702) 1 Salk. 191, (where a decision to the same effect by the Exchequer Chamber, *Carey* v. *Mathews*, is mentioned in a note of the reporter), that a corporation may appoint a bailiff to distrain without deed. But in *East London Waterworks Co.* v. *Bailey* (1827) 4 Bing. 283 (p. 288), the right of making a parol appointment for this purpose is instanced by Best, C.J. as being an exception to the general rule which was justifiable on the ground of the necessity of acting immediately, as the cattle might have escaped before the seal could be affixed; and he lays it down that "it is only in cases of necessity, occasioned by the hurry of the proceedings" that such an appointment may be made. In *Arnold* v. *Poole* (1842) 4 Man. & G. 860 (p. 877), the validity of such an appointment is based by Tindal, C.J., upon a similar consideration. These glosses upon the earlier decisions indicate the extent to which they are to be accepted as authorities. In *Horne* v. *Ivy* (1670) 1 Ventr. 47, 2 Keb. 567; 1 Mod. 18, the defendant justified a trespass for a seizure of a ship under the patent of the Canary Company, as servant of the company; and it was held, on demurrer, that he should have shewn in his plea that he was authorized by deed. But this decision was said by Littledale, J., in *Smith* v. *Birmingham Gas Co.* (1834) 1 Ad. & El. 526, to have proceeded on the ground that the service was an extraordinary one.

In *East London Waterworks Co.* v. *Bailey* (1827) 4 Bing. 283, Best, C.J., observed that one exception to the general rule is admitted, "where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal." This statement in which "necessity" is adverted to be merely as one of two considerations upon which the rule is based referred, and not as the fundamental and only one with reference to which all others are to be regarded as derivative and subsidiary, seems to be indicative of a logical standpoint somewhat different from that which is adopted in the cases just cited.

[3] Tindal, C.J., in *Arnold* v. *Poole* (1842) 4 Man. & G. 860 (p. 877). In a subsequent sentence he designates the excepted contracts as those which "relate either to trivial matters of frequent occurrence, or such as from their nature do not admit of delay."

Other statements of a similar tenor have been made by various modern judges.

"By the ancient common law, a corporation was at liberty to do little matters without seal, namely, to appoint a servant and the like; but there is no case which goes the length of determining that they might contract

the very object for which the corporation was created, the exception has prevailed: hence the retainer by parol of an inferior servant, the doing the acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions'".

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not under seal, unless for small matters, or by virtue of the terms of their act of Parliament." Parke, B., in *Finlay* v. *Bristol, &c., R. Co.* (1852) 7 Exch. 409.

"At an early period there were exceptions to the rule, for instance, in those matters in which, from their very nature, or necessary frequent occurrence, it would be difficult to execute the contract with the formality of a seal. Those were matters of trifling importance, such as the appointment of a servant by a corporation having a head,—for whether the exception applied to a corporation without a head has not yet been determined." Parke, B., in *Cope Thames Haven, &c., Co.* (1849) 3 Exch. 841.

One of the exceptional cases enumerated by Best, C.J., in *East London Waterworks Co.* v. *Bailey* (1827) 4 Bing. 283, is "where a corporation has a head, as a mayor, or a dean, who may give commands which a party may obey without the sanction of a common seal, *Randel* v. *Deane* (1692) 2 Lut. 1497, or may bind the corporation by record, Vin, Arb. Corpor. K. 7, 21."

The exceptions to the general rule which were gradually introduced had for a long time reference only to "matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like." Bovill, J., in *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463 (p. 469), aff'd in Exch. Ch. L.R. 4 C.P. 617. See also opinion of Montague Smith, J. (p. 474).

[1] Lord Denman, C.J., in *Church* v. *Imperial Gaslight & Coke Co.* (1837) 6 Ad. & E. 846 (p. 861). This statement of the law was cited with approval by Coleridge, C.J., in *Austin* v. *Guardians of Bethnal Green* (1874) L.R. 9 C.P. 91 (p. 94), and by the same judge in *Wells* v. *Kingston-upon-Hull* (1875) L.R. 10 C.P. 402 (p. 409), (holding that, as "the admission of a ship into the dock was a matter of frequent ordinary occurrence, and in some cases it might be a matter of urgency admitting of no delay," a contract by a municipal corporation which owns a graving dock to let a ship use it need not be under the corporate seal).

Referring to the exceptions which as the exigencies of the case have required, have, from time to time, been admitted to the rule, Patteson, J. drew attention to the fact, that they "are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle and justified only by necessity." *Beverley* v. *Lincoln Gaslight & C. Co.* (1837) 6 Ad. & El. 829, where it was held that, for a matter of such constant requirement to a gas company as gas meters, and to so small an amount as £15, the company, whether with or without a head, might contract without affixing the common seal.

In *Diggle* v. *London & B. R. Co.* (1850) 5 Ex. 442, 451, 19 L.J. (Ex.) 308, Rolfe, B., after referring to several earlier cases said: "Whether in all these cases I should have come to the same conclusion—that the acts there done were acts of necessity—it is immaterial to consider, as in all of them the court proceeded on the ground already stated, and adopted the general rule that those were cases of urgent necessity within the exception, which is a rule as much as the rule itself, and has been established by several authorities, viz., that corporations cannot be sued on simple contract,

From an examination of the subjoined note, in which are cited all the English and Colonial cases in which the validity of contracts of employment made by corporations of the classes specified has been determined without any reference to the doctrine adverted in the following section, it will be apparent that modern judges have on the whole shewn no disposition to depart from the ancient rule, that a binding contract of service cannot be created by parol, unless the position to be filled is one of a comparatively unimportant character. In order to make the collection of authorities as complete as possible, the effect of some cases relating to employees who were agents or independent contractors rather than servants, has been stated[5].

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unless the act be one of necessity. I say necessity, for that really embraces all the excepted cases,—that is, matters too trivial or of too frequent occurrence, or, in the case of trading corporations, drawing bills, without which they could not carry on their trade, etc. With these exceptions, the old law remains as it did in the time of Henry VIII., and the earlier times before it."

[5] (a) *Municipal corporations.*—No municipal corporation (except that of London) can appoint an attorney except under the corporate seal. *Arnold* v. *Poole* (1842) 4 Man. & G. 860 (attorney appointed by the mayor and town council to conduct suits, but not under seal, held not entitled to recover his costs against the corporation).

In *R.* v. *Stamford* (1844) 6 Q.B. 433, it was held that a resolution, on the reappointment of a town clerk by a corporation after stat. 5 & 6 W. 4, c. 76, to increase his salary in compensation for the loss of former emoluments, is not valid unless executed under seal. Such reappointments, therefore, cannot be proved by an entry of it in the minutes of the town council.

An unsealed contract for the employment of an agent to promote a bill in Parliament for the enlargement of the powers of a municipal corporation was held not binding in *Clemenshaw* v. *Dublin* (1875) 10 Ir. C.L. 1.

In *Broughton* v. *Brantford* (1869) 19 U.C.C.P. 434, Hagarty, C.J., expressed the opinion, obiter, that if the appointment of a manager of property which had passed by foreclosure into the possession of municipal corporation had been made under the corporate seal,—(as it had been in fact),—the corporation would not have been bound by the contract, whatever might be the rule in the case of a trading corporation in a matter within the scope of their ordinary business. (See §§ 2, 3, post).

A distinction is taken between cases where the appointment of a municipal corporation is a mere servant, and those in which he is an officer. While in some instances the former kind of appointment may be good without a seal, an appointment to an office is invalid without a seal, unless it is made in accordance with immemorial custom; and in any action founded upon the right of the appointee to hold his office, the existence of the custom must be alleged and proved. In *Smith* v. *Cartwright* (1851) 6 Exch. 926, an action by a coal meter for disturbing him in the exercise of his privilege, the declaration claimed the right in the corporation "by

2. Same subject discussed in relation to corporations created for special purposes.—An important exception to the general rule, as stated at the beginning of the last section is, "that a company

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the persons by them in that behalf from time to time deputed and appointed as thereinafter mentioned," and alleged that the corporation had duly and in the exercise of their said right in that behalf deputed and appointed certain meters, of whom the plaintiff was one. Commenting upon the averments, the Court said: "The corporation claim a right to measure by persons appointed by them. That alone would make the appointment merely that of a servant, and might well be without seal. But the payment in respect of the measurement is for the benefit of the meter only, the corporation takes no part of it. The meter is the plaintiff, and complains of being disturbed in the exercise of his privilege. This shews that the meter claims an office to which certain profits, to be fixed indeed from time to time by the corporation, are annexed, and he sues for a disturbance of his right to that office. If he had performed the duty, he must have claimed the prescribed fee as due to himself. Now this right to discharge certain duties in regard to the property of third persons (although against their will), and demand payment for so doing, must be by reason of his having an office; and he is not a mere servant of the corporation, but an officer appointed by them; therefore he must have an appointment under seal. And we do not think that the tenure of his office, which is said to be during the pleasure of the corporation, can make it unnecessary that he should have such an appointment, or convert him from an officer into a mere servant."

By the Supreme Court of British Columbia it has been held that a person duly elected, at a meeting of a municipal council, to municipal office, pursuant to a statute empowering the municipal council so to appoint its officers, becomes thereby the servant of the corporation without further evidence or ratification of the contract of hiring under the corporate seal or otherwise, and can maintain an action for damages, if not received into the employment in pursuance of the contract of hiring implied by such appointment. *Tuck* v. *Victoria* (1892) 2 B.C. 179. It seems quite doubtful, however, whether the statutory provision upon which the council acted was such as to justify the Court in assuming that the case was not within the scope of the principle which is ordinarily controlling in this connection, viz., that even a resolution of the members of a body corporate is not equivalent to an instrument under its seal. See note 1, supra. The designated method of appointment seems to have been in no essential respect different from that which, upon general principles, an official body, like a municipal council is presumably authorized, or rather bound, to follow, whenever it is acting in its corporate capacity, even though it may not have been expressly empowered or directed by the legislature to do so. Assuming this view to be correct, the statutory provision in question must be construed as one which was merely declaratory of the common law, Under such circumstances a decision which seems to involve the hypothesis that the provision in question had abrogated by implication the necessity for a formality which, if the provision had not been enacted, would indisputably have been necessary to create a binding contract of employment, cannot be accepted without much difficulty. It is conceived that the reported cases, so far as they have any bearing on the subject of the presumed intention of the legislature under such circumstances, afford some general support to this criticism. See *Cope* v. *Thames Haven Dock & R. Co.* (1849) 3 Exch. 841, (see subd. (*c*) of this note, infra), and *Hughes* v. *Canada Permanent, &c. Soc.* (1876) 39 U.C.Q.B. 221, (see § 3, note 7, post).

which is established for the purpose of trading may make all such contracts as are of ordinary occurrence in that trade with-

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(*b*) *Other public corporations established for specific purposes.*—The parol appointment of an assistant or clerk to the master of the workhouse, whose duties were principally the keeping of accounts of a somewhat complicated nature, requiring some amount of skill and capacity, was held not to be binding on the defendants. *Austin* v. *Guardians of Bethnel Green* (1874) L.R. 9 C.P. 91 (action for wrongful dismissal, not maintainable).

On the ground that it was not a case of necessity, and not made under seal, it was held that the appointment of a salaried "medical officer" for a fixed and definite period was not binding. *Dyte* v. *St. Pancras Board* (1872) 27 L.T.N.S. 342.

That the appointment, by the guardians of an Union, of a collector of the poor-rate must be under seal, was decided by Parke, B., in *Smith* v. *West Ham Union* (1855) 10 Exch. 807, aff'd in Exch. Ch. 11 Exch. 807 (validity of appointment not discussed in the higher court). It was suggested by Willes, (afterwards Justice), in his argument as counsel in *Henderson* v. *Australian Royal Mail S. Nav. Co.* (1855) 5 El. & Bl. 409, that this case probably proceeded on the distinction taken in *Smith* v. *Cartwright* (1851) 6 Exch. 928 (see subd. (*a*) of this note, supra);—that the appointment of a servant for the benefit of the corporation, being an incident to their every day existence as a corporation, may be by parol; but that the appointment of an officer for his own benefit, not being incident to such every day existence, must be under seal. But this theory does not seem to be applicable to the circumstances of the case.

An agreement for the hire of a teacher by a body of school trustees is invalid, if not under seal. *Quin* v. *School Trustees* (1850) 7 U.C.Q.B. 130.

