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SOLE AGENCY—VIOLATION OF CONTRACT FOR EXCLUSIVE TERRITORY—MEANING OF "PUBLICATION."

CANADA LAW BOOK CO., LIMITED v. BUTTERWORTH & CO. AND BUTTERWORTH & CO. (CANADA), LTD.

A recent decision in the Province of Manitoba in an action brought by the plaintiffs to restrain defendants from selling "Halsbury's Laws of England" in Canada, as being in contravention of an agreement set up by plaintiffs, brings up several interesting and important questions.

Among the many points which came up at the trial was the interpretation of the word "publication," the meaning of which, so far as we remember, had not up to the present time been judicially determined. In this case the evidence established that where the word is used in connection with a series of books, such as "Halsbury's Laws of England," the completion of the series is intended. The finding of the court was largely based upon the violation of a sole agency contract, as to which an injunction and damages were claimed and allowed.

The correspondence, part of which appears in the judgment, is suggestive and throws light upon a business transaction in which a large number of the profession are directly interested.

The action was brought in the Manitoba Court of King's Bench and was tried before Hon. Mr. Justice Metcalfe, who delivered judgment on March 10th in favour of the plaintiffs as follows:—

METCALFE, J.:—The plaintiff does business as a dealer in law books, throughout the Dominion of Canada, the United States and elsewhere. One S. S. Bond is the sole proprietor of the defendant Butterworth & Co., law book publisher, of London,

England. The other defendant, Butterworth & Co. (Canada), Limited, is a joint stock company, incorporated in England, having its head office for Canada at Winnipeg. Of the 1,000 shares issued by the company, Mr. Bond owns 999. The remaining share is owned by Mr. Bond's solicitor.

Prior to the year 1907, the defendants Butterworth & Co. were about to publish a work known as "Halsbury's Laws of England." This work is copyrighted and the copyright is owned by Butterworth & Co. That firm sent out circulars of advertisement by which the work is described as "The Laws of England, being a complete statement of the whole law of England, by the Right Honourable The Earl of Halsbury . . . in 18 to 20 volumes."

Some of these circulars were sent to Canada, with order forms attached, and inviting orders at the reduced rate of 21 shillings net, delivered. The Canada Law Book Co., having already had similar dealings with Butterworth & Co., opened a correspondence with a view to obtaining the exclusive right to sell this work in Canada and the United States.

On the 7th of March, 1907, the Canada Law Book Co. wrote Mr. Bond. The material parts of the letter are as follows:—

S. S. Bond, Esq.,
Messrs. Butterworth & Co.,
12 Bell Yard, Temple Bar,
London, England.

Dear Sirs,—When I was in England in July ;t you stated that you would communicate with me early after the first of the year in regard to Halsbury's Laws, as to the sole agency for this country and the United States.

On receipt of this letter please advise me by cable if you will accept our offer, which we now make, and which is on exactly the same terms and arrangements which I made with Green in regard to the Encyclopedia, second edition. We will undertake to purchase 300 sets within two years, paying you the sum of 7s. per volume, we to have the sole agency in Canada and the United States, and you to agree not to sell any copies in this country, and to notify the trade in London that they are not to sell in this territory.

Trusting to hear from you by cable on receipt of this letter, I am,
Yours very truly,
Canada Law Book Company, Limited,
R. R. Cromarty.

Afterwards one Robinson, acting on behalf of the plaintiffs, called on Mr. Bond in London, who thereupon made a proposal to Mr. Robinson, embodied in a memorandum reduced to writing, but not signed, which he handed to Mr. Robinson, and which memorandum is as follows:—

Given to Mr. Robinson.

1. Order to be accepted by the Company.
2. Sets not to be returned to England.
3. We to do our best to prevent sale to Canada.
4. Sole agency to Canada and U.S.A. for five years from publication of volume I. or for one year after publication of the last volume of the set, whichever shall be the longest period.
5. Sole agency after the above-mentioned period shall be obtained by their taking fifty sets for the first year and forty sets for the next year, and so by a sliding scale to ten sets for the fifth year.
6. Five hundred sets at 7s. 6d. in quires to be taken within two years, ordinary account.
7. We to hand over the orders from above territory received before this date, and to receive a bonus of 3s. 0d. per volume for the same; also to refer future orders and enquiries while this agreement lasts to the Canada Law Book Co.
8. B. & Co. to take back up to 100 sets at same price as charged, at completion of the expiry of the sole agency.

After Robinson's return to Canada, the Canada Law Book Co., having that memorandum before it, wrote to Mr. Bond its letter of May 21st, 1907, the material parts of which are as follows:—

Referring further to Halsbury's Laws of England, Mr. Robinson has just handed me the proposition you made to him. . . . As to the guarantee of fourteen volumes, the additional volumes, of course, will be free. We were to take 300 sets inside of five years from September last. It seems to me your proposition is a pretty stiff one. . . .

We should like very much to handle the sale of Halsbury's Laws, and would be able to give you much better satisfaction than you could get through any other channel, but the terms are too stiff. If you want the assurance of an annual sale of this work, you may rest assured that if the sale can be made, we can do it, and if the agency is handed over to us, it will receive proper attention from us. If you wish, we will meet you half way, and pay 7s. 6d. per volume. We to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication. We will waive the right to return any copies, all of which will be purchased outright. You will hand over to us any orders you

have in Canada and the United States, without any cost to us. We will agree to supply them at the special price. . . .

On receipt of this letter, you might wire me acceptance or refusal. We, of course, have the right to purchase additional sets at the price.

Yours very truly,

Canada Law Book Company, Limited.

Upon receipt of that letter, Mr. Bond, on the 13th of June, 1907, cabled as follows:—

Cromarty, Toronto.

Halsbury's Laws. Agree your modified terms. Writing.

This cablegram was unsigned. It is explained that in business dealings, it is quite usual to omit the signature to such cables. The cable was followed by a letter, dictated by Mr. Bond, and signed by Butterworth & Co., dated June 14th, the material parts of which are as follows:—

THE LAWS OF ENGLAND.

By the Earl of Halsbury and a Distinguished Body of Lawyers.

We are in receipt of your letter of May 21st with reference to the above. Although we think that you should not have had any difficulty in falling in with our proposal, yet we will agree to accept your modification of our terms. The terms between us are now as set out overleaf.

We cabled as requested as follows:—

Cromarty, Toronto. Halsbury's Laws. Agree your modified terms. Writing.

The terms "overleaf" were set forth on a separate sheet accompanying the letter. The following is a copy:—

Arrangements with The Canada Law Book Company, Ltd., for "Halsbury's Laws of England."

1. This arrangement to be between the Company, if we decide to make one for this undertaking.

2. Sets not to be returned to England.

3. Butterworth & Co. to do their best to prevent sale to Canada.

4. Canada Law Book Company to take four hundred (400) sets within two years in return for the sole agency to Canada and the U.S.A. for five years from date of publication of Volume I. During the said sole agency they to have the right of purchasing additional sets at the same price.

5. Butterworth & Co. to hand over any orders from above territory that they have received.

June 14th, 1907.

Mr. Cromarty, who appears to be the governing power of the Canada Law Book Co., says that he did not see that letter, nor the "overleaf" memorandum until the spring of the year 1912. While at first glance this might appear unlikely, I have given weight to the explanation of Mr. Cromarty, who says that, after the receipt of the cablegram, he was absent from home because of bad health, and that the letter, arriving in his absence, instead of being filed with the cablegram and the other letters in a file under the heading of "contracts" was filed by his filing clerk in the general correspondence. I believe Mr. Cromarty's testimony on this point, and I find as a fact that this letter was not brought to his personal attention, nor to the attention of anyone in authority in the employ of the plaintiff company until some time in the spring of 1912.

Mr. Bond, who is really Butterworth & Co., evidently decided, prior to the 13th November, 1912, that, thereafter he would, by his one-man company to be formed for that and other purposes, sell the said publication practically direct in what had been the previously admitted territory of the Canada Law Book Co.

On the 13th of November, 1912, and as soon thereafter as physical conditions and the capacity of the Winnipeg post office would allow, for the purpose of procuring orders within the territory previously granted to the Canada Law Book Co., Butterworth & Co. (Canada), Ltd., acting under instructions of Bond and the English house, mailed from Winnipeg many circulars offering an India paper edition, "For a short time only," of the said work, at a price less than that at which the thick paper edition was being sold, and afterwards mailed many other "follow up" and other circulars, all for the purpose of soliciting orders. Such circulars did result in many orders for Halsbury coming to Butterworth & Co. (Canada), Ltd. If the contract is alive, I think Butterworth & Co., which is really Butterworth & Co. (Canada), Ltd., has committed a breach thereof, and I do not think that Butterworth & Co. (Canada), Ltd., if the contract is alive, can escape liability.

