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LATCHFORD, J. JANUARY 7TH, 1909.

CHAMBERS.

RE CANADIAN PACIFIC R. W. CO. AND WARREN.

Interpleader — Application of Carriers—Rival Claimants—Lien for Freight—Disposition of Goods pending Trial of Issue—Reversal of Order for Sale—Retention of Goods by Carriers—Security—Costs.

Motion on behalf of Marion Swale and Thomas Swale to set aside an order made by the Master in Chambers directing a sale of certain household goods in the possession of the Canadian Pacific Railway Company, consigned to Marion Swale, and claimed by Jonathan Warren, of East Finchley, Middlesex, England.

W. M. Hall, for the applicants.

R. J. McGowan, for the Canadian Pacific Railway Company.

G. B. Strathy, for Jonathan Warren.

LATCHFORD, J.:—The order is said to be wrong in directing a sale of the goods by the railway company and payment into Court of the proceeds, reserving the question of the lien of the company for their advance charges, freight, and storage, and also reserving for further directions the trial of an issue as to the ownership of the goods.

Upon the material before me, I consider that the issue as to the right of Warren to the goods should be first decided. There is evidence that as to certain articles he has no claim whatever. His claim to others may or may not be valid. It is certain that for about two years all the goods now stored by the railway company were in the possession of Marion Swale at her home in Monmouth, South Wales.

Most of them appear to have been bought in for her by the claimant and Mrs. Swale's son, at a sale in 1906, under execution directed against her husband's goods. Warren is said to have acted as agent for a solicitor named Bradley, whom Mrs. Swale states she had authorized to claim the goods as her property, and who had neglected to do so. The goods bought in by Warren were sent by Bradley or Warren from Mill Hill, Ipswich, Suffolk, where the Swales then resided, to Monmouth, and were used in their house there until they were about to come to Canada, when such of them as had not been destroyed by use were, with other goods afterwards acquired, packed and cased by a shipping firm in Liverpool and forwarded to Montreal. There the railway company paid heavy advance charges, for which, and for freight to Toronto and storage here, the company claim a lien of more than $1,300. Warren, having in his possession a schedule of all the goods sold at Mill Hill on 21st June, 1906, copied the schedule and claimed from the railway company all the goods set forth in it. It is undoubted that all such goods are not in the possession of the company, and that other goods not mentioned in the schedule are in the 98 packages affected by the Master's order. Were the goods grain, cotton, timber, or other staple articles of commerce, easily replaced if disposed of, a sale would, no doubt, be proper; but they consist mainly of household furniture and pictures, some of which have been in the possession of the Swales and their family for generations, and made precious by long association. If such articles are sold, and the Swales are entitled to them, a wrong may be done which cannot be redressed. On the other hand, the only objection to the trial of an issue is the delay and consequent addition of about $5 a week to the storage charges. I regard this as the lesser evil, and direct that the Master's order should be varied.

There should be no sale until an issue has been stated and tried as to the ownership of the goods. In this issue the claimant should be plaintiff and Marion Swale and Thomas Swale defendants.

The lien of the applicants should, when established, be satisfied by the owner. If the goods are owned by more than one person, then such lien should be satisfied by each owner to the extent to which the goods found to be his are liable for the lien. The claimant should give the ordinary security; other questions and the costs of this appeal reserved until after trial of issue.

MADDEN, Co.C.J. DECEMBER 9TH, 1908.

COUNTY COURT OF LENNOX AND ADDINGTON.

GALLAGHER v. COUNTY OF LENNOX AND ADDINGTON.

Highway—Non-repair—Injury to Horse—Liability of Municipality—Dangerous Condition of County Road by Reason of Accumulation of Snow and Ice—Pitch Holes and Ridges—Damages.

Action for damages sustained by the plaintiff by injuries to his horse while travelling upon the highway leading from Napanee to Adolphustown, and known as the "Hamburgh Road."

W. S. Herrington, K.C., for plaintiff.

W. G. Wilson, Napanee, for defendants.

MADDEN, Co.C.J.:—The evidence establishes, and I find:—

1. That the road is a highway under the jurisdiction of the defendants, whose duty it was to keep it in repair.

2. That the plaintiff was, on 26th March last, lawfully upon the highway, going to Adolphustown from Napanee, and driving a team and cutter.

3. That this road, at a point about two or two and one-half miles south of Napanee, was on 26th of March last, and for many days previous thereto, in a very bad and dangerous condition, by reason of a large quantity of snow being allowed to accumulate thereon, and large pitch holes and ridges of ice on the travelled portion of the said road, which made it very difficult and dangerous for persons to travel thereon.

4. That this state of affairs was permitted to exist for some days previous to the accident, although this portion of the road was within the township of North Fredericksburgh and under the special supervision of the warden for the county. Thirteen witnesses for the plaintiff swear to the dangerous and unsafe condition of the road. One of them had to abandon his business and go searching around the township for another means of way so as to conduct his business; another had his horse hurt; another had an accident, and had to unhitch his horse; and another, who was the over-

seer of the road at one time—up till the latter part of February—"had almost lost his cow" in a pitch hole or snow bank beside it. For the defence the witnesses were not very satisfactory. In the face of the evidence of those 13 witnesses, I think it would be the height of absurdity to give effect to the kind of evidence given by Creighton, Milling, and Simpson. How they could go over this road as often as they say they did without seeing the dangerous condition of the road I failed to appreciate.

5. The defendant had notice of this unsafe and dangerous condition of the road. The warden had the authority of the defendants to make the road safe for travel, and was unlimited as to the expense to do so. It seems there was no expense put upon this road after the 13th March last, although the evidence for the defence brought out that this was the season of the year when the roads were expected to be bad. This particular spot where the accident occurred was notoriously known as a bad place for the accumulation of large snow drifts; and, with very little expense, either by double tracking or snow fences, the whole difficulty could have been overcome.

6. That the plaintiff's horse was injured on this place in the road on 26th March last.

7. That plaintiff's son exercised ordinary care in driving, and was not guilty of any contributory negligence.

8. That plaintiff procured without any delay the services of a veterinary surgeon, and took every care to have the horse recover from the injury received, and he incurred expense in coming to Napanee and for feed and in supplying another horse.

9. That plaintiff within 30 days gave to the defendants the requisite notice of the accident and the cause of the injury, under the statute.

10. That it appears from the evidence, and I find as a fact, that it depended largely upon how nervous the horse was, or at what angle the sleigh or cutter went into the pitch hole whether or not an accident occurred.

In my judgment, there is no necessity for either pitch holes (with or without slush and water) or the accumulation of large quantities of snow being allowed on any travelled portion of the highway for any length of time so as to impede, delay, or obstruct travel thereon. If township councils would avail themselves of the means and methods used and the precautions taken and now adopted by "live

people" and corporations carrying on large undertakings in the winter, and with this state of affairs to cope with, the machinery of the Municipal Act gives ample powers to overcome difficulties of this kind, and the question of expense is no excuse.

11. It was incumbent upon the defendants here (and is incumbent and compulsory on all municipalities) to use and adopt all modern means and methods to make the public highway at all times—day and night—reasonably safe for persons using it with ordinary care to go and come with the reasonable expectation of "no accident;" otherwise they are liable to pay damages for negligently permitting such highway to be out of repair. Courts have held that the want of a railing, milk stands, telegraph poles, overhanging branches of trees, large ruts, a heap of dirt, or a stump in the highway, constitute want of repair within the meaning of the statute, and, under the circumstances detailed here, I fail to understand by what process of reasoning a pitch hole or snow bank can be construed any the less dangerous.

The remarks of the Chief Justice of Ontario in the case of Hogg v. Township of Brooke, 7 O. L. R. 273, 3 O. W. R. 120, are especially applicable to this case. On p. 281 he says: "The Municipal Act, which obliges them to keep their highways in repair, and renders them civilly responsible for all damages sustained by any person by reason of default in observing the statute, also enables them to make provision for the making and keeping open of township roads during the season of sleighing in each year, and for providing for the application of so much of the commutation of the statute labour fund as may be necessary for keeping open such roads. Again, by R. S. O. 1897 ch. 240, every township is enabled to require owners or occupants of lands bordering on a highway to take down, alter, or remove any fence found to cause an accumulation of snow or drifts so as to impede or obstruct the travel on the public highway or any part thereof; and a township is also empowered to erect snow fences on lands lying along any road or public highway in or adjoining the township. These provisions shew the mind of the legislature to be favourable to the maintenance of open highways in a condition to be readily and safely travelled upon during the winter as well as all other seasons of the year. And it may fairly be presumed that it was supposed that in placing these powers in the hands of the municipalities, they would be brought into requisition when occasion

required or circumstances demanded it. It cannot be that municipalities may totally neglect the measures they are thus entitled to take and ask to be excused from liability for damages sustained by reason of their default. The defendants had ample notice of the condition of affairs. It was obvious that for a long time before the accident the highway—that is, the part usually and properly travelled upon—was not open. Yet no steps were taken to make or keep it open during this period. Travellers were left to make the best headway they could by opening a track for themselves alongside of the travelled way, which served their purpose until the thaw supervened. The defendants cannot be heard to say, under the circumstances, that they had no notice of the dangerous condition or want of repair of the highway. It was well known to their pathmaster, but he failed to put into requisition the powers vested in him by the by-law which is in evidence. And during the whole winter the defendants made no effort to remedy the condition of the highway. They should, therefore, assume the reasonable consequence of their neglect."