But it seems that, where public school trustees have entered into an agreement for the hire of a teacher, and have directed the officer, who has the custody of the seal, to affix it, and both parties have for two years acted on it as a binding agreement, the fact that the seal was not actually affixed will not invalidate the agreement. *McPherson Trustees S.S. No. 7* (1901) 1 Ont. L.R. 261.

In *Paine* v. *Strand Union* (1846) 8 Q.B. 326, a parol order for making a survey and map of the ratable property in one of the parishes forming the Union was held not to be binding on the Union, for the reason that such a plan was not incidental to the purposes for which the guardians of the Union were incorporated. They had nothing to do either with making or collecting rates in the several parishes of the Union, nor had they power to act as a corporation in a single parish.

(*c*) *Business corporations.*—As a general rule an attorney-at-law cannot be retained by parol. *Sutton* v. *Spectacle Makers Co.* (1864) 10 L.T.N.S. 411. But after an attorney has appeared and acted for a corporation in legal proceedings, the corporation cannot, as against the other party to the litigation, dispute his authority on the ground that he was not appointed under the corporate seal. *Thames Haven Dock Co.* v. *Hall* (1843) 5 Man. & G. 274. Nor can the other party dispute it on this ground, after taking steps in the proceedings. *Faviell* v. *Eastern Counties R. Co.* (1848) 2 Exch. 344.

In *R.* v. *Justices of Cumberland* (1848) 17 L.J.Q.B. 102, 5 Engl. Ry. Cas. 332, Wightman, J., construing the effect of a statute which gave the directors power to "appoint and displace any of the officers of the company," said their appointment of an attorney without seal was *clearly* good. Sir F. Pollock apparently is of opinion that the controlling consideration in the case is the fact that the appointment was not one to a

out the formality of a seal, and that the seal is required only in

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continuing office. See his comments (contr. p. 154) on *Cope* v. *Thames Haven, &c. Co.* (referred to infra). With all deference to the learned judge who decided this case, it may be suggested that this question is not so easy of solution as he here assumes. See the comments in *Tuck* v. *Victoria*, in subd. (*a*) of this note. Is it a reasonable inference that a legislature when it simply names the board of directors as the appointing power, intends thereby to empower them to make appointments without using the corporate seal?

It has been held that, assuming that a contract with attorneys for obtaining the passage of an incorporating act should have been under seal, the omission to set out a deed in a declaration by them for work and labour was a mere matter of form, and therefore ground for a special demurrer only. *Tilson* v. *Warwick Gaslight Co.* (1825) 4 B. & C. 962.

In *Washburn* v. *Canada Car Co.* (U.C.Q.B. 1875) an unreported case cited by the Court in *Canada Permanent, &c. Soc.* (1876) 39 U.C.Q.B. 229, it was held that a corporate seal was necessary to validate the appointment of a general manager of a car company.

In another Canadian case a similar ruling was made by Street, J., as to the appointment of a manager of a milk company. *Birnie* v. *Toronto Milk Co.* (1902) 5 Ont. L.R. 1.

A person appointed as provincial engineer of a railway company at a monthly salary of $300 was held to be an important official whose engagement must be under seal. *Armstrong* v. *Portage, &c. R. Co.* (1884) 1 Man. L.R. 344. This case is in direct conflict with an earlier one, (which, strange to say, was not referred to), in which the appointment of a chief engineer without a seal was held valid, on the ground that the appointment of such an officer was not only within the scope of the corporating act, but that it was essential and absolutely necessary for the purposes connected with the objects of the corporation. *Murdock* v. *Manitoba S. W. Col. R. Co.* (1881) Thom. & Wood (Man.) 334. In the opinion of the present writer, the earlier of these two cases shews a clear departure from the doctrine of English judges, whose decisions with relation to the principle relied upon by the Canadian court, although they have not been entirely consistent, (see next section), afford no support to the theory, that the principle may operate so as to validate a parol appointment of a permanent official of high rank.

For other Canadian cases see § 3, note 7, post.

A railway company was incorporated by an Act of Parliament, one section of which enacted, that the directors should have power to use the common seal on behalf of the company, and that all contracts relating to the affairs of the company, signed by three directors, in pursuance of a resolution of a court of directors, should be binding on the company. The following section enacted, that the directors should have full power to employ all such managers, officers, agents, clerks, workmen, and servants as they should think proper. By a resolution of the board of directors, signed by their chairman, the plaintiff was appointed agent to negotiate with another railway for the lease of the line. *Held*, that the contract was not binding on the company, since it had not been sealed, or executed with the required formalities. *Cope* v. *Thames Haven Dock & R. Co.* (1849) 3 Exch. 841, Parke, B., said: "The rule must be absolute, on the ground that this is a contract by which the company cannot be bound, unless made in the form required by the 119th section, which gives a power of binding the company by an instrument under seal, or in writing signed by three directors, in pursuance of a resolution of the board. Neither of those requisites have been complied with. . . We ought not to extend the exception

matters of unusual and extraordinary character which are not likely to arise in the ordinary course of business'".

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to cases where, from the Act incorporating the company, it is the obvious intention of the legislature that the contracts of the company should be made with certain formalities. The question then is, whether we can collect from this Act of Parliament, that a contract of this description, that is, for the employment of an agent, not in the course of the ordinary concerns of the company, can be binding on the company without a formal instrument. I am clearly of opinion that the case does not fall within the 120th section. The section may be explained as pointed out by my Brother Rolfe, by saying that it intended to give the directors power to do certain acts for which, by the 114th section, if they are to be indemnified out of the funds of the company. But if not, it only extends to the employment of managers, officers, agents, clerks, &c., on the ordinary works of the company. If they may, without any formality, appoint servants for the management of their affairs at the different stations, we cannot from that collect that they shall be bound by contracts out of the ordinary course, and from the employment of every description of servant." Platt, B., said: "I am of the same opinion, and for the same reasons. Take the case of a surveyor employed to survey two hundred miles of railway,—is it not important that the company should not be bound by a mere verbal arrangement?" With all respect for the opinion of so eminent an authority as Sir F. Pollock, the present writer ventures to think that the doubts which he has expressed as to the correctness of this decision (contr. p. 154) are scarcely warranted. The ground upon which his criticism is based is that no "appointment to a continuing office" was involved. But it is submitted that, having regard to the fact that the meaning of certain statutory provision was the only point to be determined, the permanent or temporary character of the office was not an element which could with propriety have been treated as material, and that the case was correctly viewed as one which was governed by the familiar principle that powers granted to a corporation for specific purposes cannot lawfully be exercised with reference to a subject matter which does not by a reasonable intendment fall within the scope of the grant.

(*d*) *Ecclesiastical corporations.*—In a case already cited it was remarked that from very early times exceptions to the general rule "have been allowed in the case of municipal and ecclesiastical corporations, to enable them, without the formality of a seal to transact matters of minor importance and of daily occurrence." Montague Smith, J., in *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463. In the absence of specific authority to the contrary this passage may be taken as indicating that, in respect to the extent of the duty of using the corporate seal, ecclesiastical and municipal corporations are placed by the law upon the same footing.

[1] Montague Smith, J., in *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463 (p. 474), (aff'd by the Exch. Ch. L.R. 4 C.P. 617). In the same case Bovill, C.J., made the following remarks: "It seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must, I think, be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purpose for which they are incorporated. A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal." In this case,

A similar doctrine, to the effect that contracts necessary and incidental to the purposes for which the corporation exists may be made without seal, has been applied in actions for goods supplied to, or work done for such statutory bodies as the Boards of Poor Law Unions, Boards created for the purpose of making local improvements, Municipal Councils, and Trustees of State Schools[1].

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the actual point decided was, that a company incorporated for the working of collieries, was entitled to maintain an action against an engineer for a breach of an unsealed contract in refusing to deliver an engine and machinery which he had agreed to erect for the plaintiff. The defendant's plea was that there was no mutuality in the contract, as he was not bound.

In *Australian, &c., Co.* v. *Marzetti* (1856) 11 Exch. 288, 24 L.J. Exch. 273, Pollock, C.B., remarked that "a corporation may with respect to matters for which they are expressly created deal without seal."

In *Henderson* v. *Australian Royal Mail, &c., Co.* (1855) 5 El. & Bl. 409, 24 L.J.Q.B. 322, Wightman, J., observed that the general result of the decision was, that, "whenever the contract is made with relation to the purposes of the corporation it may, if the corporation be a trading one, be enforced though not under seal." The same contracts are adverted to by Erle, J., as those which are 'incidental and necessary to the purposes for which the corporation was created," and in another passage as those "made for a purpose directly connected with the object of the incorporation." Crompton, J., laid down that a trading corporation "may make binding contracts in furtherance of the purposes of their corporation, without using their seal." In that case a company incorporated for the purpose of trading as shipowners, were sued on a contract, not under seal, made by the directors to pay remuneration in consideration of exertions to bring home a disabled vessel. On demurrer, it was held, that, the corporation being a trading one, and incorporated for a special purpose, the company was bound by the contract, as being made in furtherance of the purpose of their incorporation, though not under seal.

In *Reuter* v. *Electric Tel. Co.* (1856) 6 El. & Bl. 341, a parol agreement to send messages for a year over the defendant's telegraph line was held to be enforceable. The defendant, it was observed, were "a corporation for carrying on a particular business; and the services done by the plaintiff were in the direct course of the business which by their charter they were to carry on."

In *London Dock Co.* v. *Sinnott* (1857) 8 El. & Bl. 347, 27 L.J.Q.B. 129, an action was held not to be maintainable against a contractor for refusing after tender to sign a contract for scavenging the plaintiff's docks was held not to be maintainable, for the reason that the contract was not one of a mercantile nature, nor with a customer. But having regard to the more recent decisions, this case seems to be one of very dubious authority.

In *Copper Miners of England* v. *Fox* (1850) 16 Q.B. 230, it was held that the plaintiffs could not recover on a parol executory contract for the supply of *iron* rails, as their charter only authorized them to deal in copper as miners thereof.

See also the Canadian cases cited in § 3, note 7, post.

[1] The effect of *Sanders* v. *St. Neot's Union* (1846) 8 Q.B. 810, E.C.L.R. vol. 55, and *Clarke* v. *Guardians of the Cuckfield Union* (1852) 21 L.J.Q.B. 349, 16 Jur. 686, 1 Low. & M. 81, is that an action will lie

The effect of the doctrine thus established is to abrogate, with regard to certain classes of corporations, the doctrine formerly

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against the guardians of a Union to recover for goods supplied and work and labour done, though the defendants had not contracted under seal. The grounds of this doctrine were thus stated by Wightman, J., in the latter case: "Wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect—as in the case of the guardians of a poor law Union—and orders are given, at a board regularly constituted and having general authority to make contracts, for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods are supplied and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing a seal is wanting, and therefore that no action lies, as they were not competent to make a parol contract, and may avail themselves of their own disability." (There is a considerable difference in the words of this passage, as reported in the Jurist. But the general effect is the same).

In *Diggle* v. *Blackwell, R. Co.* (1850) 5 Exch. 442, 14 Jur. 937, Rolfe, B., remarked that he had been told by Parke, B., that there is an error in the report of *Sanders* v. *St. Neot's Union*, supra, and that the real point was not on the record. But the error, if there is really one which is material to the present discussion, is rendered less important by the fact that the principle applied in it, as well as in *Clarke* v. *Guardians*, supra, was fully approved in the cases cited below.

In *Haight* v. *North Brierley Union* (1858) El. Bl. & El. 873, 28 L.J. Q.B. 62, an accountant was held entitled to recover for work done in examining the books of the defendant. The grounds upon which the decision proceeded were stated as follows, by Erle, J.: "The work and labour had been performed, and was performed at the request of the guardians; and was, in my opinion, incidental to the purpose for which the guardians were created. They had appointed a proper officer to manage the Union accounts: they had reason to suspect that he had been guilty of fraud and embezzlement: and, by their first resolution, they appointed the plaintiff as an accountant to give them information upon this point. Such an appointment was clearly for a purpose within the general scope of their functions as guardians, namely, that of protecting the funds of the Union." Crompton, J., stated his views much more guardedly than his learned brother: "If the contract were, as has been contended, a contract from hour to hour, it might be impossible for the guardians to affix a seal. But if on the other hand, the work was distinct and specified work, done under three several resolutions, I should doubt very much whether the contract should not have been under seal." His doubts as to the correctness of the conclusion at which the Court has arrived were sufficiently strong to induce him to reserve leave for the defendants to appeal.