The plaintiff laid its claim contending that its contract with the defendant Butterworth & Co. is a contract extending for a period of five years from the date of publication; that the work is a complete work, subscribed for and sold only in sets, and that it is not "published" until the last volume is issued. In the alternative, it is said that if it has not such contract, it has a contract for at least one year from the date of the publication of the final volume. The plaintiff claims an injunction to restrain the defendants from soliciting orders within its territory, and damages for breach of the contract.

With great reason, he says it never was intended that his sole right to sell would cease before the completion of the work. Were it not for the "overleaf" accompanying the letter of June 14th, I could easily follow the plaintiff's contention. Certainly prior to the date of that letter Mr. Bond recognized that the contract should continue until a period after the publication of the last volume. While his memorandum "overleaf" may seem at variance with that conclusion, still, I fail to understand how he could expect any offer to be accepted or considered reasonable where the term would expire before the final completion of the work.

The defendant denies the contract.

At the trial I allowed an amendment setting up the fourth section of the Statute of Frauds. During the progress of the trial various applications for amendment were made, some of which I refused. As the trial proceeded, however, it became apparent that all the material evidence was at hand, and I intimated to counsel that if, upon consideration, I considered any amendments to either the statement of claim or defence were necessary to grant proper relief, I would allow the necessary amendments.

I allow the plaintiff such amendments as are necessary to set up in the alternative, the contract as one for five years, with a right of renewal, the plaintiff by his counsel having offered to take the required number of sets. I also allow the plaintiff to set up waiver and claim for equitable relief.

I allow both the plaintiff and defendants to set up pleas of estoppel.

I allow all the amendments both of the plaintiff and defendants attached to the record.

The defendants say that the contract is a contract for the sale of goods and is not to be performed within a year; that there is no sufficient memorandum; that part performance does not take the case out of the statute, citing for this proposition, *Prested* v. *Garner*, [1910] 2 K.B. 776. It was there held that the 4th section of the Statute of Frauds was not repealed by the Sales of Goods Act, and therefore, that in such case part performance as set forth in section 6 of our Sales of Goods Act does not avail. This principle was recognized without discussion on appeal: *Prested* v. *Garner*, [1911] 1 K.B. 425. The defendants also say that there was no *consensus ad idem;* that if there is a sufficient memorandum it does not embody the mutual understanding; and that there is consequently no contract.

Of course, were the facts and circumstances similar, I would have no hesitation in applying the principle laid down in *Prested* v. *Garner*, but, while expressing no opinion on the application of that case here, I think there are many circumstances in this case which would tend a Court of Equity towards a different conclusion. It is true that in *Prested* v. *Garner* there was part performance; but how? By a shipment of a certain portion of a lot of carburetors. Each of these carburetors is a complete article in itself. The balance of the lot of carburetors, I think I may safely assume, were for sale upon the open market and the deficiency would be easily replaced, while here the work is copyrighted and cannot be procured elsewhere. Then Butterworth & Co. knew the plaintiffs would, in the ordinary course of business, incur obligations with its customers to provide them with the complete sets, and that the remaining volumes could be procured only from Butterworth & Co. Not only with the knowledge, but with the consent and assistance of Butterworth & Co., the plaintiffs did proceed as though there was a contract, sold more than the 400 sets before

the expiration of two years and many hundred sets since, all of which sets were supplied by Butterworth & Co. at the price per volume mentioned in the correspondence. The contract was treated by both parties as a contract for the agency of a copyrighted publication.

Would a Court of Equity now hear the defendants say, "There is no memorandum"? Having regard to the portions of the correspondence already set forth, the mass of correspondence following during the next five years, the circumstances of the case and the conduct of the parties, who at all times acted during the whole five years as though there were an enforceable contract, I think I must find there was a contract.

It is true Mr. Cromarty did not see the letter of June 14th, 1907, nor its accompanying "overleaf" until the spring of 1912. But, had he seen those writings when they arrived, and if they contained a variation, could he have sat quietly by and now be heard to say that any variation therein expressed did not become a part of the contract. Surely after five years, if any variation were set forth in a way a reasonable man should understand, he could not now say, such is not a part of the contract. Is he in any better position because he did not see those writings? I do not think so. It was through no fault of Butterworth & Co. that Mr. Cromarty did not see either this letter or the "overleaf." I think that now the plaintiff may not be heard to deny that the variations, if any, mentioned in the "overleaf" became a part of the contract, and that the plaintiff must, by its conduct, be precluded from denying that it accepted any variation therein expressed.

It is not shewn on what date the first volume was published. Mr. Bond said some time in November, 1907. In the defence it is stated as November 14, 1907. As against the defendants, I think this may be taken as correct.

It appears that the sets supplied at 7s. 6d. per volume were unbound and printed on thick paper. Butterworth & Co. had issued an apparently limited number of sets printed on India paper. These sets were more attractive. The plaintiff kept

continually asking for such sets, and some were from time to time supplied, bound and at a higher price. Mr. Cromarty from time to time unsuccessfully urged Butterworth & Co. to print a further edition on India paper. Some Canadians wrote direct to London to the defendant Butterworth & Co. for India paper sets, and Butterworth & Co. replied stating that they could not supply them, and referring such applicants to the plaintiffs, whom Butterworth & Co. said were their sole agents. Butterworth & Co. sent copies of such correspondence to the plaintiffs. Evidently there became an increasing demand for the India paper sets. On January 6th, 1911, Butterworth & Co. wrote, "but it would be too expensive to reprint from moulds specially for the purpose of making up the stock of India paper editions. Under the circumstances there is no other course than to wait until a later date when we may be able to reprint a thick paper edition." On January 18th, the plaintiffs wrote wanting a price on 100 sets India paper edition, and later got 2 sets. Butterworth & Co., on February 10th wrote saying they could not spare more, and saying further: "If we are so fortunate as to be able to reprint the India paper edition in a few years, then it will serve as an extra attraction to those few benighted people who have not taken up the work, supposing there are any such."

Before November 12th, 1912, Mr. Bond appears to have made up his mind to go into business in Canada himself, not only to sell Halsbury, but to sell other goods in competition with the plaintiff. It is true he formed a one-man company; but can I come to any conclusion other than that Bond and Butterworth & Co. and Butterworth & Co. (Canada), Ltd. are one and the same thing, and that the limited company was thought by Bond either better for business reasons or perhaps safer in case of litigation with the Canada Law Book Co.?

Notwithstanding his repeated assertions to Cromarty that there would be no India paper edition for years, in the face of those assertions, and under the circumstances, I think, while he was making those assertions, he was preparing such an edition

and preparing to advertise and sell these at reduced rates "For a short time only" on what he says he thought was the very eve of the contract with the plaintiff.

Who came to Winnipeg and arranged for the lease in his name, bearing date November 1st, 1912? That is not shewn, but I think I may assume someone was here on his behalf. When did he install his one-man company in those premises? It is not shewn, but surely it was before November 13th, 1912. When did he prepare those circulars? Surely long before November 13th, because, having been previously printed in England, they were then here; cart-loads of them, so many cart-loads that the Post Office could not, apparently, receive them all on one day. When did he commence to get ready his India paper edition? If I exercise any common sense, I would say long before November, 1912.

But it is not until he sends a letter bearing date November 6th, by way of mail, to the plaintiff at Toronto, that he says a word about his intention to himself come into the territory. Then he writes: "We are writing to say that on the 14th of this month, we open an office in Canada," giving the Winnipeg address. Still no word of the India paper edition. Let us see what happened. I cannot do better than copy a portion of the letter of November 16th from the Winnipeg office to the London office of Butterworth & Co.

Letter of Notification.

> We have by this mail posted to London several copies of the above. On Wednesday, the 13th, we posted to the profession as many as the Post Office would allow. The balance were despatched on the 14th. If we have time we will explain our reference to the Post Office. The Government organization here is certainly the hardest case that we have ever had to deal with.

Book of the Laws of England.

> Having regard to the possibility of activity in certain directions, we had decided, prior to the receipt of the personal letter to Mr. Bellew, to expedite the posting of the above. You will recollect that the original arrangement was for them to be posted on Saturday, the 16th. We, however, arranged to post the packets for Winnipeg on the night of the 14th, and the balance were taken away in four cart-loads on the 15th.

In passing, we think it well that you should become acquainted with what we have had to go through in connection with this matter. In the first place, the staff here had to paste on the title page and the order form (two operations). Secondly, they had to insert the red special offer slip, and an envelope; thirdly, the pamphlet had to be inserted in the envelope; fourthly, each packet had to be stamped "Butterworth & Co."; fifthly, a special number of "cancelled" stamps had to be procured in order to expedite the delivery of the packets. In the next place, as the Post Office decided it was too large a quantity for them to handle immediately, our staff here had to sort the packets into various postal districts, tie them up in special bundles, and make four journeys with the cart, to which we have already referred, to the C.P.R. mailing depot, where arrangements were made for them to be put on the respective trains. We may say that one of the clerks was so amazed by such a quantity of stuff being delivered to them at once that he has asked for a copy of the pamphlet in order to keep it as a memento.

