THE

ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM AUGUST, 1914, TO THE END OF FEBRUARY, 1915.

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CASES REPORTED AND NOTED

(Cases marked (*) are reported or to be reported in the Ontario Law Reports).

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CASES CITED

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The
Ontario Weekly Notes

VOL. VII. TORONTO, SEPTEMBER 4, 1914. No. 1

APPELLATE DIVISION.

CLUTE, J. AUGUST 11TH, 1914.

*RE SOUTH OXFORD PROVINCIAL ELECTION.

MAYBERRY v. SINCLAIR.

SINCLAIR v. MAYBERRY.

Parliamentary Elections——Recount of Ballots—Appeal—Ballot Marked in Ink—Ontario Election Act, R.S.O. 1914 *ch.* 8, *sec.* 102—*Ballot not Stamped by Returning Officer—Sec.* 71 (2)—*Imperative or Directory Provision—Curative Section,* 114—*Marks on Ballots—Discrepancy between Number of Ballots Marked and Entries Made by Deputy Returning Officer—Declined and Rejected Ballots.*

In respect of an election held for the electoral district of South Oxford, there was a recount of the ballots cast, before Mr. J. G. Wallace, Deputy Judge of the County Court of the County of Oxford. The candidates at the election were Thomas Richard Mayberry and Victor A. Sinclair.

Both candidates appealed from the decision of the Deputy Judge, and the appeals were heard by CLUTE, J., as a Judge of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, pursuant to the Ontario Election Act, R.S.O. 1914 ch. 8, sec. 144.

R. McKay, K.C., for Mayberry.
E. Bristol, K.C., for Sinclair.

CLUTE, J.:—Upon the recount . . . it was agreed by counsel that the votes properly cast for Sinclair were 2569, and that the votes properly cast for Mayberry were 2566.

*To be reported in the Ontario Law Reports.

Appeal was taken on 47 ballots referred to as exhibits Nos. 1 to 47 inclusive . . . Out of these ballots the Deputy Judge allowed Sinclair 17, which, added to 2569 agreed upon by counsel, make 2586 ballots which he finds properly cast for Sinclair; and out of the said ballots he allowed Mayberry 15, which, added to 2566 agreed upon by counsel, make 2581 which he finds were properly cast for Mayberry, leaving a majority in favour of Sinclair of 5: 13 of the 47 ballots were disallowed, 1 ballot "declined," and no change was made in exhibit No. 30; which accounts for the 47 before referred to.

I shall deal with the Mayberry appeal first. . . .

Exhibit 1. Ballot marked in ink for Sinclair. It is contended that this vote should not be counted; that sec. 102 of the Election Act, R.S.O. 1914 ch. 8, directs that the ballot shall be marked with a black lead pencil, and that this direction is not directory but imperative. The section directs that the voter, on receiving his ballot, shall forthwith proceed into one of the compartments of the polling place, and there mark his ballot, "making a cross with a black lead pencil within the white space containing the name of the candidate," etc. I cannot yield to this contention. It does not say that he *shall* make a cross with a black lead pencil. The section further provides that, having marked the ballot, the voter "shall then fold the ballot paper," etc., "so that the initials and stamp on the back of it and the number on the counterfoil can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it," etc.

I do not think it can be successfully argued that a fault in folding a paper or unfolding it or examining the initials should vitiate a ballot paper, as would be the case if the word "shall" is to bear the meaning contended for throughout the section. Nor should, in my opinion, such effect be given in regard to the use of the pencil. . . .

[Reference to the Monck Case (1876), H.E.C. 725, 734; the Wigtown case (1874), 2 O'M. & H. 213 at p. 223; and the Berwick-on-Tweed Case (1880), 3 O'M & H. 180.]

This objection fails.

Exhibits 19, 20, 23, 38, 39. These also are cases of the ballot being marked with ink instead of pencil, and the objections also fail.

Exhibits 6, 11, 12, *and* 22. The question here raised is as to the validity of a ballot not stamped by the returning officer under sec. 71 (2), and affects four ballots which have been

counted for Mr. Sinclair, viz., 6, 11, 12 and 22, and two ballots which have been counted for Mr. Mayberry. The respondent relied on Ackers v. Howard (1886), 16 Q.B.D. 739. . . .

The Ackers case, while instructive, does not cover the point here in question. What the decision would have been in the absence of the official mark upon the back of the ballot papers and in the absence of the clause declaring that "any ballot paper which has not on its back the official mark shall be void and not counted," it is impossible to say; but that is the question here involved.

Section 114 directs the deputy returning officer to reject "(a) all ballot papers which have not been supplied by him," "but no word, letter, or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper, shall avoid the same or warrant its rejection." The last clause does not cure the defeat here, as under sec. 71 (2) it is the returning officer, and not his deputy, who is required to stamp every ballot paper "with a stamp furnished to him for that purpose by the Clerk of the Crown in Chancery, the impression of the stamp being so placed on the ballot paper that, when the latter is folded by a voter, the impression can be seen without the ballot paper being opened." This enables the deputy returning officer to see that the ballot paper is official.

By sec. 98, the voter shall receive from the deputy returning officer a ballot paper on the back of which the latter has previously put his initials so placed as indicated in Form 12 that when the ballot is folded his initials can be seen without opening it, and on the back of the counterfoil on which he has placed a number corresponding to that placed opposite the voter's name in the poll-book.

By sec. 102, the voter, after making his mark, shall so fold the ballot paper *that the initials and stamp* on the back of it *and* the *number on the counterfoil* can be seen without opening it, and hand it to the deputy returning officer, *who shall, without unfolding it, ascertain, by examining* his *initials and the stamp and the number on the counterfoil,* that it is the same ballot paper that he furnished to the voter, and shall then, in view of all present, including the voter, remove the counterfoil and destroy it, and place the ballot paper in the ballot box.

Form 12, referred to in sec. 98, indicates on the back of the ballot paper the place where the initials of the deputy returning officer and the stamp of the returning officer and the number on the counterfoil are to be placed, so that, when folded by

the voter, the deputy returning officer may identify the ballot paper by the initials, stamp, and counterfoil, as required by sec. 102. The question here then is quite different from that decided in the Ackers case. It is, whether a ballot paper not duly stamped by the returning officer is a ballot paper within the meaning of the Act?

Under sec. 71 (1) and (2), every ballot paper furnished to his deputy shall be stamped with the stamp furnished by the Clerk of the Crown in Chancery. Is this peremptory and imperative?