In *Nicholson* v. *Guardians of Bradfield Union* (1866) L.R. 1 Q.B. 620, where the plaintiff was held entitled to recover the price of coals supplied to the defendants under a parol contract,—these being, as Blackburn, J. observed, goods "such as must necessarily be from time to time supplied for the very purpose for which the body was incorporated."

In *Lawford* v. *Billericay, &c., Council* (1903) 1 K.B. (C.A.) 773 an engineer was allowed to recover compensation for services in preparing a plan and reports relating to a contemplated system of sewers, and for

prevailing, under which the exceptions to the general principle as to the necessity of using the corporate seal were "limited to matters of frequent occurrence and small importance[8]. As it was

other work done in connection with the affair, although he had not been employed by an instrument under seal. Sterling, L.J., remarked that "the essential question was whether the work in respect of which the plaintiff sought to recover was work necessary for the corporation in carrying out the purposes for which it was created. The Court of Appeal condemned the doctrine applied in a series of discussions in which the Court of Exchequer had held the want of a seal to be a bar to the action. *Lamprell* v. *Billericray Union* (1848) 3 Exch. 283, 18 L.J. Exch. 282 (claim for compensation for extra work done in erecting a workhouse); *Diggle* v. *London, &c., R. C.* (1850) 5 Exch. 442, 19 L.J. Exch. 308 (claim for work done and materials supplied in respect of taking up old rails and substituting new ones); *Homersham* v. *Wolverhampton Co. Waterworks Co.* (1851) 6 Exch. 137, 20 L.J. Exch. 193 (claim for extra work performed in respect to the erection of machinery, with the approval of the company's engineer, and accepted by the company).

In his judgment referred to above, Wightman, J. had admitted that these cases were undoubtedly adverse to the plaintiff's claim in the case before him, and that he found it difficult to draw any substantial distinction between them in respect to the point to be determined. He suggested, however, that a possible basis for a distinction was obtainable by adverting to the fact that, in the earliest of the three cases, the Court of Exchequer had merely relied upon certain decisions in which the general rule as to the necessity of a seal had been applied, and had not given due weight to a circumstance which, according to other authorities, should have treated as an important and differentiating element, viz., that in none of them was the subject matter of the contract necessary to the purposes for which the corporation was created. In the light of the later decisions, it may be said with some confidence that this is the true and adequate explanation of the conflict of doctrine which is disclosed by these cases.

By 38 & 39 Vict. ch. 55, § 174, it is enacted that "every contract made by an urban authority, whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority." This provision being mandatory, it has been held that, where a local board verbally directed its surveyor to employ an architect to prepare plans for new offices, the contract could not be enforced, although the jury found that the board had authorized the surveyor to procure the plans, and ratified his acts, that the new offices were necessary for the purposes of the defendants, and that the architect's plans were necessary for the erection of the building. *Hunt* v. *Wimbledon Local Board* (1878) L.R. 4 C.P.D. (C.A.) 48. Bramwell, L.J., observed that, so far as he knew, the doctrine that, where a person has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work can enforce the contract, was "confined to cases in which it could be said that the work was such as was necessary." It must have been work such that, if they had not ordered it they would not have done their duty, or such that, if they had not given the order for its execution, they would not have been able to carry out the purposes for which the corporation had been created.

See also the Canadian cases cited in § 3, note 7, post.

[8] The phrase used by Bovill, C.J., in *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463 (see note 1, supra).

Other cases in which the doctrine has been explicitly recognized, that, where certain classes of corporations are concerned, there is this

the superseded doctrine which supplied the rationale of the rule that only inferior servants could be retained by parol, (see last section), there would appear to be sufficient grounds upon which to base a strong argument, that some relaxation of that rule is a natural and permissible, if not a necessary, consequence of the adoption of the more modern doctrine. It seems difficult to deny that, taking the words in their ordinary, the engagement of servants of all grades, even the highest, may without impropriety be described as a matter which is "incidental and necessary" to the purposes for which business and other corporations are created. In fact the methods of a corporation which carried on its business by means of independent contractors, instead of servants, would be so abnormal, that in discussing general rules such arrangements may warrantably be left out of account. Yet an examination of the cases collected in note 5 to the preceding section will shew clearly that in England there has been no distinct tendency to modify the law with reference to this consideration. In none of those cases,—most of which, it may be remarked, belong to the period during which the doctrine reviewed in the present section has been fully accepted,—have the Courts countenanced the idea that that doctrine is essentially incompatible with the one which declares the corporate seal to be requisite to the validity of all appointments to superior servants. It can scarcely be regarded as a satisfactory juridical situation, that, where certain classes of corporations are concerned—(corporations which constitute, it should be observed, the great majority of those bodies)—the practical effect of allowing the two doctrines to operate concurrently and separately is that an independent contractor may in many instances be able to enforce a parol contract for the performance of work, although such a

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third exception to the general rule, are *Henderson* v. *Royal Mail Steam Nav. Co.* (1855) 5 El. & Bl. 409, 24 L.J. Q.B. 322; *Lawford* v. *Billericay, &c., Union* (1903) 1 K.B. (C.A.) 773.

The effect of these decisions, especially the last mentioned, which as will be observed, was rendered by a Court of Error, is to discredit the authority of all these cases which rest upon the assumption that this third exception does not exist.

One such case is *Diggle* v. *London, &c., R. Co.* (1850) 5 Exch. 308, where Rolfe, B., relied on the consideration that the work was done "neither on a

contract would confer no right of action on a person engaged to perform the same or similar work as a servant[1]. It is true that one of the ordinary incidents of service is the formation and subsistence of a more or less permanent relation, and the discharge of prescribed functions from day to day under the control of the master, while the essence of the undertaking of an independent contractor is merely that he will produce the stipulated results by any methods which he deems expedient. But in the present connection this distinction cannot, as it would seem, be relied upon as a differentiating element which will enable us to evade the difficulty just adverted to. That the character of the relation in the point of view here indicated may serve to determine whether a parol contract is valid or not, is a theory which has never been recognized, either expressly or impliedly, by any English Court. In all the cases belonging to the class with which we are concerned in this monograph, the rights of the parties have been discussed with reference to the importance, or the frequency, or the subject-matter of the contract.

3. Same principles applicable whether unsealed contract was executed or executory.—The fact that the parol contract in question had been executed at the time when the action upon it was brought has sometimes been viewed as a differentiating element which operated so as to enable the contractee to recover for services rendered or goods supplied in pursuance of its terms, although it would not

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general necessity, nor was it matter of frequent occurrence, nor was it one of a trivial nature."

[1] This statement, it is apprehended, is fully justified by a general comparison of the decisions cited on this and the preceding sections.

Sufficient proof of its correctness will be obtained by contrasting the decisions in *Austin* v. *Guardians of Bethnal Green* (1874) L.R. 9 C.P. 91 (§ 1, note 6, subd. (*b*), ante with *Haigh* v. *North Brierley Union* (1858) El. Bl. & El. 873 (§ 2, note 2, ante); and the declaration of Platt, B., arguendo, in *Cope* v. *Thames Haven, &c., R. Co.* (1849) 3 Exch. 841 (p. 845) that the appointment of a surveyor to survey a considerable section of a railway line must be made under seal (§ 1, note 6, subd. (*c*), ante), with the decision in *Lawford* v. *Billericay &c. Council* (1903) 1 K.B. (C.A.) 773, where an engineer was allowed to recover for services in preparing a plan for a system of sewages (§ 2, note 2, supra).

have been enforceable whilst it remained executory[1]. This theory, however, has now been definitely discarded in England, the accepted doctrine being that the validity of a contract made by a corporation without using its seal is to be tested by the same criteria, whether it is executory or executed[2]. In some instances, it is true, we find that judges have, with characteristic caution, declined to express any decided opinion as to the correctness of this doctrine[3]. But cases are not wanting in which its soundness was apparently taken for granted[4]. That it still remains unim-

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[1] In *East London Waterworks Co.* v. *Bailey* (1827) 4 Bing. 283, (action for non-delivery of pipes for the plaintiffs' works), one of the grounds upon which the right of recovery was denied was, that there was a distinction between contracts executory and executed.

See also the Canadian cases reviewed in note 7, infra.

[2] *Church* v. *Imperial Gaslight & C. Co.* (1837) 6 Ad. & El. 846, Lord Denman, C.J., reasoned as follows: "The same contract which is executory to-day may become executed to-morrow; if the breach of it in its latter state may be sued for, it can only be on the supposition that the party was competent to enter into it in its former; and if the party was so competent, on what ground can it be said that the peculiar remedy which the law gives for the enforcement of such a contract may not be used for the purpose? It appears to us a legal solecism to say that parties are competent by law to enter into a valid contract in a particular form, and that the appropriate legal remedies for the enforcement or on breach of such a contract are not available between them." In this case the Court explicitly disapproved the doctrine laid down in *East London Waterworks Co.* v. *Bailey*, supra. That decision was also condemned in *South of Ireland Colliery Co.* (1868) L.R. 3 C.P. 463 (per Montague Smith, J., p. 475).

The decision in *Church* v. *Imperial Gaslight & C. Co.* has been referred to by text writers of the highest eminence as having settled the law upon the subject. See Lindley, Comp. p. 221, and Sir F. Pollock, Contr. 150.

[3] In *Nicholson* v. *Guardians of Bradfield Union* (1866) L.R. 1 Q.B. 620, Blackburn, J., remarked in the course of his judgment that it was unnecessary to express any opinion as to what might have been the case, if the plaintiff had been suing on a breach of the contract for a refusal to accept the goods ordered, or any other breach of the contract whilst still executory.

In *Hunt* v. *Wimbledon Local Board* (1878) L.R. 4 C.P.D. 48, Cotton and Brett, L.JJ., expressed, arguendo, strong doubts as to the doctrine that there is an essential difference between executed and executory contracts.

[4] In *Young* v. *Mayor of Leamington Spa* (1882) L.R. 8 Q.B.D. (C.A.) 579, where a mandatory statute prescribed that a seal should be used in making any contract involving the payment of more than a certain amount of the corporate funds, Brett, L.J., remarked (p. 586): "The fact that the defendants had the benefit of the contract will not prevent them from setting up the statute in answer to the plaintiff's claim." It is apprehended that the mere fact that the obligation of the corporation in this instance was imposed by any express words of a statute does not weaken the significance of this remark, as indicating the opinion of the learned judge, that the rights of the party claiming under a parol contract are in no respect enlarged in consequence of its having been executed.

pugned is also indicated by these considerations,—that there is no recent English decision in which the non-enforceability of an executory parol contract has been affirmed on the mere ground that it was executory[5]; that the parol contract which was declared to be enforceable in a leading case already cited was, as a matter of fact, executory[6]; and that none of the judgments delivered in the English cases in which plaintiffs have been held entitled to recover upon executed parol contracts (see preceding section, notes 1, 2,), contain any language which can reasonably be construed as indicating an adoption of the theory, that the rights of the plaintiffs were enlarged by the circumstance that the contract had been executed by them. It is manifestly not permissible to argue that cases in which it was simply held that certain parol contracts were enforceable after they had been executed may be taken as denying by implication that the contracts in question would not have been enforceable, if they had still remained executory. The conclusion seems to be unavoidable, therefore, that in several Canadian cases which evince more or less distinctly an acceptance of the theory, that the enforceability of a corporate contract may sometimes depend upon whether it has been executed or is still executory, there has been, in so far as the judgments are founded upon that theory, a divergence from the main current of the English authorities. It is worthy of observation, however, that the facts presented in at least a portion of these cases were such that, even if no significance whatever had been ascribed to this element, the decisions

[5] See *London Dock Co.* v. *Sinnott* (1857) 8 El. & Bl. 347 (§ 2, note 1, ante), where, although the executory character of the contract might have been put forward as a plea by the defendant, or assigned as a reason for the judgment against the plaintiff, this element was not adverted to.

[6] *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463, aff'd by the Exch. Ch. in L.R. 4 C.P. 617.

In *Copper Miners of England Co.* v. *Fox* (1850) 16 Q.B. 230, where the right of the corporation to recover in an executory contract for the supply of iron rails was denied, for the reason that such a contract was beyond the scope of its charter, Lord Campbell remarked, arguendo, that, if the contract had been shewn in any way to be incidental or ancillary to carrying on the business of copper mines," it would have been binding though not under seal.

might well have been the same as those which were actually rendered[1].