Mr. Justice Garrow, in the same case, on p. 285 of 7 O. L. R. (p. 121 of 3 O. W. R.) says: "But where the barrier of snow is local, as in the present case, especially at a place known to be usually drifted, the corporation must, I think, at the peril of a charge of negligence, use the means at its command to supply that which the travelling public is entitled to demand, namely, an open and reasonably safe highway. Here it is not too much to say that half a dozen neighbours, applying, under the direction of the pathmaster, one or two days' statute labour each, under the township by-law, would have made a safe and sufficient track through the drift, and so probably have spared to the plaintiff his painful accident, and to the defendants the heavy expense to which they have been put by this litigation."

Mr. Justice Britton, on p. 287 of 7 O. L. R., says, in reference to Caswell v. St. Mary's Road Co., 28 U. C. R. 247: "There the accident happened upon the main road—the road usually travelled—and happened by reason of the ruts which had been allowed to form upon the road by the freezing and thawing of the great quantity of snow which had accumulated upon the road. It was no new condition which had suddenly arisen. The reasoning is important, and it is perhaps better to go as far in the present case, and thus to recognize the fact that the trend of recent legislation and

judicial decision is to compel additional watchfulness and care for the safety of persons using highways in townships well settled and financially able to do more than was formerly done."

These remarks, as I said before, are especially applicable to this case, and I am, therefore, of opinion that the plaintiff's loss was due to and caused by the defendants' negligence in permitting this road to be and remain dangerously out of repair, and the defendants have made default in their duty to keep it in repair, as required by the statute.

The plaintiff is entitled to recover, and the evidence as to the value of the horse ranges from $75 to $150. I think that the plaintiff may well be bound by his notice to the defendants, in which he says that he sustained damages to the extent of $100.

I will allow $100 as the value of the horse; the doctor's bill of $21.50; the bill at the Briscoe House $8; feed supplied while in the doctor's care $2; and for the loss of the use of the horse and inconvenience $20; making a total of $151.50. I assess the damages at $151.50; and direct that judgment be entered against the defendants for that amount and costs.

MACMAHON, J. DECEMBER 28TH, 1908.

TRIAL.

UNION BANK OF CANADA v. SCHECTER.

Bankruptcy and Insolvency — Chattel Mortgage Given by Insolvent—Fraudulent Scheme to Defraud Creditors—Evidence—Findings of Fact—Interpleader Issue Found in Favour of Execution Creditors.

Interpleader issue tried before MACMAHON, J., without a jury, at Perth.

A. E. Fripp, K.C., and W. McCue, Perth, for plaintiffs.

H. A. Lavell, Smith's Falls, for defendant.

MACMAHON, J.:—The execution debtor, Feldman, was indebted to the plaintiffs at the end of December, 1907, on promissory notes in the sum of $16,860. There was, in addition, an overdraft for some $210.

Mr. Waddell, the manager of the Union Bank at Smith's Falls, said that for some time prior to 2nd June, 1908, Feldman had not been making deposits in the bank, and, as they found his stock of iron had almost entirely disappeared, they had asked for a statement shewing his (Feldman's) exact financial position, which he promised to give; but no statement was furnished. So, on 2nd June, Mr. Waddell insisted on Feldman giving a mortgage on his stock for the amount of his indebtedness, which was then about $17,000. Feldman refused to give a mortgage, assigning as a reason that he knew of a case where a chattel mortgage had been given by a debtor, and the mortgagee immediately sold the property covered by the mortgage.

Feldman stated, while in the witness box, that he made the offer to give the bank warehouse receipts on the stock he held at his different places of business in Smith's Falls; but wanted the manager of the bank to undertake that the stock would be held over until after the elections, by which time he considered the market would improve, and that prices would be realized much in excess of those current at that time. On his refusal to give the required security, the bank brought suit, on 5th June, on an overdue note for $3,625.80. A motion was made before the Judge of the County Court at Perth for speedy judgment, and, on an objection as to the Judge's authority to make the order, it was refused. Speedy judgment, however, was recovered on that note, about 17th June, and on the same day execution was issued and placed in the sheriff's hands. On the 20th July two judgments were recovered against Feldman by the plaintiffs, one for $4,013.30 and another for $8,599.22, and fi. fas were placed in the sheriff's hands on that day.

It is alleged that Schecter (who is a second cousin of Feldman's, and is also related to Feldman's wife) came over to Smith's Falls on 10th December, 1907, bringing with him $3,000 which Feldman had asked Schecter by letter to lend, and which Feldman says he received, and gave his note for, payable on demand.

Feldman said the money was in bills, but was unable to say of what denomination the bills were, or whether they were issued by banks in the United States or by Canadian banks; but, on reflection, thought there were some of each.

Had he received $3,000, he would have known what kind of money he received; and I place no credence on Feldman's statement. To me it is incredible that a man doing business

as Schecter was, keeping what is known as a 5 and 10 cent store, should have brought $3,000 in bills of United States and Canadian banks with him from New York for the purpose of lending it, without obtaining security for the loan.

Feldman said that he had agreed to pay Schecter 8 per cent. interest; but there was nothing on the face of the note shewing what the rate of interest was to be, or whether it was to bear interest at all or not. It is a great strain on one's credulity to believe that the pretended lender, Schecter, was lending moneys in a foreign country, and at interest, but was not exacting interest by the note which evidenced the transaction.

Then, on 5th March, 1908, Feldman says that, being in want of further funds, he went to New York, and borrowed from Schecter $1,800, and that a blank note of the Union Bank at Smith's Falls for the $1,800 was filled in at New York, payable on demand at the Union Bank at Smith's Falls. Interest is not made payable on the face of the note. Feldman said he had agreed to pay interest on the amount of this loan also, at 8 per cent.

Although Feldman swore that the whole of the blank note was filled in at New York, the date and the figures, "$1.800," the words "on demand," the name of the payee, the words "Smith's Falls," and "eighteen hundred," as well as the signature, "J. Feldman," appear to have been written at the same time, by the same ink; while the words, "New York," before the date of the note, were written with another pen and different ink.

Feldman said that on 8th June his solicitor, Mr. Lavell, told him the bank had obtained judgment against him; which was a mistake on his (Feldman's) part; as Mr. Lavell had told him a motion had been made for judgment. But, acting on that supposition, Feldman asked to be put in telephonic communication with Schecter in New York, and Feldman had a conversation with Schecter at 8.30 p.m. on the night of that day, which lasted, according to the records of the telephone company, but one minute.

Feldman said he told Schecter that he wanted to borrow $3,000, and that Schecter said he could not lend him that much, but would let him have $2,000, but must get good security by chattel mortgage for that and the other moneys he had lent, and Feldman agreed to give a chattel mortgage on his stock.

The next day Schecter arrived at Smith's Falls, and was met at the station by Feldman, and remained at Feldman's house that night.

Feldman at the trial denied telling Schecter that he could not get any further advances from the bank; but on his examination for discovery he admitted having told Schecter that the bank would not give him any more money; "I told him the bank wouldn't invest any more money in me, because I was overdrawn; he (Schecter) said, 'You give me security, and I will give you more money.'"

Schecter said he was not told by Feldman what his indebtedness was to the bank; although it was at that time, as already stated, about $17,000.

On the following day they went to Mr. Lavell's office, Feldman stating to Mr. Lavell that he wished to give a mortgage to secure an indebtedness of $6,800 owing to Schecter. Mr. Lavell prepared a mortgage covering the whole of the chattel property owned by Feldman.

Schecter, whose evidence was taken under commission, said that no inquiry was made by him as to the value of Feldman's stock; but from the little experience he had he valued it at $15,000. The value of the stock was, I apprehend, furnished by Feldman, as Schecter had no experience in valuing such stocks. It may be that not much experience is required in the junk business; as Feldman, who had been a tailor, engaged in it, and, according to his own account, was able, at all events, to get into debt for a very large amount.

Then the $2,000 cheque which Schecter gave to Feldman on 10th June, 1908, was immediately indorsed over by Feldman to his wife; who indorsed it and passed it through the Bank of Ottawa at Smith's Falls for collection in New York.