We have not set out this information merely to shew you that we have had some trouble in connection with the matter here. We include it in this letter because it is an important fact to take into consideration in the future. The Post Office here is not equipped to handle expeditiously in any event large quantities of either circulars or advertising matter sent to them from one firm. This does not, of course, raise an insuperable barrier in the way of future advertising, but it does put upon the office here a good deal of the burden that is borne by the Post Office in every reasonable country. From our experience of the country it is better for matter to be posted in Winnipeg rather than in London; but when arranging advertising campaigns you must be good enough to take all the facts set out in this section of the letter into consideration. Unless we had actually been through the experience of the last week we should not have believed it possible that such an organization, going under the name of the Post Office, could have existed in any modern country.

Now that the *Book of the Laws of England* is on its way over the country, we feel that we have got rid of one of the most important of our early tasks. We expect, within a few days, to have quite a fair correspondence as a result of the prospectuses being sent out. As a matter of fact, we have had two or three enquiring callers at the office to-day. We have also received our first letter in connection with the matter. When we write our next letter we hope we shall be able to say we have secured our first batch of orders. Some time must elapse, however, before it is possible for letters to reach us from the profession, either in the east or the west. There is, apparently, no standardized time for the transit of letters from one place to another. In any event, however, at the end of next week our letter box should be busy.

Laws Prospectuses No. 2.

Having regard to the possible activity already referred to in the previous section, we have also decided to expedite the despatching of the "follow" pamphlet, a stock of which has safely arrived. Another reason that we have decided upon this course is that it strikes us there may be a good chance of it being even more impressive than that beautiful production, *The Book of the Laws of England*. In our opinion it is one of the best advertising prospectuses that has so far been issued by the London house. It gives fresh glory to the premier legal work; it emphasises its utility, and shews that the *turn over edition* gives the work a value which up to the present has not existed. If our letter box does not commence to be put to good use, say a week after the despatch of this "*follow*," we are not at all sure that there will not be some grounds for our coming to the conclusion that something has gone awry with the Dominion.

Our Representatives.

We met Messrs. Wood, Dalziel and Lightfoot at the depot at 1.15 Thursday morning. They did not seem surprised, even at that early hour, to be met by someone from London. They all struck us as being depressed, and they certainly had not many pleasant recollections with regard to the journey. They apparently wished to stay here a few days in order to get some washing done, and to settle down to the country, or some such nonsense. We, however, despatched them as follows by the 10.40 train to the west, leaving the night they arrived.

Mr. Dalziel has gone to Regina, and we hope he was able to commence work there yesterday.

Mr. Lightfoot starts—if he carries out our instructions—in Calgary on Saturday morning; and Mr. Wood should be fit and ready on Monday morning.

We have arranged for them to telegraph us a "night letter," as we mean to keep in close touch with them.

The Laws of England, "Turn Over" Edition.

We were glad to learn that you have shipped 100 sets of the first ten volumes of the above. We expect these will arrive in Montreal about the end of the month. As we informed you in our previous communication, we will see that Mills has very explicit instructions with regard to the disposal of these. We hope you gave special instructions to the packers with regard to the wrapping and packing of the cases containing the ten volumes. Our reason for specially mentioning this is that a number of the volumes in the representatives' specimen cases appear to have got rather damp, and, as a result, the leather is somewhat marked. We cannot say very badly marked, but the examination of the travellers' sets already referred to revealed the necessity for special care to be taken in the matter of packing. If Messrs. Wingate & Johnston have attended to this matter with the

corresponding care with which they packed the ordinary stock, we have no doubt the volumes will arrive at Montreal in quite good condition. The sets you are now sending out from England will, moreover, have greater protection than the travellers' sets referred to, as they are to be enclosed in a strong outer case. . . .

The defendants knew that the plaintiff was active in securing subscriptions and had the right to be active in doing so until the last moment. It is true that Bond did not know of Cromarty's oversight of his "overleaf" letter, for Cromarty had said nothing of it. Must I therefore assume that Bond thought his contract expired on the 13th of November, or was it a case in which he himself was uncertain? What was the "possible activity in certain directions" referred to in the letter of the 16th November from the Winnipeg office to the head office, not once, but twice, and in such a way that I can have no doubt but that both Bond and his Winnipeg representatives expected there would be activity? Was it that they did expect that the Canada Law Book Co. would not tamely submit to the termination of its contract on the 13th of November? Did they expect that, unless they could get their circulars out by the cart-load and at once, they might be stopped? Why is it that the Winnipeg office finds so much fault with the Winnipeg post office accommodation? Surely it is because the circulars which they attempted to send out were so numerous and bulky as to be extremely unusual. I say again, why was there necessity for such haste?

The Canada Law Book Co. had been active in securing subscriptions. Butterworth & Co. had a register upon which was entered the subscriptions, and the date of entry, at London. During this very month of November the Canada Law Book Co. had ordered, in the usual way, apparently, 100 sets. Did Mr. Bond think that his circulars would have any effect upon these 100 subscribers, and upon the many other various recent subscribers? Did he think that those who were getting the thick paper edition would cast longing eyes upon the India paper edition? Did he think that he was dealing fairly with his Canadian customer, the Canada Law Book Co., when, know-

ing the price at which, during the whole five years, "Halsbury" had been sold in the thick paper edition, he, at the crack of dawn, floods the market with cart-loads of circulars, advertising for sale, at a less price, "For a short time only," the far more attractive India paper edition, by a rival Law Book Company formed to sell this and other law books.

Mr. Bond may consider that good business. He may consider it honourable business; but to my mind it is not commendable.

The contract was made before the publication of the first volume. Let us see what was in the minds of the parties, or in the mind of Cromarty on the one hand, and Bond on the other. Bond intended to give, and Cromarty to take, the sole agency for a term of years. Both Bond and Cromarty thought the work would be finally completed before five years. Having regard to the nature of the work and the consequent contracts that the plaintiff would make with its customers I must find that Bond intended (when he made the contract) that the plaintiff would have the sole agency, at any rate until the final completion of the work. I do not think any other thought was then in the mind of either party. During the subsequent correspondence the plaintiff urged haste, suggesting two years.

On the strength of the circular before mentioned (complete in 18 to 20 volumes) the plaintiff opened correspondence for the exclusive agency. For what? Surely for the complete sets. Then followed Robinson's interview and the memorandum given to him by Bond to deliver to his principal, the plaintiff. Does the subsequent correspondence change the conditions set forth in that memorandum? In some respects its conditions are expressly varied. But in some respects not. In view of the common intention as to the plaintiff's right to an exclusive agency until completion of the publication, does the term in the "overleaf" so vary the contract that Bond may now say, "although I have taken longer to complete the sets than either of us contemplated, and although that is my fault, now, because five years have expired, you have no contract."

When we look at the original memorandum we see, "For five years from the publication of Volume 1, or for one year after publication of the last volume of the set, whichever shall be the longest period."

After working for five years under the contract, the defendants now say the term as to time means one thing and the plaintiff says it means another. I think, in so far as the defendants are concerned, it looks as though they are trying to take advantage of the wording of the "overleaf" to work out an afterthought and something not in the mind of Mr. Bond when he sent the cable and wrote the letter following. Parties may well be fairly agreed upon the terms of a contract when it is made and get wide apart as the years go on as to the interpretation of its terms.

While I am not prepared to follow the plaintiff's contention as at first laid, I think there is strong ground to support it.

As the parties cannot now agree, let us look at the correspondence and see if we cannot find a contract.

It is strongly urged by the defendants that I must not look at the Robinson memorandum. I cannot support this contention.

> Where one document refers to another, the two may be read together so as to constitute a complete memorandum. . . . The same rule applies if the documents can be connected together by a reasonable inference, although there be no express reference from one document to the other: Halsbury, Vol. 7, 369.

The law is fully reviewed on this point in *Bristol, etc., Aerated Bread Co.* v. *Maggs*, 44 Ch. D. 620.

When I look at the whole correspondence to gather the terms of the contract, I am deeply impressed with the fact that the memorandum given to Mr. Robinson, which was the first writing of any moment, is an essential part of the contract. It is true that Cromarty makes certain propostions in his letter of the 21st of May, 1907; but he has the written proposition before him when he writes that letter and refers to it in that letter. When I look at the cable of the 13th of June and the letter of the 14th of June, and also the "overleaf," and compare this with the

letter and with the original memorandum, I think I may safely say that, except wherein that original memorandum handed to Mr. Robinson is varied, its contents become and are a part of the contract.