"Shall" shall be construed as imperative: R.S.O. 1914 ch. 1, sec. 29 (cc); Hunt v. Wimbledon Local Board (1878), 4 C. P.D. 48, approved in Young v. Mayor, etc., of Leamington (1883), 8 App. Cas. 517, at p. 522, where Lord Blackburn quotes with approval the judgment of Lindley, L.J., in the Court of Appeal in the same case (1882), 8 Q.B.D. 579-585; Hoare v. Kingsbury Urban District Council, [1912] 2 Ch. 452, at p. 466.

The object of the Act is to secure complete secrecy in voting. The counterfoil is destroyed as soon as the deputy returning officer identifies the number on it with the number opposite the voter's name. The clause requiring the official stamp prevents fraud and gives security to those having the right to vote by ensuring the use only of ballots issued by the returning officer, the identity of which shall be certified by the official seal furnished by the Clerk of the Crown in Chancery stamped on each ballot.

To permit ballot papers not so stamped to be used would, in the language of Lindley, L.J., approved by Lord Blackburn in the Young case, "in effect be repealing the Act of Parliament," and would deprive the public of that protection which Parliament intended to secure for them.

In my opinion, no ballot paper may be used which is not stamped by the returning officer, as upon a recount such ballot can only be identified by the official stamp. Without such stamp it is discredited, and the failure of the voter or deputy returning officer to observe the defect does not cure it. The initials and number on the counterfoil, being wrongly placed there, cannot give it validity, nor do they help to identify it as issued by the returning officer.

The curative section, 114, applies only to the deputy returning officer, and does not and was not intended to apply to the returning officer. On the contrary, if the Legislature had in-

tended that the absence from the ballot paper of the official stamp to be placed there by the returning officer should not avoid the vote, it is impossible to suppose that the part of sec. 114 covering the acts of omission and commission of the deputy returning officer would not have been extended to the returning officer. The deputy returning officer is brought within, and the returning officer is excluded from, the operation of the curative clause 114. This evidences a clear intention of the Legislature to regard the mandatory direction to the returning officer as imperative. As was said by Hawkins, J., in the Ackers case: "It would be difficult to suggest a case to which the maxim 'expressio unius est exclusio alterius' could be more justly and fittingly applied." This maxim is specially applicable when applied to the interpretation of a statute: Broom's Legal Maxims, 7th ed., p. 501; The Queen v. Caledonian R.W. Co. (1850), 16 Q.B. 19, 31; Watkins v. Great Northern R.W. Co. (1851), 16 Q.B. 961, referred to in Caledonian R.W. Co. v. Colt (1860), 3 Macq. H.L. Sc. 833, at p. 839; Edinburgh and Glasgow R.W. Co. v. Linlithgow Magistrates (1859), 3 Macq. H.L. S.C. 691, at pp. 717, 730; Maxwell on the Interpretation of Statutes, 5th ed., pp. 504, 529; Craies on Statute Law, 20th ed., p. 249 (b); . . . Whiteman v. Sadler, [1910] A.C. 514, 527; . . . Blackburn v. Flavelle (1881), 6 App. Cas. 628, 634; . . . Hamilton v. Baker (1889), 14 App. Cas. 209, 217; Woodward v. Sarsons (1875), L.R. 10 C.P. 733, 746; Craies on Statute Law, p. 249; Bowman v. Blyth (1856), 7 E. & B. 26, at p. 45; Rex v. Loxdale (1758), 1 Burr. 445; Cubitt v. Maxse (1873), L.R. 8 C.P. 704, 715; Thwaites v. Wilding (1883), 12 Q.B.D. 4.

In the above cases the statutes were held to be absolute and imperative.

A case of a statute being directory merely is that of Regina v. Lofthouse (1866), L.R. 1 Q.B. 433. . . .

There seems to be no general rule as to when enabling Acts are absolute and when directory. . . .

[Reference to Liverpool Borough Bank v. Turner (1861), 30 L.J. Ch. 379, 380.]

Having regard to the object of the Act, the importance of the provision, and its necessity to reach that object, I am of opinion that sec. 71 (2) is imperative and absolute, and that non-compliance therewith renders the ballot paper void, and it is not to be counted on a scrutiny. This affects the ballot papers Nos. 6, 11, 12, and 22 cast for Sinclair, and these should

be disallowed and deducted from his total; and applies also to ballot papers Nos. 17 and 10 cast for Mayberry, which are also void and should be deducted from his total.

Exhibit 14. This ballot paper was disallowed. On this ballot there were two marks in the form of a T, and it was contended that the lines touched, and that under the cases—the Wigtown Case, 2 O'M. & H. 216; Re North Grey (1902), 4 O. L.R. 286; the Cirencester Case (1893), Day's Elec. Cas. 155; and the Bothwell Case (1884), 8 S.C.R. 676, where it was held that a ballot marked with a "B" was sufficient—it was sufficiently marked. I think this ballot paper was properly disallowed. This objection fails.

Exhibit 15. This ballot shews a "V," the balance apparently being torn off. I think it was properly counted for Sinclair. See the last case and In re Halton Election (1902), 4 O.L.R. 345.

Exhibit 24. This ballot has the word "for" written after the cross. I do not think this voids the ballot. See Woodward v. Sarsons, L.R. 10 C.P. 733; the Lennox Case (1902), 4 O.L.R. 378; Re North Grey, 4 O.L.R. 286; the West Huron Case (1898), 2 Ont. Elec. Cas. 58; Jenkins v. Brecken (1883), 7 S.C.R. 247.

Exhibit 25. This ballot is properly marked for Sinclair, but on the back there is a cross opposite the deputy returning officer's initials. I do not think this vitiates the ballot. There can be no doubt for whom the ballot was marked. The objection fails.

Exhibit 26. This ballot is marked both for Mayberry and Sinclair, but it is contended that, inasmuch as there is an additional line in the Sinclair cross, this is evidence that the voter intended to erase the Sinclair cross, leaving the ballot marked for Mayberry. I do not think so. I think the test is: if there was no cross for Mayberry, would there be a good cross for Sinclair? Answering this in the affirmative, the effect of the ballot was destroyed by marking it for both candidates. Dismissed.

Exhibit 28. Here the ballot is clearly marked with a plain cross for Mayberry, but the cross is not coloured either with pencil or ink: it was probably made with a worn and defective pencil which did not give it colour. . . .

[Reference to the Cirencester Case (Re Lawson), Day's Elec. Cas. at p. 60; the Berwick-on-Tweed Case, 3 O'M. & H. 181. I think this ballot should have been counted for Mayberry, and the appeal in this case is allowed.