It is, to my mind, apparent that this was a scheme devised by Feldman, who was assisted by Schecter, whereby the stock and business of Feldman were transferred to his wife. He said that, after the chattel mortgage was given, his wife carried on the business in her own name, and he acted as her agent in buying and selling. Feldman says he got the cheque of Schecter cashed, and gave Schecter $200 he was owing him; he also gave, he said, $600 to Mrs. Cohen, his mother-in-law, for wages he alleged to be owing her. He afterwards acknowledged that he did not get the money from the bank at all; but that the cheque was forwarded to New York for collection, on behalf of his wife. The cheque

must have been indorsed by Mrs. Feldman and placed in the Bank of Ottawa at Smith's Falls on the day it was given; as on 12th June the National City Bank received payment of it through the New York clearing house. Feldman's account of why he paid Schecter $200 was unsatisfactory. He spoke of having borrowed $100 from Schecter; but what it was for, or when borrowed, was not disclosed. If one were permitted to conjecture, I should say that Schecter was paid the $200 for his time and trouble and expense in coming from New York to assist Feldman in carrying out his scheme of having his business transfered to his wife, and, in order to do that, to have a chattel mortgage executed to Schecter, and thus protect Feldman's estate from his creditors. And as I consider the whole was a scheme to defraud Feldman's creditors, I should say the $2,000 was also received by Schecter from Feldman to meet the cheque the latter had given when it reached New York.

I find that when Feldman gave the chattel mortgage to Schecter he owed the Union Bank $17,600, and other creditors $2,500.

I find that before 1st June, 1908, Feldman had sold the greater part of his stock of iron, and that his assets of every description, including the equity in his house and lot—the latter he told Constable McGillivray he would be willing to take $2,500 for—was between $12,000 and $15,000, and would not realize that sum under a forced sale.

In Merchants Bank v. Clark, 18 Gr., Mowat, V.-C., at p. 595, said: "There is no evidence whatever except that of the parties themselves that this transaction was really a sale, or that the alleged purchase money was paid: and it has frequently been observed that a transaction of this kind ought not to be held sufficiently established by the uncorroborated testimony of the parties to it." He also said, at p. 599: "The whole account of the defendants is so unlike what takes place in the case of real purchases made in good faith, that I think it impossible on the uncorroborated evidence of the parties to hold that the transaction in question is proved to have been a real sale, intended bona fide to pass the property." See also Morton v. Nihan, 5 A.R. 20.

Mr. Lavell, who was acting as solicitor for both parties, should have informed Schecter—if he was really lending the money to the chattel mortgagor, Feldman—that the latter was largely indebted to the plaintiffs, who had sued him for part of their claim: Burns v. Metson, 28 S. C. R. 207.

It was urged by Mr. Lavell that the $2,000 alleged to have been advanced by Schecter when the mortgage was given was to enable Feldman to carry on his business. That was not so, for he intended that his wife should carry on the business in the future, and he was merely acting as her agent.

Feldman said on his examination as a judgment debtor that all the stock he was possessed of was purchased with the moneys advanced to him by the Union Bank.

I find that Feldman was insolvent when he communicated with Schecter, his relative in New York, on the night of 8th June, and that the giving of the chattel mortgage by Feldman to Schecter was a scheme entered into between them to defraud the plaintiffs and other creditors of Feldman.

The issue as to the ownership of the goods must be found in favour of the plaintiffs, with costs.

HODGINS, LOC. J. IN ADMIRALTY. JANUARY 4TH, 1909.

EXCHEQUER COURT OF ADMIRALTY.

FULLUM v. WALDIE BROTHERS.

Ship—Tug and Tow—Damage to Tow by Stranding—Negligence of Tug—Inevitable Accident—Duties of Tug and Tow—Evidence—Look-out — Damages — Limitation of Liability—Imperial Merchants Shipping Acts—Dominion Act respecting Navigation of Canadian Waters—Construction of Statutes—Effect of Headings Prefixed to Sections—Effect of Revised Statutes—Repeal of Previous Statutes—Duty of Revisers.

Action by the owners of the barge "James G. Blaine" against the defendants, as owners of the tug "J. H. McDonald," for damages caused to plaintiffs' barge by defendants' tug in stranding her on the Pandora shoal rock in the north channel of Lake Huron, while towing her from her anchorage to Algoma Mills with a cargo of coal, on 20th July, 1906.

The defence was (1) that the damage was caused by "inevitable accident," and not owing to any negligence on the part of the owners of the tug; (2) that the tow did not follow directly in the course steered by the tug, but sheered to the right and to the left; (3) that the damage was caused by

the negligent steering of the tow; and (4) that the tug was under the command and control of the master of the tow, and that it was his duty to direct the course to be steered by the tug, and that it was his failure to give proper directions for that purpose that caused the damage to the tow:

F. E. Hodgins, K.C., and W. D. McPherson, K.C., for plaintiffs.

G. T. Blackstock, K.C., and A. H. Marsh, K.C., for defendants.

THE LOCAL JUDGE:—In the case of St. Clair Navigation Co. v. The "D. C. Whitney," 10 Ex. C. R. 1, 6 O. W. R. 302, I reviewed the cases dealing with the Admiralty doctrine of "inevitable accident," and, although my finding on the question of the jurisdiction of the Admiralty over ships of the United States in collision cases, was reversed by the Supreme Court, 38 S.C.R. 303, on the ground that the Ashburton Treaty of 1842, having by art. VII., which article has never been confirmed by any legislative Act of Great Britain, Canada, or the United States—see Imperial Act of 1843, 6 & 7 Vict. ch. 76; Canadian Act of 1849, 12 Vict. ch. 19; Act of Congress of 1848, ch. 167—made the Canadian channel of the Detroit river "equally free and open to the ships, vessels, and boats of both nations," and that the arrest of the American ship, "Whitney," under a warrant issued from this Admiralty Court, "while exercising her right of an innocent and continuous passage in Canadian waters, in accordance with the Treaty rights of her nation, from one foreign port to another, could not, of itself, justify the attempted exercise of Canadian jurisdiction," and that she was therefore immune from arrest in such Canadian waters, and so was not subject to the jurisdiction of this Admiralty Court, yet, as there was no reversal of my finding on the doctrine of "inevitable accident," it is now binding on me. And, as the evidence does not warrant a finding of "inevitable accident" as the cause of the damage to the plaintiffs' barge in this case, I must overrule this contention of the defendants.

And here I may say that I had lately to dispose of a substantially similar case of the arrest of an American ship while exercising her right of an innocent and continuous passage through Canadian waters, from one American port to another; and in so disposing of it, I had to yield judicial obedience to the supreme authority of the Judicial Committee

of the Privy Council, and to the Imperial Merchant Shipping Act of 1894, as to the jurisdiction conferred on British Courts over all ships "being on or lying or passing off" all British coasts within the whole of His Majesty's dominions, under sec. 685; and to the Imperial order in council of 1897, reciting the consent of the Government of the United States that the British regulations relating to collisions "should apply to the ships of that country when beyond the limits of British jurisdiction," and declaring that "such ships shall, for the purposes of such regulations, be treated as if they were British ships:" Dunbar Dredging Co. v. The "Milwaukee," 11 Ex. C. R. 179.

As to the other defences, which refer to the contract liability of towage of ships and the relative duties of tug and tow, I had to consider and review such defences in the case of Montreal Transportation Co. v. The "Buckeye State," not yet reported, and to disallow similar defences there. To the authorities there considered, the following may be added:—

In The "Zouave and Rich" (1864), 1 Brown's Adm. 110, the Court said: "The tug is presumed, in the undertaking she makes, to know the channel and all its perils; and undertakes to take her tow safely through. It comprehends knowledge, caution, skill, and attention."

In The Wilhelm (1893), 59 Fed. Repr. 169, the tug brought the tow too near the shore; and by so doing parted the tow line, which caused the tow to drift ashore. Taft, J., held that this was negligence, and a grave fault; and shewed want of reasonable care and skill in the offender. And also in The J. W. Paxon (1885), 24 Fed. Repr. 302, where the tug in towing the tow caused both to strike a sunken wreck, known to the captain of the tug, the tug was held guilty of negligence, and therefore liable.

In the evidence in this case, the captain of the tug admitted that he was very familiar with the locality of the Pandora shoal; and that he knew by Sanford island where he was, but supposed he was all right; and he also said that when he was about 300 yards west of the shoal, he shifted the course of his tug half a point by the compass, and that he expected this half-point change would take him about 200 feet north and clear of the shoal. But, as the actual result of the half-point change brought the barge directly on the shoal, it is a reasonable presumption that, had he kept straight on the course he was steering, and not changed by

the half-point, he would have passed about 200 feet south of the shoal.

In addition to the duty of the tug towards her tow, as above reviewed, there is evidence of the neglect of the captain of the tug to provide a proper look-out; and this neglect appears to have been intensified by the facts urged by the counsel of the defence, which are: (1) that the night was smoky and hazy; (2) that the place of navigation was a dangerous locality; (3) that the tow was too heavily laden; (4) that the tow did not follow the course of the tug, owing to her wide sheering, which the captain of the tug could not say was caused by any improper steering, or use of the helm, of the tug, but he attributed her bad sheering to shallow water, and her being too heavily laden; (5) and that the captain of the tug desired to delay starting until the next morning, which was declined by the captain of the tow. The rule applicable in such cases is, the more imminent the risk, the more imperative is the necessity for implicit obedience to the duty of having a vigilant look-out.