Let us assume for the moment that the defendants are right in their contention that the term was varied by the "overleaf." Even so, the renewal clause remains a part of the contract.

But if the defendants are right in their contention that the contract expired in five years, whether they completed their publication or not, then it may be urged that the defendants not having elected to renew within the term, may have lost that right. I have been referred to no authority on this point. I think I may refer to the law regarding leases:—

> A lease which creates a tenancy for a term of years may confer on the lessee an option to take a lease for a further time . . . and its exercise is not necessarily restricted to the duration of the original term: Halsbury, Vol. 18, 845.
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> Where a lessee for a term of years has the option to renew his lease, it seems to be the better doctrine that he must notify his lessor before the term expires whether he elects to renew, as the lessor should know at the moment when the lease expires whether he has or has not a tenant. . . . A court of equity will not relieve the lessee against a failure to give the required notice if such failure was caused by wilful ignorance or accident not unavoidable. If, however, the failure to give the notice was caused by unavoidable accident, fraud of the lessor, surprise or ignorance not wilful, a court of equity should grant relief and compel renewal. . . . The lessor may also be bound by a waiver. . . . : 18 Am. & Eng. Encyc., 2nd ed., 692.
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> Courts of equity will relieve a lessee if he has lost his right to renew by fraud on the part of the lessor or by unavoidable accident on his own part. They will not assist him where his failure to renew is on account of his own gross laches or negligence. On the other hand, it is held that on the question of the right to relief against a forfeiture for failure to renew time is not essential where there is mere neglect, but that in the case of gross or wilful negligence relief will not be granted: 24 Cyc. 1006.
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> A provision in a lease giving to the lessee the privilege of extending the term is to be distinguished from a provision giving to the lessee the option to renew. In the former case no notice of the lessee's election to extend the term is required, in the absence of a stipulation therefor in the lease, his mere remaining in possession being sufficient notice: 18 Am. & Eng. Encyc., 2nd ed., 693.

The provisions of a lease requiring notice from the lessee of an election or intention to renew or extend the term are for the benefit of the lessor and, therefore, the notice itself or any other matter going to the sufficiency thereof may be waived: 24 Cyc. 1003.

It may be said that the case is not analogous; but I think the Court here should adopt a similar principle. It is true that a tenant remaining in possession gives an evidence of some intention. Here, considering the conduct of Bond and his Winnipeg office, and especially in view of the contemplated "activity in certain directions," I have no doubt that the defendants were fully aware of the stand the plaintiff would take as to the contract.

I think the defendants made all their preparations well knowing they would surprise the plaintiff. I think they succeeded in springing a surprise. Under the circumstances I fail to see in what better position the defendants are to complain of lack of election than would a lessor in any of the cases cited above. I think here the defendants had no right at all to invade the territory as they did.

I think the plaintiff is entitled to a renewal of his contract upon the terms mentioned in that memorandum. I do not think the defendants may offer for sale the India paper edition in the territory granted.

It was agreed at the trial that if I found the defendants had no right to invade the territory, I might assume damage, and that in such case there would be a reference by consent to an arbitrator to be agreed upon or to be appointed by me under the law in that behalf.

I reserve the matter of the appointment. If the parties cannot agree I will appoint the arbitrator.

There will be an injunction as prayed.

Having regard to the amendments, I allow no costs.

Judgment for plaintiff; injunction ordered.

A. B. Hudson and *H. E. Swift*, for plaintiffs. *C. P. Fullerton*, K.C., and *C. S. Tupper*, for defendants.

LORD MACNAGHTEN.

We regret to record the death of Lord Macnaghten, who died on the 17th ulto., at the age of 83. He was the second son of Sir Edmund Macnaghten, a member of an ancient Scottish family, long settled in Ulster, which has given to the country both distinguished lawyers and soldiers. His grandfather was an Indian judge, and his uncle one of the law reporters in Chancery.

Lord Macnaghten completed his education at Trinity College, Cambridge, where he won distinguished honours. He was as well known as an athlete as he was as a scholar and a judge. Among his rowing trophies are the Colquhoun Sculls and the Magdelene Pairs, with F. W. Johnstone, in 1851. In 1852 he rowed for Cambridge against Oxford and also won the Diamond Sculls. At the Henley Regattas his well-known figure was almost always to be seen in a certain corner of the grand stand.

Early in his career Lord Macnaghten was offered a judgeship by Mr. Gladstone, but declined to leave the Bar; and, on a subsequent occasion, he refused the position of Home Secretary. In January, 1887, however, he succeeded Lord Blackburn as a Lord of Appeal in Ordinary. In 1903 he was created a G.C.M.G. and a G.C.B. in 1911. Two of his sons are members of the Bar.

As a judge Lord Macnaghten may be classed as amongst the very best of those eminent men who have adorned the British Bench; and it has been said, "Whilst his pronouncements in the House of Lords are amongst the most learned of the judgments of that august tribunal, they fairly sparkle with flashes of humour and gems of thought." He was equally distinguished in the many judgments he has given in the Judicial Committee of the Privy Council, and all parts of the Empire have been benefited by his mastery expositions of the law as it affected important interests in England's overseas dominions and dependencies.

TRADE UNIONISM.

Recent developments in the system of trade unionism have brought into the government of the country a new force, of which it would be well for our legislators and statesmen to take very earnest heed. The amalgamation of all the unions connected with the work of the railways in the United Kingdom, which has long been talked about, has now been accomplished, and the absolute control of its 200,000 members is placed in the hands of a council of twenty-five of its leaders. To this body is given the power of calling on, or calling off, a strike of the whole body of railway employees for any cause whatever without consultation with the men or notice to the companies. It is hard to realize the consequences of interference with the means of transportation in such a country as England, where a dense population is dependent not only for its comforts, but for its daily bread upon the daily supplies which the railways bring to its doors. Nor is it the capitalists with whom the trades unions are at war who will be the first or principal sufferers by such an act of hostility. It is the very poor whose daily wage is cut off, and whose daily modicum of food and fuel can no longer be obtained —who have no reserve upon which they can draw either of money or provisions—who will first feel the pinch of privation. Nor is it the men who may properly be held responsible for such extreme measures who will feel their effects most severely—still less the leaders, who, it may be assured, have taken good care of themselves; it is the wives and children, the aged and infirm, who cannot feel the joy of conflict which may for a time sustain those engaged in the combat, but who must endure in silence whatever may befall.

But it will be said, Surely such a power as this council possesses will not be exercised except to right some grievous wrong for which redress has been refused, or to obtain some benefit wrongfully withheld. It will not be put in force for anything less than some vital issue which affects the whole body concerned and which cannot be settled in any less violent manner.

Will it not?

A short time ago a man in the employ of one of the English companies was suspended for drunkenness, of which he was convicted by the resident magistrates. Though this was before the amalgamation above spoken of a strike was threatened unless the man was reinstated, a strike which would have affected a large body of workmen, and, of course, tied up railway trains over a large section of country. To compel the company to replace in charge of a locomotive a man whose sobriety could not be relied on could not be thought of, so the complaint made was that the man was wrongfully convicted of intoxication. The matter was becoming so serious that the Home Secretary was appealed to. He sent another magistrate to try the case, and he finding the evidence insufficient dismissed the case, and the company then yielded and reinstated the man. Whoever was wrong in this matter—the magistrate who convicted, the magistrate who acquitted, the Home Secretary, who interfered with the regular course of justice, the company who first dismissed and then reinstated, or the trade union which, on such questionable grounds, were ready to inflict untold injury upon a mass of persons who were in no way concerned in the dispute—we have the fact that the trade unions are prepared to use their enormous power for mischief for causes the most trivial and which ought to be capable of settlement without recourse to such dangerous weapons.

We have now a case arising since the amalgamation when a strike which would have involved the whole of the railway systems throughout the British Islands was threatened on account of the dismissal of a conductor on the Midland Railway. Unwilling, we may suppose, to incur responsibility for such a calamity as was threatened the company yielded and reinstated the man.

Now, whether the company were right or were wrong in their action, we see here that the council of twenty-five were ready to exercise their power, and close up every railway in the country, regardless of consequences, for a matter so trivial, and which could and should have been adjusted as such difficulties are adjusted in every other sphere of action.

Apart from all other considerations, how is it possible for a railway company to maintain the discipline necessary not only for its own efficiency, but for the safety of the public for whom it is responsible with such a tremendous irresponsible power ever ready to intervene in any case, no matter how unimportant, in which the interests of a union may be affected?

On this continent also an effort is being made to concentrate the power of all the unions in one body so that when a dispute arises, or a demand is made, the threat of a general strike will strike terror into the whole community. The tyranny of Democracy may become as effectual in its operation and as far-reaching in its consequences as that of the most powerful and unscrupulous despotism that ever existed.