[1] In *Dempsey* v. *Toronto* (1849) 6 U.C.Q.B. 1, where a municipal corporation was held to be liable in assumpsit for services actually rendered, it was laid down that there was no general principle, applicable to all classes of corporations, that they are not liable to be sued, because they have never promised under seal that they would give a recompense.

In *Pim* v. *Municipal Council of Ontario* (1860) 9 U.C.C.P. 304 the plaintiff was allowed to recover for work done under a parol contract for the erection of a court house and gaol for a municipality. The Chancellor, who delivered the judgment, laid much stress upon the fact that the distinction between executory and executed contracts had been recognized in *East London Waterworks Co.* v. *Bailey* (note 1, supra), and attempted to minimize the effect of the decision in *Church* v. *Imperial Gaslight & C. Co.* (note 2, supra), on the ground that it was not intended to be of general application to all classes of contracts. The present writer ventures to think that it is quite possible to agree with the learned judge in his views as to the actual scope of the decision, without assenting to the conclusion drawn by him. The remarks of Lord Denman undoubtedly have reference merely to contracts of the kind discussed in the preceding section. But manifestly a decision which declares that where the validity of such a contract to be determined, the question whether they are executory or executed is immaterial, is of sufficiently wide application to cover any case which involves a contract of that description; and this was really the only aspect under which it was necessary to consider the import of the decision. It should be observed that this Canadian case antedates *South of Ireland Colliery Co.* v. *Waddle*, supra, by several years, and that the learned Chancellor had not the advantage of the guidance afforded by the very explicit statements of the law which are found in the later case.

In *Clark* v. *Hamilton, &c., Institute* (1854) 12 U.C.Q.B. 178, an architect was held entitled to recover for his services in connection with the construction of a building for the use of the defendants. The broad principle was applied that a corporate body cannot avail itself of the property or labour of others, and accept and apply such property for the purpose for which it was organized, and then refuse, on the ground that its contract was not sealed, to pay for what has thus benefitted them. Robinson, C.J., relied upon the consideration that the contract was one within the scope of the corporate charter, and in the course of its business. Burns, J., was of opinion that the contract was enforceable on the ground that it was made to carry out the very thing for which the corporation had been created. There is no little difficulty in accepting this decision simply as a legitimate application of the doctrine here referred to. Certainly that doctrine is subjected to an exceedingly severe strain, where it is invoked to support contracts for carrying out an important work of construction which, in spite of what was said by the judges, seems not have been not so much a contract made in the course of the corporate business, as one made with a view to obtaining a convenient place of business, which might for ought that appears, have been procured without undertaking the erection of a building. Such a contract seems to fall within the scope of the qualifying remarks of Montague Smith, J. (as quoted at the beginning of the last section), that a seal "is required only in matters of unusual and extraordinary character, which are not likely to arise in the ordinary course of business." If these views are correct, it is clear that the decision cannot be supported without the aid of the doctrine which treats executory and executed contracts as being upon a different footing. It may be observed that the dissent of Draper, J., was put upon an untenable ground, viz., that

4. Common law rule modified by legislation. — The chaotic condition of the authorities, which is disclosed by the review of the cases in the three preceding sections indicates that there is an urgent necessity for the enactment of statutes which

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the claim was not one for "small and ordinary services," that might frequently be required. The theory thus relied upon is discredited by the more recent English decisions. See the judgment of Bovill, C.J., in *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463, (note 1, ante).

In *Perry* v. *Ottawa* (1864) 23 U.C.Q.B. 391 a man employed by a municipal committee to make plans was held entitled to recover for his work, though no contract under seal had been made. The last cited case was followed as a controlling authority.

In *Marshall* v. *School Trustees of Kitley* (1855) 4 U.C.C.P. 376 where the defendants were held not liable for the cost of a schoolhouse erected for them under a parol contract, and accepted after its completion, the rationale of the decision apparently was that the contract had reference to a matter of unusual importance. This case is at variance with the general current of the authorities cited in this note—more especially *Clark's case*, supra,— but in the opinion of the present writer it is in harmony with the English decisions.

In *Bernardin* v. *North Dufferin* (1891) 19 Can. Sup. 581, where a parol contract for the building of a bridge was made in pursuance of a resolution passed by a municipal council, the majority of the Court, (Ritchie, C.J. and Strong, C.J., dissenting), proceeded upon the theory that the rule requiring the use of a corporate seal is subject to an exception in cases where the contract has been executed and the benefit of the stipulated work has been received by the corporation. All the earlier English and Canadian authorities were discussed in very elaborate judgments by Gwynne and Patterson, JJ.

In *Wood* v. *Ontario &c. R. Co.* (1874) 24 U.C.C.P 334, it was held under 34 Vict, ch. 48, the Act incorporating the Ontario and Quebec R.W. Co. and the Railway Act of 1868, s. 14, sub-s. 13, (which provides that "directors shall make by-laws for the appointment of all officers, servants and artificers"), that the defendants were empowered to appoint an agent to negotiate for and obtain municipal aid, and that for that purpose a resolution of the board of directors, or any entry or minute in their record of proceedings would have been sufficient, without the formality of a by-law or the seal of the company. The Court laid it down, arguendo, that, if the plaintiff had been appointed a clerk or bookkeeper, he would on the same principles have been entitled to recover the value of his services, a corporation being liable, in any event, for the value of services which have actually been performed and accepted by its authorized agent, provided the contract was within its charter powers.

In a case where a question arose as to validity of the appointment of a clerk, it appeared that, under the statutes incorporating the defendants, (Consol. Stat. U.C. ch. 53, § 19, 37 Vict. ch. 50, D.), the directors of the defendant company were empowered from time to time, at any of their usual meetings, to appoint such persons as they thought proper to be officers of the society, and from time to time to discharge such persons, and appoint others in the room of those who vacated died, or were discharged, but nothing was said as to the mode of appointment, whether under corporate seal or otherwise. The conclusion of the Court was thus stated: "Looking at the statute under which the defendants are incorporated, the

will put this branch of law upon a more rational footing. It is satisfactory to be able to note that the process of simplification has already been commenced in Canada[1].

5. American doctrine as to the use of the corporate seal.—The doctrine established in the United States is that a corporation can

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duration and character of the employment of the plaintiff, and the circumstances attending his appointment, this case does not, under the authorities, fall within any of the well recognized exceptions to the general rule; and therefore, that the contract, so far as executory, must be evidenced by the seal of the defendants." *Hughes* v. *Canada Permanent Loan & Sav. Soc.* (1876) 39 U.C.Q.B. 221.

In *Ellis* v. *Midland R. Co.* (1882) 7 Ont. App. 464 an action on a verbal contract of employment by which the plaintiff had been appointed master of a steamer, a nonsuit on the ground that a seal had not been used was held to be erroneous, as such a contract might possibly be binding, and a further enquiry into the facts was necessary. But as this case related to the hire of an employé of a superior grade, it stands in direct antagonism to the cases cited in § 1, which, in England at all events, have not been restricted in their effect to any perceptible extent by those discussed in § 2.

The same remark is applicable to *Forrest* v. *Great Western C. R. Co.* (1899) 12 Man. 472, the chief engineer of a railway company, who had performed his duties for a certain period, under a parol agreement by the president was held to be entitled to recover at the rate agreed upon. The Court proceeded upon the ground that the rule as to the use of a seal has been relaxed in cases of executed contracts, where the work done or the goods supplied were necessary for the purpose of the corporation, and the corporation had accepted them, and received the benefit thereof.

In an action for the breach of an agreement by preventing the performance of certain work, it was held that a plea simply stating that the contract was not under seal did not set forth a good defence, for the reason that there was nothing to shew that the contract was not within the scope of the plaintiff company's powers, and within the ordinary course of its business, or for purposes connected with it. The Court declined to assume that it was a contract which, although executory and not under seal, was not valid and binding. *Co-operation Stone Cutters' Assn.* v. *Clarke* (1880) 31 U.C.C.P. 280.

[1] By the Dominion Companies Act, §76, it was enacted as follows: "Every contract, etc. . . . made, etc., . . . on behalf of the company, by an agent, officer or servant of the company, in general accordance with his powers as such under the by-laws shall be binding on the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract. . . . or to prove that this same was made . . . . in pursuance of any by-law, or special note, etc." The effect of this provision apparently is, that an unsealed contract of hiring entered into by a duly authorized agent of a company, for a purpose within the scope of its charter, is binding upon it, whatever may be the character or grade of the position to which the contract relates. This provision constitutes § 24 of the Joint Stock Companies Act of 1902.

In Quebec a similar provision has been adopted by the Provincial Parliament. Rev. Stat. § 4746.

make simple contracts of all kinds, including, of course, those of hiring and service—without authenticating them by its seal[1].

The law was thus laid down by Story, J., as long ago as 1813: "It would seem to be a sound rule of law that, wherever a corporation is acting within the scope of the legitimate purpose of its institution, all parol contracts made by its agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well be"[2]. The doctrine here enunciated indicates, as will be observed, a point of view somewhat similar to that which has been applied in the cases cited in § 2, ante. But the American doctrine is obviously much wider in its scope than the one adopted by English judges.

C. B. LABATT.

[1] Thompson, Corp. §§ 5046, 5047, 5048; Story, Agency, §§ 52, 53; Angell & Ames, Corp. § 219; Clarke & Marshall, Corp. § 190.

In *Beverley v. Lincoln Gaslight Co.* (1837) 6 Ad. & El. 829, Patteson, J. alludes to the well-known fact, "that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the courts of the United States."

The present writer has only found a single decision in which the validity of a parol appointment of a servant was directly affirmed, viz., one by which it was held that the appointment of a bank clerk without a seal was so far valid as to enable him to recover the stipulated compensation. *Walker v. Bank of Kentucky* (1830) 3 J. J. Marsh 201.

But unsealed appointments of attorneys and other agents have frequently been held binding. *Osborn v. Bank* (1824) 9 Wheat. 738, 829; *Fleckner v. Bank* (1823) 8 Wheat. 338, 357, (holding that there was nothing in the Louisiana Code, (Tit. 10, ch. 2, art. 13), to indicate that a seal was necessary); *Hooe v. Mayor* (1802) 1 Cranch C.C. 90; *Ins. Co. v. Oakley* (1842) 9 Paige, 496; *Fitch v. Lewiston Steam Mill* (N.H. 1888) 12 Atl. 732; *Sav. Bank v. Davis* (1830) 8 Conn. 191; *Lathrop v. Bank* (1839) 8 Dana, 114; *Board of Education v. Greenbaum* (1864) 39 Ill. 609; *Wolf v. Goddard* (1840) 9 Watts 544.

It is not even necessary that the authority of an agent who is to execute a deed for the conveyance of the realty of a corporation should be under seal. Authority for this purpose may be conveyed by a vote of the managing officers of the corporation. Mechem, Agency, § 98.

[2] *Bank of Columbia v. Patterson*, 7 Cranch 299 (p. 306). A perusal of the judgment in this case discloses the somewhat interesting fact that Mr. Justice Story supposed himself to be rendering a decision which was in strict conformity with English doctrine. That the learned judge was mistaken as to this point is amply demonstrated by the later English decisions cited in the preceding sections. But in view of the circumstance that the American doctrine is commonly supposed to have been adopted in consideration of the exigencies created by the social conditions in a new country, it is worth noting that, in this leading case, there was no intention on the part of the Court to break away from the older authorities.

THE CRIMINAL LAW OF CANADA.

By the passing of the Criminal Code a great step was made towards placing the criminal law of Canada on a proper footing. But it is much to be regretted that when that consolidation was made steps were not taken to revise and consolidate all those provisions of the criminal law to be found in Imperial statutes which were made operative in Ontario and Quebec by virtue of the Royal Proclamation of 1763 and the Quebec Act of 1774.

It may be remembered that in the Royal Proclamation issued in 1763 it was declared that power had been given the governors of the colonies therein referred to (Quebec, as it was then called, being one) "to enact and constitute, with the advice of our said councils respectively, Courts of judicature and public justice within our said colonies for the hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as may be agreeable to the laws of England with liberty to all persons who may think themselves aggrieved by the sentences of such Courts in all civil cases to appeal under the usual limitations and restrictions to us in our Privy Council;" and by the Quebec Act of 1774 (14 Geo. II. c. 98—see R.S.O. vol. 3, p. XIII.) it was by s. 11 enacted, "and whereas the certainty and lenity of the criminal law of England, and the benefit and advantages resulting from the use of it, have been sensibly felt by the inhabitants from an experience of more than nine years, during which it has been uniformly administered. Be it therefore further enacted by the authority aforesaid, that the same shall continue to be administered and shall be observed as law in the Province of Quebec, as well in the description and quality of the offence, as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted to the exclusion of every other rule of criminal law or mode of proceeding thereon which did or might prevail in the said province before the year 1764 anything in this Act to the contrary thereof in any respect notwithstanding."