The captain of the tug admits that he did all the look-out and steering; but the British and Canadian navigation rules are explicit as to the duty of a proper look-out. By art. 29, "Nothing in these rules shall exonerate any ship, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals; or of any neglect to keep a proper look-out; or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

This question of a proper look-out came before me in the "Whitney" case, 10 Ex. C. R. at p. 15; and in Cadwell v. The "C. F. Bielman" (1906), 10 Ex. C. R. at p. 161, 7 O. W. R. 393; and to the authorities there cited may be added the following:—

In The "Genesee Chief" (1851), 12 How. (U.S.) 463, the Court held that it was the duty of every steamboat navigating waters to have a trustworthy and constant look-out, beside the helmsman; and that, whenever a collision occurred with another vessel, and there was no other look-out on board but the helmsman, it must be regarded as prima facie evidence that the collision was occasioned by the fault of the offending vessel.

And in Chamberlain v. Ward (1858), 21 How. (U.S.) at p. 570, where the mate was in charge of the deck, and in control and management of the ship, and was also the look-

out, the Court said: "Steamers navigating in the thoroughfares of commerce must have constant and vigilant look-outs stationed in proper places on the vessel, and charged with the duty for which look-outs are required; and they must be actually and vigilantly employed in the performance of the duty to which they are assigned."

Equally emphatic was the judgment of Mr. Justice Swayne in the John Tretter case, quoted in The "Armstrong" (1864), 1 Brown's Adm. at p. 185: "Where there is no look-out, the fault is of the grossest character, and every doubt relating to the consequences is to be resolved against the tug. It is impossible, in the nature of things, that the captain can properly perform his other duties, and also that of look-out, and he must not attempt it. A crew is not competent without a look-out, either on tugs or steamers. If there be none, the tug cannot avoid the responsibility by the oaths of the captain or crew, if there be the slightest doubt as to the spring-head of the catastrophe."

The evidence of Captain Cowles in this case shews that not very long before the accident there was a discusion and a difference of opinion between him and Captain Hamilton of the tug, as to the locality of Sanford island, one of the special and admitted land-marks for guiding the course of the tug. Captain Cowles said: "He (Captain Hamilton) said to look out ahead to see if I couldn't see Sanford island on the starboard bow.' 'Why,' I said, 'I am looking for it on the other bow.' 'Oh, no,' he says, 'it is on the starboard bow.' I think the engineer came out on deck very shortly afterwards, and he asked the engineer to look to see if he couldn't pick up Sanford island, and he could not see it; and pretty soon—I don't know whether the engineer or me saw the light—one of us saw Sanford island on the port bow. One of us saw it first; I think it was the engineer. We saw it about the same time, Sanford island on the port bow, where I had figured it was, and the captain said. 'That is Sanford island over there all right,' and he headed up and put the island on the starboard bow." Further on Cowles said: "I asked him again if I shouldn't steer for him, and he said no, that he was used to steering and handling the tug, and could see just as well inside the pilot house as he could out."

On the evidence given in this case, and the law applicable to it, I must find that the defendants are responsible for the damage to the tow and her cargo, caused by the im-

proper navigation of the tug in stranding the barge "James G. Blaine" on the Pandora shoal.

But the defendants contend that, under the provisions of either the Imperial Merchant Shipping Acts, or the Canadian waters respecting the navigation of Canadian waters, R. S. C. 1886 ch. 79, sec, 12, they are entitled to the limitation of their liability as owners of the tug to $38.92 per ton on the 41.33 tonnage of their tug "J. H. McDonald," for the loss and damage to the plaintiffs' barge complained of; on the ground that the said loss and damage occurred "without their actual fault and privity." The damages claimed by the plaintiffs are $4,739.77.

When the British North America Act of 1867 was passed by the Imperial Parliament, the Canadian statute then regulating the liability of owners for damages arising from a collision between two ships in Canadian waters was (1864) 27 & 28 Vict. ch. 13, secs. 11 to 14, under the heading "Duty of Masters, Liability of Owners, as to Collisions." And by the British North America Act, sec. 129, that statute being then "a law in force in Canada," it was continued in Ontario and Quebec, "subject nevertheless to be repealed, abolished, or altered by the Parliament of Canada." And after this confirmation of the provincial Act of 1864, the Parliament of Canada, during its first session, in 1868, exercising its legislative power to make laws respecting "navigation and shipping," repealed the above and other provincial Acts, and enacted the Act respecting the Navigation of Canadian Waters, 31 Vict. ch. 58, containing the clauses which were subsequently construed by the Supreme Court, as hereinafter mentioned. This Act continued in force until 1880, when it was repealed by the Act to make better provision respecting the Navigation of Canadian Waters, 43 Vict. ch. 29, which came into force on 1st September next after its passing. Both of these Acts in their preamble recitals, in the regulations for preventing collisions," in the several clauses relating to collisions," and in the legislative heading over the clauses respecting the "Duty of Masters, Liability of Owners, as to Collisions," clearly indicated that they were to apply to the cases of damages caused by collisions between vessels navigating the Canadian water-ways; for headings prefixed to the sections of a statute are regarded as preambles.

Such was the judgment of the Supreme Court in construing the prior Act of 1868 in the case of Sewell v. British Columbia Towing and Transportation Company (1883), 9 S. C. R. at p. 530, where it was held that the damages caused by the improper navigation of the defendant's tugs, in towing a ship and stranding her on a reef, were not subject to be reduced or limited by the limitation clauses of the English Merchant Shipping Act of 1862, under The "Andalusian" (1878), 3 P. D. 182, nor by the limitation clauses of the Act respecting the Navigation of Canadian Waters, of 1868, 31 Vict. ch. 58, because the legislative purpose of such limitation clauses (11-14) was indicated by the preamble, and by the heading over such sections: "Duty of Masters, Liability of Owners, as to Collision," which defined the limited application of the said sections. Strong, J., in giving judgment and construing these clauses, said: "I cannot see my way to holding that this restricted liability applies to cases other than those of collision. Further, the preamble to the statute itself—which sets forth its object to be to enact certain rules of navigation and regulations for preventing collisions—shews that the scope of the Act itself was much more confined than the English Act, and was only intended to insure careful navigation and prevent cases of collision."

In Lang v. Kerr, Anderson, & Co. (1878), 3 App. Cas. at p. 536, Lord Cairns, L.C., held that "headings" to sections of an Act of Parliament are not to be looked upon as marginal notes, for they shew that Parliament had carefully and anlytically divided the Act into those different parts." See further Eastern Counties L. and R. Co. v. Marriage (1860), 9 H. L. C. 32, 7 Jur. N. S. 53, where the separate heading over sections of an Act of Parliament was held to indicate the judicial construction they were to receive.

The judgment of the Supreme Court indicates, I think, the judicial construction which should be given to the later Act of 1880, 43 Vict. ch. 29, prefaced as it is by a substantially similar preamble to that in the Act of 1868, and also specially reciting the agreement of certain foreign governments that the British regulations respecting collisions should apply to their ships "when beyond the limits of British jurisdiction"; and re-enacting the same legislative purpose in the heading over the owners' limitation clauses (12-14) of that Act, which had been construed by the Supreme Court in the Sewell case, supra.

This Act of 1880 remained in force until the revision of the statutes of Canada, in 1886, when, under the Act 49 Vict. ch. 4, it was authorized to be repealed by the proclamation of the Governor-General in council, and the consolidated and revised Act respecting the navigation of Canadian waters, R. S. C. 1886, ch. 79, was substituted for it. But in consolidating the substituted Act, the revisers appear to have assumed legislative authority to strike out the words "as to collisions" in the heading over the limitation clauses of the consolidated Act, while retaining the term "collision" in the corresponding sections to those in which it had appeared in the original Navigation Act of 1880.

The revisers of the statutes of 1886 had the opportunity of considering the applicability of the Sewell judgment of the Supreme Court of 1883, construing these limitation clauses of the prior Canadian Navigation Act of 1868, prescribing the tonnage liability of ship-owners in collision cases, and if they had compared them with the Act of 1880 then before them for consolidation, they would have realized that the clauses were a re-enactment of the tonnage liability clauses of the prior Act under the same heading and wording, and therefore governed by the same judicial construction in the Courts of Canada as had been given to such clauses by the Supreme Court in the Sewell case. It was, therefore, their duty to reproduce in the consolidated and revised Act the same controling heading, in the same words that Parliament had used in the prior Acts, so as to preserve, as applicable to future cases, the judicial construction given to headings over such limitation clauses in the case referred to.

To strike out, and so repeal, the headings over the clauses of a statute, which, by the judgments of the House of Lords, our Supreme Court, and other Courts, have been held to be parts of such statute, and indications of the legislative purpose of the special clauses or parts of such statute, and as material for furnishing a key for their proper construction, is the prerogative of legislative power. And legislative power is defined to be the law-making authority in a state which makes, alters, or repeals the laws thereof, or declares what the law shall be; the power to enact new rules for the regulation of future conduct, rights, and controversies.