SIR JOHN BARNARD BYLES

is a conspicuous instance of the truth of Hill Burton's remark that to achieve posthumous fame, counting recollection as the equivalent of fame, a man should write some solid book. Byles attained a considerable position both at the Bar and on the Bench —he was an astute advocate and an able and painstaking judge— and yet no one will deny that but for the fact that he wrote an excellent book the majority of the present generation of lawyers would scarcely recall his name.

Some of the older members of the profession may, indeed, remember the story of his sorry horse which the wags of the Temple christened "Bills," remarking, when they saw its owner on its back, "There goes Byles on Bills"—the same horse which, according to another tradition, Byles and his clerk named "Business," so that when the former, as was his wont, went out for his afternoon's ride, his clerk could, with a clear conscience declare, in answer to the inquiries of a too inquisitive client, that the serjeant had "gone out on Business." Others may recall the anecdote which tells of Byles putting the question to counsel, who was arguing a case on sec. 17 of the Statute of Frauds, "Suppose I were to agree to sell you my horse, do you mean to say

that I could not recover the price unless—" "My Lord," was the instant reply, "the section only applies to things of the value of £10"—a retort keenly appreciated by all who had seen the Judge's steed. Or, again, a few may remember how Byles, even a stickler for the punctilious observance by counsel of the strictest orthodoxy in the matter of dress, administered this reproof to the late Lord Coleridge when at the Bar: "Mr. Coleridge, I never listen with any pleasure to the arguments of counsel whose legs are encased in light grey trousers."—*Law Times.*

PRINCIPAL'S LIABILITY FOR AGENT'S FRAUD.

It is scarcely possible to overrate the importance of the decision of the House of Lords in the recent case of *Lloyd* v. *Grace, Smith & Co.*, 107 L.T. Rep. 531, not only to solicitors—the class of employers which, of course, it primarily affects—but also to all other persons who stand in the relation of principal to agent. When it is seen from the headnote to our report what that decision was, it will be recognized how far-reaching may be its consequences: "An innocent principal is civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud, even though the principal has not profited in any way by the fraud." The concluding phrase comprises the essential part of the proposition of law. For in the Court of Appeal a difference of opinion arose by reason of the words "for the master's benefit" in the judgment of the Exchequer Chamber in the oft-cited case of *Barwick* v. *English Joint Stock Bank*, 16 L.T. Rep. 461, L. Rep. 2 Ex. 259. That judgment was delivered by Mr. Justice Willes on behalf of himself and the six other learned judges of which the court consisted. And the principle as there enunciated was in these terms: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Lord Justice Farwell, in giving judgment in the Court of Appeal in *Lloyd's* case (*ubi sup.*), laid the utmost stress on the words "and for the master's benefit."

His Lordship considered that neither that nor any other court could overrule Mr. Justice Willes' statement of the law, or qualify it by striking out those words. The learned judge referred to a number of authorities in which the law had been stated in the same terms, adding that the principal's liability did not extend to cases where the agent acted for or with a view to his own benefit to the exclusion of that of the principal. Lord Justice Kennedy expressed his concurrence in that opinion; but Lord Justice Vaughan Williams dissented therefrom. Without going so far as to say—as was argued in *Lloyd's* case (*ubi sup.*)—that in no case of wrongful conversion or fraudulent misrepresentation is a master liable for the act of his servant, the impression certainly appears to have got about that a fraudulent act committed by an agent for his own illegal purposes, even though in the ordinary scope of his authority, does not render the principal in any way responsible. That is unequivocably shown by what was said in several reported cases—notably by Lord Justice Bowen in *British Mutual Banking Company Limited* v. *Charnwood Forest Railway Company*, 57 L.T. Rep. 833, 18 Q.B. Div. 714, and by Lord Davey in *Ruben and Ladenburg* v. *Great Fingall Consolidated Company*, 95 L.T. Rep. 214, (1906) A.C. 439. The House of Lords, however, in *Lloyd's* case (*ubi sup.*), sturdily brushed aside all dicta of that description; utterly exploding the notion that the fraudulent act of the agent must be to the principal's personal advantage. Mr. Justice Willes, said Lord Loreburn, "cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that." Lord Halsbury, it will be noticed, was equally emphatic in the view that he expressed, remarking that the words "and for the master's benefit" obviously meant that it was "something in the master's business." His Lordship referred to what was said by Lord Holt in the ancient case of *Hern* v. *Nichols*, 1 Salk. 289—namely, "that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civiliter*." With Lord Macnaghten's exhaustive judgment reviewing the authorities, the position is made even more distinct, that the circumstance that a principal does not benefit through the fraudulent act of his agent is entirely im-

material. It is, indeed, difficult to conceive any case in which he could so benefit where "no express command or privity of the master be proved." It would be a singular sort of agent so zealous in his principal's interests as, without his knowledge, to be guilty of fraud in order to forward the same.—*Law Times.*

THE NEW LORD OF APPEAL.

The appointment of Mr. Justice Parker to be a Lord of Appeal is an excellent one. He will be a fitting successor to the late Lord Macnaghten, with the same scholarly intellect and the same accurate knowledge of law. As a judge of first instance, Lord Parker has displayed all the best attributes of that office in a pre-eminent degree. Whilst alert, he seldom interrupted, and, though learned, he listened with patience to the arguments of those less gifted than himself. His many admirable judgments speak for themselves. He will be a valuable addition even to the august tribunal to which he has been promoted. It is some time since the House of Lords as an appellate tribunal has been as strong as it is at the present time. It is only necessary to mention the names of the Lord Chancellor (Viscount Haldane), the Earl of Halsbury, Lord Moulton, and the new Lord of Appeal, several of whom have a reputation far beyond this country.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

MORTGAGE OF PERSONAL PROPERTY—FORECLOSURE—SERVICE OUT OF JURISDICTION—RULE 64 (E)—ONT. RULE 162 (1) E.

In *Hughes* v. *Oxenham* (1913) 1 Ch. 181, the action was brought to foreclose a mortgage of personal property. The mortgage was made within the jurisdiction, and all the parties resided there when it was made, but the defendants were when the action was brought resident in Australia. The defendants applied to discharge the order allowing service out of the jurisdiction. The question turned on whether or not the action was founded on a breach of contract to be performed within the jurisdiction within the meaning of Rule 64 (*e*)—Ont. Rule 162 (1) (*e*). Neville, J., held that it was, but the reporter inserts a slip in the report intimating that his decision was subsequently reversed by the Court of Appeal, presumably on the ground that an action for foreclosure is not an action for breach of contract.

SALE OF GOODS—CONTRACT FOR GOODS TO BE MADE—BREACH OF CONTRACT BY PURCHASER—MEASURE OF DAMAGES.

In re Vic. Mill (1913) 1 Ch. 183. In this case the claimants entered into a contract with a company now in liquidation to sell the company certain goods to be made by the claimant; the company went into liquidation, and the liquidator refused to accept the goods—and the simple question was, what was the proper measure of damages provable by the claimants in the liquidation proceedings, and Neville J. held that as there was no available market for the goods in question, which were machines of a special character, the proper measure of damages was the loss of profit sustained by the claimants through the contract not being carried out.

PRINCIPAL AND SURETY—RIGHT OF PRINCIPAL TO INDEMNITY—RELEASE OF DEBTS BY WILL—CONSTRUCTION—"DEBTS".

In re Mitchell, Freelove and Mitchell (1913) 1 Ch. 201. In this case a testator made his will whereby he bequeathed to his nephew J. J. Mitchell £2000 and forgave him all debts "owing to me from him up to the time of my decease"—The testator was surety for J. J. Mitchell to a Bank for a loan made by the

Bank to Mitchell. No claim had been made against the testator in respect to this suretyship, but after his death a claim was made by the Bank against his estate for £4000 and the executors paid £3100, part of the amount claimed, and the present proceeding was for the purpose of determining whether notwithstanding the release of debts, the executors were entitled to deduct the amount so paid from moneys coming to J. J. Mitchell out of the estate. Parker, J., held that until a surety had paid something under his guarantee there is no debt at law, but only a right to go into equity to compel the principal to indemnify the surety against the liability. Therefore he held that the release of debts did not bar the right of the executors to retain the legacy payable to J. J. Mitchell in order to make good pro tanto what they had paid the Bank.

DENTIST—UNREGISTERED PERSON ACTING AS DENTIST—NAME OR TITLE OF DENTIST—DESCRIPTION IMPLYING THAT A PERSON IS REGISTERED—DENTISTS ACT, 1878 (41-42 VICT. c. 33), s. 3——(1 GEO. V. c. 39, ss. 18, 25, ONT.)