We need hardly remind the reader that by the Province of Quebec was meant the territory afterwards known as Upper and

Lower Canada, and what is known now as the Provinces of Ontario and Quebec.

By this legislation, therefore, the criminal law of England, as it stood, possibly on June 22, 1774, or possibly only as it stood in 1763, when first proclaimed, so far as adapted to the circumstances of the colony, became the law of the then Province of Quebec. This law, of course, included not only the common law, but a considerable body of the statute law scattered through various statutes passed in divers reigns from the time of Henry III. to the time of George III. No effort has ever been made as far as we are aware, either by public authority or by any private individual to eliminate from this mass of Imperial statute law the particular criminal enactments therein to be found which are in force in Canada.

And until the publication of the third volume of the Revised Statutes of Ontario no authoritative elimination of the Imperial statutes incorporated into our provincial law of Ontario respecting property and civil rights had ever been attempted. The task had previously been considered to involve too much labour and expense, and though its utility and importance were recognized, the matter was suffered to remain in abeyance until the late Attorney-General took the matter in hand and carried it through to a successful completion.

The same laissez faire policy has prevailed too long in regard to the criminal law, and it is about time that it was remedied.

Many Imperial statutes relating to the criminal law which were in force in England in 1763, or on June 22, 1774, have since been repealed by the Imperial Parliament, and a nice question arises how far such repeal is operative in Canada.

It is quite clear that if the English criminal law had been adopted in Canada by a Canadian statute then any subsequent repeal by the Imperial Parliament of an Imperial statute adopted in Canada would not affect its operation in Canada, and it would, notwithstanding its repeal in England, continue to be operative in Canada until repealed by some competent Canadian Legislature. But in the case of the criminal law its operative force in Quebec and Ontario does not

rest on Provincial, but Imperial legislation, and the question, therefore, arises whether it is not competent for the legislative body which has introduced the law also to repeal it. On the other hand, it may be said, that having introduced the criminal law into Quebec by Imperial enactment, and having subsequently by Imperial enactment conferred on Quebec and Ontario parliamentary control over the laws, civil and criminal, operative therein, the Imperial Parliament has impliedly abnegated its right to alter or interfere with the laws of Quebec and Ontario, unless by express enactment it declares its intention so to do, and, therefore, that a repeal by the Imperial Parliament of an Imperial statute made operative in Canada by the Proclamation of 1763 and the Act of 1774 would not, unless so expressed, affect its continued operation in Canada. This would seem to have been the view of Vankoughnet, C., when he said: "While I admit the power of the Imperial Legislature to apply by express words their enactments to this country, I will never admit that without express words they do apply or are intended to so apply." *Penley* v. *Beacon Assurance Co.*, 10 Gr. at p. 428.

These, however, are questions which ought to be authoritatively settled, and the criminal law of Canada placed as far as possible on a more certain footing than it is at present. There is the further difficulty occasioned by the fact that the criminal law is not as it should be, uniform throughout the Dominion. The provisions we have been referring to, as we have seen, related only to Quebec and Ontario, but the criminal law in other provinces of the Dominion stood at Confederation on a different basis. Any discrepancies of the kind should also be done away with and an attempt made to make the Criminal Code complete as far as statute law relating to crimes is concerned, and all doubts as to whether or not a law is, or is not, in force, should be removed.

Take, for instance, offences affecting trade. These are offences not peculiar to our present state of society, they were probably just as rampant, just as obnoxious to the public weal in days gone by as they are to-day. How else are we to account for the statute of 2 & 3 Edw. VI. c. 15, passed in 1543, against con-

spiracies of victuallers and craftsmen. Their combinations to prevent competition and thereby to defraud and fleece the public appear to have been just as keenly felt in 1543 as they are to-day. That statute commences with the recital, "Forasmuch as of late divers sellers of victuals, not contented with moderate and reasonable gains, but minding to have and to take for their victuals so much as list them, have conspired and covenanted together to sell their victuals at unreasonable prices; and likewise artificers, handicraftsmen and labourers have made confederacies and promises and have sworn mutual oaths not only that they should not meddle one with another's work, and perform and finish that another hath begun, but also to constitute and appoint how much work they shall do in a day, and what hours and times they shall work, contrary to the laws and statutes of this Realm and to the great impoverishment of the King's Majesty's subjects."

It is pretty safe to say that there is hardly a word in this preamble which is not true in Canada to-day in every particular. It is, therefore, a matter of present interest to know how the legislators of 1543 dealt with the matter. By s. 1 it is enacted "that if any butchers, brewers, bakers, poulterers, cooks, costermongers or fruiterers shall at any time from and after the first day of March next coming, conspire, covenant, promise and make any oaths that they shall not sell their victuals but at certain prices; or if any artificers, workmen or labourers do conspire, covenant or promise together, or make any oaths that they shall not make or do their works but at a certain price or rate, or shall not enterprize or take upon them to finish that another has begun, or shall do but a certain work in a day, or shall not work but at certain hours and times, that then every person so conspiring, covenanting, swearing or offending, being lawfully convict thereof by witness, confession or otherwise, shall forfeit for the first offence £10 to the King's Highness; and if he have sufficient to pay the same and do also pay the same within six days next after his conviction; or else he shall suffer for the same offence twenty days' imprisonment, and shall only have bread and water for his sustenance. And for the second offence shall

forfeit £20 to the King if he have sufficient to pay the same and do pay the same within six days next after his conviction; or else shall suffer for the second offence punishment of the pillory; and for the third offence he shall forfeit £40 to the King, if he have sufficient to pay the same and also do pay the same within six days next after his conviction, or else shall sit on the pillory and lose one of his ears, and also shall at all times after that be taken as a man infamous, and his saying depositions or oath not to be credited at any time in any matters of judgment."

By s. 2 it is further provided that "if it fortune any such conspiracy, covenant or promise to be had and made by any society, brotherhood or company of any craft, mystery or occupation of the victuallers above mentioned with the preference or consent of the more part of them, that then immediately upon such act of conspiracy, covenant or promise had or made over and besides the particular punishment before in this Act appointed for the offender, their corporation shall be dissolved to all intents, constructions and purposes."

And by s. 4 it is further created: "That no person or persons shall at any time after the first day of April next coming interrupt, deny, let, or disturb any free mason, rough mason, carpenter, bricklayer, plasterer, joyner, hand hewer, sawyer, tiler, paver, glasier, lime burner, brick maker, tile maker, plummer or labourer born in this realm or made denizen, to work in any of the said crafts in any city, borough or town corporate, with any person or persons that will retain him or them, albeit the said person or persons so retained, or any of them, do not inhabit or dwell in the city, borough or town corporate where he or they shall work, nor be free of the same city, borough or town, any statute, law, advance or other thing whatsoever had or made to the contrary in anywise, notwithstanding, and that, upon pain of forfeiture of £5 for every interruption or disturbance done contrary to this statute" one moiety to the King and the other to the informer.

This statute was repealed in England by 6 Geo. IV. c. 129, s. 2. There are, therefore, several problems to be considered in regard to it. First of all was it introduced by the Royal Pro-

clamation of 1763, and continued by the Act of 1774; or is it to be regarded as a statute of only local application to England, and therefore not applicable to the circumstances of Canada? If it was in fact made the law of Ontario and Quebec, what was the effect of the repeal in England, as regards this country? Then, if in force, is it wholly or only partially in force? Is the second section, for instance, to be deemed penal or merely as affecting civil rights? Is the fourth section to be regarded as creating a crime or merely a civil liability? Then again, if in force at all whether the punishment imposed ought not, in deference to modern ideas, to be changed. The spectacle of an offending victualler or "plummer" standing in the pillory and having an ear lopped off would at the present day arouse so much sympathy with the offender, that it is safe to say that it is not in the least likely that that punishment would ever be enforced.

But it is obviously unwise to have laws on the statute book of so brutal a character as to be incapable of enforcement.

What has been said in regard to the particular statute of Edward VI. above referred to, applies with equal force to many other Imperial statutes, and there should be no longer delay on the part of the Dominion Government in taking steps to codify the whole statute law relating to crimes, and to make the law on that subject uniform throughout the Dominion.

BAD LAW.

It is told of a celebrated lawyer that it was his custom, as cases were published, to cut out those that failed to recommend themselves to his judgment as sound expositions of the law, and to cast them into a drawer which he labelled "bad law." If we were asked to make such a selection, we should among recent cases be inclined at all events to name one as obviously based on unsound principles and therefore deserving of being consigned to such a limbo. The case is *Sovereign Bank* v. *Gordon*, 9 O.L.R. 146. This decision affirms the startling proposition that where a bill of exchange or promissory note is specially indorsed, it is transferable simply by delivery, and that it is competent for the

transferee to strike out the name of the payee in the special indorsement and substitute his own.

Such a proposition we have no hesitation in saying strikes at the root of the whole system of special indorsements of negotiable instruments. If a man were to find a bill specially indorsed, according to this doctrine, it would be competent for him to strike out the name of the special indorsee and substitute his own, and the drawer would then be compelled to pay it on presentation, or run the risk of a suit to establish that the claimant was not the lawful holder. In other words, a bill is presented for payment bearing on its face the marks of possible fraud, and the onus is then cast on the drawer of resolving those doubts at his peril. The ordinary rule is that where a man calls on another to pay a negotiable instrument he must at all events be able to shew a primâ facie clear title to the instrument. A special indorsement appears to us to stand in precisely the same position as a bill drawn payable to a named person or his order. Can it be pretended for an instant that such a bill can be transferred merely by delivery, and that such a transferee could strike out the name of the payee and substitute his own? With great respect to the majority of the Court responsible for the decision, we think such a question admits of but one answer, and that, the direct opposite of what has been given in the case referred to. If the bill on its face could not be altered in the way suggested, we fail to see any sound principle by which such an alteration of a special indorsement could be justified.

The facts of the case made it abundantly clear that the plaintiffs were beneficially entitled to the notes sued on, and it is very strange that their title was not rested on its true ground of their being equitable assignees of the notes, and the special payees in consequence mere trustees for them of the legal title. On such grounds the claim of the plaintiffs might have been reasonably supported, without any violation of the laws relating to bills of exchange. In its anxiety to give judgment on the merits, the Court unfortunately suffered itself to give what we venture to think were wholly untenable reasons for its decision.

PREVENTION OF CRIME.

Corporal punishment is said to be dying out in England, statistics shewing that in their convict prisons only eight prisoners were flogged during the year, as compared with eighty-two in 1880-81. The cat, also, we are told, is giving place to the milder instrument of punishment, to wit, the birch. While this is taking place in conservative England we have some suggestions from progressive Western America, one of which, whether or not it indicates a return to barbarism, or is an evidence of advanced civilization, has certainly the charm of novelty.

A Minnesota grand jury recently made a report recommending some changes in the criminal law, which in the opinion of the jurors would tend greatly to decrease the possibility of crime. One of these was that in the case of criminals convicted for a third time they should be subjected to imprisonment for life. The other was that in cases of criminal assaults upon women it should be made impossible for the offender to commit the crime a second time. There is much sound common sense in the reasons given by the grand jury in support of these proposals in view of the axiom that punishment should be preventive rather than punitive. The reasons stated by the grand jury were as follows: "We have been impressed with the fact that nearly all the crimes brought to our attention, especially those of violence, have been committed by habitual criminals; and we have been especially impressed and alarmed by the number of crimes of violence against female chastity. We believe that the attention of the community should be directed to the existence and growth of a criminal class, and that society should recognize the criminal folly of permitting the members of the criminal class to be at large and preying upon society. And we believe that society should recognize the fact that any adult guilty of the crime of rape is deserving of absolutely no consideration, and should not be permitted to remain capable of committing that crime. . . We are aware that these recommendations are radical, but we believe that the measures proposed are

both just and humane, from the point of view of the interests of society; and we further believe that such measures would result in lessening crime in the State of Minnesota, more than any other punitive measures which could be devised, and would immediately rid this State of a large proportion of the habitual criminal class."