Exhibit 30. In Ingersoll division No. 1, it is not disputed that there were 201 ballots properly marked, of which 87 were marked for Mayberry, but only 86 have been counted for him. . . . In my view, in a recount the ballot is to be looked at, and not the poll-book. One may surmise how the discrepancy between the number of ballots and the entry made by the officer occurred, but the ballot, being properly marked, should be allowed. Appeal allowed.

Exhibit 31. A cross for Sinclair to the right of his name, with some irregular pencil markings under his name. I agree with the Deputy County Court Judge, and do not think any of the markings are such as to identify the voter. I do not think it falls within the Lennox Case, 4 O.L.R. 380, as contended by Mr. McKay.

Exhibit 34. It is contended that the stroke here amounts to a "V," and that, under the cases, the ballot should have been counted to Mayberry. I do not think so. The most that can be said is that a single stroke has been repeated, not quite covering the first stroke. It does not amount to either a "V" or a cross. It was properly disallowed. Appeal fails.

Exhibit 44. In this case the ballot is clearly marked for each candidate, although the cross opposite Sinclair's name is somewhat paler than that for Mayberry. This ballot was properly disallowed. See Halton Election Case, 4 O.L.R. 347 (6), where this point is covered.

The result is that all the appeals on behalf of Mayberry are dismissed except No. 12, ballot 28, and No. 13, ballot 30, which are allowed to be added to Mayberry's total, and ballots 6, 11, 12, and 22, which are to be deducted from Sinclair's total.

Then as to Sinclair's appeal.

Exhibits 17 *and* 10. Appeal allowed. Already dealt with.

Exhibit 18. I think this is properly allowed to Mayberry. There is a cross for Mayberry and a straight line opposite Sinclair's name apparently marked out, thus /. This vote was counted by the returning officer and allowed by the County Court Judge. I think it was properly allowed. Dismissed.

Exhibit 21. The return of the deputy returning officer shews one declined ballot. It is marked with a cross, containing three strokes in the centre of Mayberry's name, . . . His Honour says: "This should not have been counted as a declined ballot. I think the deputy returning officer intended to count it a rejected ballot." In this I agree with His Honour. It was argued that, because it was returned in form 21, it ought not to be

counted, although sufficiently marked; but sec. 117 refers to this return, and sec. 138 provides that the form may be corrected. Even without this clause, I should hold that the ballot is to be looked at and not the return. This appeal is dismissed.

Exhibit 27. Cross for Mayberry with the figures 93 before the deputy returning officer's initials on the back: counted by the deputy returning officer for Mayberry and allowed by the Deputy County Court Judge, and I think properly allowed by him. Appeal dismissed.

Exhibits 33 *and* 42. These ballots have no cross upon the face, but a cross upon the back. They were both disallowed, and I think properly so. Appeal dismissed.

Exhibit 36. Straight line for Sinclair, counted by the deputy returning officer, for Sinclair and disallowed by the Deputy County Court Judge. I think this ballot was properly disallowed. See In re Halton Election, 4 O.L.R. 345, where an error in the head-note in the West Huron Case, 2 Ont. Elec. Cas. 258, is pointed out, in which it is stated that ballots so marked in that case were "allowed." It should have been "disallowed."

Exhibit 37. In this case there was a cross and a further line making a star, thus * for Mayberry. This was rejected by the deputy returning officer and allowed by the Deputy County Court Judge. On the cases above referred to, I think the ballot was properly allowed. Appeal dismissed.

Exhibit 41. The return by the deputy returning officer shews one declined ballot. This ballot is marked with a straight line for Sinclair. His Honour held that it should have been returned as a rejected ballot, and it was disallowed by him. With this I agree. Appeal dismissed.

Exhibit 43. A cross for Mayberry, with a straight line in pencil mark under part of his name. It was counted for Mayberry by the deputy returning officer, and was allowed by the Deputy County Court Judge, and properly so, I think. This appeal is dismissed.

Exhibit 47. A straight line for Sinclair; counted for Sinclair by the deputy returning officer, and properly disallowed by His Honour.

The result is that on Mr. Mayberry's appeal two votes are to be added to his total of 2581 and four votes are to be deducted from Mr. Sinclair's total of 2586, and all the other objections taken by Mr. Mayberry are dismissed.

On Mr. Sinclair's appeal two votes are to be deducted from

Mr. Mayberry's total of 2583. That is, two votes are added and two votes are deducted from Mr. Mayberry's total of 2581, leaving that total as found by the Deputy County Court Judge, unaltered, and four votes are to be deducted from Mr. Sinclair's total of 2586, as found by the Deputy County Court Judge, leaving a total for Mr. Sinclair of 2582—thus leaving a majority in favour of Mr. Sinclair of one vote.

As each appeal has partly succeeded and partly failed, and one of the principal points involved was the non-compliance of the returning officer with the requirements of the statute, there should be no costs to either party.

HIGH COURT DIVISION.

KELLY, J. AUGUST 7TH, 1914

MACMAHON v. TAUGHER.

Solicitor—Agreement with Client Made in Foreign Country—Proof of Foreign Law—Lex Loci Contractus—Contingent Fee—Share of Estate—Agreement Made after Relationship of Solicitor and Client Arose—Duty of Solicitor—Absence of Independent Advice—Action to Set aside Agreement—Evidence—Remedy under Solicitors Act—Impossibility of Performance of Agreement.

Action by the widow of James A. MacMahon, son of the Hon. Hugh MacMahon, deceased, against one Taugher, an attorney-at-law, of San Francisco, California, and the National Trust Company Limited, executors of the will of Hugh MacMahon, to have a certain agreement between the plaintiff and the defendant Taugher set aside; for a declaration that the defendant Taugher was not entitled (as he claimed to be) to twenty-five per cent. of the value of the estate of Hugh MacMahon coming to the plaintiff; and for a declaration that the plaintiff was entitled to the whole of the estate, subject only to the payment of the proper charges and disbursements of the defendants the executors.

Hugh MacMahon died on the 18th January, 1911, leaving a will dated the 2nd September, 1910, whereof letters probate were issued to the aforesaid executors.

By the will, the testator, after making provision for his wife holding during her lifetime certain chattels and for payment to her of $600, directed his executors to invest the balance of the moneys of his estate, and to pay his wife quarterly the income arising therefrom, and also a sum of $300 annually out of the corpus. He then directed that, on the death of his wife, the interest upon the moneys of the estate remaining should be paid quarterly to his son D'Arcy Hugh MacMahon, during his life, but without power to anticipate or alienate; and, on the decease of D'Arcy, that the fund then remaining should be paid to the widow of his other son James Alexander (that is, to the plaintiff). But, should the plaintiff predecease D'Arcy, D'Arcy was empowered to appoint by deed or will the fund remaining at his decease. In default of appointment, the sum was to go to a niece.