Robertson v. *Hawkins* (1913) 1 K.B. 57. The defendant in this case was neither a registered dentist nor a duly qualified medical practitioner, but carried on dentistry, and was applied to by the plaintiff, who was in the employment of a municipal council and whose teeth were defective, for a certificate that his teeth were in a satisfactory state. He told the defendant he was required to get a certificate from a registered dentist, and produced a paper containing the requirements, which the defendant read. The defendant examined the plaintiff's teeth and extracted some, and assured him that he had given hundreds of such certificates to the Post Office, and that he would give the plaintiff the certificate required, when he returned on a subsequent day to have his teeth finished. The defendant did not at any time, either in writing or orally, state that he was a "dentist" or "a registered dentist," or state that he was a person specially qualified to practise dentistry, nor did he, in fact, give the required certificate, and the magistrate refused to convict. The Divisional Court (Lord Alverstone, C.J., and Channell and Avory, JJ.), however, held that the defendant had committed an offence, and that when he was informed by the plaintiff that he required the certificate of a registered dentist, what the defendant did was, in fact, to hold himself out as being a registered dentist competent to give the required certificate, and the case was, therefore, remitted with a direction to convict.

RESTRAINT OF TRADE—AGREEMENT BY EMPLOYEE NOT TO BE ENGAGED IN ANY OTHER BUSINESS LIKE OR SIMILAR TO EMPLOYERS—AREA OF RESTRICTION—REASONABLENESS—INJUNCTION.

Provident Clothing Co. v. *Mason* (1913) 1 K.B. 65. The plaintiffs in this case claimed to restrain the defendant from committing a breach of an agreement not to enter into or be engaged in any other business like or similar to that of the plaintiffs, his employers, "within twenty-five miles of London," where the plaintiffs carried on business. The evidence showed that the area of restriction was not wider than was reasonably necessary for the plaintiffs' protection, and the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) therefore held that the plaintiffs were entitled to an injunction restraining the defendant "from carrying on the same or a similar business to the plaintiffs, within 25 miles of London, where the plaintiffs carry on business, and reversed the decision to the contrary of the Divisional Court (Pickford and Avory, JJ.).

RAILWAY—CARRIAGE OF GOODS—DELIVERY OF GOODS DELAYED BY STRIKE—PERISHABLE GOODS—SALE OF PERISHABLE GOODS BY CARRIER, WHEN JUSTIFIED.

Suris v. *Midland Ry.* (1913) 1 K.B. 103. In this case the plaintiffs had delivered to the defendants for carriage a quantity of butter. Owing to a strike of the defendants' servants for which the defendants were not responsible, it became impossible to deliver the butter, which in consequence deteriorated, and the defendants thereupon sold it for the best price obtainable. The action was brought by the plaintiffs to recover the value of the butter. No time was specified in the contract of carriage for the delivery. The County Court Judge who tried the action held that, as the butter was not delivered at all, the onus was on the defendants to show that the delivery had been prevented by the act of God,or the King's enemies, or the inherent nature of the butter; and they failing to discharge that onus, he gave judgment for the plaintiffs for the amount claimed. The Divisional Court (Ridley, and Scrutton, JJ.), however, held that he was wrong, and that as no specific time had been named for delivery, it must be held that the goods were to be delivered within a reasonable time, and that in estimating what would be a reasonable time the fact of the strike must be taken into account, and therefore as to that point the defendants were entitled to succeed. The parties having agreed

to a settlement, it became unnecessary to decide whether the sale was justified. Scrulton, J., however, expresses the opinion that the rule regulating sales by carriers at sea, applies to carriers by land, and that to justify the sale (1) there must be a real necessity, and (2) it must be impossible to get the owner's instructions in time as to what shall be done.

CRIMINAL LAW—BURGLARY—BREAKING AND ENTERING—KNOWLEDGE OF OWNER OF PREMISES OF INTENTION.

The King . *Chandler* (1913) 1 K.B. 125. In this case the defendant was prosecuted for burglary in the following circumstances. He made the acquaintance of one Lorie, the business manager of the prosecutrix, and proposed to him a scheme whereby he should rob the prosecutrix's shop. Lorie informed his mistress and the police of the defendant's intentions, and thereafter acted under the instructions of the police, and in pursuance of those instructions he let the defendant have the keys of the premises from which he took wax impressions from which he made false keys. With these keys, on a day arranged with Lorie, he obtained entrance to the premises, and was there arrested by police officers who were on the watch for him. He was convicted of burglary, from which conviction he appealed, and it was contended on his behalf that as the prosecutrix had notice of his intention, the unlocking of the door, though a breaking if done against the will of the owner, was not a breaking in the present case because of the owner's knowledge of the intention to make the entry; but the Divisional Court (Lord Alverstone, C.J., and Channell and Avory, JJ.) held that the knowledge of the prosecutrix of the defendant's intention was no evidence that she assented to his act, and therefore that he had been properly convicted.

INSPECTION OF PROPERTY—"BUILDING IN POSSESSION OF PARTY TO ACTION"—TENANTS IN COMMON.

Coomes v. *Hayward* (1913) 1 K.B. 150, although a case turning upon the construction of a County Court Rule, has a bearing also on the construction which should be placed on Ont. Rules 571, 1096. The Rule in question authorizes the Court to order inspection of property, and for that purpose to authorize persons to enter upon any land. The Judge of the County Court under this Rule made an order for inspection, and authorized an entry for the purpose on certain premises which were held in common, some of the tenants not being before the court, and the Divisional

Court (Ridley and Scrutton, JJ.) reversed the order as being unauthorized in the circumstances.

FATAL ACCIDENT—DAMAGE—CHILD—PROSPECTIVE LOSS—FATAL ACCIDENTS ACT, 1846 (9-10 VICT. C. 93) SS. 1 AND 2—(1 GEO. V. C. 23 S.S. 2, 4 (ONT.)).

Taff Vale Ry. Co. v. Jenkins (1913) A.C. 1. This was an action under the Fatal Accidents Act (9-10 Vict. c. 93), (see 1 Geo. V. c. 33. (Ont.)), by a father to recover damages for the loss of a daughter aged sixteen who was killed by the negligence of the defendants. It appeared that she lived with her parents and was nearing the completion of her apprenticeship as a dressmaker and was likely in the near future to be able to earn a substantial remuneration. The jury awarded £75 damages, for which the judge at the trial gave judgment. The defendants appealed but the judgment was affirmed though the judges were divided in opinion. Williams, L. J., was for affirming the judgment. Farwell, L. J., for dismissing the action and Kennedy, L. J., was in favour of a new trial on the ground that the damages were excessive. The House of Lords (Lord Haldane, L.C. and Lords Macnaghten, Atkinson, Shaw and Moulton), affirmed the judgment, holding that in such cases it is not necessary to show that the deceased was actually at the time of death a source of pecuniary benefit to the party who sues, but that it is sufficient if it is shown that there was a reasonable expectation of pecuniary benefit from the deceased, and their Lordships were of the opinion that the damages were not excessive.

VENDOR AND PURCHASER—SALE OF SHARES—REPRESENTATION—WARRANTY—TEST OF WHAT IS A WARRANTY.

Heilbut v. *Buckleton* (1913) A.C. 30. In this case the House of Lords (Lord Haldane, L.C. and Lords Atkinson and Moulton), reversed both the judgment of the Court of Appeal and that of the judge at the trial. The action was brought by the plaintiff to recover damages for a false representation, whereby he was induced to subscribe for shares in a certain Company which proved a loss. The facts were that the defendants, a firm of high standing, underwrote a large number of shares of the company in question, and directed their agent, one Johnston, to procure purchasers therefor. Johnston brought the company to the notice of a gentleman who had acted as a broker for the plaintiff, and from his office the plaintiff telephoned Johnston—"I understand you are bringing out a rubber company," to which Johnston replied, "yes;"

and to an enquiry whether the company was all right, Johnston replied, "we are bringing it out," to which the plaintiff replied, "that is good enough for me," and in consequence of this conversation became purchaser of a large number of shares in the company. The company was styled the "Filisola Rubber and Produce Estates," and the plaintiff made no further inquiry when apprised of its title before completing his purchase. The jury found that the company was not "a rubber company" and that Johnston had warranted that it was, and judgment was given at the trial for the plaintiff, which was affirmed by the Court of Appeal. Their Lordships however were of the opinion that the judge at the trial erred in leaving it to the jury to say whether or not there was a warranty, because the facts were not in dispute, and it was simply a question of law whether they established a warranty; and their Lordships were of the opinion that they did not; and that it is not every representation made by a vendor that is to be regarded as a warranty, but on the contrary the true test whether or not a representation is to be regarded as a warranty is whether the evidence shows that it was so intended; as Lord Holt tersely puts it, "An affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended." In the present case they found no evidence that the representation of Johnston was intended to be a warranty and the jury having negatived any fraud they held it must be regarded as a mere innocent misrepresentation. The action was therefore dismissed.

EXECUTOR—POWER TO PLEDGE PERSONAL CHATTELS—PLEDGE BY ONE OF TWO EXECUTORS AND TRUSTEES—TRUSTEE—ASSENT TO TRUST OF WILL.