Our interesting contemporary, the *American Law Notes*, says Canadians do not seem to believe (notwithstanding Dr. Osler's chloroform theories) that a man has outlived his usefulness to society by the time he has attained the age of 50, 60 or even 70 years; in proof of which statement the writer cites the case of Hon. Mr. Justice Maclennan recently appointed to the Supreme Court. He was called to the Bar when twenty-four years of age, went upon the Bench at fifty-five and at the age of seventy-two was promoted to the highest Bench in his country. The writer takes occasion to express regret that as to the Bench in the United States it has been thought necessary to write into their law an arbitrary age limit for the performance of judicial duties; and claims that the fact of a man having "reached the age of say seventy years is by no means primâ facie evidence of his incapacity for a judicial office. If anything, such fact is evidence to the contrary, and particularly when a score of more of those years have actually been passed upon the Bench and in the acquisition of judicial training and experience." The idea which became fashionable some years ago as to the necessity of youthful vigour, as opposed to experience, has, we are glad to say, been dying out. Speaking generally, training and experience are much more valuable commodities than energy or book learning. When clients find themselves in a tight place, or a tangled question has to be solved or adjudicated upon, the man who has travelled that road before is certainly the most useful man to have; and long-headed business men know it.

CURRENT REVIEW OF ENGLISH CASES.

PRACTICE—WRIT ISSUED FOR SERVICE OUT OF THE JURISDICTION—SUBSTITUTED SERVICE WITHIN THE JURISDICTION OF WRIT FOR SERVICE OUT OF JURISDICTION—RULE 63.

In *Western Suburban & N.H.P.B. Building Society* v. *Rucklidge* (1905) 2 Ch. 472 a writ for service out of the jurisdiction was on the application of the plaintiff ordered to be served substitutionally by mailing a copy to certain places within the jurisdiction, the defendant applied to discharge the order allowing substitutional service within the jurisdiction contending that a writ for service out of the jurisdiction could not be ordered to be served within the jurisdiction, but Eady, J., following *Ford* v. *Shephard*, 34 W.R. 63, held the order regular and dismissed the motion.

EXECUTOR—JUDGMENT CREDITOR—JUDGMENT AGAINST EXECUTOR —SUBSEQUENT DECREE FOR ADMINISTRATION — INSOLVENT ESTATE.

In re Marvin, Crawter v. *Marvin* (1905) 2 Ch. 490 illustrates the danger a personal representative incurs who omits to set up a defence of plene administravit. In this case the plaintiff recovered a judgment in the usual form against the defendant as executrix for damages and costs to be levied out of the goods of the testator in the defendant's hands to be administered if she hath so much, and if she hath not as much then the cost out of her own property. The estate was in fact insolvent, and the plaintiff subsequently obtained a judgment for its general administration. The defendant then set up a right of retainer as against the plaintiff in the administration proceedings, but it was held by Eady, J., that the judgment was a conclusive admission of assets by the defendant, and as she had omitted to plead plene administravit or her right of retainer, it was now too late to do so. Of course, in Ontario the right of retainer has been abolished, but here, as in England, the personal liability of the defendant on such a judgment remains, as Eady, J., points out, "For, although the judgment is only de bonis testatoris, yet the executor, upon a deficiency of assets, must ultimately pay the debt as well as costs recovered, out of his own pocket; because the judgment is in law a proof that he has assets to satisfy it." Wms. on Exors., 8th ed., p. 1986.

COMPANY—FORGED TRANSFER OF STOCK—INNOCENT PRESENTMENT OF FORGED TRANSFER FOR REGISTRATION—IMPLIED CONTRACT TO INDEMNIFY.

In *Sheffield* v. *Barclay* (1905) A.C. 392 the House of Lords (Lord Halsbury, L.C., and Lords Davey and Robertson) have reversed the decision of the Court of Appeal (1903) 2 K.B. 580 (noted ante, vol. 40, p. 68) and restored the judgment of Lord Alverstone, C.J., (1903) 1 K.B. 1 (noted ante, vol. 39, p. 186). In commenting on the decision of the Court of Appeal we ventured some adverse comments and are not, therefore, surprised to find that decision reversed. In laying down the law to be that where a person innocently presents to a company a forged transfer of stock to be acted on, there is an implied contract on the part of the presenter to indemnify the company against any loss occasioned by the transfer proving to be forged, we think they have put the loss on the right shoulders.

DEBT—EQUITABLE ASSIGNMENT—CHOSE IN ACTION—REQUEST BY CREDITOR TO DEBTOR TO PAY DEBT TO THIRD PARTY—JUD. ACT, 1873, S. 25, SUB-S. 6—(ONT. JUD. ACT, S. 58 (5)).

In *Brandts* v. *Dunlop Rubber Co.* (1905) A.C. 454 the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) unanimously reversed the judgment of the Court of Appeal (1904) 1 K.B. 387 (noted ante, vol. 4, p. 262). The facts were shortly these, the defendants owed Kamrisch & Co. a debt, Kamrisch & Co. gave the plaintiffs Brandts & Co a letter addressed to the defendants requesting them to agree to pay the debt to the plaintiffs. This letter the plaintiffs duly forwarded to the defendants, and it was duly received by them, but by neglect or oversight of their manager, he omitted to send the letter of Kamrisch & Co. on to the defendants' head office, and in consequence, instead of paying the debt to the plaintiffs, it was paid by the defendants to an agent of Kamrisch & Co. pursuant to some previous arrangement. In the Court of Appeal the case was discussed as though it turned entirely on the clause in the Judicature Act relating to the assignments of choses in action (see Ont. Jud. Act. s. 58 (5)), but as Lord Macnaghten points out the really substantial question was whether or not there had been a good equitable assignment of the debt, and as he significantly remarks, "Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute I confess I do not understand." The letter of Kamrisch

& Co. was held to be clearly a good, equitable assignment, perfected by notice to the debtors, and, therefore, the plaintiffs could not be prejudiced by the neglect of the defendants' manager.

PRACTICE—HOUSE OF LORDS—CONSTITUTIONAL LAW—RIGHT OF PEER TO APPEAR AS ADVOCATE IN THE HOUSE OF LORDS.

In re Kinross (1905) A.C. 468. This is an interesting discussion as to the right of a peer to appear as an advocate at the bar of the House of Lords. Incidentally is also discussed the right of a Privy Councillor to appear as an advocate before the Judicial Committee of the Privy Council. The doubt arose from the supposed impropriety of a person being allowed to be heard as an advocate before a body of which he is himself a member. But their Lordships come to the conclusion that according to the constitutional practice which now prevails, no peer is competent to take part in the judicial business of the House unless he happens to be a law lord, and, therefore, there is no impropriety in a peer who is not a law lord from acting as an advocate before the House. Some remarks of the Lord Chancellor on judges resuming practice at the Bar are significant in view of recent utterances on the supposed novelty and impropriety of that proceeding. He says: "If anything is to be said about the traditions of the Bar, my impression derived from the old reports is, that in the times of our early legal history a man was one day an advocate and the next day a judge. In fact, where you use the old reports for the purpose of authority, it is difficult, without making some sort of antiquarian inquiry to ascertain whether or not the words you quote are words of authority coming from one of the judges, or whether they are merely the argument of counsel which may have been uttered the day before in his capacity as counsel, and not as a judge at all. From time to time they went from the Bar to the Bench and from the Bench to the Bar during all those years." The descent from the Bench to the Bar would seem to have very ancient authority in its favour. The remarks of Lord Spencer are also interesting. "Probably I am the only lay peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals." For cases in which peers have asserted their right to vote in judicial cases see May's Parl. Pr. 10th ed., p. 340.

SLANDER—EVIDENCE—PRIVILEGE—WITNESS.

Watson v. *McEwan* (1905) A.C. 480 although an appeal from a Scotch Court, deals with a question of general interest. The action was for an alleged slander. The plaintiff had brought an action for separation against her husband, and the alleged slander consisted of statements made by the present defendant as a witness in that action and prior to the trial to the husband and his counsel, with a view to his being called as a witness: the defendant claimed privilege. The Court of Session though unanimous that the statements made by a witness in the witness box were privileged, yet (Lord Young dissenting) considered that the privilege did not attach to statements made by an intending witness to a litigant or his counsel. The House of Lords (Lord Halsbury, L.C., and Lords James and Robertson) reversed this ruling, holding that not only are the statements of a witness in the witness box privileged, but also the statements made by him to the litigant or his counsel with a view to his being examined as a witness, any other conclusion would certainly, to say the least, be extremely inconvenient.

SHIP — CHARTER PARTY — DAMAGES FOR DETENTION — DELAY IN LOADING—CARGO NOT READY—CUSTOM OF PORT.

Ardan SS. Co. v. *Weir* (1905) A.C. 501 was an action by ship owners to recover damages against charterers for detention of the ship owing to delay in providing a cargo. The defendants claimed to excuse themselves from liability because the delay was unavoidable and attributable to the custom of the port. The ship in question arrived at the port of loading on July 14, and was ready to load, but there was no cargo ready for her until August 13, and then not enough. She had twice to be removed from her berth under a regulation of the port that a vessel must not occupy a berth when not loading, and her cargo was consequently not completed until 23 August. The House of Lords, reversing the Scotch Court of Session, held that the defendants were liable for the delay, and it was immaterial that it was due to causes over which they had no control, and to some extent occasioned by the custom of the port of lading.

SHIP—CONTRACT OF CARRIAGE—BREACH OF CONTRACT OF CARRIAGE —MEASURE OF DAMAGES.

Bolac v. *Hutchison* (1905) A.C. 515 was an action against ship owners for breach of a contract for the carriage of goods. The contract was made by the plaintiffs for the purpose of carry-

ing out a contract for the sale of the goods in question. In consequence of the non-arrival of the goods in question, Owen & Co., the persons to whom the plaintiffs had contracted to sell them went into the market to buy other goods in their place, and the plaintiffs were called on to pay and did pay to Owen & Co. £830 in respect of the goods so purchased. This the plaintiffs claimed to recover from the defendants. The Court of Session considered that as the contract of the plaintiff with Owen & Co. had not been mentioned to the defendants, and the time for performance of the plaintiffs' contract with Owen was not strictly identical with the time limited for the performance by the defendants of their contract with the plaintiff, the loss caused by the breach of the plaintiffs' contract with Owen & Co. was not the measure of damages for the breach by the defendants of their contract, and they awarded the plaintiffs only nominal damages; but the House of Lords (Lord Macnaghten, Davey, James and Robertson) reversed this decision, holding that the defendants must, as an ordinary matter of business, have known that the goods were to be carried for the purpose of enabling the plaintiffs to carry out some contract actually in existence, or in immediate contemplation, that a breach of their contract with the plaintiffs would inevitably cause a breach of contract by the plaintiffs with some manufacturer or merchant, and, therefore, the damages occasioned thereby were properly recoverable against the defendants. The rule being that "setting aside all special damages, the natural and fair measure of damages is the value of the goods at the place and time when they ought to have been delivered."

RAILWAY—SALE OF RAILWAY BY MORTGAGEE—46 VICT. c. 24, ss. 14, 16 (D.)—DOMINION RAILWAY ACT, 1888 (51 VICT. c. 29 (D.)).

In *Central Ontario Ry. Co.* v. *Trusts and Guarantee Co.* (1905) A.C. 576 the Judicial Committee of the Privy Council (Lords Macnaghten and Davey and Sir A. Wilson) have affirmed the judgment of the Court of Appeal, 8 O.L.R. 342, to the effect that a railway under the jurisdiction of the Dominion Government may now be sold as a going concern in an action at the suit of a mortgagee whose mortgage is in default.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* HARKNESS.

Criminal law—Unlawful making contracts for sale of stock—Keeping common gaming house—Stock transactions on margin—Agent for broker—Evidence—Onus—Criminal Code—Aiding and abetting.

The defendant was convicted of unlawfully making contracts purporting to be for the sale of stock, goods, etc., in respect of which no delivery thereof was made without the bonâ fide intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stock, goods, etc., contrary to s. 201 of the Criminal Code, and of being the keeper of and keeping a common gaming house, contrary to that section. Defendant carried on a business in Ontario as "Harkness & Co., brokers, stocks, grain and provisions." He was not a member of a stock exchange, but asserted that he was the agent of a firm of operators in Pennsylvania, with a branch in Buffalo, N.Y. When giving their orders, the persons who dealt with the defendant deposited with him sums of money not exceeding a margin of two per cent. in the case of stocks and one per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was telegraphed to that office, and the next day defendant handed to the customer a paper, signed Harkness & Co., brokers, notifying the customer that he had bought the commodities specified, at the price named, for delivery on demand, subject to the contract, etc. Save this document, there was no delivery. If the stocks, grains or provisions held by the customer went up in price, he directed the defendant to sell out, and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. The defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day. No interest was charged.