Possibly the revisers of this Canadian Navigation Act of 1886 may not have had the intention of repealing the legislative words "as to collision" over these tonnage liability

clauses, which had influenced the Supreme Court in the Sewell judgment, and had not intended to usurp the legislative prerogative of Parliament; or possibly their attention may not have been called to that judgment, and the judicial construction given to those clauses in the Supreme Court. But innocence of intention, or want of knowledge of Supreme Court judgments, cannot excuse a disregard or usurpation of the legislative prerogative of Parliament to repeal or alter headings or words in statutes which have been judicially construed by the Courts, for by so doing they originate fresh forensic and judicial difficulties in considering how far previous judicial constructions apply to the consolidated Acts in the Revised Statutes of Canada. That similar difficulties may have to be considered in future shipping cases may be conceded, owing to the continuation of the altered wording of the heading over the same limitation clauses in the revised Act respecting Shipping in Canada (1906) ch. 113, secs. 920, 923.

The succession-relation of the Revised Statutes of Canada to the original and repealed statutes, was thus explained by Wilson, C.J., in Regina v. Durnion (1887), 14 O. R. at p. 681: "The repealed Acts have not been absolutely repealed and abolished; nor do the Revised Statutes take effect as new and independent enactments. But all matters are to be carried on under the Revised Statutes as if no repeal had taken place; for the Revised Statutes are not new laws, but a consolidation, and declaratory of the law as contained in the former Acts."

And in License Commissioners of Frontenac v. County of Frontenac (1887), 14 O. R. at p. 745, Boyd, C., indicated a similar view: "The purpose of the revision was to revise, classify, and consolidate the public general statutes of the Dominion; and the repeal of the old statutes incorporated in the revision was rather for convenience of citation and reference, by giving a new starting point, than with a view of abrogating the former law. . . . The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity. The point in hand was long ago passed upon by a jurist of the highest repute, Shaw, C.J., in Wright v. Oakley (1843), 5 Met. (46 Mass.) at p. 406, from which I quote his words: 'In terms the whole body of the statute law was repealed, but these repeals went into operation simultaneously with the Revised Statutes which were substituted for them, and

were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealed Act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the re-enactment of new, ones.'"

Further, I think that the doctrine governing the constructions of statutes in pari materia may also be invoked in this case. As stated by Lord Mansfield, C.J., in Rex v. Loxdale (1758), 1 Burr. at p. 447: "Where there are different statutes in pari materia, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other." Lord Justice Knight Bruce approved of this in Ex p. Copeland (1852), 2 De G. M. & G. at p. 920, by saying: "Although the Act has been repealed, still upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act." And Lord Justice James in Greaves v. Tofield (1880), 14 Ch. D. 563, 571, is equally clear: "If an Act of Parliament uses the same language which was used in a former Act of Parliament, referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is, to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense in which the decisions have attached to them." And Maxwell on Statutes says (p. 76) that a statute may be construed by such light as its legislative history may throw upon it.

For these reasons, I prefer to follow the judicial decision of the Supreme Court in the Sewell case, rather than the unauthorized attempt at legislation of the revisers of the statute, and hold that the limitation clause 13 in the Canada Shipping Act, R.S.C. 1886 ch. 79, prescribing the tonnage liability of ship-owners, not having been repealed by Parliamentary legislation, applies only to cases of damages caused by collisions between vessels navigating the Canadian water-ways; and that it is not invocable to limit the liability of the defendants for the damages caused by the improper navigation of the defendants' tug in stranding the plaintiffs' barge on the Pandora shoal.

There will be a decree for the plaintiffs, with a reference to the registrar to take the accounts, and tax to the plaintiffs the costs of the action and reference.

CARTWRIGHT, MASTER. JANUARY 11TH, 1909.

CHAMBERS.

WESTON v. PERRY.

Pleading—Statement of Claim—Motion to Strike out as Embarrassing — Enticing Plaintiff's Husband to Leave her—Cause of Action.

Motion by defendant to strike out paragraph 2 of the statement of claim as prejudicial and embarrassing.

T. N. Phelan, for defendant.

J. B. Mackenzie, for plaintiff.

THE MASTER:—A comparison of the paragraph in question with paragraphs 5 and 6 of the statement of claim in the previous action between these parties seems to shew that there is no substantial difference. In the present action the plaintiff alleges that the defendant enticed and persuaded her husband to leave her and go and live with defendant. In the former action (which was against defendant and her husband) the plaintiff alleged that both defendants conspired to alienate her husband's affections, and thereby prevailed on him to live apart from her. In the earlier case these paragraphs were struck out as embarrassing, and no appeal was taken from this. In the present case the alleged ground of action is not identical, as it is against the wife alone, and is based on enticing. There is no precedent for any such action. Mr. Mackenzie relied on Bullen & Leake, 6th ed., p. 412, n. 1, by analogy, and the judgment of the Court of Appeal in Lellis v. Lambert, 24 A. R. 653, at p. 664, per Osler, J.A. He also cited Whitaker v. Kershaw, 45 Ch. D. 320, and Weldon v. Winslow, 13 Q. B. D. 784, as authority that a married woman can now sue or be sued alone for torts done to or by her.

As the matter is novel, I do not think it can be properly disposed of on interlocutory application. This view is sup-

ported by the decision in the familiar case of Stratford Gas Co. v. Gordon, 14 P. R. 407, as well as by the fact that defendant, as long ago as June last, found no difficulty in meeting this claim. The statement of defence alleges that the statement of claim discloses no ground of action.

For these reasons, I think that the matter must be disposed of in such way as the trial Judge thinks best. He may see fit to deal with this claim and the objection to it himself. No doubt, in some way care will be taken not to prejudice the defendant in any way by allowing a claim to go to the jury which cannot be sustained in law.

The motion must be dismissed, with costs in the cause, but without prejudice to any application that the parties may make to the Judge at the trial. . . .

JANUARY 11TH, 1909.

DIVISIONAL COURT.

ROSS v. CHANDLER.

Partnership—Cheque Payable to Firm—Indorsement and Deposit by Partner in Bank to Credit of Another Firm —Liability of Bank to Partner Deprived of Proceeds of Cheque—Discount of Cheque—Absence of Knowledge or Suspicion and of Negligence — Apparent Authority of Partner Making Deposit—Breach of Trust — Participation in—Trover—Conversion of Cheque.

Appeal by plaintiff from judgment of RIDDELL, J., 12 O. W. R. 341, dismissing the action.

G. F. Shepley, K.C., for plaintiff.

J. Bicknell, K.C., for defendants the Imperial Bank of Canada.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The action is brought to compel the defendants the Imperial Bank of Canada to pay into Court, to the credit of a partnership firm consisting of the plaintiff and the defendants McRae and Chandler, to which I shall afterwards refer as the old firm, or to a receiver to be ap-

pointed by the Court on behalf of the old firm, $56,251.27, being the amount of a cheque dated 8th March, 1907, drawn by the St. Maurice Construction Company on the Bank of Montreal, and payable to the order of the old firm, which, as the plaintiff asserts, was converted to their own use by the bank.

The facts, as to which there is practically no dispute, are fully set out in the opinion of the trial Judge which is reported 12 O. W. R. 341, and the only question for decision is, whether or not, upon that state of facts, the defendants the Imperial Bank, by their dealings with the cheque, were, as against the old firm, guilty of a conversion of it, or parties to a breach of trust of which the defendants McRae and Chandler, as it is contended, were guilty, in applying property of the old firm to the use of a firm of McRae, Chandler, & McNeil, which I shall call the new firm, of which the paintiff was not a member and in which he was not interested.

That the defendants McRae and Chandler were entitled to obtain payment of the cheque and to indorse it in the name of the old firm is not open to question, and indeed, according to the testimony of the plaintiff himself, that was what he expected and intended them to do.

It seems equally clear that Mr. Hay, the assistant general manager of the bank, with whom the transaction took place, had notice of the intended and of the actual application by McRae and Chandler of the proceeds of the cheque, so far as the depositing of them to the credit of the new firm was an application of them, for that they should be so deposited was the object of the transaction in which the parties were engaged.

The indorsement of the cheque, and the receipt by McRae and Chandler of the proceeds of it, being, as I have said, acts within their authority, it follows that the acts of the bank in presenting the cheque for and receiving payment of it and handing over the proceeds to McRae and Chandler, cannot render the bank liable to the old firm for the conversion of the cheque or for the payment to it of the proceeds.

It was, however, contended that in placing the proceeds of the cheque to the credit of the new firm, McRae and Chandler were guilty of a breach of trust, and that the bank were parties to the breach of trust, and are liable with McRae and Chandler to answer for it to the old firm.