Attenborough v. *Solomon* (1913) A.C. 76. In this case the House of Lords (Lord Haldane L.C. and Lords Atkinson and Shaw) have affirmed the decision of the Court of Appeal (1912) 1 Ch. 451 (noted ante vol. 48 p. 299). The case turned on the question of the validity of a pledge of chattels of his testator made by one of two executors in the following circumstances. The testator after appointing two persons executors and trustees of his will and giving pecuniary legacies gave the residue to his trustees upon trust for sale and distribution as mentioned in the will. All the debts and legacies so far as known were paid and the residuary account was sent in and duly passed within one year of the testator's death. Part of the residuary estate consisted of some plate which was in the possession of A. A. Solomon, one of the executors, and he fourteen years after the testator's death pledged this plate with the defendant Attenborough for a sum which he applied to

his own use. The defendant advanced his money without notice of a y trust and supposing that the plate was the pledger's own property. On the death of A. A. Solomon the fact of the pledge was discovered and the present action by the surviving executor and a new trustee appointed in place of A. A. Solomon, was brought to recover possession of the plate. The Court of Appeal held in favour of the plaintiff, and this judgment is now affirmed. Their Lordships hold that A. A. Solomon after the rendering of the residuary account ceased to hold the plate as executor, but must be taken to have assented to the residuary bequest, and thereafter the executors held the residue as trustees, and A. A. Solomon alone was incapable of transferring a legal title to the property. It may be remarked that the defendant did not deal with A. A. Solomon on the faith of his being executor and as such having a right to deal with the goods, but on the assumption that he was dealing with his own property. The case therefore resolved itself into one person advancing to another money on the security of goods supposed to belong to the other, but to which in fact he had individually no title.

CROWN TIMBER ACT, ONT. (R.S.O. 1897, c. 32)—EXECUTION—INTEREST OF TIMBER LICENSEE—EXECUTION ACT, ONT. (9 EDW. VII., c. 47)—ASSIGNEE OF LICENSE AFTER DELIVERY OF EXECUTION AGAINST ASSIGNOR TO SHERIFF

McPherson v. *Temiskaming Lumber Co.* (1912) A.C. 145. This was an appeal from the Court of Appeal for Ontario. The simple question was whether the interest of a timber licensee under the Crown Timber Act, R.S.O. 1897, c. 32, was eligible in execution, and whether the execution creditor is not entitled to enforce his execution as against an assignee claiming under an assignment made after the delivery of the execution to the sheriff. The Judicial Committee of the Privy Council (Lord Haldane, L.C. and Lords Halsbury, Atkinson and Shaw) in reversing the decision of the Court of Appeal lay down the following proposition. (1) That under the Timber License Act the licensee is possessor of an asset in the nature of land (2) that the asset is subject to execution; (3) that the execution does not interfere with the property of the debtor, his power to assign or transfer, subject only to the security of the execution creditor not being impaired; (4) that when there is cut timber on the land on the date of the execution (*quære* delivery of writ to sheriff) that timber is the instant subject of seizure; (5) should timber be cut subsequent to the date (delivery to the sheriff) of the execution it is then instantly attached, and

the execution cannot be defeated, because the timber has been cut by an assignee of the debtor, under an assignment made after the laying on of the execution; and (6) the only exception is in case of a title acquired by a third party in good faith for valuable consideration without notice of the execution. It must be remembered that the execution in question in this case was against both land and goods, and while the writ against lands bound the timber before cutting, the writ against goods bound it immediately it was cut. Their Lordships held that the case was concluded, as far as the liability of a timber licensee's interest being exigible, by the *Glenwood Lumber Co.* v. *Phillips* (1904) A.C. 408, an appeal from Newfoundland, turning on a similar Act to the Ontario Execution Act.

COMPANY—CONTRACT BY COMPANY—ASSIGNMENT BY RECEIVERS OF COMPANY OF CONTRACT MADE BY COMPANY—BREACH OF CONTRACT BY COMPANY—ASSIGNEE OF CHOSE IN ACTION—RIGHT OF SET OFF IN RESPECT OF DAMAGES FOR BREACH OF CONTRACT ASSIGNED.

Parsons v. *The Sovereign Bank* (1913) A.C. 160 is also an appeal from the Court of Appeal, Ontario. The facts were as follows. In a debenture holders' action against a company, receivers were appointed who assigned to the Sovereign Bank a contract made by the company with Parsons et al. for the sale of goods. The contract had not been completely performed by the company, and the purchasers in an action by the Bank claimed the right to set off against the amount payable by them under the contract, the damages which they had sustained by reason of the company's breach of contract. The Judicial Committee of the Privy Council (Lord Haldane, L.C. and Lords Macnaghten, Atkinson and Shaw), held that they were entitled to do this, and reversed the decision of the Court of Appeal to the contrary.

MUNICIPAL ACT, B.C., 1892, S. 146—MUNICIPAL CLAUSES ACT, B.C., S.S. 243, 244—CONSTRUCTION—VALIDITY OF MUNICIPAL BY-LAWS—LIMITATION

Wilson v. *Delta* (1913) A.C. 181. This was an action by a municipal corporation of British Columbia to recover certain dyking dues payable under a by-law. The action was dismissed and the plaintiffs did not appeal. The defendant set up a counter claim, claiming to recover damages alleged to have been occasioned by the carrying out of the work provided for by the by-law. By the Municipal Act, 1892, s. 146, it is provided that a by-law under

which debentures are issued cannot be invalidated on any ground whatever where interest has been paid on the debentures for one year. And by the Municipal Clauses Act, s.s. 243 and 244, a cause of action for deviation for any deviations by the Municipality from the general plan of any public works authorized by the by-law is barred after the lapse of a year from the date when the cause of action arises. These statutes were held by the British Columbia Supreme Court to be a bar to the right of the defendant to recover on his counter claim, and the Judicial Committee of the Privy Council (Lords Macnaghten, Mersey, and Moulton) affirmed the decision. Their Lordships being of the opinion that the deviations in question were incidental to the carrying out of the works and made with a view to diminish unnecessary inconvenience and resulting claim to compensation.

VENDOR AND PURCHASER—AGREEMENT TO GIVE OPTION TO PURCHASE, AND ALSO TO PAY COMMISSION TO PURCHASER—PRINCIPAL AND AGENT.

Kelly v. *Enderton* (1913) A.C. 191. This was an appeal from the Court of Appeal from Manitoba. The case was somewhat peculiar. The plaintiff being owner of land, entered into an agreement to give the defendant, Enderton, an option to purchase the land at a specified price and also agreed to pay Enderton a commission on the sale of $1000. Enderton exercised the option and nominated one Simpson as the person to whom the conveyance was to be made. This was done. The plaintiff subsequently discovered that Simpson was a clerk in Enderton's employ, and brought an action to set aside the sale, claiming that the Endertons were agents and not competent to be themselves the purchasers, and the fact that a commission was payable indicated that they were merely agents for sale. The Judicial Committee (Lord Haldane, L.C. and Lords Dunedin, Atkinson and Moulton) agreed with the Court below, that the terms of the agreement were perfectly clear, that the Endertons themselves were entitled to exercise the option and the fact that they were also to get a commission was not inconsistent with their right to become the purchasers.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] IN RE WEST LORNE SCRUTINY. [Feb. 13.

Election law—Vote on municipal by-law—Scrutiny—Powers of judge—Inquiry into qualification of voter—Disposition of rejected ballots—Ontario Municipal Act, 1903, *ss.* 369 *et seq.* —*Voters' Lists Act*, 1907, *s.* 24.

A County Court judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. Davies and Brodeur JJ. dissenting.

The judge has no power to inquire whether rejected ballots were cast for or against the by-law.

Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law.

The Supreme Court affirmed the decision of the Court of Appeal, 26 O.L.R. 339, reversing the judgment of a Divisional Court, 25 O.L.R. 267, which reversed the decision at the hearing, 23 O.L.R. 598.

Appeal dismissed with costs.

Raney, K.C., for appellant. *C. St. Clair Leitch*, for respondent.

N.S.] NOVA SCOTIA CAR WORKS V. HALIFAX. [Feb. 18.

Municipal corporation—Exemption of industry from taxation—Special assessment—Local improvement.

By agreement with the City of Halifax, sanctioned by an Act of the legislature, a company doing business in the city was granted for a certain period "a total exemption from taxation" except for water rates.

Held, reversing the judgment of the Supreme Court of Nova Scotia, 45 N.S. Rep. 552, Fitzpatrick, C.J., dissenting, that a special assessment for a proportionate part of the cost of a public sewer, claimed to be chargeable against the lands of the company

was "taxation" within the meaning of said agreement and the company was exempt from liability therefor.

Appeal allowed with costs.