Held, that the proper inference from all the facts shewn was that there was an understanding between the defendant and the customers, that the stocks, grain or provisions should never be called for or delivered, and that differences only should be dealt with. It was open to the Court to find, against the form of the papers that passed and the testimony of the parties themselves, that, notwithstanding the ostensible terms, there was a secret understanding. The evidence supported the finding that there was no intention on the part of any one to transfer any property to any one—that the transactions were merely bets on the rise and fall of the market, or gambling transactions.

The opinion evidence of two witnesses, so far as it purported to deal with the legality or illegality of the transactions, should not have been received; but, as no substantial wrong or miscarriage was occasioned, and a case was established against the defendant without the opinion evidence, the first proviso of s. 746 (1) (*f*) of the Criminal Code should be given effect to.

Semble, that, upon the proper construction of s. 704 of the Code, when upon the trial of a person charged under sub-clause (*b*) of s. 201 (1) it is established that he has made or signed, or has acted, aided or abetted in the making or signing of, a contract for the sale or purchase of the specified commodities, and there is no delivery at the time, the onus of shewing a bonâ fide intention to deliver or receive is upon the person charged.

Held, 1. The customer and Richmond & Co., having, by the aid of the defendant, committed the offence prohibited by s. 201 (1) (*b*), the defendant had done acts for the purpose of aiding them to commit the offence, and abetted them in the commission of the offence, and, under s. 51 of the Code, became a party to and guilty of the same offence, and there was no reason why he should not be charged as a principal.

2. The contracts were made in Canada: *Pearson* v. *Carpenter* (1904) 35 S.C.R. 380.

3. Sub-s. 3 of s. 201 is a legislative declaration that an office or place of business of the character kept by the defendant is a common gaming house and so a common nuisance, and that a person maintaining such a place is the keeper of a common gaming house; and this is an offence for which he may be indicted—a penalty being provided by s. 951 of the Code; and, therefore (OSLER, J.A., dubitante), the conviction under sub-s. 3 was properly made.

Johnston, K.C., for defendant. *Cartwright*, K.C., for Crown.

Full Court] MORIARITY *v.* HARRIS.

Constable — Assault — Trespass — Unofficial act — Absence of malice—R.S.O. 1897, c. 88.

Held, reversing the decision of a Divisional Court, 40 C.L.J. 707, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority, or any reason to think that he had, officially, authority to do what he did, and was, therefore, although the plaintiff did not prove malice, not entitled to the protection afforded by s. 1, sub-s. 1, of R.S.O. 1897, c. 88, and was liable for the trespass. Review of English and Ontario cases.

Kelly v. *Barton*, 26 O.R. 608, 22 A.R. 522, followed.

Carscallen, K.C., for plaintiff, appellant. *MacKelcan*, K.C., and *G. Lynch-Staunton*, K.C., for defendant.

Full Court.]

CITY OF TORONTO *v.* TORONTO RAILWAY COMPANY.

Time tables—Routes—Open cars—Night cars.

Upon an appeal by the defendants and a cross-appeal by the plaintiffs the judgment of ANGLIN, J., reported 9 O.L.R. 333, and 41 C.L.J. 325, as to the construction in certain respects of the agreement between the City of Toronto and the Toronto Railway Company was affirmed except as to the running of night cars, the Court of Appeal being of opinion, reversing the judgment below on this point, that a car which starts on its route before midnight must finish its route even if it has to run after midnight to do so.

C. Robinson, K.C., and *Fullerton*, K.C., for plaintiffs. *W. Cassels*, K.C., *W. Laidlaw*, K.C., and *J. Bicknell*, K.C., for defendants.

HIGH COURT OF JUSTICE.

Meredith, C.J.]

TATTERSALL *v.* PEOPLE'S LIFE INS. CO.

Costs—Taxation—Witness fees—Plaintiff travelling from abroad —Expenses—Subsistence money—Plaintiff remaining after trial.

Upon a taxation between party and party of the plaintiff's costs and disbursements, she was allowed travelling expenses in coming from England to Ontario to give evidence on her own

behalf at the trial of this action and in returning to England, and a per diem allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario in order to be in readiness to testify at a new trial if one should be ordered.

J. J. Warren, for defendants. *C. W. Bell*, for plaintiff.

Falconbridge, C.J.K.B., Street, J., Magee, J.]

RE BOLSTER.

Will—Construction—Direction to pay debts and testamentary expenses—Succession duties—Specific legacies—Exoneration at expense of residuary legatees.

A testator made numerous specific pecuniary bequests, and gave the residue of his estate to persons other than the specific degatees. He directed his executors to pay his just debts and funeral and testamentary expenses.

Held, that succession duties do not come within the description either of a debt of part of the testamentary expenses; and that the specific legacies, not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees.

Kennedy v. *Protestant Orphans Home* (1894) 25 O.R. 235, *Manning* v. *Robinson* (1898) 29 O.R. 483, and *Re Holland* (1902) 3 O.L.R. 406, approved.

Decision of TEETZEL, J., affirmed.

W. T. J. Lee, *Middleton*, *Raymond*, and *Frank Ford*, for the various parties.

Meredith, J.] LANCASTER *v.* SHAW.

Penalty—Ontario Election Act—Disqualified person voting—"Postmasters in cities"—Sub-postmaster.

A sub-postmaster in full charge of a post office, though not the principal post office, in a city or town, is a "postmaster" within the meaning of s. 4 of the Ontario Election Act, and is liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly.

H. B. Elliott and *Edmund Weld*, for plaintiff. *Gibbons*, K.C., for defendant.

Mulock, C.J., Exch., Anglin, J., Clute, J.] [Nov. 28, 1905.

PRESTON *v.* TORONTO RY. CO.

Negligence—Contributory—Plaintiff putting himself in peril—New trial.

Appeal from the judgment of BOYD, C., dismissing an action brought for damages for injury caused to plaintiff by one of the company's cars on Yonge Street, Toronto. Plaintiff was a telegraph messenger and on Feb. 6, 1905, was riding a bicycle in a southerly direction, behind a car going south. The car stopped, and in order to avoid running into it, and finding snow on the road to the right, turned into the east track, and was struck by a car approaching from the south, and had his leg broken. The Chancellor entered a nonsuit, the damages being agreed upon at $1,000 in case plaintiff should be afterwards held entitled to succeed. Plaintiff swore that he had no warning of the approach of the car from the south.

There was no statutory obligation to ring the gong when one car is passing the other, but there is a rule of the company to that effect.

Held, that this does not relieve defendants of the duty of adopting reasonable precautions in order to prevent accidents being caused by their cars, when running in the streets, to persons lawfully using the same. Plaintiff may have put himself in a position of peril, but to do so is not per se an act of negligence. It may be justified by circumstances: *Dublin Ry. Co.* v. *Slattery*, 3 A.C. 1,155; *Jones* v. *Boyce*, 1 Stark. 493; *Bennett* v. *G.T.R. Co.*, 7 A.R. 470; *Morrow* v. *C.P.R. Co.*, 21 A.R. 153; *Morden* v. *Hamilton Street R.W. Co.*, 24 S.C.R. 717; *Green* v. *Toronto R.W. Co.*, 26 O.R. 319. There being evidence which might have satisfied the jury that the injury to plaintiff was caused by the omission on defendants' part to ring the gong, and also evidence from which they might have found that it was attributable directly to his own negligence, the case should not have been withdrawn from the jury.

Appeal allowed and new trial ordered, unless defendants consent to a judgment being entered for plaintiff for $1,000 and costs. If they do not consent, defendants ordered to pay the costs of the trial and of this appeal.

Shirley Denison, for plaintiff. *D. L. McCarthy*, for defendants.

Boyd, C.] [Dec. 1, 1905.

UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM *v.* TOWNSHIPS OF HAMILTON AND HALDIMAND.

Toll roads expropriation—Costs of arbitration.

A county which, upon the petition of two interested townships, proceeding in accordance with the provisions of the Toll Roads Expropriation Act, 1901, initiates and takes part in an arbitration to fix the value of a toll road cannot recover from the petitioning townships the costs incurred by it.

H. F. Holland and *W. F. Kerr*, for plaintiffs. *F. M. Field*, for Township of Hamilton. *J. B. McColl*, and *J. F. Keith*, for Township of Haldimand.

Clute, J.] [Dec. 1, 1905.

McCARTNEY *v.* COUNTY OF HALDIMAND.

Municipal corporations—Contract—By-law—Purchase of land—Conveyance to corporation—Attempted rescission.

A municipal council desiring to maintain as required by statute an industrial farm passed a by-law directing that "a farm be purchased for an industrial farm." Tenders were then called for; a committee was appointed to examine the properties offered, that of the plaintiff being among them; the plaintiff's tender was accepted; the title to his property searched by the corporation's solicitor; and a conveyance of the property to the corporation obtained and registered. A cheque in the plaintiff's favour for the purchase money was made out and signed by the proper officers, but before its delivery to the plaintiff a by-law was passed by the council rescinding the former by-law, ordering the cheque to be cancelled, and directing the property to be reconveyed to the plaintiff.

Held, that the transaction was an executed one, the benefit of which the corporation had obtained, and, notwithstanding the absence of a by-law specifically authorizing it, could not be rescinded against the will of the plaintiff, in whose favour judgment for the amount of the purchase money was accordingly given.

Lynch-Staunton, K.C., and *J. Harrison*, for plaintiff. *Douglas*, K.C., and *T. A. Snider*, for defendants.

POLICE COURT, ST. THOMAS.

J. M. Glenn, K.C., Pol. Mag.] [Nov. 6, 1905.

THE KING *v.* ANDERSON.

Sunday observance—Sale of newspapers—Newsdealer a "tradesman."

The defendant was charged with a violation of "The Lord's Day Act," C.S.U.C. c. 104.

According to the evidence given on the hearing, the defendant keeps a store on Talbot Street in this city, and on Sunday the 22nd day of October last he was in his store doing business, and on that day sold copies of *The Detroit Free Press, The Detroit News Tribune* and *The Buffalo Courier*, for five cents each. Only one witness was called on behalf of the defendant and this witness stated that he was travelling agent for *The Detroit News Tribune*, and that he had appointed the defendant to represent that paper in St. Thomas. He also stated that the defendant was supplied from time to time with so many copies of *The Detroit News Tribune* as he required at a certain price, and that he was credited from time to time with a certain amount for unsold copies. No evidence was given to shew the terms upon which he was being supplied with the other newspapers mentioned.

Held, 1. A newsdealer who sells newspapers on Sunday is liable to a fine as for an infraction of the Ontario "Lord's Day Act," C.S.U.C. c. 104.

2. A newsdealer is a "tradesman" within the meaning of that statute.

A. McCrimmon, K.C., for the Crown. *John A. Robinson*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] CAMPBELL *v.* MCKAY. [Nov. 28, 1905.

Trial—Withdrawal of case from jury—Collection Act—Commissioner acting under—Judicial act—Disqualification by interest.

Plaintiff was brought before D., a commissioner of the Supreme Court, for examination under the provisions of the Collection Act, and made application for his discharge on the ground of the insufficiency of the affidavit on which the warrant for his arrest was issued, and also on the ground of interest

on the part of the commissioner. The commissioner refused the application and ordered plaintiff to give bonds and in default to be committed to gaol. In an action brought against the commissioner claiming damages for malicious arrest and imprisonment plaintiff relied principally on evidence that the commissioner had refused upon affidavits to discharge plaintiff from an order made for his arrest on the ground that he was about to leave the province.

Held, 1. This was a judicial act and a perfectly justifiable proceeding and in the absence of evidence of malice, or from which malice could be inferred, the trial judge was right in withdrawing the case from the jury.

2. It did not take away the jurisdiction of the commissioner, and make the matter null and void, that he was afterwards discovered to be disqualified by interest on account of having had as a solicitor, a claim for another person against the same debtor.

O'Connor and *Tobin*, for appellant. *Fullerton*, for respondent.

Full Court.] THE KING *v.* ROBINSON. [Dec. 2, 1905.

Disorderly house—Evidence.

Defendants were convicted of the offence of keeping a disorderly house, to wit, a common bawdy house. The evidence in addition to disclosing the character of the house that at the time of the commission of the offence charged the defendant, Isaiah Robinson, was the tenant, and that he and his wife were in actual occupation of the house.