The testator's widow died on the 18th June, 1911, and his son D'Arcy on the 8th July, 1913.

The plaintiff in November, 1911, first became aware of the death of the testator's widow and of the benefits intended for her by the will, when she was asked to consent to payment out of the assets of the testator's estate of the expenses connected with the widow. She was then living in San Francisco, and was without means and in bad health. She then consulted the defendant Taugher as to raising money upon her prospects under the will and as to whether she should give the consent asked for. About the beginning of February, 1912, Taugher received a copy of the will and other documents from Toronto, and prepared an agreement to be executed by himself and the plaintiff, according to which he was to endeavour to effect a settlement or compromise by which she would receive some immediate benefit from the estate, and he was to have for his services one-half of any sum received. A copy of the draft agreement was given to the plaintiff, and after about ten days she returned it to Taugher, and took exception to his receiving 50 per cent. if D'Arcy should die before the contemplated settlement was completed; and the draft agreement was altered by making Taugher's remuneration 25 per cent. in the event suggested—which was the event that happened. Thus amended, the agreement was executed on the 16th March, 1912. At the same time, she signed a power of attorney in favour of Taugher, by which he was given the very widest powers of entering into any agreement or compromise with D'Arcy in relation to her interest in the estate, and of selling, assigning, and disposing of her interest, present and contingent, therein.

There was some correspondence and negotiation between Taugher and representatives of D'Arcy, but no settlement was made; and, as soon as D'Arcy's death, in July, 1913, became known to the plaintiff, she revoked the power of attorney and repudiated the agreement. Taugher, however, claimed the fund remaining in the hands of the executors; and this action was begun.

The plaintiff alleged that Taugher was her attorney when she signed the agreement and power in March, 1912; that she had no independent advice; that he procured her execution of the documents by deceit and overreaching; and that long before the death of D'Arcy negotiations had ceased, and no further efforts were in contemplation.

S. King and C. A. Moss, for the plaintiff.

I. F. Hellmuth, K.C., for the defendant Taugher.

C. S. MacInnes, K.C., for the defendants the National Trust Company Limited.

KELLY, J. (after setting out the facts):—The evidence of a number of attorneys-at-law in San Francisco, men of long professional experience, was taken on commission and submitted at the trial. On the question of the validity of agreements entered into by attorneys-at-law in that State providing for contingent fees, this evidence suffices to shew that such agreements have been upheld by the Courts of that State, and that such contracts may there be made. Other evidence of these witnesses was directed to the question of the relationship between an attorney and his client, and the obligations of the attorney towards the client with respect to the good faith required of him from the time the relationship is established. . . .

[Reference to Cox v. Delmas (1893), 99 Cal. 104.]

The fair deduction to be drawn from the evidence of these witnesses on the law of California is, that the attorney who bargains in a matter of advantage to himself with his client is bound to shew that the transaction is fair and equitable; that the client was fully informed of his rights and interests in the subject-matter of the transaction and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm's length; the general principle there governing this class of cases and forming the basis of the rule being that, if a confidence is reposed and that confidence is abused and the other party suffers an injury thereby, the Court

will grant relief. But . . . that the strict duty required of the attorney, when the relationship of attorney and client has been established, does not arise in the making of a contract by which the relationship is originally created and the attorney's compensation is fixed. . . .

[Reference to Cooley v. Muller & Lux, 156 Cal. 510.]

Had the relationship of attorney and client been established between these parties before the making of the contract now in issue? And, if so, did the attorney fulfil the obligations involved in that relationship? . . .

When I consider the evidence of the plaintiff, given throughout with the greatest of candour and straightforwardness, and without any appearance of a desire to overstate her own position, and the deductions to be drawn from Taugher's correspondence, as well as from other circumstances, I find it impossible to reach any other conclusion than that from the end of December, 1911, or the beginning of January at least, his relation to the plaintiff was that of an attorney to his client, and that he so considered himself and held himself out. . . .

The relationship having been, as I find, so established, the next consideration is, did Taugher discharge the obligations to the plaintiff which his fiduciary relationship towards her demanded? As expressed in Cox v. Delmas, 99 Cal. at p. 123, citing from Gibson v. Jeyes, 6 Ves. 278, one of these obligations is, that, if the attorney on his own account has any transaction with his client about the subject of the litigation, he must, with reference to such transaction, be able to give and must give to his client that reasonable advice against himself that he would have given against a third person.

Not only was the plaintiff entitled to the protection that this expression of the law indicates, but . . . the very reason for her selecting and retaining and consulting him—and that reason was made known to him—was the confidence which she understood could be reposed in him as an Ontario lawyer (he having practised in Ontario before going to California). She had the utmost confidence in him and implicitly relied upon him. She had no male friend or adviser; in fact, no friends except one woman friend, as was made known to Taugher. She had had no experience in legal matters; she was without knowledge of business affairs . . .; her financial condition could not be worse than it was; her health was not good, and she had fears of having contracted an illness which might prove fatal.

Were these documents (the agreement and the power of attorney) such as a prudent and careful attorney—one fully appreciating his duty to his client—would or should advise or permit that client to execute? I am forced to answer in the negative. . . . My conclusion is, that, the relationship of attorney and client having been established before the making of the agreement, that relationship cast upon the defendant Taugher an obligation and duty towards the plaintiff which he failed to perform; and, as a consequence, the agreement cannot be enforced against the plaintiff. This is in accordance with the law of California, as I understand it from the evidence submitted and the authorities cited; and it is not out of harmony with the state of the law in this Province. A contract such as this, entered into here in similar circumstances, would not be upheld.

This renders it unnecessary to discuss the question . . . whether the matter should be determined under the law of California . . . or . . . of this Province. . . .

A deduction easily made is, either that, on the refusal in June, 1912, of D'Arcy's solicitor further to consider a compromise, Taugher treated the matter as at an end, or that he was content to take no further active steps in the plaintiff's interest, but quietly sit by and await results.

The question whether the agreement is void by reason of impossibility of performance is one which, in view of my findings on other grounds, need not be dealt with. . . . I am inclined to the opinion . . . that the agreement could not be successfully attacked on that ground alone.

A further contention raised by the defendant Taugher is on the right of the plaintiff to have the question of Taugher's remuneration disposed of by action, and not under the provisions of the Solicitors Act, 2 Geo. V. ch. 28, sec. 56 et seq. (R.S.O. 1914 ch. 159, sec. 56 et seq.). The questions arising in this action could not, in my view, have been determined by the machinery provided by that Act, the provisions of which were not intended to apply, and do not apply, to a set of circumstances such as have arisen in the present case. Moreover, the defendant Taugher having by notice denied the right of the plaintiff to receive any part of the estate of which the defendant company are the trustees, except by payment to be made through him, and having expressly forbidden his co-defendants to make any payment to the plaintiff, and having thus tied up the assets of the estate, the plaintiff did not exceed her rights in proceed-

ing by this action to have the question in dispute determined, and thus obtain a judicial declaration as to the distribution of these assets. . . .