E. P. Allison, for appellant. *F. H. Bell*, K.C., for respondent.

N.S.] PICKLES v. CHINA MUTUAL INS. CO. [Feb. 18.

Marine insurance—Mutual company—Cancellation of policy—Return of unearned premium—Cancellation by operation of law.

A mutual insurance company incorporated under the laws of the State of Massachusetts issued marine policies in favour of parties in Nova Scotia who gave notes for the premiums. The policies provided for a return of premiums "for every thirty days of unexpired time if this policy be cancelled." Before any of the premium notes matured the policy holders were notified that the company had been put into liquidation at the instance of the Insurance Commissioner, the notice stating that the legal effect was "to cancel all outstanding policies." In an action by the receiver in the company's name to enforce payment on the notes:—

Held, 1, affirming the judgment appealed against, 46 N.S. Rep. 7, that the decision of the case must be governed by the law of Massachusetts; that the holder of a policy in a mutual company being both insurer and insured, the notes sued on were assets for distribution among the creditors; and the receiver was, therefore, entitled to recover the full amount.

2. A cancellation resulting from the action of the State was not a cancellation within the meaning of the above clause providing for return of premium.

Appeal dismissed with costs.

Mellish, K.C., for appellant. *Rogers*, K.C., for respondent.

Ont.] CANADA FOUNDRY CO. v. BUCYRUS. [Feb. 18.

Trade mark—Geographical name—Right to register—Interference with use.

A company in the United States engaged in the manufacture of certain articles for use on railways adopted the word "Bucyrus" as their trade mark for use in connection with such goods as distinguished from those manufactured by others,

and sold them for many years in the United States and Canada under that designation

Held, that the company was entitled to register the word "Bucyrus" as their trade mark for use in connection with such goods.

For some years the Canada Foundry Co. was agent in Canada for selling the "Bucyrus" goods and built up a large business for their principals. After their agency terminated they applied the designation "Canadian Bucyrus" to similar goods of their own manufacture and eventually registered these words as a trade mark for such goods.

Held, that such trade mark should be expunged from the registry.

The judgment of the Exchequer Court, 14 Ex. C.R. 35, was affirmed.

Appeal dismissed with costs

J. K. Kerr, K.C., and *J. A. Paterson*, K.C., for appellants. *D. L. McCarthy*, K.C., for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Feb. 5.

HARRISON *v.* MADER.

MADER *v.* HARRISON.

Physicians—Agreement for employment followed by partnership —Construction—Partnership at will—Arbitration and award—Award outside terms of submission—Held void—Agreement not capable of enforcement.

An agreement in writing entered into between two medical practitioners provided for the employment of the one as assistant to the other for the period of two years for a specified sum in cash and a percentage of the net proceeds earned and received during the said years.

Held, affirming the judgment of the trial judge that before the commission became payable the money must be received as well as earned, though it need not be received in the same calendar year in which it was earned.

There was a provision that on the expiration of the period first provided for a partnership was to be entered into between the parties and that during the period of such partnership the assistant should receive for his services one-third of the net proceeds and the senior partner two-thirds and that a formal partnership agreement mutually satisfactory to both parties should be entered into, with a further agreement that in the events of the terms not being mutually satisfactory and the partnership not going into effect the respective rights of the parties in regard to patients and who should retain them to be referred to arbitration No formal agreement was entered into, but the parties continued to do business together for a period of six months after the expiration of the original period, after which there was an arbitration and an award.

Held, 1. Affirming the judgment of the trial judge that during the period of six months after the expiration of the original period the relation between the parties was that of partners at will, rather than an employment on the original terms.

2. As the provision in the agreement with respect to retaining patients on the termination of the agreement contained no effective provision binding on either party, the court could not enforce it either by specific performance or injunction.

3. An award which goes outside the terms of the submission or is uncertain is void and cannot be enforced.

Roscoe, K.C., for appellant. *Rogers*, K.C., for respondent.

Province of Quebec.

COURT OF REVIEW.

Tellier, DeLorimier, and Greenshields, JJ.] [Dec. 24.

LESNER *v.* LEVESQUE.

(8 D.L.R. 494.)

Real estate agent—Taking offer and contract in his own name.

A real estate agent who without disclosing that he is a real estate agent obtains in his own name a contract of sale of a property at a fixed price and disposes of it to a third party

is not entitled to charge the vendor with any commission on the sale of such property inasmuch as there is no contract of agency whatsoever. *Stratton* v. *Vachon*, 44 Can. 395, referred to; and see *Haffner* v. *Grundy*, 4 D.L.R. 529, and Annotation, 4 D.L.R. 531.

E. Pélissier, K.C., for plaintiff, appellant. *T. E. Walsh*, K.C., for defendant, respondent.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ.] [Dec. 20.

REX *v.* WHISTNANT.

(8 D.L.R. 468.)

Evidence—Guilt — Presumptions and inferences—Statement or admission of accused—Interpretation by surrounding circumstances—Corroboration.

Held, 1. The statement or admission of the accused in the words, "I won't do it again," may constitute an implied admission of guilt of the particular crime of which he is charged, by inferences drawn from the circumstances under which the statement was made to identify what it was that his promise had reference to and to shew, in the absence of direct evidence, that the person to whom the exclamation was addressed must have charged accused with the crime immediately prior to the making of such statement.

2. As sec. 1003 of the Criminal Code (1906) specifically requires that the "testimony admitted by virtue of this section" *i.e.*, a statement taken in Court from a child of tender years not understanding the nature of an oath upon the trial of certain sexual crimes, must be corroborated by "some other material evidence in support thereof implicating the accused," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by the Code of the testimony similarly taken from another child of tender years. (Dictum *per* Harvey, C.J.). *R.* v. *Pailleur*, 15 Can. Cr. Cas. 339; *R.* v.

Daun, 11 Can. Cr. Cas. 244, 12 O.L.R. 227; *R.* v. *Iman Din*, 18 Can. Cr. Cas. 82, referred to.

L. F. Clarry, for the Crown. *W. S. Davidson*, for the defendant.

Book Reviews.

Mishuah: A Digest of the basic principles of the Early Jewish Jurisprudence. Translated and annotated by HYMAN E. GOLDIN, LL.B., of the New York Bar. G. P. Putnam's Sons, New York and London, 1913 (205 pages).

This work places before those interested in the study of the origin of law in general, a translation, in our Common Law Language, of the Jewish Mishuah, which enunciates the basic principles of Jewish Jurisprudence and which the Talmud elaborates and seeks to explain. It is especially interesting as conveying an insight into the cultural and social life of the Jews of 2000 years ago.

The law laid down in the Mishuah would seem to be the result of the rulings of the Rabbis from time to time in disputed cases, meeting and settling them as occasion arose, and in that respect similar to the origin of our Common Law. A perusal of this book shows the remarkable similarity existing between the rules of law laid down for the Jewish people of old and our Common Law as it exists to-day.

The book is a clever and intelligent presentation of a most interesting and important subject and might, we think, with much advantage to legal literature, be enlarged upon in a future edition.

Flotsam and Jetsam.

Judge Philips was holding court in Missouri and stopping at an hotel that was known all over the State as one of the worst if not *the* worst.

A man was brought before the judge charged with larceny and pleaded guilty. "Prisoner," said the judge, "this is an atrocious crime you have committed and I intend to punish you severely. I wish I had it in my power to send you to our hotel for six months, but I have not that power and therefore can only put you in jail."

UNFRUITFUL.—The learned counsel was endeavcring to impress the court with the fact that his clients had always been anxious to settle. "My Lord," he said, impressively, "only eighteen months ago we held out the clive branch." "Yes," responded the witty judge, "but there were no olives on it."—*Exch.*

A Wheeling, W. Va., lawyer says he has heard many queer verdicts in his time, but that the quaintest of these was that brought in not long ago by a jury of mountaineers in a sparsely settled part of that State.

This was the first case for the majority of the jury, and they sat for hours arguing and disputing over it in the bare little room at the rear of the court room. At last they straggled back to their places and the foreman, a lean, gaunt fellow, with a superlatively solemn expression, voiced the general opinion:—

"The jury don't think that he done it; for we allow he wasn't there; but we think he would have done it ef he'd had the chanst."—*Exchange.*

During the recent financial panic, according to a contemporary, a German farmer went to a bank for some money. He was told that the bank was not paying out money, but was using cashier's cheques. He could not understand this, and insisted on money.

The officers took him in hand, one after another, with littl effect. At last the president tried his hand, and after long and minute explanation, some inkling of the situation seemed to be dawning on the farmer's mind. Much encouraged, the president said: "You understand now how it is, don't you, Mr. Schmidt?"

"I t'ink I do," admitted Mr. Schmidt. "It's like dis, aindt it? Ven my baby vakes up at night and vants some milk, I gif him a milk ticket."—*Exchange.*