Held, that there was sufficient evidence to justify the conviction and that it should be affirmed.

Maddin, for prisoners. *Attorney-General*, for the Crown.

Province of New Brunswck.

SUPREME COURT.

McLeod, J.] —— [Dec. 4, 1905.

CUSHING SULPHITE FIBRE CO. *v.* CUSHING.

Winding-up Act—Allowing proceedings on behalf of company—Leave to appeal to Privy Council.

An application was made on behalf of the plaintiff company for leave to appeal to the Judicial Committee of the Privy Council from judgment of the Supreme Court of New Brunswick. The

application was supported by a majority of the bondholders and shareholders of the company. For the liquidators of the said company, it was contended that they were the proper parties to take action and that they had not sufficient time to consider the advisability of appeal.

Held, that while permission might be given to other parties than the liquidators to take proceedings in the name of the company, this leave would not be granted until an appeal from the winding-up order winding up the said company was decided by the Supreme Court of Canada. In the meantime, the liquidators could give notice of appeal to the Supreme Court of Canada. To grant this application, would mean protracted litigation if the winding-up order was sustained, and in the other event, leave could be obtained at a later date. Application refused.

Teed, K.C., for the company. *Hazen*, K.C., for the liquidators. *Pugsley*, A.-G., for certain shareholders.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] [Oct. 13.

BAIN *v.* CANADIAN PACIFIC RY. CO.

Discovery—Production of documents—Examination on affidavit as to documents.

Held, 1. When an affidavit on production of documents is made by an officer of a company any other examinable officer of the company may be examined upon it, and his answers may be used to impeach the affidavit on an application to compel the filing of a further and better affidavit.

2. If such last-mentioned officer on his examination states that he does not know whether or not certain documents exist which by the rules of the company should be in existence, he will be ordered to inquire and obtain the information necessary to enable him to answer fully and explicitly.

3. Reports of the various officials and servants of a railway company upon the occurrence of a fire alleged to have been caused by sparks from an engine, and as to the condition of the engine, if made in the regular course of duty, are not privileged from production.

4. The fire having occurred on the 20th day of the month, the officer was ordered to produce all reports on the condition of the engine from the first to the last day of the month.

Hoskin, for plaintiff. *McLaws*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] REX *v.* GOLDEN. [Oct. 19, 1905.

Criminal Code, s. 591—Statement of accused—Signature of accused—Evidence of, against him at trial on charge of forgery.

Prisoner was tried at the October assizes in the City of Vancouver with having forged a post office money order. At the preliminary hearing the magistrate read over to him the warning set out in s. 591, and the prisoner said he had nothing to say, whereupon the magistrate asked him to sign the statement which he had made, which the prisoner did. Counsel for the Crown tendered this signature at the assizes for comparison by an expert with the writing on the post office order. This was objected to on the ground that anything the prisoner wrote would be on the same basis as if he had spoken it, and that he had declined to give evidence before the magistrate.

Held, that the signature so obtained might be put in evidence.

Maclean, K.C., for the Crown. *Bowser*, K.C., for accused.

accused.

Hunter, C.J.] REX *v.* GRINDER. [Oct. 23, 1905.

Criminal law—Handwriting, proof of in criminal prosecution—Accused testifying on his own behalf.

Prisoner, charged with horse stealing, gave a certain memorandum in writing as to the transaction. At the trial MORRISON, J., on conclusion of the prisoner's evidence in his own behalf, asked him to make a copy of said memorandum, which direction was objected to and over-ruled. On a third trial the Crown sought to put in evidence the specimen of handwriting so obtained.

Held, that the prisoner, notwithstanding that he had submit-

ted himself for examination, could not be compelled to furnish evidence against himself by being subjected to a test, or supplying specimens of writing where the question of his own handwriting was a material part of the case to be proved against him.

Maclean, K.C., D. A.-G. for the Crown. *Henderson*, for accused.

Hunter, C.J.] REX *v.* MCGREGOR. [Nov. 1, 1905.

Criminal law—Certiorari—Summary convictions—Record of proceedings—Appeal, right of depending upon record—Rule nisi—Crim. Code ss. 856 (3), 590, 591.

Held, 1. The omission of the magistrate to take down in writing the evidence given before him was fatal to the conviction.

2. It is not unecessary to state the grounds on which the motion for a rule nisi is made, but if they are not stated it may necessitate an adjournment.

McQuarrie, for the Crown. *W. J. Whiteside*, for prisoner.

Hunter, C.J.] JOHNSON *v.* DUNN. [Nov. 2, 1905.

Contract—No time limit—Reasonable time for performance—Nominal damages—Trespass—Injunction.

Action for damages for trespass and for an injunction.

Plaintiff entered into a contract in October, 1902, with the Hazelmere Mill Company for the purchase and cutting of shingle bolts on a quarter section of land at the rate of 40c. per cord. The mill paid $150 in December following on account of the purchase price, and it was variously estimated that there were between $400 and $800 worth of timber on the land. No time limit was mentioned. The contract was assigned in March, 1905, to one Kinney, under whose authority defendant entered the land and began to cut the timber in August, 1905, when he was stopped by an interim injunction. No notice was given plaintiff of the assignment, and no bolts having been cut pursuant to the contract, he notified the company on May 12, 1905 (which notice reached them on the 13th), that the carrying away of the timber must be commenced within two months from date of notice and completed within two years. Neither defendant nor his principal was served with this notice, although they became aware of it within a few days, and defendant did not commence work

within two months of the time the notice came to the knowledge of Kinney.

Held, 1. It is well settled that the law implies that, where no time is mentioned, the contract should be carried out within a reasonable time having regard to all the circumstances; and when undue delay occurs, the other party has the right to notify the delaying party that unless the contract is carried out within a specified time, such time to be a reasonable time, he will consider the contract at an end. Chitty, 14th ed., p. 354; Leake, 4th ed., 599, and cases there cited.

2. The time here given was, in all the circumstances, reasonable. Only nominal damages having been proved, judgment was given for $5 and costs, and injunction not continued.

Martin, K.C., and *W. M. Gray,* for plaintiff. *Bowser,* K.C., for defendant.

Full Court.] IN RE TELFORD. [Nov. 8, 1905.

Medical Act, B.C. Stat. 1898, c. 9; 1899, c. 4; 1903, c. 4; 1903-4, c. 4; 1905, c. 6—Enquiry by committee of council—Appeal to judge—Medical practitioner—Removal from register—"Infamous or unprofessional conduct."

Appeal by the Council of the College of Physicians and Surgeons of B.C. from the judgment of MORRISON, J., reversing and setting aside the order of the council erasing the name of Dr. T., the applicant, from the British Columbia medical register.

A young, unmarried woman, being pregnant, having to the knowledge of T. endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. T., supposing it might be necessary to operate owing to the patient's condition arising from these unsuccessful attempts, inflicted a wound the more effectually to deceive her parents and others with respect to her real condition by causing them to believe that she had been operated upon for appendicitis. This was done in a private sanitarium under T.'s exclusive control, and without professional or other consultation. T. informed her father (whom she resided with and was dependent upon), in answer to enquiries as to his daughter's condition, that she was suffering from appendicitis. The incision made by T. could serve no purpose relating to the health of the patient. T. was prosecuted for having performed a criminal operation for abortion, but was acquitted. The Medical Council, however, after a formal inquiry by a Committee of Council, resolved to erase his name from

the register of medical practitioners. From this decision he appealed to a judge of the Supreme Court.

Held, reversing the decision of MORRISON, J., that T. was guilty of unprofessional conduct, his acquittal on the criminal prosecution disposing of the charge of infamousness; and that the order of the Medical Council erasing his name from the register should be restored.

Davis, K.C., and *A. E. McPhillips*, K.C., for the Council. *Martin*, K.C., for respondent.

Hunter, C.J.] REX *v.* WILLIAMS. [Nov. 10, 1905.

Criminal law—Habeas corpus—Code, Part LV. ss. 785, 786, 789, 790—Summary trial—Election by accused—Costs—Action.

Application for writ of habeas corpus and certiorari to quash a conviction by magistrate under Part LV. of the Code relating to summary trials of indictable offences. The affidavit of the prisoner stated that at the trial he was not told that he had a right to be tried by a jury and that he did not plead guilty. The magistrate, in his affidavit, stated that before committing the prisoner to gaol he reduced the charge to writing, read it to prisoner, put to him the question required to s. 786, explained to prisoner that he was not obliged to plead or answer, but if he did so he would be committed for trial in the usual course. That prisoner thereupon consented to summary trial and pleaded guilty.

Held, 1. The omission by the magistrate to hold the preliminary enquiry as provided in s. 789, to enable him to decide whether or not the case should be disposed of summarily was fatal.

2. The omission to inform the accused as to the probable time when the first Court of competent jurisdiction would sit, was also fatal. No costs of action.

Whiteside, for the Crown. *Bowser*, K.C., and *Edmonds*, for prisoner.

Duff, J.] WALLACE *v.* FLEWIN. [Nov. 27, 1905.

Water Clauses Consolidation Act, 1897—Appeal from commissioner—Power of Commissioner to amend record.

Petition, under s. 36 of the Water Clauses Consolidation Act, 1897, for cancellation of a record issued to one Keith in Feb.,

1905, and afterwards, in March, 1905, at the request of Keith, amended to read as having been granted to Keith and Hamilton.

Held. A commissioner, prior to the passage of the amendment of 1905, having adjudicated upon an application for a record, and having made the appropriate entry, is functus officio, and has no power to amend such record.

Any such amendment, being a nullity, cannot be reviewed in any proceedings under s. 36.

Bodwell, K.C., and *Oliver*, for petitioner. *Bowser*, K.C., for respondents.

Book Reviews.

THE LAW OF ASSESSMENT, by A. WEIR, B.A., LL.B., of Osgoode Hall, Barrister-at-law, including the law of Statute Labour. Toronto: Canada Law Book Company, 1905.

If light is needed on any subject in which the profession and the public are jointly interested it is the law affecting the assessment of property. Mr. Weir, whom we know to be a careful and painstaking student of the law and an accurate thinker, has here given us the result of his industry and thought. Further experience will remedy some defects, for no man is born a scientific bookmaker; but what is most important he gives us the law as it stands.

A book on this subject, giving the Act and the decisions on the various sections, gathering together all the Canadian cases, with a full selection from those of England and the United States will be as useful to those who have to administer the law in the various municipalities as to the lawyer who may be called upon to advise thereon.

The author has, we are glad to see, dealt fully with the procedure in tax sales, and his collections of authorities on the subject will be found very useful to practitioners, who are so often called upon to advise upon the legality or otherwise of the proceedings antecedent to or at these sales.

A good index closes the volume.

UNITED STATES DECISIONS.

BILLS AND NOTES:—A bank which has accepted a cheque on deposit, with the depositor's indorsement, is held in *Aebi* v. *Bank of Evansville* (Wis.) 68 L.R.A. 964, to discharge the in-

dorser from liability thereon by failing to notify him of its non-payment for nearly a month, notwithstanding it was lost in the mail when forwarded for collection, and the bank waited in the hope that it would reach its destination.

BURGLARY:—Raising a window partly open so as to create an aperture sufficient to admit of entrance into a building, which is subsequently effected through the opening, is held, in *Claiborne* v. *State* (Tenn.) 68 L.R.A. 859, to be a sufficient breaking to come within the statute defining burglary as the "breaking and entering into a mansion house by night with intent to commit a felony."

LATERAL SUPPORT:—A landowner is held, in *Kansas City N. W. R. Co.* v. *Schwake* (Kan.) 68 L.R.A. 673, to have no right to recover damages for injury to lateral support of his property until the earth is so much disturbed that it slides or falls, since the actionable wrong for impairment to lateral support is not the excavation, but the act of allowing the land to fall. An elaborate note to this case reviews all the other authorities on liability for removal of lateral or subjacent support of land in its natural condition.

FLOTSAM AND JETSAM.

A story is told of a certain newly-appointed judge who remonstrated with counsel as to the way in which he was arguing his case. "Your honour," said the lawyer, "you argued such a case in a similar way when you were at the Bar." "Yes, I admit that," quietly replied the judge. "But that was the fault of the judge who allowed it."

The *Central Law Journal* says: "A judge is not half fitted for his work till he has learned that legal principles are intended to bear such a relationship to each other that they may be woven into a garb of justice in which to clothe the very right of a matter."

"It is a sad day for the State when the attorneys begin to lose confidence in the work of the higher Courts."