Judgment will be in favour of the plaintiff, declaring that the defendant Taugher is not entitled to 25 per cent. of the estate of the late Hugh MacMahon, nor to any part thereof; that, as between the plaintiff and the defendant Taugher, the whole estate belongs to the plaintiff; and that the agreement between them is null and void and should be set aside. The defendant Taugher will pay the costs of the action both of the plaintiff and of his co-defendants.

FALCONBRIDGE, C.J.K.B. AUGUST 8TH, 1914.

GLAESER v. KLEMMER.

Fraud and Misrepresentation — Promissory Notes Given for Share in Partnership—Negotiations for Partnership—Uberrima Fides—Part Inducement by Fraudulent Misrepresentation—Repudiation—Delay—Excuse.

Action upon a promissory note for $1,000. Counterclaim for wages and for delivery up of two other notes made by the defendant.

W. H. Wright, for the plaintiffs.
D. Robertson, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B.:—The defendant is twenty-seven years of age and son-in-law of the plaintiff Leinberger. He is quite inexperienced in business. He had saved some money, driving a 'bus for nearly nine years for his father and for the man who bought the father out. In January last, he was induced to go into partnership with the plaintiffs, giving three notes of $1,000 each as his capital. One of these is the note sued on. His defence is that he was induced to enter into the partnership by certain false and fraudulent representations of the plaintiffs.

My Lord Justice Lindley says (Partnership, 6th ed., p. 314): "The utmost good faith is due from every member of a partnership towards every other member. . . . This obligation

to perfect fairness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership but between whom no partnership as yet exists.''

And in Beckman v. Wallace (1913), 29 O.L.R. 96, it is held that, if there be a fraudulent misrepresentation as to any part of that which induces a party to enter into a contract, the party may repudiate the contract.

I allow the defendant to amend his statement of defence by adding thereto the paragraphs 3a, 3b, and 3c, in the notice to amend served on the 23rd May; and I find that the defendant has proved all these.

I accept also his statement that the plaintiffs falsely and fraudulently represented that they had reduced their indebtedness to $200, that they had in the last six months of 1911 and all 1912 made a profit of $5,600, and that their profit on the goods they manufactured was 50 per cent.

I consider the defendant's inexperience and want of business capacity to be sufficient explanation and excuse for his not having sooner repudiated the contract.

The action will be dismissed with costs. Judgment for the defendant on his counterclaim with costs, for $22.52 wages, and for delivery up of the other two notes to the defendant, or, if they have endorsed over or otherwise transferred the same, that the plaintiffs be ordered to indemnify the defendant therefrom.

FALCONBRIDGE, C.J.K.B. AUGUST 14TH, 1914.

HUNT v. EMERSON.

Principal and Agent—Agent's Commission on Sale of Land—Agreement—Evidence—Failure of Claim for Commission—Costs.

Action by a broker for commission on the sale of land, tried without a jury at London.

G. Lynch-Staunton, K.C., and E. W. Scatcherd, for the plaintiff.

Sir George Gibbons, K.C., and G. S. Gibbons, for the defendant.

FALCONBRIDGE, C.J.K.B.:—There is very little dispute about the facts. In any conflict which could not be settled by reference to a writing, the plaintiff would fail to satisfy the burthen of proof.

In his telegram, the defendant declared positively that he would not take less than $100,000 net to him, and that he would not pay any commission on that figure, and to order the payment of a commission to the plaintiff would be to place it in the power of an agent to dictate to his employer at what price the latter should sell.

Here, as in Hubbard v. Gage (1913), 4 O.W.N. 901, the transaction was in the form of an option.

In Toulmin v. Millar (1887), 58 L.T.N.S. 96, a case strongly relied on by the plaintiff, Lord Watson says (p. 97): "The agent then says: 'I think I can find you a purchaser. Will you not sell?' To which he replies: 'I will sell for £10,000, not a sixpence less; if you can get that sum sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent."

This case falls rather within the lines of Sibbitt v. Carson (1912), 26 O.L.R. 585: "The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern:" per Middleton, J., at p. 587; affirmed in appeal (1912), 27 O.L.R. 237; and Sutherland v. Rhinhart (1912), 5 Sask. L.R. 343.

I have of course referred also to Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, and McBrayne v. Imperial Loan Co. (1913), 28 O.L.R. 653.

The plaintiff fails. The defendant might have afforded to be a little generous. He denies even that he offered the plaintiff $250 for his expenses. For this and other reasons, in dismissing the action, I make no order as to costs.

FALCONBRIDGE, C.J.K.B. AUGUST 24TH, 1914.

BARKER v. NESBITT.

Fraud and Misrepresentation—Sale of Plant and Business—Action for Balance of Price—Evidence—Failure of Defendants to Prove Misrepresentations.

Action to recover $14,000, in the circumstances mentioned below.

The action was tried without a jury at Belleville.

I. F. Hellmuth, K.C., and T. Walmsley, for the plaintiff.

E. G. Porter, K.C., and W. Carnew, for the defendants.

FALCONBRIDGE, C.J.K.B.:—The plaintiff is a manufacturer carrying on a foundry and stove business in the town of Picton. The defendants are business men, residing in the village of Brighton, in the county of Northumberland. By memorandum of agreement bearing date the 5th May, 1913, the plaintiff sold to the defendants and the defendants purchased all the machinery or appliances used or owned by the plaintiff, for the sum of $15,000, payable $1,000 cash on or before the 15th May, 1913, and the balance on the removal or taking over of the said machinery. The plaintiff also sold to the defendants and the defendants purchased, for a company to be formed, the goodwill, trade marks, patents, etc., for $10,000, to be paid for in or with $10,000 stock in the company to be formed under the Ontario Companies Act, with a provision for the defendants redeeming such $10,000 stock at par, if desired within three years by the plaintiff. The said plaintiff was to give assistance towards the planning of the building to be erected, etc., and assist the general manager in the operation of the company for a period of at least six months. There were other stipulations in the agreement, one of which was a covenant by the plaintiff that he would not, directly or indirectly, either by himself or in partnership, etc., engage in any business similar to the one now carried on by him, for a period of ten years. The defendants were to form the new company at once and have suitable buildings erected in Brighton, and proceed to remove the machinery, plant, etc., not later than the 1st December. The defendants paid the sum of $1,000 to the plaintiff, but refused to pay the balance of $14,000; hence this action.