Assuming this contention to be well founded, it is manifest that the relief the plaintiff would be entitled to is not that the whole proceeds of the cheque should be paid into Court, but only so much of them as has not been applied for the purposes of the old firm; and that part at least of the proceeds had been applied in that way was conceded on the argument.

I am, however, of the opinion that the contention is not well founded.

The case must, in my opinion, be treated just as if, after the proceeds of the cheque had been received by the agents of the old firm, for the bank were its agents to receive payment of the cheque, they had been handed to McRae and Chandler, and afterwards deposited by them to the credit of the new firm.

Unless the proposition can be maintained that a banker, who has money belonging to a partnership firm, would be justified in refusing to honour a cheque properly drawn upon him by the firm, because he knew that the partners who presented it for payment intended to deposit the money when received to the credit of a partnership firm bearing another name, of which those partners were members, and did not know that another partner in the firm which were his customers was a member of that other firm, I can see no ground upon which the bank can be fixed with liability for having concurred in a breach of trust committed by the defendants McRae and Chandler.

That proposition cannot, in my opinion, be maintained, To hold that such a duty as must be applied from it rests upon a banker, would be to hold what, so far as I have been able to ascertain, has never been decided, would interfere seriously with banking business, and would not be in accordance with the law.

To so hold would mean that a debtor to a partnership may not pay his indebtedness to one of the partners if aware that he intends to use the money for the purposes of another firm in which he is and another partner is not a member, without being liable for a breach of trust if the money is so used; and that such a liability would arise could not be seriously argued.

There was, moreover, no evidence whatever of any fraudulent intent on the part of McRae and Chandler in dealing with the cheque, as it was dealt with by them, and there was nothing to shew that in the result any part of the proceeds

of it was applied for purposes other than those of the old firm.

It may be that in depositing the proceeds of the cheque to the credit of the new firm, a technical breach of trust was committed by McRae and Chandler, but, whether or not a breach of trust, technical or otherwise, was committed, the bank are not, in my opinion, chargeable with being parties to it.

In the view I have taken as to the real nature of the transaction between the parties, it is unnecessary to refer to the cases cited by the learned counsel for the plaintiff or to the provisions of the Bills of Exchange Act to which he referred.

In my opinion, the appeal should be dismissed with costs.

JANUARY 11TH, 1909.

DIVISIONAL COURT.

WALKER v. WABASH R. R. CO.

Railway—Injury to Servant and Consequent Death—Collision of Trains—Evidence as to Cause of Collision—Negligence—Contributory Negligence—Disobedience of Rules of Railway Company—Construction of Written Rules—Questions for Jury—Functions of Trial Judge—Instructions to Jury—Mistrial—New Trial.

Appeal by defendants from judgment of MAGEE, J., in favour of plaintiff, after the trial of the action with a jury at St. Thomas, and motion by defendants, in the alternative, to reduce the damages by the amount of a policy of accident insurance which was carried by the husband of the plaintiff.

The plaintiff was the widow of John James Walker, who was killed on 2nd January, 1908, in a collision between a train on which he was engine-driver and a train of the defendants, and she brought this action to recover compensation for his death, for the benefit of herself and her deceased husband's two children.

H. E. Rose, K.C., for defendants.

J. B. Davidson, St. Thomas, for plaintiff.

The judgment of the COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The deceased was a locomotive engineer in the employment of the Grand Trunk Railway Company, and at the time of his death was in charge of a locomotive which was pulling a regular schedule train of that company, which I shall afterwards refer to as Jackson's train, and proceeding westward from Fort Erie to St. Thomas This train passed through the station grounds at Tillsonburg, without stopping, and when it had reached a point on the line about 100 yards east of a bridge crossing Otter creek, about 3.20 a.m., came into collision with a train of the defendants consisting of two engines and several cars running from Corinth, the next station east of Tillsonburg, to the latter place.

This train had formed part of a train of the defendants which I shall hereafter refer to as Lawton's train, the remainder of which had been left and at the time of the collision was lying on the north siding at Tillsonburg, having been separated from it in order that it might proceed to Corinth; and there was at the same time another train on the south siding.

The Lawton train was divided, in obedience to instructions received by the conductor of it, to double to Corinth, to which I shall afterwards refer, which meant that he was to divide his train, take part of it to Corinth, and then return to Tillsonburg and take the remainder to the same station.

The number of Jackson's train was 93. Lawton's train was not numbered, but is referred to in the train orders as extra west engines 1392 and 1125 coupled.

Lawton's train was under orders to run ahead of Jackson's, and of first No. 91 train; but, according to the testimony of Jackson, he was not made aware of the order. When Lawton's train arrived at Tillsonburg, he was much behind time, and he there received a telegram from the despatcher at St. Thomas in these words: "What is the matter you are making such slow time. Can you not handle train?" (exhibit 11). To which the conductor replied: "On account of bad rail and train frozen up at Courtland will be unable to get over grade without doubling to Corinth. Please advise what to do" (exhibit 12). In reply to this the order to double to Corinth, to which I have referred, which reads, "Double to Corinth then and get out of there at once with half of your train" (exhibit 13), was received by Lawton at

Nixon. According to Jackson's testimony, he received a verbal order from the operator at that station to go ahead of train 91, which up to that time he had been following, and communicated this order to the deceased, and his train accordingly left Nixon ahead of train 91.

The Canadian Pacific Railway crosses the line of the Grand Trunk Railway Company about half a mile east of the station building at Tillsonburg, and there is at this crossing an interlocking switch. Before going over the crossing the deceased shut off steam and lessened the speed of his train so that, according to Jackson's testimony, it passed over at a speed of from 15 to 20 miles an hour; according to the same testimony, the deceased increased the speed to about 35 miles an hour, at which rate the train was going when it passed through the station grounds, and when it had reached a point a short distance east of the cattle-pen shewn on the plan (exhibit 1), he (Jackson) noticed that the part of Lawton's train which was lying in the north siding was not headed by an engine, and was about to apply the brakes, when the emergency brake on the engine was applied in an effort to stop the train, but without success, as the train, though its speed was lessened, went on a further distance of about 1,700 feet, when the collision occurred, its speed being then about 20 miles an hour.

According to Jackson's testimony, when his train had gone over the diamond at the crossing, everything in sight indicated that the track ahead was clear, and on the rear part of the portion of Lawton's train which was in the north siding, were displayed green lights, which indicated that it was in clear of the main line.

Jackson also testified that when a train had to wait in the through siding at Tillsonburg, it was the practice to detach the engine, for the purpose of its being moved on to the water tank to take water, the purpose of this being to save the time which would be consumed if the taking of water was delayed until the train which was being met was passed. The object of this evidence, which was brought out by the plaintiff's counsel, was to shew that it did not follow from seeing a train not headed by an engine on a siding that the engine was not on the siding ahead of its train waiting to take water or taking water at the tank.

The defendants and the Grand Trunk Railway Company operate trains on the same line, which is a single track railway.

The contention of the plaintiff at the trial was that the collision was caused by the negligence of the conductor of Lawton's train in not sending out a flagman, or seeing that proper lights were displayed on the rear of that train, which was lying in the siding, to warn trains approaching from the east not to pass Tillsonburg, of the negligence of the brakesman in not so going out, and the conductor in not asking for orders from the train despatcher at Corinth to return from Corinth to Tillsonburg.

The defendants' contention was that, according to the rules governing the deceased and the movements of his train, it was his duty to approach a station prepared to stop, and not to proceed until the switches and signals were seen to be right, or the track was plainly seen to be clear; that it was also his duty not to proceed if a train, not headed by an engine, was upon the through siding at the station; that the deceased had disregarded this duty; that he had not approached the Tillsonburg station prepared to stop, but at such a speed as prevented him from bringing his train to a stop when he saw that the part of the train which had been left at Tillsonburg and was lying in the north siding, was not headed by an engine; and that this failure of duty was the cause of the collision.

In support of the defendants' contention, reliance was placed upon two rules of the Grand Trunk Railway Company, both of which, it was urged, had been violated by the deceased.

One of these rules, No. 213 (exhibit 2), reads as follows: "213. All trains must approach stations, the end of double track, junctions, railroad crossing at grade, and drawbridges, prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear. Where required by law, all trains must stop."

The other rule is No. 218, and reads as follows: "218. If a train parts while in motion, trainmen must use great care to prevent the detached parts from coming into collision. Engine-men must give the signal as provided in Rule No. 165, and keep the front part of the train in motion until the detached portion is stopped. The front portion will have the right to go back, regardless of all trains, to recover the detached portion, first sending a flagman with danger signals a sufficient distance in advance in the direction in which the train is to be backed, and running with great caution, at a speed to insure absolute safety.

On single track all the precautions required by the rules must also be taken to protect the train against opposing trains. The detached portion must not be moved or passed around until the front portion comes back. This rule applies to trains of every class. When it is known that the detached portion has been stopped, and the whole occurrence is in plain view, no curves or other obstructions intervening, so that signals can be seen from both portions of the train, the conductor and engine-man may arrange for the re-coupling, using the greatest caution."