By their statement of defence and counterclaim the defendants plead that the plaintiff, having a special knowledge of the business of foundryman and stove-manufacturer, entered into negotiations with the defendants, who had no personal knowledge of the business, and he, knowing that the defendants would have to rely entirely on his representations, undertook and represented to the defendants that the business he was offering to sell had for a number of years before been actually earning a profit of 50 per cent. gross, and 33⅓ per cent. net on the output annually; and the defendants, desiring to establish a paying industry to boom (sic) the village of Brighton, as well as for their own profit, and relying on the plaintiff's representations, paid the $1,000 mentioned; that they afterwards learned that the said representations were not true, but were grossly exaggerated, and they wrote a letter to the plaintiff requesting him to verify his said representations, to which they received no reply (this is the letter of the 29th November, 1913, hereinafter referred to); but the plaintiff, on the contrary, commenced this action; and the defendants claimed by way of relief that the agreement by reason of the false representations made by the plaintiff as aforesaid was a fraud upon the defendants, and should be declared to be null and void, etc.; and, by way of counterclaim, they asked repayment of the said $1,000 and damages, etc. The reply to this pleading was delivered on the 21st February, 1914.

On the 9th April, 1914, the defendants' solicitor served a notice on the plaintiff's solicitor that application would be made at the hearing for leave to amend the statement of defence "by adding after the word 'annually' in the 23rd line of the 3rd paragraph thereof the following words, 'and that the annual output was 1,500 or more stoves of various patterns, selling at various prices ranging from $5 to $38, and that the total sales and gross proceeds for the year 1912 were upwards of $32,000; that the net profit thereon was 33⅓ per cent.; and that the plaintiff had been drawing from such profits the sum of about $4,000 a year for living expenses, leaving the balance of profits as shewn in the said business; that the business was one well-established, and had a large and growing trade, and at a point such as the village of Brighton would make a good return for money invested, as the plaintiff alleged he could shew by his cost of production; and that the plaintiff had in the said business been giving employment to about 25 hands all the year round; and by adding after the word 'profits' in the 30th line

of the said paragraph 3 the following words, 'extent and volume of business, withdrawal of profits, and employment of labour.' ''

In accordance with my usual practice, I directed the notice of motion to be filed, intimating that, no doubt, I would allow the amendment if the evidence and the merits of the case seemed to justify it.

The only written representation made by the plaintiff is contained in the following letter (dated the 11th April, 1913, and written by the plaintiff to one of the defendants): ''This business is one well-established, and has a large and growing trade, and with more capital could easily be very much increased, and at a point such as your town, with more than one railway, would make a good return for money invested, as I can shew by my cost of production. We have been giving employment to about 25 hands the year around. Any further information you may desire will be pleased to give it.''

It is but faintly contended that this letter contains any substantial misrepresentation. The business did increase slightly from 1910 to 1911 and from 1911 to 1912, and ''about 25 hands'' is not a gross misrepresentation.

Then as to the alleged verbal misrepresentations, it is a matter of comment that, up to the middle of February, apparently the only instruction given to the defendants' solicitor was as to the statement set out in the defence, i.e., as to the profits, net and gross. When this is read in connection with the alleged statement of a business shewing sales or gross proceeds of $32,000, the result is, that this presumably sane plaintiff sells a business worth net $9,000 or $11,000 a year for $15,000 or, if we add the $10,000 stock, for $25,000—a *reductio ad absurdum.*

As counsel said in argument, there was a lamentable conflict of testimony. The phrase is well chosen in view of the fact that the parties and their witnesses all seemed to be highly respectable people, and I have no remarks to make as to their respective demeanour in the witness-box.

Only four out of the six defendants were called. Bullock and Russill did not give evidence; and, therefore, I am told nothing about any representations which may have been made to them to induce them to enter into the contract. And I think it is a subject of comment as to the whole case that they were not called for the defence.

It is a very remarkable thing that, while Drewry says that he heard before or about the 1st July that things were not as

represented, and told the plaintiff so, and Ross says that he heard of misrepresentations "in early fall," yet they went on with their preparation for building in Brighton for the company which had been incorporated on the 20th May. Mr. Austin, an architect, was in Brighton on the last Saturday in August in connection with plans and specifications for the building. He saw some of the directors of the company, and Brandenburg (the plaintiff's agent) was there. He advertised for tenders, which were opened about the middle of September. They decided then not to build at that time. The defendant Nesbitt said the price of brick was too high, and made the announcement, "Gentlemen, building will not go on under present conditions." There is not a syllable of direct protest or complaint until the writing of the letter of the 29th November, 1913, two days before the payment of the balance was due.

The defendants differ in their evidence as between and among themselves. There are two discrepancies in Ross's evidence as compared with his examination for discovery. He said that he thought it was a mistake in his evidence immediately after the examination, but did not take steps to correct it. He was a very important witness for the defence. He admits that he told Fred. Cory in the autumn that he thought his co-defendant Nesbitt was trying to "queer" the business, and to tell Barker to go on and sue, and he would give evidence for him when the time came. True, he says that this was before he acquired knowledge of the falsity of the alleged representations.

The agreement itself does not favour the defendants' contention. It is not for the bare purchase of a continuing business. It is: (1) a purchase of specific machinery, appliances, etc., for $15,000; (2) a purchase of goodwill, trade-marks, patents, etc., for $10,000 to be paid for in or with $10,000 stock in the company to be formed, with the other provisions as set out above. There is no undertaking or covenant as to volume of business or profit or any matter now complained of. The defendants knew that the plaintiff kept no books.

The defendants fail to satisfy the onus of proof. Crediting all parties with a reasonable desire to tell the truth, the plaintiff has a better reason for remembering exactly what took place than have the defendants, in this, that he was vitally interested in the bargain which he was making, involving the sale of his whole business enterprise; he apparently had faith in it to the extent of taking $10,000 stock. The primary object of the defendants was not to make money for themselves (although they

probably would not have scorned that element), but to secure an industry for the town of Brighton—in the language of the statement of defence, to "boom" it; and their personal interest was, therefore, comparatively indirect and remote. They were acting for and with the board of trade of the town, and they wanted married men in the employment of the concern so as increase the number of householders in Brighton.

The plaintiff will have judgment for $14,000, with interest from the 1st day of December, and allotment and delivery of $10,000 fully paid-up shares of the company, and costs.

The counterclaim will be dismissed with costs. Leave to amend the statement of defence is refused.

McKINNEY v. McLAUGHLIN—FALCONBRIDGE, C.J.K.B.—AUGUST 6.