The contention of the plaintiff was that the position of the order board at the station and of the semaphore at the west end of the sidings and the lights displayed on the rear end of the portion of Lawton's train which was in the north siding, indicated that Lawton's train was in the siding clear of the main line, and that the main line was clear; and that the absence of a flagman to warn Jackson's train that the forward portion of Lawton's train was still on the main line, was a further intimation to the deceased that the main line was clear.

The plaintiff's counsel also contended that it was Lawton's duty, when he reached Corinth, to communicate to the operator at that station the intended movements of his train, in which case it was contended that the operator at Tillsonburg would have been advised of them, and would have displayed his order board so as to warn the deceased to stop there.

The questions submitted to the jury and their answers, so far as they are material to our inquiry, are as follows:—

1. Were the defendants guilty of any negligence which caused the death of John James Walker? A. Yes.

2. If so, wherein did such negligence consist? A. By not displaying red markers at rear end of Lawton's train. By not sending out flagmen the required distance for safety. By conductor Lawton not asking for orders from despatcher to return from Corinth to Tillsonburg.

3. What person, or persons, if any, in the service of the defendants, was or were guilty of such negligence, and what position did each occupy in the defendants' service? A. The conductor and rear brakesman of Lawton's train.

4. Could John James Walker, by the exercise of reasonable care, have avoided the injury which caused his death? A. No."

A great mass of evidence was given at the trial, and witnesses were allowed, notwithstanding the objection by counsel, to give their opinions as to the meaning of the two rules to which reference has been made, and as to the duty of the deceased and of Lawton, in the circumstances of the case, and it is very difficult, if not impossible, to separate statements of the witnesses as to the practice followed in the operation of trains apart from the written rules, from what were merely expressions of opinion as to the meaning of the rules.

An instance of this was the opinion given by witnesses as to the meaning of rule 218, especially that part of it which refers to the detached portion of a train being "moved or passed around," which was said to mean that another train must not pass a train not headed by an engine lying in a siding; another instance was the opinion given as to the meaning of "approach stations" and "prepared to stop" as used in rule 213.

It was for the trial Judge to interpret and to instruct the jury as to the meaning of the written rules, though, no doubt, parol evidence was admissible to explain, and it was for the jury to determine, the meaning of technical terms used in them. The function of the jury was, however, at an end, when the meaning of such terms had been determined, and it was for the trial Judge finally to decide what the meaning of the rules was.

As was said in Neilson v. Harford, 8 M. & W. 806: "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances, if any, have been ascertained as facts by the jury, and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words of art or phrases used in commerce and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them:" p. 823.

The case was submitted to the jury as one in which the questions were as to negligence of the defendants' servants and contributory negligence by the deceased. The proper questions, in addition to that of negligence of the defendants' servants, as it seems to us, were, whether the deceased had disobeyed the rules of his employers, and whether but for that disobedience the accident woud have happened,

for, though the contention of the plaintiff as to the negligence of the defendants' servants was well founded, if, notwithstanding that negligence, but for the deceased's disobedience of the rules the accident would not have happened, the plaintiff must fail.

For the protection of their property and of their employees and of persons and property being transported over their railway, the Grand Trunk Railway Company had provided double safeguards, one by the regulations affecting persons in the position which the deceased occupied, and the other persons in the position which Lawton occupied; and the failure of Lawton to obey the regulations governing his conduct was, of course, no excuse for the deceased disobeying the regulations by which he was governed, and neither would be entitled to recover for an injury occasioned by his own negligence or by the combined negligence of both.

Much depends upon the meaning of rule 213. Its provisions are somewhat vague, for there is nothing in terms defining what is meant by "approach stations" or by "prepared to stop" or by "stations."

In construing the rule, regard should, of course, be had to the object which it was designed to serve, so far as that can be gathered from the rule itself, and if it was the duty of the deceased not to have passed the portion of Lawton's train which was lying in the north siding, it may well be that the rule is to be interpreted as meaning that it was his duty when approaching Tillsonburg to have had his train under such control that if what did actually happen in this case occurred, he would be able to bring it to a stop before passing beyond the point where the sidings join the main line, and that notwithstanding that that line appeared to be clear, and that the signals and other conditions indicated that it was clear.

If what has just been mentioned was the duty of the deceased under rule 213, he was guilty of a breach of that rule, and it may well be that, but for that breach, the accident would not have happened; but, if that was not his duty, it may well be that, assuming the facts to be again found as to the defendants' negligence as they have been found, the deceased was guilty of no breach of duty in proceeding as he did through the station at Tillsonburg.

We do not think that rule 218 has any application. It deals with the case of a train parting while in motion, but not with the case of a train being designedly cut in two in order that such an operation as that in which those in charge of Lawton's train were engaged, may be effected. The detached portion which is not to be moved or passed around, is plainly the detached portion of a train which has parted while in motion.

If there be such a duty as it was contended rule 213 creates, it must depend, not upon rule 213, but upon some other written rule, or the well-known practice adopted in te operation of the trains of the Grand Trunk Railway Company.

Upon the whole, we think that the trial was not a satisfactory one, and that there must be a new trial in order that all questions of fact necessary for determining the rights of the parties may be found by the jury, after proper instructions as to the construction to be placed on the written rules, to use the language of the Court in Neilson v. Harford, either "absolutely" or "conditionally."

We say nothing as to the question of the right of the defendants to have deducted from the damages assessed the amount of the accident insurance which the deceased carried, and which it is said was received by his widow.

The facts as to this insurance were not brought out fully at the trial, and we think it better not to express an opinion as to that question now on a hypothetical state of facts, or on the facts as stated in the affidavits filed by the defendants in support of their motion, especially as no additional expense and no inconvenience will be occasioned by taking that course, the deduction being a mere matter of calculation, if the defendants are right as to the law and the facts on this branch of the case.

The appeal will, therefore, be allowed, and a new trial had, and the costs of the former trial and of the appeal will be costs in the cause, unless the Judge before whom the action is retried otherwise directs.

CARTWRIGHT, MASTER. JANUARY 12TH, 1909.

CHAMBERS.

CASWELL v. LYONS.

LYONS v. CASWELL.

Consolidation of Actions — Cross-actions — Stay of one — Leave to Counterclaim in the other—Terms—Stay of Execution—Costs.

Motion by defendant in first action and plaintiff in second for an order consolidating the two actions.

C. M. Colquhoun, for applicant.

F. J. Roche, for Caswell.

THE MASTER:—The second action was not begun till the first was at issue and ready for trial, and after plaintiff had been examined for discovery. The matters set up in the second action are very old, and occurred before the claim set up in the first action, to which, indeed, they seem to have given rise. If really relied on, they should have been set up by way of counterclaim in the first action. This suggests that it is an afterthought. Probably the defendant Lyons wishes to use it rather as a shield than as a sword, as it is plain that his opponent is not financially strong. If she fails in her action, it seems not unikely that he will not care to pursue the matter further.

The proper course, in my view, is to allow the first action to proceed, with liberty to the defendant therein to apply to the trial Judge for such relief by way of stay of execution or otherwise as may seem just, in case the plaintiff succeeds. The costs of this motion will be costs in the first action to the successful party, unless otherwise ordered by the trial Judge.

JANUARY 13TH, 1909.

TRIAL.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Damages—Inciting or Procuring Breach of Contract—Actionable Wrong—Sale of Goods to Customers Subject to Restriction—Rival in Business, with Notice of Restriction, Inducing Customer to Break Contract—Malice—Proof of Damage—Injunction—Nominal Damages—Reference—Costs.

Action for damages for interference by defendants with the contractual relations between plaintiffs and their customers.

W. E. Raney, K.C., and C. M. Colquhoun, for plaintiffs.

G. H. Kilmer, K.C., and W. H. Irving, for defendants.

BOYD, C.:—This is the latest, if not the last, chapter in the history of the feud between the Copeland-Chatterson and the Business Systems concerns. Both the litigants have ceased to do business as they were constituted at the beginning of the litigation herein, and the evidence was given in this case rather with a view of winding up the loose ends than of fighting the remaining issues to their legitimate results. Probably both parties have had enough of active controversy in the Courts. However that may be, the only matter presented for decision to me was the right to recover damages for alleged interference of the defendants with the contractual relations between the plaintiffs and their customers, as at common law, and not taking into account any reference to the patents held by the plaintiffs and referred to at length in the pleadings.