Pleading—Action for Possession of Motor Car—Statement of Defence—Assertion of Lien for Debt—Insufficiency—Particulars—Leave to Amend.]—Motion by the plaintiff for judgment on the pleadings in an action to recover possession of a motor car and damages for detention. The defendants asserted a lien upon the car. The learned Chief Justice said that it was quite clear that the statement of defence did not disclose a defence to the cause of action alleged in the statement of claim. The lien should be specially pleaded, and particulars of the debt in respect of which the lien was claimed should be given: Bullen & Leake on Pleading, 6th ed. (1905), p. 866 et seq.; Halsbury's Laws of England, vol. 27, p. 911; Halliday v. White (1864), 23 U.C.R. 593; Somers v. British Empire Shipping Co. (1860), 8 H.L.C. 338; Monarch Life Assurance Co. v. Mackenzie (1913), 25 O.W.R. 743 (P.C.) The plaintiff was, therefore, entitled to judgment, with costs, and with a reference as to damages. The defendant should be allowed to amend on payment of costs. W. Laidlaw, K.C., for the plaintiff. L. F. Heyd, K.C., for the defendants.

PRIER v. PRIER—FALCONBRIDGE, C.J.K.B.—AUGUST 10.

Contract—Conveyance of Farm by Parents to Son—Bonds for Maintenance—Performance of Contract—Consideration.]—Action originally brought by the father and mother of John Prier to enforce bonds given by him for their support and maintenance, the defendant being the executor and devisee of John Prier, to whom the original plaintiffs had conveyed their farm, in consideration of the bonds, etc. The action was continued by the executor of the father, and an alternative claim to set aside the conveyance of the farm was made. The learned Chief Justice said that the old people were both dead; and, on the great preponderance of testimony, they had nothing to complain of in their lifetime—e.g., many witnesses deposed to offers made to them to build a house, as contemplated by the bonds. This was no case of failure of consideration. The contract was executed on both sides. Action dismissed—under all the circumstances, without costs. J. S. Fraser, K.C., for the plaintiff. F. F. Pardee, K.C., for the defendant.

RE NATIONAL AUTOMOBILE WOODWORKING CO. LIMITED—FALCONBRIDGE, C.J.K.B.—AUGUST 19.

Company—Winding-up—Order under Dominion Statute—Consent of Creditor or Shareholder—Sec. 12 of Statute.]—Motion by the assignee of the company for an order for the winding-up of the company under the Dominion statute. The learned Chief Justice said that, upon filing the written consent of a creditor or shareholder to the amount required by sec. 12 of the Winding-up Act, the usual order should go; Frederick Curzon Clarkson to be provisional liquidator; reference to the Master in Chambers to appoint a permanent liquidator and exercise the other usual powers. J. F. Boland, for the applicant. Grayson Smith, for A. J. H. Eckhardt.

THOMPSON v. THOMPSON—FALCONBRIDGE, C.J.K.B.—AUGUST 19.

Will—Action to Set aside—Motion for Interim Injunction Restraining Executors from Dealing with Estate—Evidence.]—Motion by the plaintiffs to continue an injunction granted ex parte by BRITTON, J., restraining the defendants from dealing with the estate of Thomas Thompson or taking proceedings under the letters probate. The learned Chief Justice said that the material filed on behalf of the plaintiffs disclosed a very weak case. With the exception of a statement on hearsay alleged to have been made by a Minister of the Gospel, who did not himself make an affidavit, the only real material was what was contained in the affidavit of a medical practitioner, who said that he visited the testator on the 22nd May last—the will having been made on the 20th May. The doctor says: "I verily believe that the said Thomas Thompson was not capable of making a will on the said 22nd day of May." He did not swear that, in his opinion, the testator was not capable of making a will on the 20th. In other words, the Court was asked to draw an inference which the deponent evidently did not venture to draw. It was sworn in the affdavits filed by the defendants that the doctor visited the testator on the 19th; and it seemed strange that this fact was not mentioned in the doctor's affidavit. It looked as though these omissions were designedly made; but the affidavits were drawn in a very slovenly fashion. For example, the plaintiff Alice Thompson was made to swear in her affidavit that "I am one of the above-named defendants." Motion adjourned until the trial, the injunction not being continued in the meantime. Costs of this motion to be costs in the cause to the defendants in any event, unless the Judge at the trial should otherwise order. W. J. McLarty, for the plaintiffs. John King, K.C., for the defendants.

COUNTY COURT OF THE COUNTY OF LANARK.

SCOTT, Co. C.J. JULY 22ND, 1914.

BAILEY v. FINDLAY.

Highway—Improper Use of—Motor Vehicle Left Standing on Highway for Unreasonable Time—Injury to Horse Taking Fright at Car—Liability of Owners of Car—Proximate Cause of Injury—Negligence — Contributory Negligence—Motor Vehicles Act, 2 Geo. V. ch. 48 — Inapplicability to "Dead" Car — Absence of Lights — "Between Dusk and Dawn"—Secs. 6(2) and 8(3) of Act.

Action for damages for injury to the plaintiff's horse by reason of its having become frightened by the defendants' motor car standing upon a highway.

The action was tried without a jury.

W. H. Stafford, for the plaintiff.

J. A. Stewart, for the defendants.

SCOTT, Co.C.J.:—On the evening of Saturday the 21st June, 1913, one Wellington Weir, accompanied by his sister, was returning from a trip into the country to the town of Carleton Place, by way of High street. They were travelling in a single rubber-tired buggy, drawn by a horse, both the property of the plaintiff, a livery-man of Carleton Place, from whom they had been hired by Weir during the afternoon of the same day. When the occurrence complained of actually took place is not shewn, with any degree of certainty, in any of the evidence offered on behalf of the plaintiff. Weir testified that he had reached his father's house from a picnic about six o'clock that evening, had tea there, and left for Carleton Place after sundown. The sun set, according to the evidence, at 7.54 or 7.55 o'clock. Before reaching the town he met two motor cars, both of which, he said were lighted. Neither of these cars caused the horse any trouble. Weir's father lives probably 3½ miles from where the accident occurred. It is suggested by Weir that he was driving at the rate of perhaps six miles an hour. On passing the residence of William Findlay in High street, the horse became frightened at a motor car standing on the left side of the highway, at a distance of about 15 feet from the inner wheels of the buggy. The

car was seen by Miss Weir, according to her estimation, at a distance equal to the depth of the court-room before they reached it. The car was standing near to but outside of Mr. Findlay's gateway. According to photographs put in, High street at this point is a well-travelled, level road, used for vehicular traffic over the whole space of the highway except a strip boulevarded next the fence on the left side and a grass waste along the fence on the opposite side. The car was outside the boulevard. The car was dead, and no lights were burning. When opposite the car, the horse took fright, reared, and on coming to the ground knuckled over, and was found, on examination shortly afterwards by a veterinary surgeon, to have broken his leg. He proceeded on three legs until stopped and unhitched about half a block further on. It is not suggested that any other object than the car caused the fright. According to the defendants' admissions, the car had been standing there from 5 o'clock p.m. until 8.30 or 8.35 p.m. The only evidence as to the identity and ownership of the car is that contained in the testimony of both defendants, who were joint owners. No suggestion is made that more than one car was seen at this point during that afternoon or evening, and I think it is reasonably clear that, if a motor car was the immediate cause of this accident—a circumstance which it is not sought to deny—that car was the defendants'. As to the time of the accident the defendants have given the only definite evidence, viz., that the car left with Mrs. Findlay sen. for her residence at about 8.35. It must be accepted then as a fact that the accident occurred prior to this hour, i.e., at some moment before the car was moved off.

The case was prepared, presented, and argued, on both sides, largely as it seemed affected by the several phases of the Motor Vehicles Act, 2 Geo. V. ch. 48, as amended by 3 & 4 Geo. V. ch. 52 (now R.S.O. 1914 ch. 207), and particularly with reference to the need of a lighted lamp on the front or rear of the car or in both positions, as required by sec. 6(2) and sec. 8(3) of the Act. It is not easy to say just what the language of these subsections means. Section 6(2) requires a lighted lamp on the front "after dusk and before dawn," while, by sec. 8(3), the light is required on the rear "at all times between dusk and dawn." Two witnesses, one on each side, were summoned as experts to shed light on the word "dusk." These gentlemen agree that no recognised legal definition exists, and that recourse must be had to reputable dictionaries, but that it is ordinarily accepted that "dusk" is the period of the 24 hours which inter-

venes between daylight and darkness and is popularly known as "twilight." One of these witnesses goes so far as to say that this condition exists until the sun has descended 18 degrees below the horizon, which on the night in question, according to his estimate, would occur at 10.30 o'clock. Be that as it may, this event happened during the early period of dusk, as thus defined. As the lighted lamp is, however, not required to be carried on the front of the car until "after dusk," and the wording, in view of the punitive results which depend upon it, should be strictly construed, I am of the opinion that there was no breach of this statutory regulation on the part of the defendants. As to the lamp on the rear of the car under sec. 8(3), the finding is much easier, as such is only required on a motor vehicle "while being driven on a highway:" see sub-sec. (1) of the same section.

There must be a finding, therefore, for the defendants in so far as any stipulation in this Act is concerned, if the Act itself is a factor.

In my judgment, however, what happened here is not governed by the Motor Vehicles Act. What is aimed at there is sufficiently indicated in the title of the Act itself, viz., "An Act to regulate the Speed and Operation of Motor Vehicles on Highways." A careful reading of the statute convinces me that a "dead" car placed on the side of a highway, and not being operated, as was the case here, is not contemplated in any of the sections of the Act, but they appear to be directly concerned with the operation of "live" cars on the highway, and should be read with the Highway Travel Act, R.S.O. 1914 ch. 206, which applies inter alia to motor vehicles.

Having eliminated the Motor Vehicles Act for the purposes of this judgment, the case must be considered under the general law governing the public use of highways. It is now generally accepted law that the public, unless the contrary be proved, has the right to use the whole space of a highway between the opposite fences. The contrary may be proved by shewing that the municipality has exercised the powers of restriction contained in certain sections of the Municipal Act, 1913, e.g.: sec. 398 (37), prohibiting the use of all vehicles on any sidewalk, or foot-path; sec. 400 (49), regulating traffic and prohibiting heavy traffic in certain streets; sec. 472(1) (*d*), and sec. 483, sub-secs. 1 and 2, for setting apart and protecting boulevards; sub-sec. 4 of the latter section, setting apart and protecting bicycle paths, etc. Upon every part of the highway not restricted under the foregoing or any other enabling statutory provision, every person

has an equal right of travel. The user must be reasonable, and the law is settled that any one who uses any part of a highway in an unusual and unreasonable manner, and thereby causes special damage to another, is liable in an action at the suit of that other.

This case, it seems to me, narrows down to a consideration of the following questions, viz.: (1) was the placing of the defendants' car upon the side of the roadway and leaving it there unattended for a period of 3½ hours a reasonable use of the highway? and (2) if not, was this unreasonable user the cause of the damage of which the plaintiff complains?

The operation of automobiles upon the highways of this Province has long since passed the experimental stage, and, having become such a fruitful source of litigation, judicial notice has frequently been taken of the fact that these vehicles are very apt to cause fright to horses approaching them. The defendant George H. Findlay, who appears to have had considerable experience in handling a car, admitted that a standing car might frighten some horses, but that it would depend upon the horse. . . .

[Reference to Roe v. Village of Lucknow (1894), 21 A.R. 1, at p. 11; Howarth v. McGugan (1893), 23 O.R. 396; Harris v. Mobbs (1878), 3 Ex. D. 268; Wilkins v. Day (1883), 12 Q.B.D. 110; McIntyre v. Coote (1909), 19 O.L.R. 9.]

In the present action there was no suggestion of contributory negligence or want of care on the part of Weir either in the pleadings or the evidence offered.

I have read the many cases cited by counsel on both sides and a number of others, and, applying the principles which seem to fit the facts in this action, I am unable to escape a finding against the defendants.

It was urged on their behalf that the length of time their car remained on the highway could not have affected the plaintiff, as the situation would have been the same had the car been there only 30 seconds before the horse passed it, instead of 3½ hours. The answer to that, of course, is, that, had a reasonable use of the highway been made by the defendants, the car would not have been there to frighten the horse. Had the accident happened while meeting a moving car reasonably operated, the defendants would have been entitled to protection; but, leaving the car on the side of the road for a period which, I think, the authorities bind me to hold unreasonable, unattended and without reasonable safeguards to prevent injury to passers-by, they take the

risk, and are placed in the position of the defendants in McIntyre v. Coote and the several cases I have quoted.

If I am wrong in my view of the inapplicability of the Motor Vehicles Act, then the defendants would be met with other difficulties in establishing that the plaintiff's damage was not due to their negligence. Whatever happened to the horse at the exact moment it became frightened was pronounced a few minutes afterwards by a veterinary surgeon as a broken leg. The reasonable conclusion is, that the motor car was the proximate cause. . . .

Judgment for the plaintiff for $178 and costs.