The defendants' company was formed by 4 members or employees of the plaintiffs, who formed a corporate combination for the purpose of competing with the plaintiffs in their line of business. This was mainly the sale of ledgers and other books with binders fitted up on the loose-leaf system, which has come into great vogue in business circles. The business of plaintiffs was carried on chiefly by means of canvassing agents, who visited all parts of the

country and took orders. It was a distinctive feature of plaintiffs' business that the customers who bought their ledgers, binders, etc., should also get the supply of loose sheets constantly needed to fit into the ledgers, etc., from the plaintiffs, and not from any other source. This was provided for at first by a restrictive condition pasted into the ledgers and other goods sold, and afterwards by means of orders, containing such a clause, signed by the customer. It may be broadly stated that there would be no effective restriction obtained by the mere notice stuck on the ledger; to make a contract with that condition, it must be shewn that the buyer assented thereto and bought on that condition. And when the order was signed by the customer, his assent would usually be sufficiently established. In the latter case there would be a valid contract between the plaintiffs and the customer, which he could only break, by purchasing sheets elsewhere, at the peril of injunction and damages, i.e., a contractual relation which would be recognized and given effect to by the Court, and in the former case there would be no such contractual relations as to the sheets subsequently procured.

The defendants are formed of the 4 who went out from the plaintiffs and others, these 4 being directors and Mr. Trout (one of them) the manager. The defendants were thus familiar with the methods of doing business adopted by the plaintiffs, and in the general conduct of the business they followed the same lines. They canvassed actively for business among the old customers of the plaintiffs, and solicited their orders for (among other things) loose sheets. These orders were so placed with many old customers, and the sheets so obtained were used in the ledger-binders bought from the plaintiffs. In their mode of dealing the plaintiffs relied not only upon the restrictive clause, but mainly, I think, upon the fact that their goods and sheets were protected by patent. As to the sheets this was erroneous—and as to the restrictive clause, it would protect them only so far as they could prove a contract being made subject to that restriction. In the subsequent canvassing of the defendants' agents, they were aware of the existence of the restrictive condition, and they were aware that many orders had been taken containing the condition which had been signed and accepted by the customer. But, as said by Mr. Trout, when he canvassed he was not able to recollect what particular customers had signed the order, and he went

on ignoring the fact that there might be an order in any given case, and sold without reference to it. If any question arose as to the right of the defendants to sell sheets with one who had bought a ledger-binder from the plaintiffs, the assurance was given that it was all right, and, if desired, a guarantee was given to protect the purchaser. It may be that primarily and chiefly this referred to the supposed liability under the patent law, but the expressions used were large enough to cover protection and indemnity as against the restriction in the purchase of loose sheets elsewhere than from the plaintiffs. The point, as it appears to me, is that some difficulty was apprehended as to the assertion of the plaintiffs' claims, and against these the defendants were willing to indemnify, taking all risks of what the claims might be. As to the orders for the binders taken by Trout and the other ex-agents of the plaintiffs, which the customer signed, they, and the defendant company, through them, are certainly affected with notice of the contract, though it may not have been specifically present to them, and the customers they dealt with cannot say they were not aware of the terms of the contract under which they obtained and used the binder. In a direct action against the customer, his ignorance of one of the terms, e.g., the restrictive clause, would be no defence against an action for damages for its breach. If the agent of the defendants, under the circumstances above detailed, knowing or being affected with the knowledge of this contract, assisted in its breach by solicitation of order for loose sheets, and thereby procured the sale of such sheets to the old customer of the plaintiffs, I take it he might be proceeded against for the wrong without joining the other actor in the transaction of sale and purchase. The objection for want of parties in that the persons who bought the loose sheets from the defendants, in violation of their contracts, are not before the Court, should not prevail. It is essential to the success of the plaintiffs that they should prove as a basis an existing contract with a customer of the plaintiffs, as to the purchase of sheets subsequently needed, which has been broken, and that such a breach has been aided or procured or induced by the intervention of the defendants, knowing or believing or having reason to know and believe that such a contract existed.

It is proved as to the Independent Cordage Co. that Trout, when in the employ of the plaintiffs, sold a binder

to that company, with restrictive condition as to purchase of sheets, in 1902, and that in April, 1906, the salesman of the defendants solicited and obtained an order for sheets to be used in that binder. There was discussion as to the authority for supplying the sheets, and the salesman said they had settled with the plaintiffs, and it was all right. True it is that the discussion may have been respecting the patents which were erroneously supposed to cover the sheets, and not with regard to the restrictive clause, yet the defendant company, constituted as it was, had knowledge of the manner of dealing as to the sheets and the restrictive conditions, and had such notice, if not direct knowledge, as would implicate the company in the inducement to purchase sheets from the defendants in violation of the contract not to do so made by the Independent Cordage Co. with the plaintiffs.

The like conduct is proved with regard to the Century Co., at all events as to one ledger purchased by that company from the plaintiffs, through Mr. Trout, with restrictive condition in the order.

These two instances of breach of contract induced by the solicitation of the defendants' agents, having or affected with knowledge of the contract, are sufficiently established, and give, I think, a good cause of action.

The law may thus be stated. The act of buying sheets for the ledger-binder by one who purchased that binder under the restrictive condition that he would get his supply of sheets solely from the Copeland-Chatterson Co., who manufactured and supplied the binder, would be a breach of that contract (quoad the condition), and would amount to an actionable wrong.

If such a purchaser is induced to buy sheets from another dealer, who is aware of the conditional contract, and thereby assists in the breach of the condition, for his own gain and to the detriment of the original vendor of the ledger-binder, that purchaser may be restrained from using such inducements, and may be made answerable in damages, if any are proved. These propositions of law are laid down in modern cases, and were acted on by Mr. Justice Burbidge in a case much like to the present, viz., Copeland-Chatterson Co. v. Hatton, 10 Ex. C. R. 224, 241-246, which was affirmed in the Supreme Court, 37 S. C. R. 651. Other cases not connected with patent law, but as to contracts generally, are also reported, to which I may shortly refer.

In Exchange Telegraph Co. v. Gregory, [1896] 1 Q. B. 147, the head-note expresses the law thus: "In order to support an action for maliciously inducing persons to break their business contracts with the plaintiff, proof of specific damage need not be given; it is sufficient to prove facts from which it may properly be inferred that some damage must result to the plaintiff from the defendant's wrongful acts." This decision was followed by Stirling, J., in Exchange Telegraph Co. v. Central News, [1897] 2 Ch. 48, who held it was competent for a news agency to collect information from one source and transmit it to subscribers to whom it is new, upon the terms that they shall not communicate it to third parties, and the Court will interfere by injunction to restrain a subscriber from communicating such information to a third party in breach of his contract, and also to restrain a third party from inducing a subscriber to break his contract by supplying him with such information with a view to publication.

As further developed, it may now safely be asserted that the element of malice is not necessary to be alleged or proved; spite or ill-will is not of the gist of the action. It is enough to prove that the defendant has incited or procured a breach of contract, and, this being proved, an actionable wrong is established, unless there be legal justification for interfering with the contract. This ground of decision, first plainly pointed out by Lord Macnaghten in Quinn v. Leathem, [1901] A. C. at p. 570, is now well-recognized law, as shewn in South Wales Miners Federation v. Glamorganshire Coal Co., [1905] A. C. 239. What may be sufficient justification for interfering with the contractual rights of the plaintiffs with the purchaser of their ledger-binders and sheets, is a matter of evidence to be made out by the defendants. It is not enough to say that the restrictive condition was not present to the minds of either party when the solicitation was made, or that the object was to make profit for the defendants by competition with the plaintiffs, and that the motive of injuring the plaintiffs or lessening their sales was not taken into consideration. What justification suffices is considered by Mr. Justice Darling in Read v. Friendly Society, [1902] 2 K. B. 88, and the point has been elaborated in an able judgment in the Massachusetts Court, where much attention has been given to this class of cases, in Beekman v. Marsters, 195 Mass. 205 (1907), where it is decided that it is no defence in a suit to enjoin a defendant

from inducing a third party to break his contract with the plaintiffs, that the defendant acted merely for the purpose of increasing his own business, and with no desire to injure the plaintiff. And lastly, the general field is reviewed in National Co. v. Edison Co., [1908] 1 Ch. 335.

Not much damage has been actually proved, and, in view of the allegation of absence of assets suggested, I do not suppose that a reference is desired to pursue the inquiry further. A foundation for actual damage has been made, and I propose to award a nominal sum, with leave to the plaintiffs to have a reference, at their own risk as to costs, if so advised.

The judgment of the Court will be for the plaintiffs, with $50 damages, and costs on the higher scale, so far as that part of the action is concerned. So far as the rest of the action is concerned, it should be dismissed with costs, to be set off against the damages and costs granted plaintiffs, and payment made of balance according to the result. If the plaintiffs elect a reference, the Master will dispose of the costs of the reference, and payment will be made of the further damages, if any, according as he reports.

JANUARY 14TH, 1909.

DIVISIONAL COURT.

ARMOUR v. GRAND TRUNK R. W. CO.

Railway—Animals Killed on Track—Fences—Negligence of Owner—Nonsuit Set aside.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., 12 O. W. R. 927, dismissing the action.

E. C. S. Huycke, K.C., for plaintiff.

M. K. Cowan, K.C., and W. E. Foster, for defendants.

The COURT (MULOCK, C.J., CLUTE, J., LATCHFORD, J.), allowed the appeal with costs and directed judgment to be entered for plaintiff for $375 with interest and costs.